THE

FEDERAL REPORTER.

VOLUME 96

CASES ARGUED AND DETERMINED

IN THE

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

PERMANENT EDITION.

SEPTEMBER—NOVEMBER, 1899.

A TABLE OF STATUTES CONSTRUED IS GIVEN IN THE INDEX.

ST. PAUL:
WEST PUBLISHING CO.
1899.

AMENDMENTS TO RULES.

UNITED STATES CIRCUIT COURT OF APPEALS.

Sixth Circuit.

3.[1]

[Paragraphs 5, 6, and 7 of rule 3 were amended November 21, 1898, so as to read as follows:]

At other than calendar sessions the court, on motion, will also hear appeals from interlocutory orders granting or refusing preliminary injunctions, appeals, or writs of error in any cause given priority by the statutes of the United States, and appeals from orders in habeas corpus proceedings where the petitioner is in jail, provided that the record has been printed and the brief of the moving party and due notice of the motion have been filed with opposing counsel at least six days before the opening day of the session.

Appeals in habeas corpus or criminal cases when the petitioner or appellant is in jail will be heard at any time when the court is in session after the record has been printed and the brief for the petitioner has been filed with opposing counsel six days before the day set for the hearing of the motion.

At other than calendar sessions, the court will also hear all motions and miscellaneous business, and will announce opinions. For good cause shown, on motion of either party, the court may advance any cause upon the docket to be heard at any session, whether calendar or otherwise, even though the time permitted under the rules for the filing of briefs may not have expired at the day set for hearing. Such motions for the advancements of causes will be heard only by the court upon five days' previous notice to opposing counsel.

7.[2]

[Rule 7 was amended November 21, 1898, so as to read as follows:]

ATTORNEYS AND COUNSELORS.

All attorneys and counselors permitted to practice in the supreme court of the United States, or in any circuit court of the United States, shall become attorneys and counselors in this court on taking

[1] For rule 3, as amended, see 31 C. C. A. xcviii., 90 Fed. xcviii.
[2] For rule 7, as amended October 2, 1894, see 31 C. C. A. xcix., 90 Fed. xcix.

an oath or affirmation as prescribed by rule 2 of the supreme court of the United States and upon subscribing the roll. The fee for such admission shall be ten dollars.

Every person taking the oath and paying such fee shall be entitled to a certificate of his admission, signed by the clerk.

16.[3]

[Paragraph 1 of rule 16 was amended November 21, 1898, so as to read as follows:]

DOCKETING CASES.

1. It shall be the duty of plaintiff in error or appellant to docket the case and file the record thereof with the clerk of this court by or before the return day, whether in vacation or in term time, and at the time of filing the record the plaintiff in error or appellant shall deposit with the clerk the sum of thirty-five dollars as security for costs, except in cases in which the proper showing is made and an order of this court is entered thereon allowing the cause to proceed in forma pauperis. But for good cause shown, the justice or judge who signed the citation, or any judge of this court, may enlarge the time by or before its expiration, the order of enlargement to be filed with the clerk of this court. If the plaintiff in error or appellant shall fail to comply with this rule, the defendant in error or appellee may have the cause docketed and dismissed, upon producing a certificate, whether in term time or vacation, from the clerk of the court wherein the said judgment or decree was rendered, stating the case and certifying that such writ of error or appeal has been duly sued out or allowed. And in no case shall the plaintiff in error or appellant be entitled to docket the case and file the record, after the same shall have been docketed and dismissed under this rule, unless by order of the court.

17.[4]

[Rule 17 was amended November 21, 1898, so as to read as follows:]

DOCKET.

The clerk shall enter upon a docket all cases brought to and pending in the court in their proper chronological order, and such docket shall be called at every calendar session, as provided in rules 3 and 37. And if a case is called for hearing at two calendar sessions successively, and upon the call at the second session neither party is prepared to argue it, it will be dismissed at the cost of the plaintiff in error or appellant, unless sufficient cause is shown for further postponement.

[3] For rule 16, as amended, see 31 C. C. A. c., 90 Fed. c.
[4] For rule 17, as amended October 22, 1894, see 31 C. C. A. ci., 90 Fed. ci.

23.[5]

[Paragraph 6 of rule 23 was amended November 21, 1898, so as to read as follows:]

6. In any case where the record shall have been printed in the court below, either circuit judge may, on the written application of the plaintiff in error or appellant, order that such printed record be used in this court. In such case the judge shall require, as a condition of making the order, a certificate of the clerk of this court that the record is in accordance with the printing rules and is properly indexed, in which case the supervision fee provided in table of costs,[6] rule 31, shall be charged and collected by the clerk.

[5] For rule 23, as amended, see 31 C. C. A. cli., 90 Fed. cli.
[6] See 31 C. C. A. clxxi., 90 Fed. clxxi.

Ninth Circuit.

14.[1]

[Paragraph 5 of rule 14 was amended October 20, 1899, so as to read as follows:]

5. All appeals, writs of error, and citations must be made returnable at San Francisco, California, not exceeding thirty days from the day of signing the citation, whether the return day fall in vacation or in term time, and be served before the return day.

16.[2]

DOCKETING CASES.

[Paragraph 1 of rule 16 was amended October 20, 1899, so as to read as follows:]

1. It shall be the duty of the plaintiff in error or appellant to docket the case and file the record thereof with the clerk of this court at San Francisco, California, by or before the return day, whether in vacation or in term time. But for good cause shown, the justice or judge who signed the citation, or any judge of this court, may enlarge the time by or before its expiration, the order of enlargement to be filed with the clerk of this court. If the plaintiff in error or appellant shall fail to comply with this rule, the defendant in error or appellee may have the cause docketed and dismissed, upon producing a certificate, whether in term time or vacation, from the clerk of the court wherein the judgment or decree was rendered, stating the case and certifying that such writ of error or appeal has been duly sued out or allowed. And in no case shall the plaintiff in error or appellant be entitled to docket the case and file the record after the same shall have been docketed and dismissed under this rule, unless by order of the court.

17.[3]

DOCKET.

[Rule 17 was amended October 20, 1899, so as to read as follows:]

The clerk shall, upon payment to him by the appellant or plaintiff in error of a deposit of twenty-five dollars in each case, file the record and enter upon a docket all cases brought to and pending in the court in their proper chronological order.

[1] For rule 14, as amended, see 31 C. C. A. cxxxv., 90 Fed. cxxxv.
[2] For rule 16, as originally adopted, see 31 C. C. A. clx., 90 Fed. clx.
[3] For rule 17, as amended, see 31 C. C. A. cxxxvi., 90 Fed. cxxxvi.

36.[4]

[Paragraph 3 of rule 36 was amended October 20, 1899, so as to read as follows:]

3. A term of this court shall be held annually in the city of Seattle in the state of Washington and in the city of Portland in the state of Oregon. The Seattle term shall be held beginning upon the second Monday in September, and the term at Portland shall be held beginning upon the third Monday in September. All appeals and writs of error from the circuit and district courts for the district of Washington, the transcripts of which shall be filed in this court between the first day of April and the first day of August of each year, shall be heard at said annual term in the city of Seattle, unless it be stipulated by the parties thereto that they be heard at San Francisco. All other appeals and writs of error from said circuit and district courts for that district shall be heard at San Francisco, unless it be stipulated by the parties thereto that they be heard at said annual term in the city of Seattle. All appeals and writs of error from the circuit and district courts for the district of Oregon, the transcripts of which shall be filed in this court between the first day of April and the first day of August of each year, shall be heard at said annual term in the city of Portland, unless it be stipulated by the parties thereto that they be heard at San Francisco. All other appeals and writs of error from said circuit and district courts for that district shall be heard at San Francisco, unless it be stipulated by the parties thereto that they be heard at said annual term in the city of Portland. Appeals and writs of error from the circuit and district courts for the districts of Idaho and Montana may, upon the stipulation of the parties thereto, be heard at the annual term to be held either at Seattle or Portland.

[4] For rule 36, as amended, see 31 C. C. A. cxli., 90 Fed. cxli.

JUDGES

OF THE

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

FIRST CIRCUIT.

Hon. HORACE GRAY, Circuit Justice.....Washington, D. C.
Hon. LE BARON B. COLT, Circuit Judge.....Bristol, R. I.
Hon. WILLIAM L. PUTNAM, Circuit Judge.....Portland, Me.
Hon. NATHAN WEBB, District Judge, Maine.....Portland, Me.
Hon. EDGAR ALDRICH, District Judge, New Hampshire.....Littleton, N. H.
Hon. FRANCIS C. LOWELL, District Judge, Massachusetts.....Boston, Mass.
Hon. ARTHUR L. BROWN, District Judge, Rhode Island.....Providence, R. I.

SECOND CIRCUIT.

Hon. RUFUS W. PECKHAM, Circuit Justice.....Washington, D. C.
Hon. WILLIAM J. WALLACE, Circuit Judge.....Albany, N. Y.
Hon. E. HENRY LACOMBE, Circuit Judge.....New York, N. Y.
Hon. NATHANIEL SHIPMAN, Circuit Judge.....Hartford, Conn.
Hon. WILLIAM K. TOWNSEND, District Judge, Connecticut.....New Haven, Conn.
Hon. ALFRED C. COXE, District Judge, N. D. New York.....Utica, N. Y.
Hon. ADDISON BROWN, District Judge, S. D. New York.....New York, N. Y.
Hon. EDWARD B. THOMAS, District Judge, E. D. New York....29 Liberty St., New York.
Hon. HOYT H. WHEELER, District Judge, Vermont.....Brattleboro, Vt

THIRD CIRCUIT.

Hon. GEORGE SHIRAS, Jr., Circuit Justice.....Washington, D. C.
Hon. MARCUS W. ACHESON, Circuit Judge.....Pittsburgh, Pa.
Hon. GEORGE M. DALLAS, Circuit Judge.....Philadelphia, Pa.
Hon. GEORGE GRAY, Circuit Judge .....Wilmington, Del.
Hon. EDWARD G. BRADFORD, District Judge, Delaware.....Wilmington, Del.
Hon. ANDREW KIRKPATRICK, District Judge, New Jersey.....Newark, N. J.
Hon. JOHN B. McPHERSON, District Judge, E. D. Pennsylvania.....Philadelphia, Pa.
Hon. JOSEPH BUFFINGTON, District Judge, W. D. Pennsylvania.....Pittsburgh, Pa.

FOURTH CIRCUIT.

Hon. MELVILLE W. FULLER, Circuit Justice.....Washington, D. C.
Hon. NATHAN GOFF, Circuit Judge.....Clarksburg, W. Va.
Hon. CHARLES H. SIMONTON, Circuit Judge.....Charleston, S. C.
Hon. THOMAS J. MORRIS, District Judge, Maryland.....Baltimore, Md.
Hon. THOMAS R. PURNELL, District Judge, E. D. North Carolina.....Raleigh, N. C.
Hon. HAMILTON G. EWART, Dist. Judge, W. D. North Carolina ..Hendersonville, N. C.

Hon. WILLIAM H. BRAWLEY, District Judge, E. and W. D. South Car..Charleston, S. C.
Hon. EDMUND WADDILL, Jr., District Judge, E. D. Virginia.....Richmond, Va.
Hon. JOHN PAUL, District Judge, W. D. Virginia.....Harrisonburg, Va.
Hon. JOHN J. JACKSON, District Judge, West Virginia.....Parkersburg, W. Va.

FIFTH CIRCUIT.

Hon. EDWARD D. WHITE, Circuit Justice.....Washington, D. C.
Hon. DON A. PARDEE, Circuit Judge.....New Orleans, La.
Hon. A. P. McCORMICK, Circuit Judge.....Dallas, Tex.
Hon. DAVID D. SHELBY, Circuit Judge .....Huntsville, Ala.
Hon. JOHN BRUCE, District Judge, M. and N. D. Alabama.....Montgomery, Ala.
Hon. HARRY T. TOULMIN, District Judge, S. D. Alabama.....Mobile, Ala.
Hon. CHARLES SWAYNE, District Judge, N. D. Florida.....Pensacola, Fla.
Hon. JAMES W. LOCKE, District Judge, S. D. Florida.....Jacksonville, Fla.
Hon. WILLIAM T. NEWMAN, District Judge, N. D. Georgia.....Atlanta, Ga.
Hon. EMORY SPEER, District Judge, S. D. Georgia.....Macon, Ga.
Hon. CHARLES PARLANGE, District Judge, E. D. Louisiana.....New Orleans, La.
Hon. ALECK BOARMAN, District Judge, W. D. Louisiana.....Shreveport, La.
Hon. HENRY C. NILES, District Judge, N. and S. D. Mississippi.....Kosciusko, Miss.
Hon. DAVID E. BRYANT, District Judge, E. D. Texas.....Sherman, Tex.
Hon. EDWARD R. MEEK, District Judge, N. D. Texas. .....Ft. Worth, Tex.
Hon. THOMAS S. MAXEY, District Judge, W. D. Texas.....Austin, Tex.

SIXTH CIRCUIT.

Hon. JOHN M. HARLAN, Circuit Justice.....Washington, D. C.
Hon. WILLIAM H. TAFT, Circuit Judge.....Cincinnati, Ohio.
Hon. HORACE H. LURTON, Circuit Judge.....Nashville, Tenn.
Hon. WILLIAM R. DAY, Circuit Judge.....Canton, Ohio.
Hon. WALTER EVANS, District Judge, Kentucky. .....Louisville, Ky.
Hon. HENRY H. SWAN, District Judge, E. D. Michigan.....Detroit, Mich.
Hon. HENRY F. SEVERENS, District Judge, W. D. Michigan.....Grand Rapids, Mich.
Hon. AUGUSTUS J. RICKS, District Judge, N. D. Ohio.....Cleveland, Ohio.
Hon. ALBERT C. THOMPSON, District Judge, S. D. Ohio .....Cincinnati, Ohio.
Hon. CHARLES D. CLARK, District Judge, E. and M. D. Tennessee....Chattanooga, Tenn.
Hon. ELI S. HAMMOND, District Judge, W. D. Tennessee.....Memphis, Tenn.

SEVENTH CIRCUIT.

Hon. HENRY B. BROWN, Circuit Justice.....Washington, D. C.
Hon. WILLIAM A. WOODS, Circuit Judge.....Indianapolis, Ind.
Hon. JAMES G. JENKINS, Circuit Judge.....Milwaukee, Wis.
Hon. PETER S. GROSSCUP, Circuit Judge .....Chicago, Ill.
Hon. CHRISTIAN C. KOHLSAAT, District Judge, N. D. Illinois.....Chicago
Hon. WILLIAM J. ALLEN, District Judge, S. D. Illinois.....Springfield, Ill.
Hon. JOHN H. BAKER, District Judge, Indiana.....Indianapolis, Ind.
Hon. WILLIAM H. SEAMAN, District Judge, E. D. Wisconsin.....Sheboygan, Wis.
Hon. ROMANZO BUNN, District Judge, W. D. Wisconsin.....Madison, Wis.

EIGHTH CIRCUIT.

Hon. DAVID J. BREWER, Circuit Justice.....Washington, D. C.
Hon. HENRY C. CALDWELL, Circuit Judge.....Little Rock, Ark.
Hon. WALTER H. SANBORN, Circuit Judge.....St. Paul, Minn.
Hon. AMOS M. THAYER, Circuit Judge.....St. Louis, Mo.
Hon. JOHN A. WILLIAMS, District Judge, E. D. Arkansas.....Little Rock, Ark.
Hon. JOHN H. ROGERS, District Judge, W. D. Arkansas.....Ft. Smith, Ark.
Hon. MOSES HALLETT, District Judge, Colorado.....Denver, Colo.
Hon. OLIVER P. SHIRAS, District Judge, N. D. Iowa.....Dubuque, Iowa.

Hon. JOHN S. WOOLSON, District Judge, S. D. Iowa.....Des Moines, Iowa.
Hon. WILLIAM C. HOOK, District Judge, Kansas. .....Leavenworth, Kan.
Hon. WM. LOCHREN, District Judge, Minnesota.....Minneapolis, Minn.
Hon. ELMER B. ADAMS, District Judge, E. D. Missouri.....St. Louis, Mo.
Hon. JOHN F. PHILIPS, District Judge, W. D. Missouri.....Kansas City, Mo.
Hon. W. H. MUNGER, District Judge, Nebraska.....Omaha, Neb.
Hon. CHARLES F. AMIDON, District Judge, North Dakota.....Fargo, N. D.
Hon. JOHN E. CARLAND, District Judge, South Dakota.....Sioux Falls, S. D.
Hon. JOHN A. MARSHALL, District Judge, Utah.....Salt Lake City, Utah.
Hon. JOHN A. RINER, District Judge, Wyoming.....Cheyenne, Wyo.

NINTH CIRCUIT.

Hon. JOSEPH McKENNA, Circuit Justice.....Washington, D. C.
Hon. WM. W. MORROW, Circuit Judge.....San Francisco, Cal.
Hon. WILLIAM B. GILBERT, Circuit Judge.....Portland, Or.
Hon. ERSKINE M. ROSS, Circuit Judge.....Los Angeles, Cal.
Hon. JOHN J. DE HAVEN, District Judge, N. D. California.....San Francisco, Cal.
Hon. OLIN WELLBORN, District Judge, S. D. California.....Los Angeles, Cal.
Hon. HIRAM KNOWLES, District Judge, Montana.....Helena, Mont.
Hon. CORNELIUS H. HANFORD, District Judge, Washington.....Seattle, Wash.
Hon. THOMAS P. HAWLEY, District Judge, Nevada.....Carson City, Nev.
Hon. CHARLES B. BELLINGER, District Judge, Oregon.....Portland, Or.
Hon. JAMES H. BEATTY, District Judge, Idaho.....Boise City, Idaho.
Hon. CHARLES S. JOHNSON, District Judge, Alaska.....Sitka.

CASES REPORTED.

	Page
A. A. Griffing Iron Co., Griffing v. (C. C.)	577
Acme Flexible Clasp Co. v. Cary Mfg. Co. (C. C.)	344
Ætna Ins. Co., Langan v. (C. C.)	705
Alexander, Guarantee Savings, Loan & Investment Co. v. (C. C.)	870
Allen, In re (D. C.)	512
American Oak Leather Co. v. United States Rubber Co. (C. C. A.)	891
American Palace-Car Co. of New Jersey, Eldred v. (C. C.)	59
American Pipe Mfg. Co., Tenney v. (C. C.)	919
American Spirit Mfg. Co., Collins v. (C. C.)	133
American Surety Co. of New York v. Lawrenceville Cement Co. (C. C.)	25
American Waltham Watch Co. v. Sandman (C. C.)	330
Anaces, The (D. C.)	856
Anchor Electric Co., Hart & Hegeman Mfg. Co. v. (C. C. A.)	1005
Apollo Incandescent Gaslight Co., Welsbach Light Co. v. (C. C. A.)	332
Ashley, Carter-Crume Co. v. (C. C. A.)	1004
Ashmore v. Iseley (C. C.)	775
Assyrian Asphalt Co., United States Repair & Guaranty Co. v. (C. C.)	235
Athol Mach. Co., Starrett v. (C. C.)	244
Ayer, McCulloch v. (C. C.)	178
Baker, In re (D. C.)	954
Ball & Socket Fastener Co. v. C. A. Edgarton Mfg. Co. (C. C. A.)	489
Bartol, Van Siclen v. (C. C.)	796
Bartram, United States v., three cases (C. C. A.)	1006
Bass, Ratcliff & Gretton v. Feigenspan (C. C.)	206
Bate Refrigerating Co. v. Sulzberger (C. C. A.)	1004
Baudouine, In re (D. C.)	536
Baumann, In re (D. C.)	946
Bedingfield, In re (D. C.)	190
Belknap, In re (D. C.)	614
Benbow, Southern Loan & Trust Co. v. (D. C.)	514
Bennett v. Carr (C. C. A.)	213
Benton v. McIntosh (C. C.)	132
Berry, United States v. (D. C.)	842
Bidwell, Buttfield v. (C. C. A.)	328
Birch v. Felton (C. C.)	176
Blanton, Voorheis v. (C. C.)	497
Blumenthal, Coughlin v. (C. C.)	920
Board of Chosen Freeholders of Passaic County, Price v. (C. C. A.)	174
Board of Com'rs of Oxford, N. C., v. Union Bank of Richmond, Va. (C. C. A.)	293
Board of Com'rs of Stanly County, N. C., v. Coler (C. C. A.)	284
Booth, In re (D. C.)	943
Bradley, In re (C. C.)	969
Bradley v. Hargadine-McKittrick Dry-Goods Co. (C. C. A.)	914
Bragg v. Lamport (C. C. A.)	630
Bragg, Wright v. (C. C. A.)	729
Braintree & W. St. R. Co., Hawley Furnace Co. of New England v. (C. C.)	221
Brant, In re (C. C.)	257
Brewster, Jenks v. (C. C.)	625
Brooklyn Heights R. Co., Mathesius v. (C. C.)	792
Brown, Nutter v. (C. C.)	229
Brown, Reed Mfg. Co. v. (C. C. A.)	1005
Brundage, In re (C. C.)	963
Brush Electric Co., Mt. Morris Electric Light Co. v. (C. C. A.)	1005
Burrell v. Elgin Creamery Co. (C. C.)	234
Bushnell Co., Thompson v. (C. C. A.)	238
Butler v. United States (C. C. A.)	1004
Buttfield v. Bidwell (C. C. A.)	328
Buzzell, Reynolds v. (C. C. A.)	997
C. A. Edgarton Mfg. Co., Ball & Socket Fastener Co. v. (C. C. A.)	489
California Oil & Gas Co. of Arizona v. Miller (C. C.)	12
Cambria Iron Co. v. Carnegie Steel Co. (C. C. A.)	850
Cameron Town Mut. Fire, Lightning & Windstorm Ins. Co., In re (D. C.)	756
Campbell Printing-Press & Manufacturing Co., Miehle Printing-Press & Manufacturing Co. v. (C. C.)	226
Carmichael, In re (D. C.)	594
Carnegie Steel Co., Cambria Iron Co. v. (C. C. A.)	850
Carolina Cooperage Co., In re (D. C.)	604
Carolina Cooperage Co., In re (D. C.)	950
Carr, Bennett v. (C. C. A.)	213
Carter-Crume Co. v. Ashley (C. C. A.)	1004
Cary Mfg. Co., Acme Flexible Clasp Co. v. (C. C.)	344
Cates v. Producers' & Consumers' Oil Co. (C. C.)	7
Centralia & C. R. Co., Farmers' Loan & Trust Co. v. (C. C. A.)	636
Chamberlain, Mullin v. (C. C. A.)	999
Champion, United States v. (C. C. A.)	1006
Chandler v. Pomeroy (C. C. A.)	156
Chatillon v. Forschner (C. C.)	342
Chesapeake & O. R. Co. v. Hennessey (C. C. A.)	713
Chiatovich v. Hanchett (C. C.)	681
Chicago Dry-Goods Co., Neustadter v. (D. C.)	830
Chu Ah Quan, In re (C. C. A.)	1004
Chung Fat, In re (D. C.)	202

Page

Cincinnati, H. & D. R. Co., Popp v. (C. C.) 465
City of Anniston, Safe-Deposit & Trust Co. of Baltimore v. (C. C.) 661
City of Helena, Mahoney v. (C. C.) 790
City of Laporte, Gamewell Fire-Alarm Tel. Co. v. (C. C.) 664
City of Memphis, Iron Mountain R. Co. of Memphis v. (C. C. A.) 113
City of New York, Pine v. (C. C. A.) 1005
City of Pontiac v. Talbot Pav. Co. (C. C. A.) 679
City of St. Louis, Wheless v. (C. C.) 865
City Water-Supply Co., Cowell v. (C. C.) 769
Cleveland, C., C. & St. L. R. Co., Narramore v. (C. C. A.) 298
Clews v. Jamieson (C. C. A.) 648
Cobb, In re (D. C.) 821
Colby University v. Village of Canandaigua (C. C.) 449
Coler, Board of Com'rs of Stanly County, N. C., v. (C. C. A.) 284
Collins v. American Spirit Mfg. Co. (C. C.) 133
Columbus Electric Co., Worden v. (D. C.) 803
Comingore, In re (D. C.) 552
Computing Scale Co., Hoyt v. (D. C.) 250
Continental Fire Ass'n, Continental Ins. Co. v. (C. C.) 846
Continental Ins. Co. v. Continental Fire Ass'n (C. C.) 846
Continental Trust Co., Rose v. (C. C. A.) 784
Continental Trust Co., Toledo, St. L. & K. C. R. Co. v. (C. C. A.) 784
Coughlin v. Blumenthal (C. C.) 920
Covenant Building & Loan Ass'n, Lauer v. (C. C.) 775
Covert v. Travers Bros. Co. (C. C.) 568
Cowdrey, In re (D. C.) 317
Cowell v. City Water-Supply Co. (C. C.) 769
Cowen v. Winters (C. C. A.) 929
Crane Elevator Co., Overweight Counterbalance Elevator Co. v. (C. C.) 231
Crossman, Press Pub. Co. v. (C. C. A.) 1005
Cruse v. McCauley (C. C.) 369
Crystal Spring Bottling Co., In re (D. C.) 945
Cutter v. Iowa Water Co. (C. C.) 777

Daubner, In re (D. C.) 805
Davey Pegging-Mach. Co. v. Isaac Prouty & Co. (C. C.) 336
Deck v. Whitman (C. C.) 873
De Hart, Jeffries v. (D. C.) 494
Delaware, L. & W. R. Co. v. Probasco (C. C. A.) 1004
De Luca v. Hughes (C. C.) 923
Des Moines Scale & Manufacturing Co., E. T. Fairbanks & Co. v. (C. C.) 972
Dewey Min. Co. v. Miller (C. C.) 1
Dews, In re (D. C.) 181
Dime Sav. Bank v. Manufacturers' Paper Co. (C. C. A.) 1004
Donallan v. Tannage Patent Co. (C. C. A.) 1004
Duff Mfg. Co. v. Norton (C. C.) 986
Dunavant, In re (D. C.) 542
Dunn v. Howe (C. C.) 160

Earhart, Ecorse Transp. Co. v. (C. C.) 925
Earle, In re (C. C.) 678
Eaton & Prince Co., Overweight Counterbalance Elevator Co. v. (C. C.) 231
Ecorse Transp. Co. v. Earhart (C. C.) 925

Page

Edgarton Mfg. Co., Ball & Socket Fastener Co. v. (C. C. A.) 489
Eldred v. American Palace-Car Co. of New Jersey (C. C.) 59
Elgin Creamery Co., Burrell v. (C. C.) 234
Ellington, McIlwaine v. (C. C.) 1007
Elliptical Carbon Co. v. Solar Carbon & Manufacturing Co. (C. C.) 413
Elmira Waterworks Co. v. New York Filter Mfg. Co. (C. C. A.) 1005
Emily B. Maxwell, The (C. C. A.) 999
Erickson v. Pacific Coast Steamship Co. (C. C.) 80
Escanaba, The (D. C.) 252
E. T. Fairbanks & Co. v. Des Moines Scale & Manufacturing Co. (C. C.) 972
Ethelred, The (D. C.) 446
Evans v. Felton (C. C.) 176

Fairbanks & Co. v. Des Moines Scale & Manufacturing Co. (C. C.) 972
Farmers' Loan & Trust Co. v. Centralia & C. R. Co. (C. C. A.) 636
Feigenspan, Bass, Ratcliff & Gretton v. (C. C.) 206
Felton, Birch v. (C. C.) 176
Felton, Evans v. (C. C.) 176
Fernie, The Sir Robert (D. C.) 348
Fielding, In re (D. C.) 800
Fisher, McNaught v. (C. C. A.) 168
Fixen & Co., In re (D. C.) 748
Fletcher, McGrotty v. (C. C.) 264
Forschner, Chatillon v. (C. C.) 342
Ft. Wayne Electric Corp., In re (D. C.) 803
Francis, New York Commercial Co. v. (C. C.) 266
French & American Trading Co., Société Fabriques de Produits Chimiques de Thann et de Mulhouse v. (C. C. A.) 1006
Frice, In re (D. C.) 611

Gamewell Fire-Alarm Tel. Co. v. City of Laporte (C. C.) 664
Garnett Gold-Min. Co., Skinner v. (C. C.) 735
General Electric Co. v. Rahway Electric Light & Power Co. (C. C.) 563
Genevieve, The (D. C.) 859
Gilbert v. McNulta (C. C.) 83
Gimbel, Shoe v. (C. C.) 96
Glenesslin, The (D. C.) 768
Gold Hill Min. Co., Williams v. (C. C.) 454
Grafflin, Vrooman v. (C. C. A.) 275
Graham, Maitland v. (C. C.) 247
Great Western Min. & Mfg. Co. v. Harris (C. C.) 503
Griffing v. A. A. Griffing Iron Co. (C. C.) 577
Griffing Iron Co., Griffing v. (C. C.) 577
Grimes, In re (D. C.) 529
Grubbs, Ex parte (D. C.) 183
Grubbs-Wiley Grocery Co., In re (D. C.) 183
Guarantee Savings, Loan & Investment Co. v. Alexander (C. C.) 870
Guttner v. Pacific Steam Whaling Co. (D. C.) 617

Hamlin v. Toledo, St. L. & K. C. R. Co. (C. C. A.) 784
Hanchett, Chiatovich v. (C. C.) 681
Hanifen v. Price (C. C.) 435
Hargadine-McKittrick Dry-Goods Co., Bradley v. (C. C. A.) 914

	Page
Harris, Great Western Min. & Mfg. Co. v. (C. C.)	503
Harrison, Terre Haute & L. R. Co. v. (C. C. A.)	907
Hartman, In re (D. C.)	593
Hart & Hegeman Mfg. Co. v. Anchor Electric Co. (C. C. A.)	1005
Hawley Furnace Co. of New England v. Braintree & W. St. R. Co. (C. C.)	221
Hayden, In re (D. C.)	199
Hayden v. Williams (C. C. A.)	279
Hedrick, Williams v. (C. C. A.)	657
Heller, Stokes Bros. Mfg. Co. v. (C. C.)	104
Hempstead, In re, two cases (C. C.)	94
Hennessey, Chesapeake & O. R. Co. v. (C. C. A.)	713
Henuy v. La Compagnie Générale Transatlantique, etc. (C. C.)	497
Hill, In re (D. C.)	185
Hirsch, In re (D. C.)	468
Hobbs v. National Bank of Commerce of Kansas City, Mo. (C. C. A.)	396
Hoffman, William Mann Co. v. (C. C.)	237
Howe, Dunn v. (C. C.)	160
Hoyt v. Computing Scale Co. (D. C.)	250
Hughes, De Luca v. (C. C.)	923
Hulitt, In re (C. C.)	785
Hunt v. Illinois Cent. R. Co. (C. C. A.)	644
Hutchings v. Lamson (C. C. A.)	720
Idzall, In re (D. C.)	314
Illinois Cent. R. Co., Hunt v. (C. C. A.)	644
International Tooth-Crown Co. v. Kyle (C. C.)	442
Iowa Water Co., Cutter v. (C. C.)	777
Iron Mountain R. Co. of Memphis v. City of Memphis (C. C. A.)	113
Isaac Prouty & Co., Davey Pegging-Mach. Co. v. (C. C.)	336
Iseley, Ashmore v. (C. C.)	775
Iseley, McIlwaine v. (C. C.)	62
Jack v. Walker (C. C.)	578
Jacobus v. United States (C. C. A.)	260
Jamieson, Clews v. (C. C. A.)	648
Jefferson, In re (D. C.)	826
Jeffries v. De Hart (D. C.)	494
Jenks v. Brewster (C. C.)	625
Jennings v. Rogers Silver Plate Co. (C. C.)	340
J. L. Owens Co., Sperry Mfg. Co. v. (C. C.)	975
Johnson v. Miller (C. C. A.)	271
Johnston v. Woodbury (C. C.)	421
Jones, Ex parte (C. C.)	200
J. Stevens Arms & Tool Co., Starrett v. (C. C.)	244
J. W. Reedy Elevator Mfg. Co., Overweight Counterbalance Elevator Co. v. (C. C.)	231
Kansas & T. Coal Co., State of Arkansas v. (C. C.)	353
Keegan v. King (D. C.)	758
Kettenring v. Northwestern Masonic Aid Ass'n (C. C.)	177
King, Keegan v. (D. C.)	758
Klamath River Lumber & Improvement Co., Pokegama Sugar Pine Lumber Co. v. (C. C.)	34
Kross, In re (D. C.)	816
Kyle, International Tooth-Crown Co. v. (C. C.)	442
La Compagnie Générale Transatlantique, etc., Henuy v. (C. C.)	497
Lamport, Bragg v. (C. C. A.)	630
Lamson, Hutchings v. (C. C. A.)	720
Langan v. Ætna Ins. Co. (C. C.)	705
Lauer v. Covenant Building & Loan Ass'n (C. C.)	775
Laughlin, In re (D. C.)	589
Lawrenceville Cement Co., American Surety Co. of New York v. (C. C.)	25
Legg, In re (D. C.)	326
Leigh, In re (D. C.)	806
Li Foon v. McCarthy (C. C. A.)	1005
Loeb, Paine v. (C. C. A.)	164
Louden Machinery Co. v. Montgomery Ward & Co. (C. C.)	232
Lumley, Wabash R. Co. v. (C. C. A.)	773
McBride v. Sunset Telephone Co. (C. C.)	81
McCarthy, Li Foon v. (C. C. A.)	1005
McCauley, Cruse v. (C. C.)	369
McClarin, Way v. (C. C. A.)	416
McCorvey, In re (D. C.)	317
McCulloch v. Ayer (C. C.)	178
McFaun, In re (D. C.)	592
McGraw v. Woods (C. C.)	56
McGrotty v. Fletcher (C. C.)	264
McIlwaine v. Ellington (C. C.)	1007
McIlwaine v. Iseley (C. C.)	62
McIntosh, Benton v. (C. C.)	132
MacLeod, Tompkins v. (C. C.)	927
McNaught v. Fisher (C. C. A.)	168
McNeely v. Williames (C. C. A.)	978
McNulta, Gilbert v. (C. C.)	83
Mahoney v. City of Helena (C. C.)	790
Maitland v. Graham (C. C.)	247
Mann Co. v. Hoffman (C. C.)	237
Manufacturers' Paper Co., Dime Sav. Bank v. (C. C. A.)	1004
Mathesius v. Brooklyn Heights R. Co. (C. C.)	792
Maxwell, The Emily B. (C. C. A.)	999
Mawhinney Last Co., Miller v. (C. C.)	248
Merchants' Nat. Bank, Third Nat. Bank v. (C. C. A.)	1006
Merritt, New Jersey Wire-Cloth Co. v. (C. C.)	216
Meyers, In re, two cases (D. C.)	408
Miehle Printing-Press & Manufacturing Co. v. Campbell Printing-Press & Manufacturing Co. (C. C.)	226
Miller v. Mawhinney Last Co. (C. C.)	248
Miller, California Oil & Gas Co. of Arizona v. (C. C.)	12
Miller, Dewey Min. Co., v. (C. C.)	1
Miller, Johnson v. (C. C. A.)	271
Miller Down-Draft Furnace Co., Springfield Furnace Co. v. (C. C.)	418
Montgomery Ward & Co., Louden Machinery Co. v. (C. C.)	232
Morris, Stewart v. (C. C. A.)	703
Mt. Morris Electric Light Co. v. Brush Electric Co. (C. C. A.)	1005
Mullin v. Chamberlain (C. C. A.)	999
Murray, In re (D. C.)	600
Mutual Reserve Fund Life Ass'n, Ryan v. (C. C.)	796
Narramore v. Cleveland, C., C. & St. L. R. Co. (C. C. A.)	298

	Page
National Bank of Commerce of Kansas City, Mo., Hobbs v. (C. C. A.)	396
National Nickel Co., Nevada Nickel Syndicate v. (C. C.)	133
Neustadter v. Chicago Dry-Goods Co. (D. C.)	830
Nevada Nickel Syndicate v. National Nickel Co. (C. C.)	133
Newark Spring Mattress Co., Ryan v. (C. C.)	100
New Jersey Wire-Cloth Co. v. Merritt (C. C.)	216
New York Air-Brake Co., Westinghouse Air-Brake Co. v. (C. C. A.)	991
New York Commercial Co. v. Francis (C. C.)	266
New York Filter Mfg. Co., Elmira Waterworks Co. v. (C. C. A.)	1005
New York, N. H. & H. R. Co., Smith v. (C. C.)	504
Northwestern Masonic Aid Ass'n, Kettenring v. (C. C.)	177
Norton, Duff Mfg. Co. v. (C. C.)	986
Noyes, Perry v. (C. C.)	233
N. T. Bushnell Co., Thompson v. (C. C. A.)	238
Nutter v. Brown (C. C.)	229
Oliver, In re (D. C.)	85
Olson v. Oregon Coal & Navigation Co. (D. C.)	109
Oregon Coal & Navigation Co., Olson v. (D. C.)	109
Ota, In re (D. C.)	487
Overweight Counterbalance Elevator Co. v. Crane Elevator Co. (C. C.)	231
Overweight Counterbalance Elevator Co. v. Eaton & Prince Co. (C. C.)	231
Overweight Counterbalance Elevator Co. v. J. W. Reedy Elevator Manufacturing Co. (C. C.)	231
Overweight Counterbalance Elevator Co. v. Standard Elevator & Manufacturing Co. (C. C.)	231
Owens Co., Sperry Mfg. Co. v. (C. C.)	975
Pacific Coast Steamship Co., Erickson v. (C. C.)	80
Pacific Steam Whaling Co., Guttner v. (D. C.)	617
Paine v. Loeb (C. C. A.)	164
Passavant, United States v. (C. C. A.)	1006
Pegasus, The (D. C.)	623
Perry v. Noyes (C. C.)	233
Philadelphia & R. R. Co., Union Switch & Signal Co. v. (C. C. A.)	761
Pine v. City of New York (C. C. A.)	1005
Pitt, Rodgers v. (C. C.)	668
Pokegama Sugar Pine Lumber Co. v. Klamath River Lumber & Improvement Co. (C. C.)	34
Pomeroy, Chandler v. (C. C. A.)	156
Popp v. Cincinnati, H. & D. R. Co. (C. C.)	465
President, etc., of Colby University v. Village of Canandaigua (C. C.)	449
Press Pub. Co. v. Crossman (C. C. A.)	1005
Price v. Board of Chosen Freeholders of Passaic County (C. C. A.)	174
Price, Hanifen v. (C. C.)	435
Price, United States v. (D. C.)	960
Probasco, Delaware, L. & W. R. Co. v. (C. C. A.)	1004
Producers' & Consumers' Oil Co., Cates v. (C. C.)	7
Prouty & Co., Davey Pegging-Mach. Co. v. (C. C.)	336
Provident Sav. Life Assur. Soc. of New York, Rosenplanter v. (C. C. A.)	721
Puget Sound Reduction Co., In re (C. C.)	90
Purvine, In re (C. C. A.)	192
Rahway Electric Light & Power Co., General Electric Co. v. (C. C.)	563
Reckless, Western Nat. Bank of New York v. (C. C.)	70
Reed Mfg. Co. v. Brown (C. C. A.)	1005
Reedy Elevator Mfg. Co., Overweight Counterbalance Elevator Co. v. (C. C.)	231
Republic of France, World's Columbian Exposition Co. v. (C. C. A.)	687
Reynolds v. Buzzell (C. C. A.)	997
Rhutassel, In re (D. C.)	597
Richards, In re (C. C. A.)	935
Richardson v. Swift & Co. (C. C. A.)	699
Rider, In re (D. C.)	808
Rider, In re (D. C.)	811
R. M. Waterman, The (C. C. A.)	253
Robinson, Supreme Lodge K. P. v. (C. C. A.)	1006
Rodgers v. Pitt (C. C.)	668
Rogers Silver Plate Co., Jennings v. (C. C.)	340
Rome Planing Mill, In re (D. C.)	812
Rose v. Continental Trust Co. (C. C. A.)	784
Rosenplanter v. Provident Sav. Life Assur. Soc. of New York (C. C. A.)	721
Rosser, In re (D. C.)	305
Rosser, In re (D. C.)	308
Roy, In re (D. C.)	400
Russie, In re (D. C.)	609
Ryan v. Mutual Reserve Fund Life Ass'n (C. C.)	796
Ryan v. Newark Spring Mattress Co. (C. C.)	100
Safe-Deposit & Trust Co. of Baltimore v. City of Anniston (C. C.)	661
Sanborn, In re (D. C.)	551
Sandman, American Waltham Watch Co. v. (C. C.)	330
Saunders, United States v. (C. C.)	268
Schiller, In re (D. C.)	400
Scott, In re (D. C.)	607
Shoe v. Gimbel (C. C.)	96
Shorer, In re (D. C.)	90
Simonson, Sinsheimer v. (D. C.)	579
Sinsheimer v. Simonson (D. C.)	579
Sir Robert Fernie, The (D. C.)	348
Sisler, In re (D. C.)	402
Skinner v. Garnett Gold-Min. Co. (C. C.)	735
Smith, In re (D. C.)	832
Smith v. New York, N. H. & H. R. Co. (C. C.)	504
Smith v. Wells, Fargo & Co. (C. C.)	375
Société Fabriques de Produits Chimiques de Thann et de Mulhouse v. French & American Trading Co. (C. C. A.)	1006
Solar Carbon & Manufacturing Co., Elliptical Carbon Co. v. (C. C.)	413
Southern Loan & Trust Co. v. Benbow (D. C.)	514
Sperry Mfg. Co. v. J. L. Owens Co. (C. C.)	975
Springfield Furnace Co. v. Miller Down-Draft Furnace Co. (C. C.)	418

	Page
Standard Elevator & Manufacturing Co., Overweight Counterbalance Elevator Co. v. (C. C.)	231
Stark, In re (D. C.)	88
Starrett v. Athol Mach. Co. (C. C.)	244
Starrett v. J. Stevens Arms & Tool Co. (C. C.)	244
State of Arkansas v. Kansas & T. Coal Co. (C. C.)	353
Stevens Arms & Tool Co., Starrett v. (C. C.)	244
Stewart v. Morris (C. C. A.)	703
Stokes Bros. Mfg. Co. v. Heller (C. C.)	104
Sullivan v. Swain (C. C.)	259
Sulzberger, Bate Refrigerating Co. v. (C. C. A.)	1004
Sunset Telephone Co., McBride v. (C. C.)	81
Supreme Lodge K. P. v. Robinson (C. C. A.)	1006
Swain, Sullivan v. (C. C.)	259
Swift & Co., Richardson v. (C. C. A.)	699
Talbot Pav. Co., City of Pontiac v. (C. C. A)	679
Tannage Patent Co., Donallan v. (C. C. A.)	1004
Tenney v. American Pipe Mfg. Co. (C. C.)	919
Terre Haute & L. R. Co. v. Harrison (C. C. A.)	907
Third Nat. Bank v. Merchants' Nat. Bank (C. C. A.)	1006
Thomas, In re (D. C.)	828
Thompson v. N. T. Bushnell Co. (C. C. A.)	238
Toledo, St. L. & K. C. R. Co. v. Continental Trust Co. (C. C. A.)	784
Toledo, St. L. & K. C. R. Co., Hamlin v. (C. C. A.)	784
Tompkins v. MacLeod (C. C.)	927
Transfer No. 8, The (C. C. A.)	253
Travers Bros. Co., Covert v. (C. C.)	568
Tudor, In re (D. C.)	942
Two Barrels Whisky, United States v. (C. C. A.)	479
Union Bank of Richmond, Va., Board of Com'rs of Oxford, N. C., v. (C. C. A.)	293
Union Switch & Signal Co. v. Philadelphia & R. R. Co. (C. C. A.)	761
United States v. Bartram, three cases (C. C. A.)	1006
United States v. Berry (D. C.)	842
United States v. Champion (C. C. A.)	1006
United States v. Jacobus (C. C. A.)	260
United States v. Passavant (C. C. A.)	1006
United States v. Price (D. C.)	960
United States v. Saunders (C. C.)	268
United States v. Two Barrels Whisky (C. C. A.)	479
United States v. Wells, Fargo & Co. Express (D. C.)	835
United States, Butler v. (C. C. A.)	1004
United States, Wilkins v. (C. C. A.)	837
United States Repair & Guaranty Co. v. Assyrian Asphalt Co. (C. C.)	235
United States Rubber Co. v. American Oak Leather Co. (C. C. A.)	891
Van Orden, In re (D. C.)	86
Van Siclen v. Bartol (C. C.)	796
Village of Canandaigua, President, etc., of Colby University v. (C. C.)	449
Voorheis v. Blanton (C. C.)	497
Vrooman v. Grafflin (C. C. A.)	275
Vulcan, The (D. C.)	859
Wabash R. Co. v. Lumley (C. C. A.)	773
Walker, In re (D. C.)	550
Walker, Jack v. (C. C.)	578
Waterman, The R. M. (C. C. A.)	253
Way v. McClarin (C. C. A.)	416
Way Tai, In re (C. C.)	484
Weaver v. Williams (C. C. A.)	1007
Wells, Fargo & Co., Smith v. (C. C.)	375
Wells, Fargo & Co. Express, United States v. (D. C.)	835
Welsbach Light Co. v. Apollo Incandescent Gaslight Co. (C. C. A.)	332
Western Nat. Bank of New York v. Reckless (C. C.)	70
Westinghouse Air-Brake Co. v. New York Air-Brake Co. (C. C. A.)	991
Westminster, The (D. C.)	766
Wheless v. City of St. Louis (C. C.)	865
Whitman, Deck v. (C. C.)	873
Wiener & Goodman Shoe Co., In re (D. C.)	949
Wilkins v. United States (C. C. A.)	837
Williames v. McNeely (C. C. A.)	978
William Mann Co. v. Hoffman (C. C.)	237
Williams v. Gold Hill Min. Co. (C. C.)	454
Williams v. Hedrick (C. C. A.)	657
Williams, Hayden v. (C. C. A.)	279
Williams, Weaver v. (C. C. A.)	1007
Willowdene, The (D. C.)	569
Winters, Cowen v. (C. C. A.)	929
Woodbury, Johnston v. (C. C.)	421
Woodruff, In re, two cases (D. C.)	317
Woods, McGraw v. (C. C.)	56
Worden v. Columbus Electric Co. (D. C.)	803
World's Columbian Exposition Co. v. Republic of France (C. C. A.)	687
Wright, In re (D. C.)	187
Wright, In re (D. C.)	820
Wright v. Bragg (C. C. A.)	729
Young, In re (D. C.)	606

CASES CITED.

Page

Abbey v. Dry-Goods Co., 44 Kan. 415, 24 Pac. 426 73
Abeel v. Culberson, 56 Fed. 329, 333 671
Ableman v. Booth, 21 How. 506, 516 ... 562, 677
Abraham, In re, 35 C. C. A. 592, 93 Fed. 767, 774 ..... 519, 520, 522, 540, 944
Abraham v. Ordway, 158 U. S. 416, 15 Sup. Ct. 894 774
Ackley v. Mining Co., 112 Cal. 42, 44 Pac. 330 ..... 741, 742
Adams v. Haskell, 6 Cal. 316 197
Adams v. Stamping Co., 141 U. S. 539, 12 Sup. Ct. 66 434
A. Heaton, The, 43 Fed. 592 111
Ah Fong, In re, 1 Fed. Cas. 213 363
Aimo, The, 2 Asp. 96 1002
Alexander v. Overton (Neb.) 72 N. W. 212 672
Alger v. Anderson, 92 Fed. 696 875
Allen v. Car Co., 139 U. S. 662, 11 Sup. Ct. 682 24
Allen v. Flood, 46 Wkly. Rep. 258 .... 683, 684
Allen v. Gillette, 127 U. S. 589, 8 Sup. Ct. 1331 879
Allis v. Insurance Co., 97 U. S. 145 884
Allison v. Brookshire, 38 Tex. 200 833
Alsup v. Jordan, 69 Tex. 300, 6 S. W. 831 833
Alta Silver-Min. Co. v. Placer-Min. Co., 78 Cal. 629, 632, 21 Pac. 373 147
American Waltham Watch Co. v. Watch Co. (Mass.) 53 N. E. 141 331
American Waterworks Co. v. Trust Co., 20 C. C. A. 133, 73 Fed. 956 462
American & F. Christian Union v. Yount, 101 U. S. 352 463
Ames v. Kansas, 111 U. S. 449, 462, 4 Sup. Ct. 437, 443 354-357
Anaces, The, 87 Fed. 565; 34 C. C. A. 558, 93 Fed. 240 856
Andrews v. Bacon, 38 Fed. 777 721
Andrews v. Smith, 5 Fed. 833 ..... 521, 526
Anon., 1 Atk. 578 257
Ansonia Brass & Copper Co. v. Supply Co., 144 U. S. 11-18, 12 Sup. Ct. 601 ... 103
Appel v. Railway Co., 111 N. Y. 550, 19 N. E. 93 300
Appolos v. Brady, 1 C. C. A. 299, 49 Fed. 401 ..... 917, 918
Argersinger v. McNaughton, 114 N. Y. 535, 21 N. E. 1022 167
Argonaut Min. Co. v. Milling Co., 84 Fed. 1 17
Armory v. Delamirie, 1 Strange, 506, 1 Smith, Lead. Cas. 636 621
Armour Packing Co. v. Snyder, 84 Fed. 136 967
Armstrong v. Law, 27 Wkly. Law Bul. 100 788

Page

Armstrong v. McDonald, 10 Barb. 300 ... 548
Armstrong v. U. S., 13 Wall. 154 841
Arndt v. Griggs, 134 U. S. 316, 324, 10 Sup. Ct. 557 ..... 675, 889
Arnold v. Canal Co., 125 N. Y. 15, 25 N. E. 1064 ..... 717, 718
Arthur v. Morrison, 96 U. S. 108 94
Asheville St. Ry. Co. v. City of Asheville, 109 N. C. 688, 14 S. E. 316 124
Assessors of Internal Revenue v. Osbornes, 9 Wall. 567 263
Atchison, T. & S. F. R. Co. v. Matthews, 174 U. S. 96, 19 Sup. Ct. 609 745
Atkinson v. Waterworks Co., 2 Exch. Div. 441 300
Atlantic Mut. Life Ins. Co., In re, Fed. Cas. No. 629 196
Atlantic Trust Co. v. Irrigation Co., 79 Fed. 501 670
Atlantic & G. R. Co. v. Georgia, 98 U. S. 359, 366 290
Atlantic & P. R. Co. v. Mingus, 165 U. S. 413, 17 Sup. Ct. 348 127
Attorney General v. Mining Co., 99 Mass. 148 460
Atwood v. Holcomb, 39 Conn. 270 548
Avery v. Holland (1806) 2 Overt. 71 888
Ayers, In re, 123 U. S. 443, 8 Sup. Ct. 164 563

Bachrack v. Norton, 132 U. S. 337, 10 Sup. Ct. 106 355
Bacon v. Texas, 163 U. S. 207, 216, 16 Sup. Ct. 1023 129
Baddeley v. Granville, 19 Q. B. Div. 423 .. 302
Baker v. Backus' Adm'r, 32 Ill. 96 257
Baldwin v. Kansas, 129 U. S. 52, 57, 9 Sup. Ct. 193 290
Baldwin v. Society (Sup.) 48 N. Y. Supp. 463 726
Ball v. Tompkins, 41 Fed. 486, 490 .... 676, 677
Ballard Pav. Co. v. Mulford, 100 U. S. 147 ..... 867, 868
Baltimore & O. R. Co., Ex parte, 106 U. S. 5, 1 Sup. Ct. 35 866
Baltimore & O. R. Co. v. Baugh, 149 U. S. 368, 13 Sup. Ct. 914 111
Bangs v. Loveridge, 60 Fed. 963 467
Bank of Augusta v. Earle, 13 Pet. 588, 592 ..... 457, 463
Bank of Bethel v. Bank, 14 Wall. 383 85
Bank of North America v. Rindge, 57 Fed. 279 73
Bardon v. Improvement Co., 157 U. S. 327, 15 Sup. Ct. 650 20
Barnes v. District of Columbia, 91 U. S. 540 791
Barney v. Baltimore City, 6 Wall. 280 ... 16

Page

Barnitz v. Beverly, 163 U. S. 127, 16 Sup. Ct. 1045 884
Bartlett, Reid & Co. v. Teah, 1 Fed. 768.. 918
Bass, In re, 3 Woods, 382, Fed. Cas. No. 1,091 .....322, 324, 947
Bate Refrigerating Co. v. Hammond, 129 U. S. 151, 9 Sup. Ct. 225 333
Bate Refrigerating Co. v. Sulzberger, 157 U. S. 1, 37, 15 Sup. Ct. 508, 516....334, 441
Bates v. Keith, 82 Fed. 100, 103..... 990
Bausman v. Dixon, 173 U. S. 113, 19 Sup. Ct. 316.....84, 928, 929
Baxter v. Insurance Co., 119 N. Y. 450–455, 23 N. E. 1048..... 725
Baxter v. Wales, 12 Mass. 365..... 155
Beach v. Hobbs, 82 Fed. 916, 919; 34 C. C. A. 248, 92 Fed. 146, 147.....541, 988
Bean v. Brookmire, Fed. Cas. No. 1,168.. 825
Beaver v. Bare, 104 Pa. St. 58..... 548
Beck v. Protective Union (Mich.) 77 N. W. 13, 25 683
Bell v. Trust Co., 1 Biss. 260, Fed. Cas. No. 1,260 .....670, 673
Belloni v. Freeborn, 63 N. Y. 383, 390.... 795
Bellows v. Allen, 22 Vt. 108..... 504
Bendey v. Townsend, 109 U. S. 668, 3 Sup. Ct. 482..... 884
Benedict v. Railroad Co., 19 Fed. 173.... 885
Benner v. Porter, 9 How. 235..... 262
Bennett v. Ass'n, 177 Pa. St. 233, 35 Atl. 684 873
Bennett v. Harkrader, 158 U. S. 441, 15 Sup. Ct. 863..... 18
Bennett v. Roofing Co., 19 Mo. App. 349–351 185
Berridge v. Banks, 125 Ind. 561, 25 N. E. 805 634
Berthold v. Hoskins, 38 Fed. 772..... 771
Besch v. Mfg. Co., 36 Mo. App. 333..... 185
Betz v. Maier, 12 Tex. Civ. App. 219, 221, 33 S. W. 710, 711..... 833
Bibb v. Allen, 149 U. S. 481, 492, 13 Sup. Ct. 950 653
Bienville Water-Supply Co. v. City of Mobile, 95 Fed. 539..... 453
Bigelow v. Burnham (Iowa) 49 N. W. 104 68
Bissell v. Huntington, 2 N. H. 143..... 621
Black, In re, 2 Ben. 196, Fed. Cas. No. 1,457 477
Black v. McClelland, 12 N. B. R. 431, Fed. Cas. No. 1,462..... 88
Black v. Scott, 9 Fed. 186..... 890
Blair, In re, 4 Wis. 531..... 196
Blake, Moffitt & Towne v. Francis-Valentine Co., 89 Fed. 691..... 753
Blakey v. Bank, 95 Fed. 267..... 804
Blanche Page, The, 16 Blatchf. 1, Fed. Cas. No. 1,524..... 196
Blum v. Ellis, 73 N. C. 293..... 823
Blumenthal v. Shaw, 23 C. C. A. 590, 77 Fed. 954 548
Board of Com'rs of Stanly Co. v. Coler, 96 Fed. 284 297
Board of Com'rs of Stanly Co. v. Snuggs, 121 N. C. 394, 28 S. E. 539....286–288, 290
Board of Com'rs of Wilkes County v. Call (N. C.) 31 S. E. 481..... 290
Bobo v. Bryson, 76 Am. Dec. 406, 21 Ark. 387 548

Page

Bock v. Perkins, 139 U. S. 628, 11 Sup. Ct. 677 356
Bonnafee v. Williams, 3 How. 574..... 467
Booth v. Clark, 17 How. 322..... 526
Boston & R. Electric St. Ry. Co. v. Car-Box Co., 25 C. C. A. 420, 80 Fed. 287, 288 492
Boswell's Lessee v. Otis, 9 How. 336, 348 675
Bosworth v. Ass'n, 26 C. C. A. 279, 80 Fed. 969; 19 Sup. Ct. 625.....647, 648
Bowman v. Railroad Co., 115 U. S. 611, 6 Sup. Ct. 192; 125 U. S. 465, 490, 495, 8 Sup. Ct. 689, 701, 703, 1062..365, 367, 771
Boyce's Ex'rs v. Grundy, 3 Pet. 210, 215.. 55
Boyd v. Cherry, 50 Fed. 279..... 347
Boyd v. Coal Co. (Ind. App.) 50 N. E. 368 303
Boyd v. U. S., 116 U. S. 616, 6 Sup. Ct. 524 .....482, 562, 563, 961
Boyden v. Burke, 14 How. 575..... 557
Boylan v. Railroad Co., 132 U. S. 146, 10 Sup. Ct. 50..... 932
Boyle v. Zacharie, 6 Pet. 658..... 56
Branson v. Wirth, 17 Wall. 42..... 588
Brant, In re, 96 Fed. 257..... 259
Bray v. Cobb, 91 Fed. 102..... 823
Bray v. Wheeler, 29 Vt. 514..... 548
Bridgeport Electric & Ice Co. v. Meader, 18 C. C. A. 451, 72 Fed. 115, 118..... 151
Briggs v. Stroud, 58 Fed. 717, 720..... 677
Brinckerhoff v. Bostwick, 99 N. Y. 185, 1 N. E. 663..... 398
Brine v. Insurance Co., 96 U. S. 627....882, 884, 885
Brinkerhoff v. Aloe, 146 U. S. 515, 517, 13 Sup. Ct. 221..... 977
Brinkerhoff v. Brown, 6 Johns. Ch. 139... 781
British Queen Min. Co. v. Mining Co., 139 U. S. 222, 11 Sup. Ct. 523..... 731
Broach v. Powell, 79 Ga. 79, 81, 3 S. E. 763 .....186, 324
Brobst v. Brock, 10 Wall. 519..... 886
Brodnax v. Groom, 64 N. C. 244..... 291
Bronson v. Kinzie, 1 How. 311, 316..... 75
Brooklyn Cent. R. Co. v. Railroad Co., 32 Barb. 358, 367..... 124
Brooklyn City & N. R. Co. v. Bank, 102 U. S. 14, 31, 55..... 464
Brooks v. Calderwood, 34 Cal. 566..... 20
Brooks v. Delaplaine, 1 Md. Ch. 351, 354 670
Broom v. Armstrong, 137 U. S. 278, 11 Sup. Ct. 75..... 889
Brown, In re, 91 Fed. 358..... 522
Brown v. Campbell, 110 Cal. 644, 649, 43 Pac. 12 677
Brown v. Colorado, 106 U. S. 95, 98, 1 Sup. Ct. 175..... 130
Brown v. Deposit Co., 128 U. S. 403, 410, 412, 9 Sup. Ct. 129, 130..... 780
Brown v. The D. S. Cage, 1 Woods, 401, Fed. Cas. No. 2,002..... 110
Brown v. Ellis, 86 Fed. 357..... 504
Brown v. Houston, 114 U. S. 622, 630, 5 Sup. Ct. 1091, 1095.....355, 367
Brown v. Iron Co., 134 U. S. 534, 10 Sup. Ct. 604 642
Brown v. Kohout (Minn.) 63 N. W. 248.. 672
Brown v. Society, 47 Me. 275..... 694
Brown v. Stove Co. (Tenn. Ch. App.) 42 S. W. 161 907
Brown v. Tillinghast, 84 Fed. 71..... 85

Page

Brown v. Trousdale, 138 U. S. 389, 11 Sup. Ct. 308 ... 869
Brown v. Walker, 161 U. S. 591, 16 Sup. Ct. 644 ... 308, 962
Bruch v. Carter, 32 N. J. Law, 554 ... 620
Brush Electric Co. v. Electric Co., 41 Fed. 679 ... 441
Bruss-Ritter Co., In re, 90 Fed. 651 ... 528
Bryan v. Brasius, 162 U. S. 415, 16 Sup. Ct. 803 ... 886
Buchanan Bridge Co. v. Campbell (Ohio) 54 N. E. 372, 376 ... 667
Buck v. Colbath, 3 Wall. 334, 341 ... 674, 759, 760
Buckingham v. McLean, 13 How. 150, 151, 167 ... 89, 182, 477, 596
Buddecum v. Kirk, 3 Cranch, 293 ... 767
Budzisz v. Steel Co., 170 U. S. 41, 18 Sup. Ct. 503 ... 17
Buell v. State, 45 Ark. 338 ... 363
Buist v. Bryan, 44 S. C. 124, 21 S. E. 537 ... 872
Bulwer Consol. Min. Co. v. Mining Co., 83 Cal. 589, 23 Pac. 1102 ... 19
Buntrock Clothing Co., In re, 92 Fed. 886 ... 541
Burns v. Weesner, 134 Ind. 442, 34 N. E. 10 ... 659
Broughs v. White, 69 Ga. 845 ... 323
Bushnell v. Kennedy, 9 Wall. 387, 393 ... 677
Bushnell v. Smelting Co., 148 U. S. 682, 13 Sup. Ct. 771 ... 17
Butler v. Ass'n, 97 Tenn. 679, 37 S. W. 385 ... 728
Byers v. McAuley, 149 U. S. 608, 13 Sup. Ct. 906 ... 519

Cady v. Schultz, 19 R. I. 193, 32 Atl. 915 ... 849
Caha v. U. S., 152 U. S. 211, 221, 14 Sup. Ct. 513 ... 840, 841
California v. Southern Pac. Co., 157 U. S. 229, 15 Sup. Ct. 591 ... 31
Camarillo v. Fenlon, 49 Cal. 203 ... 672
Camp, In re, 91 Fed. 745, 746 ... 321, 322, 534
Camp v. Zellars, 94 Fed. 799 ... 944
Campbell v. Campbell, 11 N. J. Eq. 268 ... 548
Campbell v. Cooper, 34 N. H. 49 ... 548
Campbell v. White, 95 N. C. 491 ... 533
Canadian Pac. Ry. Co. v. Johnston, 9 C. C. A. 587, 61 Fed. 738 ... 397
Capital Nat. Bank of Lincoln v. Bank, 172 U. S. 425, 19 Sup. Ct. 202 ... 84
Capital Sheet-Metal Co. v. Kinnear & Gager Co., 31 C. C. A. 3, 87 Fed. 333 ... 434
Carey v. Williams, 25 C. C. A. 227, 79 Fed. 906 ... 282
Carpenter v. O'Connor, 16 Ohio Cir. Ct. R. 526 ... 523
Carpenter v. Strange, 141 U. S. 87, 11 Sup. Ct. 960 ... 887
Carpenter Straw-Sewing Mach. Co. v. Searle, 8 C. C. A. 476, 60 Fed. 82 ... 241
Carr v. Coke, 116 N. C. 223, 22 S. E. 16 ... 291
Carr v. Fearington, 63 N. C. 560 ... 521
Carr v. Hilton, 1 Curt. 230, Fed. Cas. No. 2,436 ... 477
Carr v. U. S., 98 U. S. 433 ... 562
Carrol v. Green, 92 U. S. 509 ... 721
Carroll v. Carroll's Lessee, 16 How. 287 ... 322
Carson v. Dunham, 121 U. S. 421, 427, 7 Sup. Ct. 1030, 1033; 149 Mass. 53, 20 N. E. 312 ... 356, 357, 670

Page

Carter v. Hobbs, 92 Fed. 594 ... 522, 528
Carter v. Ruddy, 166 U. S. 493, 17 Sup. Ct. 640 ... 56
Cash-Register Co. v. Woodbury, 70 Conn. 321, 39 Atl. 168 ... 327
Castro v. Barry, 79 Cal. 443, 21 Pac. 946 ... 19, 20
Cates v. Allen, 149 U. S. 451, 13 Sup. Ct. 883, 977 ... 641
Central Nat. Bank v. Hume, 128 U. S. 195, 206, 209, 9 Sup. Ct. 44 ... 181
Central Nat. Bank v. Stevens, 169 U. S. 459, 18 Sup. Ct. 403 ... 525
Central R. Co. of New Jersey v. Mills, 113 U. S. 249, 257, 5 Sup. Ct. 456, 459 ... 356
Central Trust Co. v. McGeorge, 151 U. S. 129, 133, 14 Sup. Ct. 286 ... 677, 769
Central Trust Co. v. Railroad Co., 89 Fed. 24, 29 ... 671, 674
Chamberlain v. Shaw, 18 Pick. 278 ... 621
Chambers v. Harrington, 111 U. S. 350, 4 Sup. Ct. 428 ... 18
Chandler v. Pomeroy, 46 Fed. 533; 87 Fed. 262; 143 U. S. 318, 12 Sup. Ct. 410 ... 156, 157
Chandler v. Spencer, 109 Ind. 553, 10 N. E. 577 ... 634
Chapman v. Brewer, 114 U. S. 158, 5 Sup. Ct. 799 ... 20
Chappedelaine v. Dechenaux, 4 Cranch, 306 ... 467
Chappell v. Waterworth, 155 U. S. 102, 15 Sup. Ct. 34 ... 2, 18, 355
Charlotte, C. & A. R. Co. v. Gibbs, 142 U. S. 386, 12 Sup. Ct. 255 ... 368
Chase v. Elkins, 2 Vt. 290 ... 548
Chase v. Peck, 21 N. Y. 581, 583 ... 151
Chesley v. St. Clair, 1 N. H. 189 ... 621
Chetwood, Ex parte, 165 U. S. 443, 458, 17 Sup. Ct. 385 ... 84, 85, 520
Chiatovich v. Hanchett, 88 Fed. 873 ... 681, 684
Chicago, B. & Q. R. Co. v. City of Chicago, 166 U. S. 226, 17 Sup. Ct. 581 ... 122
Chicago, D. & V. R. Co. v. Fosdick, 106 U. S. 68, 1 Sup. Ct. 10 ... 879
Chicago, M. & St. P. R. Co. v. Ross, 112 U. S. 377, 5 Sup. Ct. 184 ... 111
Chicago Planing-Mill Co. v. Bank, 86 Ill. 587 ... 133
Chicago Ry. Equipment Co. v. Bank, 136 U. S. 268, 280, 10 Sup. Ct. 999 ... 327, 328
Chicago & A. R. Co. v. Ferry Co., 108 U. S. 18, 1 Sup. Ct. 614, 617 ... 21
Chicago & A. R. Co. v. Rolling-Mill Co., 109 U. S. 713, 3 Sup. Ct. 594 ... 275
Chicago & N. W. R. Co. v. Ward, 61 Ill. 130 ... 717, 719
Childress v. Emory, 8 Wheat. 642 ... 467
Chisholm v. Clitherall, 12 Minn. 375, 379 (Gil. 251) ... 673
Christy, In re, 3 How. 292 ... 521, 522, 527, 528, 552
Chy Lung v. Freeman, 92 U. S. 275 ... 360, 364, 365
Cincinnati, H. & D. Ry. Co. v. Van Horne, 16 C. C. A. 182, 69 Fed. 139 ... 300
City of Alexandria, The, 17 Fed. 392 ... 112
City of Brooklyn, In re, 143 N. Y. 596, 38 N. E. 983 ... 452

Page
City of Charlotte v. Shepard, 120 N. C. 411, 27 S. E. 109 290
City of Chicago v. Robbins, 2 Black, 418 .. 791
City of East St. Louis v. Albrecht, 150 Ill. 506, 512, 37 N. E. 934 680
City of Laporte v. Telephone Co., 146 Ind. 466, 45 N. E. 588 666
City of New Orleans v. Benjamin, 153 U. S. 411, 14 Sup. Ct. 905 .....2, 17, 21
City of New York, The, 147 U. S. 72, 85, 13 Sup. Ct. 211 864
City of Norwalk, The, 55 Fed. 98 111
City of Shreveport v. Cole, 129 U. S. 36, 9 Sup. Ct. 210 2
City of Walla Walla v. Water Co., 172 U. S. 1, 19 Sup. Ct. 77 .....126, 128, 131
City Ry. Co. v. Railroad Co., 166 U. S. 557, 17 Sup. Ct. 653 23
Civil Rights Cases, 109 U. S. 3–17, 3 Sup. Ct. 18 122
Clark v. Graham, 6 Wheat. 577 884
Clark v. Iselin, 21 Wall. 360 .....826, 939
Clark v. Smith, 13 Pet. 195 20
Clark v. Wooster, 119 U. S. 322, 7 Sup. Ct. 217 232
Clarke v. Holmes, 6 Hurl. & N. 349; 7 Hurl. & N. 937 303
Clarke v. Mathewson, 12 Pet. 164 467
Clay v. Field, 138 U. S. 464, 11 Sup. Ct. 419 866
Cleghorn v. Greeson, 77 Ga. 343 186
Cleveland, C., C. & St. L. Ry. Co. v. Baker, 33 C. C. A. 468, 91 Fed. 224 304
Cloud v. Hamilton, 11 Humph. 104 548
Cloud v. Moorman, 18 Ind. 40 635
Clyde v. Railroad Co., 55 Fed. 448 265
Coal Co. v. Estievenard, 53 Ohio St. 43, 40 N. E. 725 305
Coates v. Wilkes, 94 N. C. 180 525
Cobb, In re, 5 Fed. Cas. 1123 (No. 2,920), 29 Am. & Eng. Enc. Law, 38 834
Cobb v. Knapp, 71 N. Y. 348 167
Cobbs v. Coleman, 14 Tex. 596 833
Cochrane v. Deener, 94 U. S. 780 235
Coffman, In re, 93 Fed. 422 806
Coghlan v. Railroad Co., 142 U. S. 101, 12 Sup. Ct. 150 873
Cohen v. Solomon, 66 Fed. 411, 413, 414 .. 670
Cohens v. Virginia, 6 Wheat. 264, 379 .. 2, 357
Cole v. Railway Co., 71 Wis. 114, 37 N. W. 84 .....700, 702
Coler v. Board, 89 Fed. 257 287
Collier, In re, 93 Fed. 194 535
Collins v. New Hampshire, 171 U. S. 30, 18 Sup. Ct. 768 967
Collins v. Stott, 76 Fed. 613 676
Colorado Central Consol. Min. Co. v. Turck, 150 U. S. 138, 143, 14 Sup. Ct. 35, 37 356
Columbia Building & Loan Ass'n v. Bollinger, 12 Rich. Eq. 124 872
Columbia Mill Co. v. Alcorn, 150 U. S. 460, 14 Sup. Ct. 151 848
Comer v. Tabler, 44 Fed. 467 907
Commercial Mfg. Co. v. Canning Co., 135 U. S. 176, 10 Sup. Ct. 718 333
Com. v. Erisman, 21 Pittsb. Leg. J. 69 .. 959
Com. v. Hutchinson, 10 Pa. St. 466 957
Compton v. Jesup, 15 C. C. A. 397, 412, 68 Fed. 263, 279 519

Page
Cone v. Lewis, 64 Tex. 333 833
Connecticut v. Shelton, 47 Conn. 409 957
Connecticut Mut. Life Ins. Co. v. Cushman, 108 U. S. 51–65, 2 Sup. Ct. 236 ... 727, 728, 884
Connemara, The, 103 U. S. 754 867
Considerant v. Brisbane, 22 N. Y. 389, 391, 395, 396, 398, 399 167
Consolidated Electric Mfg. Co. v. Holtzer, 15 C. C. A. 63, 67 Fed. 910 343
Cooke v. Avery, 147 U. S. 375, 13 Sup. Ct. 340 355
Cooke v. Boynton, 135 Pa. St. 102, 19 Atl. 944 124
Cooley v. Board, 12 How. 299 365
Cooper v. Griffin (1892) 1 Q. B. Div. 740 .. 267, 268
Cooper v. Reynolds, 10 Wall. 308, 316 675
Cope v. Hastings, 183 Pa. St. 322, 38 Atl. 720 176
Corning v. Burden, 15 How. 252 235
Corporation of New Orleans v. Winter, 1 Wheat. 91 16
Cortes, In re, 136 U. S. 330, 10 Sup. Ct. 1031 201
Cothran v. Ellis, 125 Ill. 496, 16 N. E. 646 654
Cotton, In re, Fed. Cas. No. 3,269 959
Cotton v. Sharpstein, 14 Wis. 236 196
Cottrell v. Manlove (Kan. Sup.) 49 Pac. 520 397
Coughlin v. Blumenthal, 96 Fed. 920 924
Coughlin v. Ehlert, 39 Mo. 285 196
Counselman v. Hitchcock, 142 U. S. 547, 560, 12 Sup. Ct. 195 .....308, 961, 962
Covell v. Heyman, 111 U. S. 176, 182, 4 Sup. Ct. 355, 358 .....670, 677
Covert v. Travers Bros. Co., 70 Fed. 788 .. 569
Coward v. Railroad Co., 57 Am. Rep. 226 834
Cowell v. Springs Co., 100 U. S. 55, 59 ... 462
Cowell v. Water-Supply Co., 96 Fed. 769 .. 890
Craft, In re, 2 Ben. 214, Fed. Cas. No. 3,316; 6 Blatchf. 177, 178, Fed. Cas. No. 3,317 .....89, 477
Craig v. Hoge, 95 Va. 275, 279, 280, 28 S. E. 317 .....670, 674
Crandall v. Nevada, 6 Wall. 42 365
Crawford v. Publishing Co., 22 App. Div. 56, 47 N. Y. Supp. 747 795
Crescent City Gaslight Co. v. Gaslight Co., 27 La. Ann. 138, 147 129
Crispin v. Babbitt, 81 N. Y. 516 111
Crocker Nat. Bank v. Pagenstecher, 44 Fed. 705 770
Cropper v. Coburn, 2 Curt. 465, Fed. Cas. No. 3,416 56
Crouch v. Gridley, 6 Hill. 250 88
Crystal Springs Land & Water Co. v. City of Los Angeles, 76 Fed. 148; 82 Fed. 114 .....17, 21–23
Cummings v. Jackson (N. J. Err. & App.) 38 Atl. 763, 765 151
Cunningham v. Railroad Co., 109 U. S. 451, 452, 3 Sup. Ct. 292, 609 562
Curtis v. Leavitt, 15 N. Y. 15, 85 728
Curtis v. Sutter, 15 Cal. 262, 263 20
Cutler v. How, 8 Mass. 257 155
Cutler v. Johnson, 8 Mass. 266 155

Daggett v. Rankin, 31 Cal. 322, 326 150
Daisy Day, The, 40 Fed. 540 252

Page

Dalzell v. Mfg. Co., 149 U. S. 315, 325, 13 Sup. Ct. 886 153
Dana v. Lull, 21 Vt. 383 504
Darcy v. City of San Jose, 104 Cal. 642, 38 Pac. 500 742
Daube v. Iron Co., 23 C. C. A. 420, 77 Fed. 713 731
Daves v. Southern Pac. Co., 98 Cal. 19, 32 Pac. 708 111
Davidson v. Calkins, 92 Fed. 230 ..... 20, 25
Davies v. Corbin, 112 U. S. 36, 5 Sup. Ct. 4 869
Davies v. Lathrop, 12 Fed. 353 467
Daviess Co. v. Dickinson, 117 U. S. 657, 665, 6 Sup. Ct. 897 298
Davis v. Bohle, 34 C. C. A. 372, 92 Fed. 325 522, 753, 823
Davis v. Gray, 16 Wall. 220 467
Day v. Micou, 18 Wall. 162 889
Dearborn v. Phillips, 21 Tex. 451 833
Dearmond v. Dearmond, 10 Ind. 191 635
Delaware County & P. Electric Ry. Co. v. City of Philadelphia, 164 Pa. St. 457, 30 Atl. 396 124
De Lue, In re, 91 Fed. 510 941
Delz v. Winfree (Tex. Sup.) 16 S. W. 111 .. 684
Demarest v. Flack, 128 N. Y. 205, 28 N. E. 645 461
Dennick v. Railroad Co., 103 U. S. 11–21 .. 73, 76, 81
Denver & R. G. Ry. Co. v. Harris, 7 Sup. Ct. 1286 124
De Vaughn v. Hutchinson, 165 U. S. 570, 17 Sup. Ct. 461 884
Dewey Min. Co. v. Miller, 96 Fed. 1 ..... 7, 18
Dexter v. Edmands, 89 Fed. 467, 469 .... 73, 78
Dial v. Reynolds, 96 U. S. 340 523
Dick v. Foraker, 155 U. S. 404, 15 Sup. Ct. 124 890
Dierker v. Hess, 54 Mo. 250 548
Dietzsch v. Huidekoper, 103 U. S. 494–498 131, 671
Doe v. Mining Co., 43 Fed. 219 18
Dollar Sav. Bank v. U. S., 19 Wall. 239 ... 957
Doon Tp. v. Cummins, 142 U. S. 366, 376, 12 Sup. Ct. 220 298
Doren v. Gillum, 136 Ind. 134, 35 N. E. 1101 659
Dow v. Railroad Co., 20 Fed. 260 885
Doyle v. Spaulding, 19 Fed. 744 347
Draper v. Wattles, 7 Fed. Cas. 1061 (No. 4,073) 347
Dresser, In re, 3 N. B. R. 557, Fed. Cas. No. 4,077 194
Dubuque & Sioux City R. Co. v. Richmond, 19 Wall. 584 366
Duchesse D'Auxy v. Porter, 41 Fed. 68 ... 466
Duff Mfg. Co. v. Forgie, 78 Fed. 626 988
Duff Mfg. Co. v. Norton, 92 Fed. 921 987
Dull v. Blackman, 169 U. S. 243, 18 Sup. Ct. 333 ..... 887, 888
Duncan v. Associated Press, 81 Fed. 417 .. 770
Dundee Mortgage & Trust Investment Co. v. Hughes, 89 Fed. 182, 185 672
Dunn v. Society, 46 Ohio St. 93, 18 N. E. 496 694
Durant v. Mining Co., 97 Mo. 62, 10 S. W. 484 303

Eames v. Andrews, 122 U. S. 40, 66, 7 Sup. Ct. 1073 981

Page

Earle, In re, Fed. Cas. No. 4,244 755
Earl of Chesterfield v. Janssen, 2 Ves. Sr. 125 154
Earl Wemyss, The, 6 Asp. 364 1002
Easley, In re, 93 Fed. 419 ..... 521, 941
Eastern Bldg. & Loan Ass'n v. Bedford, 88 Fed. 15 873
East Lake Land Co. v. Brown, 155 U. S. 488, 15 Sup. Ct. 357 ..... 2, 355
Eastman v. Clackamas Co., 32 Fed. 33 261
East Oakland Tp. v. Skinner, 94 U. S. 255 290, 298
Easton, S. E. & W. E. P. Ry. Co. v. City of Easton, 133 Pa. St. 505, 19 Atl. 486 .. 124
Echols v. Smith (Ky.) 42 S. W. 538 928
Edwards v. Water Co., 21 Nev. 469, 34 Pac. 381 147
Electoral College Case, 8 Fed. Cas. 427 ... 562
Elizabeth Jones, The, 112 U. S. 514, 5 Sup. Ct. 468 1002
Ellenwood v. Chair Co., 158 U. S. 105, 107, 15 Sup. Ct. 771 888
Elliott v. Insurance Co. (Iowa) 79 N. W. 452 712
Elliott v. Swartwout, 10 Pet. 151 94
Ellis v. Trust Co., 4 Ohio St. 651 789
Ellsworth v. Hayes, 71 Wis. 428, 434, 37 N. W. 249 686
Elmendorf v. Taylor, 10 Wheat. 152 465
Elmwood Tp. v. Marcy, 92 U. S. 289 290
Embrey v. Jemison, 131 U. S. 336, 344, 9 Sup. Ct. 776 653
England v. Dearborn, 141 Mass. 590, 6 N. E. 837 147
Equitable Bldg. & Loan Ass'n v. Vance, 49 S. C. 402, 27 S. E. 274, 29 S. E. 204 .. 872, 873
Erskine v. Oil Co., 80 Fed. 583 24
Erwin v. Lowry, 7 How. 172 521
E. S. Higgins Carpet Co. v. O'Keefe, 25 C. C. A. 220, 79 Fed. 900 303
Ewell v. Daggs, 108 U. S. 143–151, 2 Sup. Ct. 408, 413 ..... 728, 729
Eyster v. Gaff, 91 U. S. 521..519, 521, 524, 525

Fagan v. City of Chicago, 84 Ill. 227 680
Falls v. Building Co., 97 Ala. 417, 13 South. 25 ..... 69, 463
Falls v. Torrence, 11 N. C. 412 549
Farmers' Loan & Trust Co. v. Railway Co., 127 Ind. 250, 26 N. E. 784 635
Farnsworth v. Railroad Co., 92 U. S. 49, 66 127
Farnum v. Canal Corp., 1 Sumn. 46, 62, Fed. Cas. No. 4,675 507
Feibelman v. Packard, 109 U. S. 421, 3 Sup. Ct. 289 355
Felton v. Bullard, 94 Fed. 781 ..... 716, 717
Felton v. Smith, 84 Ind. 485 635
Fidelity Insurance, Trust & Safe-Deposit Co. v. Iron Co., 84 Fed. 744 910
Fidelity Insurance, Trust & Safe-Deposit Co. v. Railroad Co., 33 W. Va. 761, 771, 11 S. E. 58 151
Field v. Clark, 143 U. S. 649, 12 Sup. Ct. 495 292
Field v. Ridgely, 116 Ill. 424, 6 N. E. 156 .. 896
Fife v. State, 31 Ark. 455, 458 362
First Nat. Bank v. Duel Co., 74 Fed. 373, 374 677
First Nat. Bank of Charlotte v. Morgan, 132 U. S. 141, 145, 10 Sup. Ct. 37 677

Page
Fisher v. Moog, 39 Fed. 667 58
Fisk v. Henarie, 142 U. S. 459, 467, 12 Sup. Ct. 207 356
Fisk v. Railroad Co., 10 Blatchf. 518, 9 Fed. Cas. 167, Fed. Cas. No. 4,830..131, 671
Fitzgerald v. Railway Co., 45 Fed. 812 17
Fitzgerald v. Robinson, 112 Mass. 371, 381 686
Flagg v. Walker, 113 U. S. 659, 5 Sup. Ct. 697 885
Flanders v. Wells, 61 Ga. 195 186
Flannagan v. Railway Co., 45 Wis. 98; 50 Wis. 462, 7 N. W. 337 717
Flash v. Conn, 109 U. S. 371, 3 Sup. Ct. 263 .....73, 397
Fletcher v. Fletcher, 88 Ind. 418 660
Florence, The, 2 Flip. 56, Fed. Cas. No. 4,880 622
Florida v. Anderson, 91 U. S. 676 467
Foley, In re, 76 Fed. 390, 392; 80 Fed. 949, 951 .....670, 676
Foley v. Hartley, 72 Fed. 570, 573, 574.. 670, 671, 676
Fonda, Ex parte, 117 U. S. 516, 6 Sup. Ct. 848 970
Fong Yue Ting v. U. S., 149 U. S. 698, 713, 13 Sup. Ct. 1016, 1022 486
Fontain v. Ravenel, 17 How. 384 875
Forgie v. Mfg. Co., 26 C. C. A. 654, 81 Fed. 865 988
Ft. Wayne Electric Corp., In re, 94 Fed. 109 801
Fourth Nat. Bank v. Francklyn, 120 U. S. 747, 756, 7 Sup. Ct. 757 .....398, 721
Foye, In re, 2 Low. 399, Fed. Cas. No. 5,021 957
Fraker v. Railway Co., 32 Minn. 54, 19 N. W. 349 .....717, 719
Francis-Valentine Co., In re, 93 Fed. 953.. 522
Frankenthal v. Solomonson (Wash.) 55 Pac. 754 .....827, 828
Franklin Savings Bank v. Taylor, 4 C. C. A. 55, 53 Fed. 854 660
Frazier v. Barnum, 19 N. J. Eq. 316, 318.. 834, 835
Freeman, In re, 4 Ben. 245, Fed. Cas. No. 5,082 89
Freeman v. Alderson, 119 U. S. 185, 187, 7 Sup. Ct. 165 675
Freeman v. Howe, 24 How. 450, 457 ..... 519, 670, 759, 760, 823
French v. Hay, 22 Wall. 238, 250–253.... 131, 670, 671
French Republic v. World's Columbian Exposition, 83 Fed. 109 693
Frisbie v. U. S., 157 U. S. 160, 15 Sup. Ct. 586 846
Frishman v. Insurance Co., 41 Fed. 449... 671
Frost v. Naylor, 68 N. C. 326 533
Fuller Warren Co. v. Stove Co., 30 C. C. A. 193, 86 Fed. 463 977

Gabrielson v. Waydell, 135 N. Y. 1, 31 N. E. 969 .....110, 111
Gaines v. Thompson, 7 Wall. 347 84
Galliher v. Cadwell, 145 U. S. 372, 12 Sup. Ct. 873 104
Gamble v. City of San Diego, 79 Fed. 487, 500 670
Gardner v. Collins, 2 Pet. 58 465
Gardner v. Railroad Co., 150 U. S. 349–355, 14 Sup. Ct. 140 .....302, 716

Page
Garner v. Bank, 16 C. C. A. 86, 67 Fed. 833 131
Gashwiler v. Willis, 33 Cal. 11, 20 147
Gassert v. Noyes, 18 Mont. 216, 44 Pac. 959 371
Gates v. Bucki, 4 C. C. A. 116, 53 Fed. 961, 966 670
Gay v. Iron Co., 94 Ala. 303, 308, 317, 323, 11 South. 353 .....670, 677
Gayler v. Wilder, 10 How. 497 347
Gaylord v. Railroad Co., 6 Biss. 286, 291, Fed. Cas. No. 5,284 670
Geiger v. Peterson, 164 Pa. St. 352, 30 Atl. 262 950
George Dee & Sons Co. v. Insurance Co. (Iowa) 73 N. W. 594 708
George M. West Co. v. Lea, 174 U. S. 590, 19 Sup. Ct. 836 .....814, 816
Germania Ins. Co. v. Wisconsin, 119 U. S. 473, 475, 7 Sup. Ct. 260 .....355, 357
Gibbs v. Chase, 10 Mass. 125 620
Gibbs v. Crandall, 120 U. S. 106, 7 Sup. Ct. 497 17
Gibson v. Chouteau, 13 Wall. 101 373
Gibson v. Peters, 150 U. S. 342, 14 Sup. Ct. 134 85
Gibson v. Shufeldt, 122 U. S. 27, 7 Sup. Ct. 1066 .....866, 867
Giffin v. Blandin, 80 Md. 136, 30 Atl. 624.. 278
Gifford v. Corrigan, 117 N. Y. 257, 22 N. E. 756 931
Gilman v. Philadelphia, 3 Wall. 713 365
Gilmore v. Herrick, 93 Fed. 525 928
Gloninger v. Hazard, 42 Pa. St. 389 24
Godillot v. Grocery Co., 71 Fed. 873 211
Goldschmidt, In re, 3 Ben. 379, Fed. Cas. No. 5,520 89
Gold-Washing Water Co. v. Keyes, 96 U. S. 199 .....2, 17, 21
Goodlett v. Railroad Co., 122 U. S. 391, 401, 404, 406, 7 Sup. Ct. 1254, 1255, 1257 508
Goodpaster v. Leathers, 123 Ind. 121, 23 N. E. 1090 635
Goodridge v. Mills Co., 160 Mass. 234, 35 N. E. 484 303
Goodsell v. Stinson, 7 Blackf. 437 635
Goodyear's India-Rubber Glove Mfg. Co. v. Rubber Co., 128 U. S. 598, 9 Sup. Ct. 166 848
Gordon v. Gilfoil, 99 U. S. 168, 178 677
Gorris v. Scott, L. R. 9 Exch. 125 300
Grace v. Hunt (1813) Cooke, 341 888
Graham v. Railroad Co., 47 La. Ann. 215–217, 16 South. 806 684
Grand v. Railroad Co., 83 Mich. 564, 47 N. W. 837 .....303, 305
Granger v. Granger, 147 Ind. 95, 44 N. E. 189, 46 N. E. 80 660
Grant v. Powder Co., 14 R. I. 380 180
Grant v. Railway Co. (Minn.) 69 N. W. 23 148
Great Western Tel. Co. v. Purdy, 162 U. S. 329–339, 16 Sup. Ct. 810 397
Greeley v. Lowe, 155 U. S. 58, 15 Sup. Ct. 24 890
Green v. City of Lynn, 55 Fed. 516, 518.. 988
Green v. Raymond, 58 Tex. 80 833
Greene, In re, 52 Fed. 104, 113 .....359, 615
Green's Adm'x v. Creighton, 23 How. 90.. 504
Greer v. Tweed, 13 Abb. Prac. (N. S.) 427 155
Gregory v. Stetson, 133 U. S. 579, 10 Sup. Ct. 422 31

Page

Griffiths v. Earl of Dudley, 9 Q. B. Div. 357 304
Gross v. Mortgage Co., 108 U. S. 477–488, 2 Sup. Ct. 940, 946..... 728
Grove v. Grove, 93 Fed. 865..... 890
Groves v. Lord Wimborne [1898] 2 Q. B. 402, 407 .....300, 301
Grubbs-Wiley Grocery Co., In re, 96 Fed. 183 953
Grund v. Tucker, 5 Kan. 70..... 73
Grzesk v. Hibberd, 149 Ind. 354, 48 N. E. 361 631
Guaranty Trust & Safe-Deposit Co. v. Railroad Co., 139 U. S. 137, 11 Sup. Ct. 512 919
Gubbins v. Lautenschlager, 75 Fed. 615... 625
Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 17 Sup. Ct. 255.....368, 743, 745
Gumbel v. Pitkin, 124 U. S. 131, 8 Sup. Ct. 379 519
Gutwillig, In re, 90 Fed. 475; 34 C. C. A. 377, 92 Fed. 377.....522, 823
Guy v. Doak, 47 Kan. 236, 27 Pac. 968.. 257. 258
G. V. B. Min. Co. v. Bank, 95 Fed. 23, 30 148

Haas v. Sternbach, 156 Ill. 44, 41 N. E. 51 896
Hacker, In re, 73 Fed. 464..... 970
Hadden v. Collector, 5 Wall. 107..... 441
Hagan v. Lucas, 10 Pet. 400.....519, 670
Hagood v. Southern, 117 U. S. 52, 6 Sup. Ct. 608 562
Hailes v. Stove Co., 123 U. S. 582, 8 Sup. Ct. 262 241
Hailes v. Van Wormer, 20 Wall. 353, 368.. 977
Haines v. Carpenter, 91 U. S. 254..... 523
Hall, In re, 167 U. S. 38, 17 Sup. Ct. 723.. 263
Hall v. De Cuir, 95 U. S. 485, 488..... 367
Hall v. Hall, 44 N. H. 293..... 548
Hall & Stilson Co., In re, 73 Fed. 527.... 670
Hallam v. Tillinghast, 75 Fed. 849..... 84
Halliday v. Miller, 29 W. Va. 426, 1 S. E. 829 548
Hamilton v. Insurance Co., 136 U. S. 242, 10 Sup. Ct. 945..... 708
Hamilton Gaslight & Coke Co. v. Hamilton City, 146 U. S. 258, 266, 13 Sup. Ct. 90.. 129
Hanifen v. Godshalk Co., 78 Fed. 811; 28 C. C. A. 507, 84 Fed. 649, 651..421, 435, 436
Hannibal & St. J. R. Co. v. Husen, 95 U. S. 469–471 .....359–361, 365
Hardin v. Boyd, 113 U. S. 756, 5 Sup. Ct. 771 58
Hardin v. Ray, 94 N. C. 456..... 547
Hardy. Ex parte, 68 Ala. 303..... 196
Hargadine-McKittrick Dry-Goods Co. v. Bradley (Ind. T.) 43 S. W. 947..... 916
Harker v. Dement, 9 Gill, 7..... 621
Harkrader v. Wadley, 172 U. S. 148, 164, 19 Sup. Ct. 119..... 670
Harper v. Railroad Co., 36 Fed. 102..... 467
Harrington v. Connor (Neb.) 70 N. W. 911 672
Hart v. Mfg. Co., 7 Fed. 543..... 327
Hartranft v. Wiegmann, 121 U. S. 609, 7 Sup. Ct. 1240..... 94
Hatch v. Bancroft-Thompson Co., 67 Fed. 802, 807 670
Hausmeister v. Porter, 21 Fed. 355..... 662
Hawley v. Fairbanks, 108 U. S. 543, 2 Sup. Ct. 846.....867, 869

Page

Hayden v. Thompson, 17 C. C. A. 592, 71 Fed. 60 280
Haynes v. Brown, 36 N. H. 545..... 282
Hay-Press Co. v. Devol, 72 Fed. 717, 721.. 147
Hays v. Sulsor, 11 Fed. Cas. 915 (No. 6,271) 347
Haywood v. Shreve, 44 N. J. Law, 94..... 88
Head v. Fordyce, 17 Cal. 151..... 20
Healy v. Gorman, 15 N. J. Law, 328..... 68
Hearne v. De Young, 119 Cal. 670, 678, 52 Pac. 150, 499..... 686
Heeser v. Miller, 77 Cal. 192, 19 Pac. 375.. 20
Hegeler v. Bank, 129 Ill. 157, 21 N. E. 812 896
Heidritter v. Oilcloth Co., 112 U. S. 294, 300, 302, 5 Sup. Ct. 135.....670, 675
Hellman v. Shoulters, 114 Cal. 150, 44 Pac. 915, 45 Pac. 1057..... 739
Henderson v. Mayor, 92 U. S. 259..... 360
Henderson v. Wadsworth, 115 U. S. 264, 6 Sup. Ct. 40..... 867
Hendryx v. Fitzpatrick, 19 Fed. 810..... 196
Hennessey v. Woolworth, 128 U. S. 438, 442, 9 Sup. Ct. 109..... 154
Henry v. Water Co., 10 Colo. App. 14, 24, 51 Pac. 90. 93..... 150
Hentig v. James, 22 Kan. 326..... 73
Hervey v. Railway Co., 28 Fed. 169..... 643
Heryford v. Davis, 102 U. S. 235..... 327
Herzberg, In re, 25 Fed. 699..... 528
Hesse v. Railroad Co., 58 Ohio St. 167, 169, 50 N. E. 355..... 304
Hestres v. Brennan, 37 Cal. 385, 388..... 673
Heywood v. Tillson, 75 Me. 225..... 684
Hicks v. Insurance Co., 9 C. C. A. 215, 60 Fed. 690 724
Hicks v. Knost, 94 Fed. 625..... 804
Hill v. Murray, 6 Ben. 141, Fed. Cas. No. 6,495 110
Hilton v. Dickinson, 108 U. S. 165, 2 Sup. Ct. 424 771
Hine v. Roberts, 48 Conn. 267..... 328
Hipp v. Babin, 19 How. 278..... 24
Hirsch, In re, 74 Fed. 928..... 555
Hirshfeld v. Fitzgerald, 157 N. Y. 166, 177, 51 N. E. 997..... 673
Holland v. Hyde, 41 Fed. 897..... 17
Hollister v. Hollister, 6 Pa. St. 449..... 766
Hollister v. Mfg. Co., 113 U. S. 59, 5 Sup. Ct. 717 .....417, 434
Holman, In re, 92 Fed. 512.....182, 470, 476
Holton v. Guinn, 76 Fed. 96, 101..... 677
Holtz, In re, 1 Nat. Bankr. News, 204..90, 182
Holum v. Railway Co., 80 Wis. 299, 50 N. W. 99 305
Home Ins. Co. v. Howell, 24 N. J. Eq. 238, 241 670
Hord v. James (1805) 1 Overt. 201..... 880
Horn v. Jones, 28 Cal. 214..... 20
Horne v. Railroad Co., 18 Fed. 50–52..506, 507
Horn & Brannen Mfg. Co. v. Pelzer, 34 C. C. A. 45, 91 Fed. 665..... 246
Hough v. Railway Co., 100 U. S. 213..301, 716
Houston, In re, 94 Fed. 119..... 957
Houston v. Bank, 6 How. 486, 504..... 527, 528, 552
Hovey v. Elliott, 167 U. S. 409, 17 Sup. Ct. 841 197
Hovey v. Hufeland, 2 O. G. 493..... 441
Howard, In re, 95 Fed. 415.....753, 756
Howard v. Daly, 61 N. Y. 362..... 795
Howard v. Sadler [1893] 1 Q. B. Div. 1... 268

Page

Howe, In re, 1 Paige, 125.....150, 151
Howell v. Manglesdorf, 33 Kan. 194, 5 Pac. 759 73
Howell v. Moores, 127 Ill. 68, 79, 19 N. E. 863 670
Hubbell v. Meigs, 50 N. Y. 491..... 282
Huber v. Mfg. Co., 148 U. S. 270, 13 Sup. Ct. 603 .....334, 335
Huda v. Glucose Co., 154 N. Y. 474, 482, 48 N. E. 897..... 303
Hughes v. Ass'n (Tenn. Ch. App.) 46 S. W. 362 67
Hughes v. Green, 28 C. C. A. 537, 84 Fed. 833, 835 671
Hume v. U. S., 132 U. S. 406, 412, 10 Sup. Ct. 134 155
Humes v. City of Ft. Smith, 93 Fed. 857.. 354
Hunt, In re, 5 N. B. R. 493, Fed. Cas. No. 6,883 534
Hunt v. Palao, 4 How. 589..... 262
Hurlbut v. Schillinger, 130 U. S. 456, 471, 9 Sup. Ct. 584..... 441
Hutchings v. Lampson, 82 Fed. 960..... 720
Huttman, In re, 70 Fed. 701..... 555

Inez Min. Co. v. Kinney, 46 Fed. 832....17, 18
Interior Const. & Imp. Co. v. Gibney, 160 U. S. 217, 219, 16 Sup. Ct. 272..... 677
Interior Lumber Co. v. Perkins, 25 C. C. A. 613, 80 Fed. 528..... 434
International Tooth-Crown Co. v. Bennett, 23 C. C. A. 179, 77 Fed. 313.....442, 444
International Tooth-Crown Co. v. Richmond, 30 Fed. 775..... 442
Interstate Building & Loan Ass'n v. Powell, 55 S. C. 316, 33 S. E. 355..... 872
Iron Mountain & H. R. Co. v. Johnson, 119 U. S. 608, 7 Sup. Ct. 339..... 123
Irvine v. Lowry, 14 Pet. 298..... 467
Irwin v. Williar, 110 U. S. 499, 508, 4 Sup. Ct. 165..... 653
Isler v. Dewey, 84 N. C. 345..... 549

Jackson v. Mortgage Co. (Ga.) 15 S. E. 812 69
Jackson v. Port, 17 Johns. 479..... 795
Jacobus v. Insurance Co., 27 N. J. Eq. 604 635
James v. Morgan, 1 Nev. 111..... 155
Jefferies v. Railway Co., 5 El. & Bl. 802.. 619
Jefferson, In re, 1 Nat. Bankr. News, No. 12, p. 288, 93 Fed. 948..... 535
Jeffersonville, M. & I. R. Co. v. Oyler, 60 Ind. 392 20
Jeffries v. Bartlett, 20 Fed. 496..... 534
Jenkins v. Collard, 145 U. S. 546, 12 Sup. Ct. 868 841
Jenkins v. Flower, 24 Pa. St. 308..... 682
Jensen v. The Sachem, 42 Fed. 66..... 111
Jewett v. Trust Co., 45 Fed. 801.....676, 769
J. I. Case Plow Works v. Finks, 26 C. C. A. 49 927
John A. Etheridge Furniture Co., In re, 92 Fed. 329, 331.....522, 753
John G. Stevens, The, 170 U. S. 124, 18 Sup. Ct. 544..... 252
Johnson v. Auditor, 78 Ky. 282..... 957
Johnson v. Bunker Hill & S. M. & C. Co. 46 Fed. 417..... 16
Johnson v. Patterson, 2 Woods, 443, Fed. Cas. No. 7,403..... 189
Jolly v. Pryor (Tex. Civ. App.) 33 S. W. 889 677

Page

Jones, In re, 2 Low. 451, Fed. Cas. No. 7,446 477
Jones v. Loveless, 99 Ind. 318..... 635
Jones v. Railway Co., Fed. Cas. No. 7,486 767
Jones v. Schall, 45 Mich. 380, 8 N. W. 68 257, 258
Jones v. U. S., 137 U. S. 202, 11 Sup. Ct. 80 841
Joslin v. Spring Co., 36 N. J. Law, 145... 88
Joyce v. McAvoy, 31 Cal. 287, 288..... 20
Judd v. Telephone Co., 31 Fed. 182..... 670

Kane v. Haywood, 66 N. C. 1..... 197
Kansas v. Railway Co., 77 Fed. 339..... 18
Kansas Pac. R. Co. v. Railroad Co., 112 U. S. 414, 5 Sup. Ct. 208.....355, 357
Kayton v. Barnett, 116 N. Y. 627, 23 N. E. 24 167
Keenan v. Shannon, Fed. Cas. No. 7,640.. 753
Keener v. Irrigation Co., 110 Cal. 627, 43 Pac. 14 .....741, 742
Kelley v. Milan, 127 U. S. 139, 8 Sup. Ct. 1101 298
Kelley v. Railway Co., 35 Minn. 490, 29 N. W. 173 717
Kelly v. Clow, 32 C. C. A. 205, 89 Fed. 297 434
Kempner, In re, Fed. Cas. No. 7,689, 6 N. B. R. 521..... 194
Kilgore v. Kilgore, 127 Ind. 276, 26 N. E. 56 660
Kimberling v. Hartly, 1 Fed. 571..... 521
Kincaid v. Storz, 52 Mo. App. 564, 570... 677
King v. Lawson, 84 Fed. 209..... 17
King v. Railway Co., 1 Pennewill (Del.) 452, 41 Atl. 975..... 921
King v. Rea, 56 Ind. 1..... 660
Kirtland, In re, 10 Blatchf. 515, Fed. Cas. No. 7,851 527
Kittle v. Hall, 29 Fed. 508..... 569
Knapp v. Railroad Co., 20 Wall. 117..... 467
Knapp v. Simon, 96 N. Y. 288, 289..... 167
Kneeland v. Trust Co., 136 U. S. 89, 98, 10 Sup. Ct. 950, 953..... 641
Knight v. Ass'n, 142 U. S. 161, 169, 12 Sup. Ct. 258..... 841
Knisley v. Pratt, 148 N. Y. 382, 42 N. E. 986 .....303, 304
Knost, In re, 1 Nat. Bankr. News, 403.... 804
Koehler v. Sanders, 122 N. Y. 65, 25 N. E. 235 .....848, 849
Kohler, Ex parte, 74 Cal. 38, 41, 15 Pac. 436, 437 738
Kohler v. Matlage, 72 N. Y. 259..... 795
Kollock, In re, 165 U. S. 533, 17 Sup. Ct. 446 840
Krause v. Morgan, 53 Ohio St. 26, 40 N. E. 886 305
Krementz v. S. Cottle Co., 148 U. S. 556, 559, 560, 13 Sup. Ct. 719, 720.....490, 491
Krueger, In re, Fed. Cas. No. 7,942..... 755
Kuhn v. Morrison, 75 Fed. 81..... 890

Lachemeyer, In re, 18 N. B. R. 270, Fed. Cas. No. 7,966..... 957
Lackman v. Wood, 25 Cal. 147..... 548
Lady Essex, The, 39 Fed. 767..... 483
Lake Co. v. Graham, 130 U. S. 674, 9 Sup. Ct. 654 298
Lake Co. v. Rollins, 130 U. S. 662, 670, 9 Sup. Ct. 652..... 948

Page

Lake Erie & W. R. Co. v. Craig, 19 C. C. A. 631, 73 Fed. 642.....300, 305
Lake Shore & M. S. R. Co. v. McCormick, 74 Ind. 440..... 300
Lake Shore & M. S. R. Co. v. Prentice, 147 U. S. 101–111, 13 Sup. Ct. 261, 263... 933, 935
Landler v. Crowell, 16 O. G. 405..... 441
Langdon v. Sherwood, 124 U. S. 74, 8 Sup. Ct. 429..... 883
Lanning v. Osborne, 76 Fed. 319..... 259
Lansing v. Goelet, 9 Cow. 346.....880–882
Lansing v. Manton, Fed. Cas. No. 8,077... 753
Larkin v. Scranton City, 162 Pa. St. 289, 293, 29 Atl. 910..... 677
Lathrop, In re, Fed. Cas. No. 8,106..... 755
Lathrop v. Bank, 8 Dana, 114..... 463
Latta v. Bell, 122 N. C. 639, 30 S. E. 15... 535
Laughlin, In re, 96 Fed. 589..... 593
Lea v. George M. West Co., 91 Fed. 237... 522
Lee v. Haley, 5 Ch. App. 155..... 849
Lee v. Watson, 1 Wall. 339..... 772
Leeper v. Texas, 139 U. S. 462, 467, 11 Sup. Ct. 577, 579..... 290
Lehigh Zinc & Iron Co. v. Zinc & Iron Co., 43 Fed. 545..... 771
Leiter v. Pike, 127 Ill. 287, 326, 20 N. E. 31..... 635
Leland v. Stone, 10 Mass. 459..... 155
Lem Moon Sing v. U. S., 158 U. S. 538, 15 Sup. Ct. 967..... 488
Lester v. Buel, 49 Ohio St. 240, 30 N. E. 821..... 657
Lewis v. City of Shreveport, 108 U. S. 282, 2 Sup. Ct. 634..... 298
Lewis v. McElvain, 16 Ohio, 347..... 728
Liddell, Ex parte, 93 Cal. 633, 637, 29 Pac. 251, 252..... 738
Lightner v. City of Peoria, 150 Ill. 80, 87, 37 N. E. 69..... 680
Lilienthal's Tobacco v. U. S., 97 U. S. 237 481
Limer v. Traders' Co. (W. Va.) 28 S. E. 730..... 148
Linkenhoker's Heirs v. Detrick, 81 Va. 44 406
Litchfield v. Ballou, 114 U. S. 192, 5 Sup. Ct. 821.....666, 667
Litchfield v. Register, 9 Wall. 575..... 84
Litchfield Coal Co. v. Taylor, 81 Ill. 590.. 303
Little York Gold Washing & Water Co. v. Keyes, 96 U. S. 199, 201, 203.....356, 357
Livingston County Agricultural Soc. v. Hunter, 110 Ill. 155..... 694
Logging Co. v. Schneider, 20 C. C. A. 390, 74 Fed. 195..... 702
Long v. Crosson, 119 Ind. 3, 21 N. E. 450.. 632
Long v. Long, 73 Fed. 369.....676, 770
Long's Appeal, 92 Pa. St. 179..... 24
Loomis v. Bragg, 50 Conn. 228..... 328
Lotta, The, 65 Fed. 319..... 519
Louden Irrigating Canal Co. v. Ditch Co., 22 Colo. 102, 114, 43 Pac. 535..... 670
Loughlin v. State, 105 N. Y. 159, 11 N. E. 371..... 111
Louisiana v. City of New Orleans, 102 U. S. 203..... 77
Louisville, N. A. & C. Ry. Co. v. Trust Co., 174 U. S. 552, 565, 566, 19 Sup. Ct. 817 505, 507
Louisville & N. R. Co. v. Railroad Commission, 19 Fed. 679..... 741

Page

Louisville & N. R. Co. v. Wangelin, 132 U. S. 599, 10 Sup. Ct. 203..... 177
Lovell Mfg. Co. v. Cary, 147 U. S. 623–637, 13 Sup. Ct. 472..... 103
Low v. Durfee, 5 Fed. 256..... 195
Lowry v. Railroad Co., 46 Fed. 83..... 357
Ludwig v. Gillespie, 105 N. Y. 653, 11 N. E. 835..... 167
Luke v. Lyde, 2 Burrows, 882, 887..... 464
Lumley v. Railroad Co., 22 C. C. A. 60, 76 Fed. 66..... 773
Lyon v. Culbertson, 83 Ill. 33..... 654

McAllaster v. Insurance Co. (N. Y.) 50 N. E. 502..... 712
McArthur v. Scott, 113 U. S. 340, 5 Sup. Ct. 652..... 660
Macay, Ex parte, 84 N. C. 59..... 546
McBride v. Plow Co., 40 Fed. 162..... 676
McCauley v. Ass'n, 97 Tenn. 421, 37 S. W. 212..... 67
McCloskey v. Cyphert, 27 Pa. St. 220, 225 548
McConihay v. Wright, 121 U. S. 206, 7 Sup. Ct. 940.....56, 875
McCormick v. Sullivant, 10 Wheat. 192... 884
McDonald v. Chisholm, 131 Ill. 274, 281, 23 N. E. 596..... 148
McDonald v. Conniff, 99 Cal. 386, 391, 34 Pac. 71, 73..... 743
McDonald v. Huff, 77 Cal. 279, 19 Pac. 499..... 635
McDougall v. Society, 64 Hun, 515, 19 N. Y. Supp. 481; 135 N. Y. 551–553, 556, 32 N. E. 251.....723, 726
McFadden v. Ross, 14 Ind. App. 312, 41 N. E. 607..... 635
McGoon v. Scales, 9 Wall. 23..... 885
McGourkey v. Railway Co., 146 U. S. 536, 13 Sup. Ct. 170..... 327
McIlhinny v. McIlhenny, 137 Ind. 411, 37 N. E. 147..... 660
Mack v. Parks, 69 Am. Dec. 267..... 834
McLean v. Fleming, 96 U. S. 245..... 569
McNulty v. Batty, 10 How. 72..... 262
McShane v. Carter, 80 Cal. 310, 22 Pac. 178.....458, 464, 465
McVikar v. Jones, 70 Fed. 754..... 73
Macy v. Jordan, 2 Denio, 570..... 956
Magdalen College Case, 11 Coke, 74..... 957
Maiola, In re, 67 Fed. 114..... 488
Maitland v. Gibson, 11 C. C. A. 446, 63 Fed. 840..... 247
Maitland v. Mfg. Co., 29 C. C. A. 607, 86 Fed. 124..... 247
Maker v. Powder Co., 23 Atl. 63..... 180
Mallory Mfg. Co. v. Fox, 20 Fed. 409..... 195
Maloney v. Nelson, 144 N. Y. 182, 186, 187, 39 N. E. 82..... 795
Mamie, The, 105 U. S. 773..... 867
Manchester v. Massachusetts, 139 U. S. 240, 11 Sup. Ct. 559..... 839
Margarum v. Christie (Fla.) 19 South. 637, 639..... 151
Market Nat. Bank of New York v. Bank, 89 N. Y. 398..... 920
Marks v. Marks, 75 Fed. 321, 332..... 677
Marmion, The, 1 Asp. 412.....1002
Marsh v. Fulton Co., 10 Wall. 676..... 298
Marshall v. Otto, 59 Fed. 249, 252..... 677
Martin's Adm'r v. Railroad Co., 151 U. S. 673, 687, 14 Sup. Ct. 533..... 356

Page
Martinton v. Fairbanks, 112 U. S. 670, 672, 5 Sup. Ct. 322 689
Martorelli, In re, 63 Fed. 437 488
Marwick, In re, 2 Ware (Dav. 229) 233, Fed. Cas. No. 9,181 948
Masten v. Hunt, 51 Fed. 216; 5 C. C. A. 42, 55 Fed. 78 493
Matheson v. Campbell, 24 C. C. A. 384, 78 Fed. 914 347
May, In re, 1 Fed. 737 196
Mayer v. Hellman, 91 U. S. 497 525
Mayer v. Hermann, 10 Blatchf. 256, Fed. Cas. No. 9,344 549
Mayes v. Railway Co., 63 Iowa, 562, 14 N. W. 340; 19 N. W. 680 300
Maynard v. Tilden, 28 Fed. 703 58
Mayor v. Cooper, 6 Wall. 247 357
Meares v. Davis, 121 N. C. 126, 28 S. E. 188 776
Meares v. Duncan, 123 N. C. 203, 31 S. E. 476 776
Meares v. Finlayson, 55 S. C. 105, 32 S. E. 986 872
Mechanics' Sav. Bank v. Safe-Deposit Co., 87 Fed. 113 73
Mechanics' & Farmers' Building & Loan Ass'n v. Dorsey, 15 S. C. 462 872
Medsker v. Bonebrake, 108 U. S. 66, 71, 2 Sup. Ct. 351, 353 ..... 590, 602
Mellen v. Iron Works, 131 U. S. 352, 9 Sup. Ct. 781 890
Memphis & C. R. Co. v. Alabama, 107 U. S. 581, 584, 2 Sup. Ct. 432 ..... 507, 508
Mendenhall, In re, Fed. Cas. No. 9,423 755
Mercantile Mut. Ins. Co. of New York v. Folsom, 18 Wall. 237 689
Mercantile Trust Co. v. Railway Co., 39 Fed. 337 257
Merchants' Ins. Co. v. Ritchie, 5 Wall. 541 262
Merchants' & Manufacturers' Nat. Bank v. Circuit Judge, 43 Mich. 296, 5 N. W. 627 257, 258
Merchants' & Manufacturers' Nat. Bank v. Cumings, 149 N. Y. 360, 44 N. E. 173 ... 795
Meriwether v. Garrett, 102 U. S. 472 126
Meroney v. Ass'n, 116 N. C. 882, 891, 21 S. E. 924, 927 ..... 67, 69
Merriam v. Publishing Co., 43 Fed. 450, 451 973
Merrill v. Bank, 21 C. C. A. 282, 75 Fed. 148; 173 U. S. 131, 19 Sup. Ct. 360 .. 85, 946
Merriman v. Railroad Co., 12 C. C. A. 275, 290, 64 Fed. 535, 550 782
Merritt v. Steel-Barge Co., 24 C. C. A. 530, 534, 79 Fed. 228, 231 674
Messimer's Appeal, 92 Pa. St. 169 24
Metcalf v. Watertown, 128 U. S. 586, 589, 9 Sup. Ct. 173, 174 ..... 17, 356
Michigan Ins. Bank v. Eldred, 130 U. S. 693, 9 Sup. Ct. 690 397
Michigan Tel. Co. v. City of Charlotte, 93 Fed. 11 23
Miles v. Woodward, 115 Cal. 308, 46 Pac. 1076 ..... 458, 740
Miller v. Baker, 1 Metc. (Mass.) 27 620
Miller v. Courtnay, 152 U. S. 172, 14 Sup. Ct. 517 56
Miller v. Goodwin, 70 Ill. 659 290
Miller v. Sherry, 2 Wall. 237, 238 ..... 521, 880, 886

Page
Milligan, Ex parte, 4 Wall. 3, 111 970
Milliken v. City Council, 54 Tex. 388 363
Milwaukee & St. P. R. Co. v. Arms, 91 U. S. 489 935
Minnesota v. Barber, 136 U. S. 313, 10 Sup. Ct. 862 969
Minnesota v. Railroad Co., 87 Fed. 498 ... 357
Mississippi Mills v. Cohn, 150 U. S. 202, 14 Sup. Ct. 75 875
Mississippi & M. R. Co. v. Cromwell, 91 U. S. 643, 645 ..... 153, 155
Mississippi & M. R. Co. v. Ward, 2 Black, 485 ..... 354, 772
Missouri, K. & T. Ry. Co. v. Elliott, 56 Fed. 772 56
Missouri Pac. R. Co. v. Baxter, 42 Neb. 793, 60 N. W. 1044 300
Missouri Pac. R. Co. v. Nebraska, 164 U. S. 403, 17 Sup. Ct. 130 122
Mitchell v. Torup, Parker, 227 482
Mobile Co. v. Kimball, 102 U. S. 702 367
Monaco, In re, 86 Fed. 117 488
Montague v. Richardson, 24 Conn. 338 833
Montana Ore-Purchasing Co. v. Mining Co., 29 C. C. A. 462, 85 Fed. 867; 93 Fed. 274 ..... 2, 17
Monte Allegre, The, 9 Wheat. 616, 648 910
Moore v. Hegeman, 72 N. Y. 376 538
Moran v. Sturges, 154 U. S. 274, 14 Sup. Ct. 1019 519
Morasse v. Brochu, 151 Mass. 568, 574, 577, 25 N. E. 74 686
Morris v. Creel, 2 Va. Cas. 49 558
Morris v. Lindauer, 4 C. C. A. 162, 54 Fed. 23 467
Morrison v. Marker, 93 Fed. 692 ..... 25, 890
Moses, In re, 83 Fed. 995 488
Mosher v. Railway Co., 127 U. S. 390, 8 Sup. Ct. 1324 932
Mount v. Scholes, 21 Ill. App. 192 670
Mowry v. Hawkins, 57 Conn. 453, 18 Atl. 784 ..... 266, 268
Mugler v. Kansas, 123 U. S. 661, 8 Sup. Ct. 297 360
Mulloy v. Ass'n, 2 MacArthur, 594 872
Munday v. Rahway, 43 N. J. Law, 340 .. 76, 77
Murdock, In re, Fed. Cas. No. 9,939 551
Murray v. Charleston, 96 U. S. 432 126
M. Vandercook, The, 24 Fed. 472 252
Myers Mfg. Co. v. Wetzel (Tenn. Ch. App.) 35 S. W. 896 463
Myerstown Bank v. Roessler, 186 Pa. St. 431, 40 Atl. 963 950

Narramore v. Railway Co., 96 Fed. 301 ... 717
Nashua & L. R. Corp. v. Railroad Corp., 136 U. S. 356, 376, 10 Sup. Ct. 1004, 1008 505, 507–509, 511
Nashville C. & St. L. Ry. v. Taylor, 86 Fed. 168 18
National Bank of Oxford v. Whitman, 76 Fed. 697 73
Neal v. Delaware, 103 U. S. 370–397 122
Nebraska City v. Campbell, 2 Black, 590 .. 791
New Orleans v. Houston, 119 U. S. 265, 7 Sup. Ct. 198 355
New Orleans Gaslight Co. v. Mfg. Co., 115 U. S. 650, 660, 6 Sup. Ct. 252 129
New Orleans, M. & T. R. Co. v. Mississippi, 102 U. S. 135, 140 ..... 23, 355, 357

Page

New Orleans Waterworks Co. v. City of New Orleans, 164 U. S. 471, 17 Sup. Ct. 161 129
New Orleans Waterworks Co. v. Refining Co., 125 U. S. 18, 8 Sup. Ct. 741..... 126
New Orleans Waterworks Co. v. Rivers, 115 U. S. 674, 6 Sup. Ct. 273.....126, 129
Newton v. Harland, 1 Man. & G. 644..... 124
New York Commercial Co. v. Francis, 28 C. C. A. 199, 83 Fed. 769..... 266
New York, L. E. & W. R. Co. v. Bennett, 1 C. C. A. 392, 49 Fed. 598..... 932
New York, L. E. & W. R. Co. v. Winter's Adm'rs, 143 U. S. 60, 73, 12 Sup. Ct. 360 932
New York Life Ins. Co. v. Statham, 93 U. S. 24 723
New York & N. J. Globe Gaslight Co. v. Investment Co., 41 N. Y. Supp. 797..... 150
Nichols v. Dissler, 31 N. J. Law, 473..... 88
Nichols v. Levy, 5 Wall. 433, 441..... 539
Nishimura Eliu's Case, 142 U. S. 651, 12 Sup. Ct. 336.....485-487
Noble v. City of Seattle, 19 Wash. 133, 52 Pac. 1013 80
Nobles v. Georgia, 168 U. S. 398, 18 Sup. Ct. 87 20
Nogus, Ex parte, 7 Wend. 499..... 795
Noonan v. Bradley, 9 Wall. 394, 403..... 466
Noonan v. Railroad Co., 68 Fed. 1..... 676
Norman v. Craft, 90 N. C. 211..... 535
Norris v. Jackson, 9 Wall. 125..... 689
Northern I. R. Co. v. Railroad Co., 15 How. 232, 242..... 770
Northern Pac. R. Co. v. Babcock, 154 U. S. 190, 197, 203, 14 Sup. Ct. 978..73, 80, 301
Northern Pac. R. Co. v. Clark, 153 U. S. 252, 14 Sup. Ct. 809..... 33
Northern Pac. R. Co. v. Herbert, 116 U. S. 642, 6 Sup. Ct. 590..... 716
North Hudson County Ry. Co. v. Flanagan, 57 N. J. Law, 236, 238, 30 Atl. 476 677
North Pennsylvania Coal Co. v. Snowden, 42 Pa. St. 488..... 24
Norton v. Shelby Co., 118 U. S. 425, 440, 451, 452, 6 Sup. Ct. 1121.....290, 298
Norwich Co. v. Wright, 13 Wall. 122..... 252
Nugent v. Boyd, 3 How. 426..... 522, 525, 527, 528
Nyback v. Lumber Co., 90 Fed. 774..... 700

Oakley v. Van Noppen, 96 N. C. 247, 2 S. E. 663 533
O'Connell, Ex parte, 92 Fed. 889..... 817
O'Connor, In re, 95 Fed. 943..... 941
O'Connor v. Pittsburgh, 18 Pa. St. 187.... 120
O'Donnell v. Railroad Co., 49 Fed. 689, 692 769
Office Specialty Mfg. Co. v. Mfg. Co., 174 U. S. 492, 496, 19 Sup. Ct. 643..... 976
Oliver v. Alexander, 6 Pet. 143..... 868
Olmsted v. Keyes, 85 N. Y. 593..... 265
Olney v. Tanner, 10 Fed. 101..... 526
O'Maley v. Gaslight Co., 158 Mass. 135, 32 N. E. 1119.....301, 303
Oregon Short-Line & U. N. Ry. Co. v. Skottowe, 162 U. S. 490, 16 Sup. Ct. 869 ..... 2, 18
Orr v. Insurance Co., 12 La. Ann. 255... 684
Osborn v. Bank, 9 Wheat. 738, 822.....2, 467

Page

Osborn v. President, etc., 9 Wheat. 737, 824 357
Osgood v. Mining Co., 56 Cal. 571..... 372
Osterberg v. Trust Co., 93 U. S. 424, 428.. 910, 913
Owen v. Williams, 114 Ind. 179, 15 N. E. 678 635
Owens v. Railroad Co., 20 Fed. 10, 12... 670, 673, 674

Pacific Coast S. S. Co. v. Bancroft-Whitney Co., 94 Fed. 180, 185..... 675
Pacific R. Co. v. Leavenworth, 1 Dill. 393, Fed. Cas. No. 10,649..... 124
Pacific Railroad Removal Cases, 115 U. S. 1, 5 Sup. Ct. 1113.....355, 357
Packard v. Wood, 17 Abb. Prac. 318, 322 673
Palmer v. Village of Corning, 156 U. S. 342, 345, 15 Sup. Ct. 381..... 977
Pancoast v. Insurance Co., 79 Ind. 172.. 69
Panzara, In re, 51 Fed. 275..... 488
Parker v. Morrill, 106 U. S. 1, 1 Sup. Ct. 14 772
Passenger Cases, 7 How. 283, 462....361, 363
Patrick v. Bowman, 149 U. S. 411, 421, 422, 13 Sup. Ct. 811, 866..... 168
Patterson, In re, 2 Ben. 155, Fed. Cas. No. 10,817 956
Patterson v. Lynde, 106 U. S. 519, 1 Sup. Ct. 432 946
Paul v. Virginia, 8 Wall. 168..... 457
Payne v. Wilson, 74 N. Y. 348, 351..... 151
Peale v. Phipps, 14 How. 368, 374..... 760
Pearce v. Foot, 113 Ill. 228, 239....654, 656
Pearce v. Rice, 142 U. S. 28, 40, 12 Sup. Ct. 130, 135.....654, 655
Peck v. Jenness, 7 How. 612, 625..... 523, 670, 760
Peers v. McLaughlin, 88 Cal. 294, 26 Pac. 119 151
Peisch v. Ware, 4 Cranch, 347..... 482
Pekin Min. & Mill. Co. v. Kennedy, 81 Cal. 356, 22 Pac. 679.....458, 464, 465
Peltasohn, In re, Fed. Cas. No. 10,912... 194
Pelzer v. Newhall, 93 Fed. 684..... 247
Penn v. Whitehead, 94 Am. Dec. 478, 17 Grat. 503 548
Pennington v. Smith, 24 C. C. A. 145, 78 Fed. 399 467
Pennoyer v. Neff, 95 U. S. 714, 724, 727.. 675, 889
Pennsylvania v. Bridge Co., 18 How. 462 875
Pennsylvania Co., In re, 137 U. S. 451, 454, 11 Sup. Ct. 141..... 356
People v. Arensberg, 105 N. Y. 123, 11 N. E. 277 965
People v. Center, 66 Cal. 552, 5 Pac. 263; 6 Pac. 481..... 20
People v. Gillson (N. Y.) 17 N. E. 343... 361
People v. Howard, 50 Mich. 239, 15 N. W. 101 463
People v. Perry, 79 Cal. 105, 114, 21 Pac. 423 738
People's Bank v. Calhoun, 102 U. S. 256.. 519
People's Bank of City of New York v. Church, 109 N. Y. 512, 521, 17 N. E. 408 147
Perego v. Dodge, 163 U. S. 160, 16 Sup. Ct. 971 18
Pewabic Min. Co. v. Mason, 145 U. S. 361, 12 Sup. Ct. 890..... 879

Page

Phillips v. City of Detroit, 111 U. S. 604, 4 Sup. Ct. 580 977
Phillips v. Society, 60 Wis. 401, 19 N. W. 377 694
Phœnix Mut. Life Ins. Co. v. Bailey, 13 Wall. 616, 620 55
Pickering v. Cease, 79 Ill. 328 ..... 654, 656
Pine v. Smith, 11 Gray, 38 69
Pitman, In re, 1 Curt. 186, Fed. Cas. No. 11,184 196
Pitney v. Insurance Co., 65 N. Y. 18 167
Pittelkow, In re, 92 Fed. 901 522
Pittsburgh Locomotive & Car Works v. Bank, 19 Fed. Cas. 785 (No. 11,198) 327
Platt v. Insurance Co. (Ill. Sup.) 38 N. E. 580 712
Plumley v. Massachusetts, 155 U. S. 461, 15 Sup. Ct. 154 ..... 965, 969
Plummer v. Brown, 64 Cal. 429, 430, 1 Pac. 703 672
Pohl v. Brewing Co., 134 U. S. 381, 10 Sup. Ct. 577 333–335
Pokegama Sugar-Pine Lumber Co. v. Improvement Co., 86 Fed. 528, 538 ..... 38, 55
Polk v. Wendall, 9 Cranch, 87 465
Pollard v. Bailey, 20 Wall. 520, 527 ..... 398, 721
Pope v. Railroad Co., 173 U. S. 573, 19 Sup. Ct. 500 928
Pope Mfg. Co. v. Gormully, 144 U. S. 224, 236, 12 Sup. Ct. 632 154
Porter v. Sabin, 149 U. S. 473, 13 Sup. Ct. 1008 823
Post v. Ass'n, 97 Tenn. 408, 37 S. W. 216 67
Post v. Sup'rs, 105 U. S. 667 290
Postal Tel. Cable Co. v. Alabama, 155 U. S. 482, 484, 15 Sup. Ct. 192 ..... 2, 18, 355
Post Pub. Co. v. Hallam, 8 C. C. A. 201, 59 Fed. 530 935
Post's Adm'r v. County of Hamilton, 22 C. C. A. 128, 76 Fed. 208 731
Potts v. Wallace, 146 U. S. 689, 13 Sup. Ct. 196 161
Poulin v. Railway Co., 3 C. C. A. 23, 52 Fed. 197 932
Powers v. City Council of Springfield, 116 Mass. 84, 86 670
Prather v. U. S., 9 App. Cas. D. C. 89 839
President, etc., of Bowdoin College v. Merritt, 59 Fed. 6 671
Pressley v. Harrison, 102 Ind. 19, 1 N. E. 188 ..... 257, 258
Preston, In re, 6 N. B. R. 545, Fed. Cas. No. 11,394 534
Price, In re, 91 Fed. 635 551
Prior v. Quackenbush, 29 Ind. 475 659
Pritchard v. Norton, 106 U. S. 124, 1 Sup. Ct. 102 ..... 397, 873
Provident Savings Life Assur. Soc. v. Ford, 114 U. S. 635, 642, 5 Sup. Ct. 1104 ..... 355, 357
Purvine, In re, 96 Fed. 192; Nat. Bankr. News, No. 14, p. 326 ..... 312, 937

Quickstep, The, 9 Wall. 665 252

Racouillat v. Sausevain, 32 Cal. 376, 389 151
Rader v. Township of Union, 44 N. J. Law, 260 77

Page

Rae's Ex'rs v. Insurance Co., 9 C. C. A. 215, 60 Fed. 690 724
Rahway v. Munday, 44 N. J. Law, 415 77
Railroad Co. v. Lambright, 5 Ohio Cir. Ct. R. 433 301
Ray v. Norseworthy, 23 Wall. 128 552
Reagan v. Trust Co., 154 U. S. 362, 14 Sup. Ct. 1047 122
Ream v. Watkins, 27 Mo. 516 548
Rector, etc., of Trinity Church v. Higgins, 48 N. Y. 532 795
Reece Buttonhole Mach. Co. v. Machine Co., 10 C. C. A. 194, 61 Fed. 958 345
Reed, Ex parte, 100 U. S. 13 ..... 562, 840
Reed v. Bank, 29 Grat. 719 406
Reed v. Stockmeyer, 20 C. C. A. 381, 74 Fed. 186 702
Rees v. City of Watertown, 19 Wall. 107 663
Reichman, In re, 91 Fed. 624 815
Reinach v. Railroad Co., 58 Fed. 33, 44 ..... 467, 670
Reineman v. Robb, 98 Pa. St. 474 950
Reinhardt v. Nealis, 101 Tenn. 169, 46 S. W. 446 887
Reynolds v. Shuler, 5 Cow. 323 620
Rhodes v. Bank, 13 C. C. A. 612, 66 Fed. 512, 516 ..... 73, 720, 721
Rice v. Houston, 13 Wall. 66 467
Rich v. Lambert, 12 How. 347 868
Richards v. Elevator Co., 158 U. S. 299, 15 Sup. Ct. 831 977
Richards v. Holmes, 18 How. 143 879
Richardson v. Buswell, 43 Am. Dec. 450 834
Richardson v. Hall, 124 Mass. 228 834
Richmond & D. Ry. Co. v. Risdon's Adm'r, 87 Va. 335, 339, 12 S. E. 786 300
Riddlesbarger v. Insurance Co., 7 Wall. 386 177
Ridgeway v. Lanphear, 99 Ind. 251 659
Riggs v. Johnson Co., 6 Wall. 166, 187, 193, 196 ..... 519, 670, 674, 677
Rinn v. Rhodes, 93 Ind. 389 634
Risdon Iron & Locomotive Works v. Medart, 158 U. S. 71–84, 15 Sup. Ct. 745 106
Rison v. Knapp, 1 Dill. 187, Fed. Cas. No. 11,861 477
Roberts v. Stoner, 18 Mo. 481 196
Robertson v. Winchester, 85 Tenn. 171, 1 S. W. 781 887
Robinson, In re, 6 Blatchf. 253, Fed. Cas. No. 11,939 956
Robinson v. Bank, 21 N. Y. 406 399
Robinson v. Bidwell, 22 Cal. 287, 379 738
Robinson v. Caldwell, 165 U. S. 359, 362, 17 Sup. Ct. 343 677
Robinson v. Campbell, 3 Wheat. 212 56
Robinson v. Lewis, 45 N. C. 58 549
Robinson v. Robertson, 2 Willson, Civ. Cas. Ct. App. § 254 833
Rockendorfer v. Faber, 92 U. S. 347, 356 977
Rockwell v. Hubbell's Adm'rs, 45 Am. Dec. 251–256 834
Rodgers v. Ferguson, 32 Tex. 533 833
Rodgers v. Pitt, 89 Fed. 420, 424 669
Rodman v. Town of Washington, 122 N. C. 39, 30 S. E. 118 290
Rogers v. Hargo, 92 Tenn. 35, 20 S. W. 430 67
Rogers v. Palmer, 102 U. S. 263 549
Romero v. U. S., 1 Wall. 721 841

Page

Roper v. Roper, 3 Tenn. Ch. 55..... 889
Rose v. Baker, 99 N. C. 323, 5 S. E. 919.. 525
Rosenberg, In re, Fed. Cas. No. 12,055... 760
Rough v. Simmons, 65 Cal. 227, 3 Pac. 804 20
Rouse, Hazard & Co., In re, 33 C. C. A. 356, 91 Fed. 96..... 937
Rowland, Ex parte, 104 U. S. 612..... 563
Rowland v. Ass'n, 115 N. C. 830, 18 S. E. 965; 116 N. C. 877, 878, 22 S. E. S..... 69
Royall, Ex parte, 117 U. S. 241, 6 Sup. Ct. 734 .....970, 971
Rudd v. Robinson, 126 N. Y. 113, 26 N. E. 1046 282
Runyan v. Coster's Lessee, 14 Pet. 122.. 457, 463
Rush v. Railway Co., 36 Kan. 129, 12 Pac. 582 300
Rush v. Vought, 55 Pa. St. 437..... 548
Russell v. Butterfield, 21 Wend. 300..... 621
Russell v. Roberts, 3 E. D. Smith, 318.... 155
Russell v. Stansell, 105 U. S. 303.....867-869
Rutter v. Mining Co., 75 Fed. 37..... 18
Ryan v. Lynch, 68 Ill. 160..... 290

Sage v. Railroad Co., 125 U. S. 375, 8 Sup. Ct. 887 642
St. John v. Insurance Co., 13 N. Y. 31... 265
St. Louis v. Telephone Co., 148 U. S. 92, 13 Sup. Ct. 485..... 689
St. Louis Foundry v. Publishing Co., 74 Tex. 651, 12 S. W. 842..... 833
St. Louis, I. M. & S. Ry. Co. v. Davis, 54 Ark. 389, 15 S. W. 895..... 300
St. Louis, I. M. & S. Ry. Co. v. Paul, 173 U. S. 404, 19 Sup. Ct. 419; (Ark.) 40 S. W. 705 744
St. Louis, V. & T. H. R. Co. v. Railroad Co., 33 Fed. 440, 448..... 782
St. Louis & S. F. Ry. Co. v. James, 161 U. S. 545, 546, 554, 563, 16 Sup. Ct. 621 355, 505, 507, 508
St. Louis & S. F. Ry. Co. v. McBride, 141 U. S. 127, 132, 11 Sup. Ct. 982.....677, 792
St. Paul, M. & M. Ry. Co. v. Railroad Co., 15 C. C. A. 167, 68 Fed. 2..... 17
St. Tammany Waterworks Co. v. Waterworks, 120 U. S. 65, 7 Sup. Ct. 405..... 129
Salkey, In re, 11 N. B. R. 423, 21 Fed. Cas. 235 (No. 12,253).....194, 311, 312
Saltmarsh v. Spaulding, 147 Mass. 224, 17 N. E. 316..... 460
Sanford Fork & Tool Co. v. Howe, Brown & Co., 157 U. S. 312, 15 Sup. Ct. 621... 897
San Mateo v. Railroad Co., 13 Fed. 722.. 739
Santa Clara Co. v. Railroad Co., 118 U. S. 394, 6 Sup. Ct. 1132..... 368
Santa Clara Female Academy v. Sullivan, 116 Ill. 375, 6 N. E. 183..... 462
Saulsbury v. Village of Ithaca, 46 Am. Rep. 122 791
Saunders v. Com., 10 Grat. 494..... 957
Scarff v. Metcalf, 107 N. Y. 211, 13 N. E. 796 111
Schenck v. Barnes, 156 N. Y. 316, 50 N. E. 967 538
Schneider v. Turner, 130 Ill. 28, 22 N. E. 497 .....654, 655
Schollenberger, Ex parte, 96 U. S. 369. 378 769
Schollenberger v. Pennsylvania, 171 U. S. 1, 18 Sup. Ct. 757..... 967

Page

Schuehle v. Reiman, 86 N. Y. 270, 273... 670
Schulenberg v. Harriman, 21 Wall. 44, 63 126
Schuler v. Post, 18 App. Div. 374, 46 N. Y. Supp. 18..... 538
Schuyler's Steam Towboat Co., In re, 136 N. Y. 169, 175, 32 N. E. 623..... 670
Scorpion Silver Min. Co. v. Marsano, 10 Nev. 380, 381..... 20
Scott v. Donald, 165 U. S. 58-88, 17 Sup. Ct. 265 935
Scott v. McNeal, 154 U. S. 34, 14 Sup. Ct. 1108 122
Scott v. Neely, 140 U. S. 106, 11 Sup. Ct. 712 641
Scott v. U. S., 12 Wall. 443, 445..... 155
Scovill v. Thayer, 105 U. S. 143.....945, 946
Scudder v. Bank, 91 U. S. 406..... 397
Seaver v. Bigelows, 5 Wall. 208.....867, 868
Sedgwick v. Menck, 1 N. B. R. 675, Fed. Cas. No. 12,616..... 521
Sellers v. Bell, 36 C. C. A. 513, 84 Fed. 811, 812 834
Seymour v. Osborne, 11 Wall. 516..... 421
Shafer v. Mumma, 17 Md. 331..... 363
Sharon v. Terry, 36 Fed. 337, 355, 359.. 131, 670, 671
Shattuck v. Insurance Co., 4 Cliff. 598, Fed. Cas. No. 12,715.....68, 873
Shaw v. Mining Co., 145 U. S. 444, 449, 12 Sup. Ct. 935..... 356
Shelby v. Guy, 11 Wheat. 361..... 465
Sheldon v. Packet Co., 8 Fed. 769, 770... 781
Shepley v. Cowan, 91 U. S. 337..... 373
Shields, In re, Fed. Cas. No. 12,784..... 810
Shields v. Barrow, 17 How. 130.....58, 782
Shields v. Coleman, 157 U. S. 168, 178, 15 Sup. Ct. 570.....519, 675, 823
Shields v. Thomas, 17 How. 3; 18 How. 253, 259.....780, 866, 867, 869
Shirk v. City of La Fayette, 52 Fed. 857.. 467
Shorer, In re, 1 Nat. Bankr. News, 331, 96 Fed. 90 182
Short v. Hepburn, 21 C. C. A. 252, 75 Fed. 113 677
Shoshone Min. Co. v. Rutter, 31 C. C. A. 223, 87 Fed. 801..... 18
Shreveport v. Cole, 129 U. S. 36, 9 Sup. Ct. 210 21
Sievers, In re, 91 Fed. 366; 34 C. C. A. 372, 92 Fed. 325.....522, 753
Simmons v. Anderson, 56 Ga. 55..... 323
Simmons v. Railway Co., 159 U. S. 288, 16 Sup. Ct. 1..... 881
Simonds Rolling-Mach. Co. v. Mfg. Co., 93 Fed. 958 421
Simonson, In re, 92 Fed. 904..... 580
Simonson v. Sinsheimer, 95 Fed. 948..... 580
Singer Mfg. Co. v. Mfg. Co., 163 U. S. 169, 16 Sup. Ct. 1002..... 973
Single v. Mfg. Co., 55 Fed. 553, 555..770, 890
651 Chests of Tea v. U. S., 1 Paine, 499, Fed. Cas. No. 12,916..... 483
Slattery's Appeal, 59 Fed. 450..... 96
Slocum v. Irrigation Co., 122 Cal. 555, 55 Pac. 403 741
Smiley v. Smiley, 114 Ind. 258, 16 N. E. 585 635
Smith, In re, 92 Fed. 135; 93 Fed. 791; Fed. Cas. No. 12,977.....522, 541, 551, 832

Page

Smith v. Adams, 130 U. S. 175, 9 Sup. Ct. 566 772
Smith v. Arnold, 5 Mason, 414, 420, Fed. Cas. No. 13,004 879
Smith v. Baker [1891] App. Cas. 325 301
Smith v. Black, 115 U. S. 308, 6 Sup. Ct. 50 879
Smith v. Harrington (Wyo.) 27 Pac. 803 673
Smith v. Loewenstein, 29 Wkly. Law Bul. 359 301
Smith v. Lyon, 133 U. S. 315, 320, 10 Sup. Ct. 303 ..... 356, 890
Smith v. McIver, 9 Wheat. 532, 535 670
Smith v. Mason, 14 Wall. 419 540
Smith v. Nichols, 21 Wall. 112, 119 977
Smith v. Railroad Co., 64 Fed. 1, 3 676
Smith v. Whitney, 116 U. S. 167, 6 Sup. Ct. 570 840
Smithson v. Hubbell, 81 Fed. 593 84
Smyth v. Ames, 169 U. S. 466, 18 Sup. Ct. 418 ..... 122, 368
Snohomish Co. v. Bank, 81 Fed. 518 84
Snow v. Railway Co., 8 Allen, 441 301
Soby v. People, 134 Ill. 66, 25 N. E. 109 .. 654
Solomon, In re, 2 Hughes, 164, Fed. Cas. No. 13,166 404–406
Southern Pac. R. Co. v. California, 118 U. S. 109, 112, 16 Sup. Ct. 993 ..... 355, 357
Southern Pac. R. Co. v. Seley, 152 U. S. 145, 14 Sup. Ct. 530 300
Spalding v. New York, 4 How. 21; 7 Hill, 301, 10 Paige, 284 956
Speyer, In re, Fed. Cas. No. 13,239, 6 N. B. R. 255 194
Spindle v. Shreve, 111 U. S. 542, 546, 4 Sup. Ct. 522, 524 541
Spokane Falls Ry. Co. v. Ziegler, 167 U. S. 65, 17 Sup. Ct. 728 23
Springfield Furnace Co. v. Furnace Co., 96 Fed. 418 226
Stafford v. Elliott, 59 Ga. 837 ..... 320, 323
Standard Paving Co. Case, 95 Fed. 137 ... 236
Stanley v. Bank, 115 N. Y. 122, 22 N. E. 29 548
Stanton v. Embrey, 93 U. S. 548, 554 677
Starin v. City of New York, 115 U. S. 248, 257, 6 Sup. Ct. 28, 31 ..... 2, 21, 357
Stark, In re, 1 Nat. Bankr. News, 232, 96 Fed. 88 ..... 90, 182
Stark v. Starrs, 6 Wall. 402, 409 ..... 20, 373
State v. Bank, 152 U. S. 454, 14 Sup. Ct. 654 2
State v. Chinault, 55 Kan. 326, 329, 40 Pac. 662 671
State v. Coke Co., 18 Ohio St. 262, 293 ... 129
State v. Horgan, 55 Minn. 183 966
State v. McGregor, 76 Fed. 956 969
State v. Marshall, 64 N. H. 549, 15 Atl. 210 966
State v. Patterson, 98 N. C. 660, 4 S. E. 350 291
State v. Railway Co., 33 Fed. 394 17
State v. Rankin, 16 Am. Rep. 737 792
State v. Robinson, 81 N. C. 409 291
State Freight Tax Case, 15 Wall. 232, 279 360, 365, 366
State Trust Co. v. Mfg. Co., 72 Fed. 575 .. 670
Stayton Min. Co. v. Woody, 50 Fed. 633 .. 17
Stearns v. Stearns, 16 Mass. 167, 170 670

Page

Steel v. Insurance Co., 51 Fed. 715, 2 C. C. A. 463; 154 U. S. 518, 14 Sup. Ct. 1153 178
Steele, In re, 22 Fed. Cas. 1202 (No. 13,346) 833, 834
Stevens v. Ferry, 48 Fed. 9 888
Stewart v. Morris, 32 C. C. A. 7, 203, 88 Fed. 461; 89 Fed. 290 703
Stewart v. Railroad Co., 168 U. S. 445–450, 18 Sup. Ct. 105 81
Stewart's Case, 168 U. S. 445, 18 Sup. Ct. 105 467
Stickney v. Wilt, 23 Wall. 150, 164 821
Stockmeyer v. Reed, 55 Fed. 259 111
Stone v. South Carolina, 117 U. S. 430, 6 Sup. Ct. 799 355
Stowell v. Otis, 71 N. Y. 36 619
Stratton v. Jarvis, 8 Pet. 4 868
Streeter v. Bank, 147 U. S. 36, 13 Sup. Ct. 236 907
Stuart v. Maxwell, 16 How. 150–163 94
Stuyvesant Bank, In re, Fed. Cas. No. 13,582 755
Sullivan v. Sullivan, 99 Cal. 187, 193, 33 Pac. 862, 864 747
Susquehanna & W. Coal Co. v. Blatchford, 11 Wall. 172 467
Sutherland, In re, Deady, 416, Fed. Cas. No. 13,639 956
Sutton Mfg. Co. v. Hutchinson, 11 C. C. A. 320, 63 Fed. 496 897
Suydam v. Broadnax, 14 Pet. 67 504
Swain v. Seamens, 9 Wall. 254–274 54
Swift v. Tyson, 16 Pet. 1 464
Syracuse Water Co. v. City of Syracuse, 116 N. Y. 167, 22 N. E. 381 ..... 451, 452

Taft v. Engraving Co., 38 Fed. 29 251
Tatem, Ex parte, 1 Hughes, 588, 23 Fed. Cas. 708 971
Taylor v. Bradley, 39 N. Y. 129, 141 795
Taylor v. Carryl, 20 How. 583, 594–597 .. 670, 760, 823, 971
Taylor v. Mfg. Co., 143 Mass. 470, 10 N. E. 308 305
Taylor v. Taintor, 16 Wall. 366, 370 674
Taylor Burner Co. v. Diamond, 72 Fed. 182 104
Tennessee v. Bank, 152 U. S. 454, 459–462, 14 Sup. Ct. 654, 656 ..... 18, 23, 355, 357
Tennessee v. Davis, 100 U. S. 257 357
Tennessee v. Sneed, 96 U. S. 69 885
Tennessee v. Whitworth, 117 U. S. 129, 139, 6 Sup. Ct. 645, 649 355
Tenney v. Foote, 95 Ill. 99 654
Terre Haute & I. R. Co. v. Harrison, 32 C. C. A. 130, 88 Fed. 913 909
Terry v. Anderson, 95 U. S. 628 721
Terry v. Tubman, 92 U. S. 156 721
Texas & P. R. Co. v. Archibald, 170 U. S. 665, 18 Sup. Ct. 777 716
Texas & P. R. Co. v. Cody, 166 U. S. 607, 17 Sup. Ct. 703 355
Texas & P. R. Co. v. Cox, 145 U. S. 593, 603, 605, 12 Sup. Ct. 905 ..... 73, 677
Texas & P. R. Co. v. Kuteman, 4 C. C. A. 503, 54 Fed. 547, 551 671
Theurkauf v. Ireland, 27 Fed. 769 17
Theyken v. Machine Co., 109 Pa. St. 95 .. 950

Page

Third St. & S. Ry. Co. v. Lewis, 19 Sup. Ct. 451 497
Thomas, In re, 92 Fed. 912..... 598
Thomas v. Quartermaine, 18 Q. B. Div. 685, 695, 696, 703.....301, 303
Thomas v. Reese, 17 O. G. 195..... 441
Thompson, Ex parte, 23 Fed. Cas. 1016.. 970
Thompson v. Allen Co., 115 U. S. 554, 559, 6 Sup. Ct. 140, 144.....662, 663
Thompson v. Ass'n, 120 N. C. 420, 27 S. E. 118..... 776
Thompson v. Boisselier, 114 U. S. 1, 5 Sup. Ct. 1042..... 434
Thompson v. Edwards, 85 Ind. 414..... 69
Thompson v. Insurance Co., 136 U. S. 287, 10 Sup. Ct. 1019..... 178
Thompson v. Jennings, 21 C. C. A. 486, 66 Fed. 57; 75 Fed. 572.....239, 241, 243
Thomson v. Wooster, 114 U. S. 112, 5 Sup. Ct. 792..... 875
Thomson-Houston Electric Co. v. Railway Co., 69 Fed. 257..... 103
Thornborough v. Whitacre, 6 Mod. 305, 2 Ld. Raym. 1164..... 155
Thorpe v. Railroad Co., 27 Vt. 149..... 361
Thorpe v. Sampson, 84 Fed. 63, 66..... 670
Tiffany v. Institution, 18 Wall. 376..... 826
Tiffany v. Lucas, 15 Wall. 421..... 825
Tindal v. Wesley, 167 U. S. 204, 17 Sup. Ct. 770 84
Titan, The, 23 Fed. 413..... 111
Tobin v. McNab, 30 S. E. 828, 53 S. C. 73 872, 873
Toland v. Sprague, 12 Pet. 300, 331..... 677
Tolles v. Wood, 99 N. Y. 616, 1 N. E. 251; 16 Abb. N. C. 1..... 538
Tomlinson v. Hewett, 2 Sawy. 283, Fed. Cas. No. 14,087..... 361
Toof v. Martin, 13 Wall. 40..... 814
Topliff v. Topliff, 145 U. S. 156, 12 Sup. Ct. 825 103
Town of South Ottawa v. Perkins, 94 U. S. 260, 268.....290, 298
Towns v. Pratt, 66 Am. Dec. 727..... 834
Trapnell v. Conklyn (W. Va.) 16 S. E. 570 548
Tribble v. Anderson, 63 Ga. 31..... 186
Trimble v. Strother, 25 Ohio St. 378..... 931
Trustees of Cuyahoga Falls Real-Estate Ass'n v. McCaughy, 2 Ohio St. 152.... 728
Tuthill v. Wilson, 90 N. Y. 423..... 167
Tuttle v. Churchman, 74 Ind. 311, 314.... 633
Two Hundred Chests of Tea, 9 Wheat. 430–438 94
Tyler, In re, 149 U. S. 181, 13 Sup. Ct. 793 519
Tyler v. Savage, 143 U. S. 79, 95, 12 Sup. Ct. 340 55

Union Bank v. Jolly's Adm'rs, 18 How. 503 504
Union Bank of Richmond v. Com'rs, 116 N. C. 339, 21 S. E. 410; 119 N. C. 214, 25 S. E. 966.....288–290, 295, 297
Union Metallic Cartridge Co. v. Cartridge Co., 112 U. S. 624, 5 Sup. Ct. 475..... 852
Union Mill & Mining Co. v. Ferris, 2 Sawy. 176, Fed. Cas. No. 14,371..... 374
Union Mut. Life Ins. Co. v. University of Chicago, 6 Fed. 443, 447...131, 670, 671, 673
Union Pac. Ry. Co. v. O'Brien, 161 U. S. 451, 16 Sup. Ct. 618..... 304

Page

Union Switch & Signal Co. v. Railroad Co., 87 Fed. 906..... 761
Union Trust Co. v. Railroad Co., Fed. Cas. No. 5,284; 6 Biss. 197, Fed. Cas. No. 14,401; 117 U. S. 434, 6 Sup. Ct. 809 643, 670, 672, 673
U. S. v. Bailey, 9 Pet. 238..... 840
U. S. v. Boisdore's Heirs, 8 How. 113.. 263, 264
U. S. v. Boyer, 85 Fed. 425..... 359
U. S. v. Britton, 108 U. S. 199, 2 Sup. Ct. 531 839
U. S. v. Cameron, 15 Fed. 794..... 767
U. S. v. Coolidge, 1 Wheat. 415..... 839
U. S. v. Crosby, 7 Cranch, 115..... 884
U. S. v. Dodge, 2 Gall. 313, Fed. Cas. No. 14,975 196
U. S. v. Duncan, 4 McLean, 607, Fed. Cas. No. 15,003..... 910
U. S. v. Eaton, 144 U. S. 677, 679, 688, 12 Sup. Ct. 764, 767.....839–841
U. S. v. Eliason, 16 Pet. 291..... 562
U. S. v. Ford, 50 Fed. 467..... 841
U. S. v. Fowkes, 3 C. C. A. 394, 53 Fed. 13 615
U. S. v. Fox, 94 U. S. 315..... 884
U. S. v. Harris, 23 C. C. A. 483, 77 Fed. 821 731
U. S. v. Herron, 20 Wall. 251.....956, 957
U. S. v. Hudson, 7 Cranch, 32..... 839
U. S. v. Lee, 106 U. S. 196, 1 Sup. Ct. 240 84
U. S. v. McCrory, 33 C. C. A. 515, 91 Fed. 295 263
U. S. v. New Orleans, 98 U. S. 381, 392.. 126
U. S. v. One Hundred and Twelve Casks of Sugar, 8 Pet. 277..... 94
U. S. v. Repentigny, 5 Wall. 211, 268... 127
U. S. v. Rogers, 65 Fed. 787..... 488
U. S. v. Stowell, 133 U. S. 1, 12, 10 Sup. Ct. 244, 245.....480, 482
U. S. v. Symonds, 120 U. S. 46, 7 Sup. Ct. 411 840
U. S. v. Telephone Co., 128 U. S. 315, 352, 9 Sup. Ct. 91..... 779
U. S. v. Teschmaker, 22 How. 392, 405.. 841
U. S. v. Two Bay Mules, 36 Fed. 84..... 483
U. S. v. Two Horses, Fed. Cas. No. 16,578 483
United States Bldg. Co. v. Walker (Kan. Sup.) 54 Pac. 1043..... 672
United States Mortg. Co. v. Gross, 93 Ill. 483, 493 463
United States Repair & Guaranty Co. v. Paving Co., 87 Fed. 339..... 236
United States Rubber Co. v. Leather Co., 27 C. C. A. 118, 82 Fed. 248..... 892

Valton v. Assurance Co., 20 N. Y. 32..... 265
Van Antwerp v. Hulburd, 8 Blatchf. 282, Fed. Cas. No. 16,827..... 85
Vanderpoel v. Gorman, 140 N. Y. 563, 35 N. E. 932..... 461
Van Wyck v. Knevals, 106 U. S. 360, 368, 1 Sup. Ct. 336..... 127
Vegelahn v. Guntner, 167 Mass. 92, 98, 44 N. E. 1077..... 684
Victor Coal Co. v. Muir, 20 Colo. 320, 38 Pac. 378 305
Village of Morgan Park v. Wiswall, 155 Ill. 262, 267, 40 N. E. 611, 612..... 680

Page
Virginia, Ex parte, 100 U. S. 339....121, 122
Virginia Coupon Cases, 114 U. S. 286, 5 Sup. Ct. 911 563
Vogel v. Leichner, 102 Ind. 55, 1 N. E. 554 631, 632
Voorheis v. Blanton, 83 Fed. 234; 32 C. C. A. 384, 89 Fed. 885 499
Vulcanite Pav. Co. v. Pavement Co., 36 Fed. 378 103

Wabash Ry. Co. v. Ray (Ind. Sup.) 51 N. E. 920 300
Wabash Western Ry. v. Brow, 164 U. S. 271, 17 Sup. Ct. 126; 13 C. C. A. 222, 65 Fed. 941, 944, 949.....133, 676
Wadley v. Blount, 65 Fed. 667, 674, 676.. 670, 671
Waite, In re, 1 Low. 207, Fed. Cas. No. 17,044 477
Waite v. O'Neil, 72 Fed. 348, 359..... 154
Walden v. Skinner, 101 U. S. 589..... 467
Walker v. Bank, 5 C. C. A. 421, 56 Fed. 76, 81 676
Walker v. Brown, 165 U. S. 654, 664, 17 Sup. Ct. 453..... 151
Walker v. Collins, 167 U. S. 57, 17 Sup. Ct. 738 355
Walker v. Felt, 54 Cal. 386.....672, 673
Walker v. Powers, 104 U. S. 245, 251.... 779
Walkley v. City of Muscatine, 6 Wall. 481 662
Wall v. Railway Co., 95 Fed. 398..... 132
Walla Walla Case, 172 U. S. 1, 19 Sup. Ct. 77 452
Walton v. Walton, 54 N. J. Eq. 607, 35 Atl. 289 197
Ward, In re, 9 N. B. R. 349, Fed. Cas. No. 17,145 513
Ward v. Maryland, 12 Wall. 418..... 360
Warsaw Waterworks Co. v. Village of Warsaw, 16 App. Div. 502, 44 N. Y. Supp. 876 452
Washington Market Co. v. Hoffman, 101 U. S. 112..... 867
Watkins, Ex parte, 3 Pet. 193, 201..... 970
Watkins v. Holman's Lessee, 16 Pet. 25, 26 887
Watson v. Railway Co., 58 Tex. 434..... 717
Webster v. City of Beaver Dam, 84 Fed. 280 791
Weed v. Insurance Co., 133 N. Y. 394, 407, 31 N. E. 231..... 167
Weeks, In re, 82 Fed. 729..... 556
Weideman v. State, 55 Minn. 183, 56 N. W. 688.....966, 967
Welton v. Missouri, 91 U. S. 275..... 360
Wesson v. County of Saline, 20 C. C. A. 227, 73 Fed. 917..... 731
Western National Bank v. Skillman (not reported) 79
Westinghouse v. Power-Brake Co., 170 U. S. 537, 18 Sup. Ct. 707..... 991
Westinghouse Air-Brake Co. v. Air-Brake Co., 11 C. C. A. 528, 63 Fed. 962..... 992
Westmoreland & Cambria Nat. Gas Co. v. De Witt, 130 Pa. St. 250, 18 Atl. 724... 24
Wetmore v. Rymer, 169 U. S. 115, 18 Sup. Ct. 293 505
Wetmore v. Wetmore, 149 N. Y. 520, 521, 530, 44 N. E. 169, 170.....88, 539
Weyman v. Southard, 10 Wheat. 1..... 840

Page
Wheeler v. Lawson, 103 N. Y. 40, 8 N. E. 360 619
Wheeler v. Walton & Whann Co., 65 Fed. 720, 722 673
White v. City of Meadville, 177 Pa. St. 643, 35 Atl. 695..... 453
White v. Cotzhausen, 129 U. S. 329, 9 Sup. Ct. 309..... 907
White v. Ewing, 159 U. S. 36, 15 Sup. Ct. 1018 259
Whitehouse, In re, 1 Low. 429, Fed. Cas. No. 17,564 956
White's Creek Turnpike Co. v. Davidson Co., 14 Lea, 73..... 121
Whitfield, Ex parte, 2 Atk. 315..... 257
Whitfield v. Hill, 58 N. C. 310..... 549
Whitman v. Bank, 28 C. C. A. 404, 83 Fed. 288 .....73, 397, 721
Whitney v. Emmett, 29 Fed. Cas. 1076 (No. 17,585) 347
Whitney v. Fox, 166 U. S. 637, 17 Sup. Ct. 713 774
Wicker v. Hoppuck, 6 Wall. 94..... 795
Wightman v. Wightman, 45 Ill. 167..... 196
Wilcox & Gibbs Guano Co. v. Insurance Co., 61 Fed. 199..... 677
Wilcox & Howe Co., In re, 70 Conn. 224, 39 Atl. 163..... 327
Willard v. Tayloe, 8 Wall. 557, 567..... 154
William Branfoot, The, 3 C. C. A. 155, 52 Fed. 390 605
Williames v. McNeely, 64 Fed. 766..... 979
Williams v. Benedict, 8 How. 107, 112.. 519, 760
Williams v. District, 16 Lea, 531..... 120
Williams v. Thorn, 70 N. Y. 270....538, 539
Williamson v. Berry (1850) 8 How. 545.. 880
Wilmer v. Railroad Co., 2 Woods, 409, Fed. Cas. No. 17,775..... 673
Wilson v. McMillan, 62 Ga. 16..... 548
Wilson v. Railroad Co., 37 Minn. 326, 33 N. W. 908..... 300
Wilson v. White, 109 N. Y. 59, 15 N. E. 749 660
Windham Provident Institution for Savings v. Sprague, 43 Vt. 502..... 946
Winn, In re, 30 Fed. Cas. 303..... 522
Winters v. Armstrong, 37 Fed. 508..... 787
Wisconsin v. Insurance Co., 127 U. S. 265, 8 Sup. Ct. 1370..... 599
Wise v. Nixon, 76 Fed. 3; 78 Fed. 203... 18
Wiswall v. Sampson, 14 How. 52..... 760
Withers v. Stinson, 79 N. C. 341..... 823
Witters v. Sowles, 32 Fed. 130..... 788
Wolfskill, In re, 5 Sawy. 385, Fed. Cas. No. 17,930 477
Wood v. Brady, 150 U. S. 23, 14 Sup. Ct. 6 889
Wood v. Drummer, 3 Mason, 308, 322, 30 Fed. Cas. 435, 440..... 32
Wood v. Locke, 147 Mass. 604, 18 N. E. 578 300
Wood v. Tipton Co., 7 Baxt. 112..... 121
Woodard, In re, 95 Fed. 956..... 952
Woodbury v. Fisher, 20 Ind. 387..... 635
Woodmanse & Hewitt Mfg. Co. v. Williams, 15 C. C. A. 520, 68 Fed. 489..... 246
Woolfolk v. Murray, 44 Ga. 137, 138..... 534
World's Columbian Exposition Case, 6 C. C. A. 58, 74, 56 Fed. 654, 670.....690, 694

	Page
World's Columbian Exposition Co. v. Republic of France, 33 C. C. A. 333, 91 Fed. 64	688
Wright v. Nagle, 101 U. S. 791	129
Yeaton v. Railroad Corp., 135 Mass. 418-420	717, 718
Yick Wo v. Hopkins, 118 U. S. 356, 6 Sup. Ct. 1064	122
Zimmer v. Schleehauf, 115 Mass. 52	88
Zimmerman v. So Relle, 25 C. C. A. 518, 80 Fed. 417, 420	670, 671

CASES

ARGUED AND DETERMINED

IN THE

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

DEWEY MIN. CO. v. MILLER et al.

(Circuit Court, S. D. California. June 12, 1899.)

1. JURISDICTION OF FEDERAL COURTS — FEDERAL QUESTION — AVERMENTS OF BILL.
When the jurisdiction of a federal court is invoked on the ground that the suit arises under the laws of the United States, such facts must be alleged in the bill as to make it affirmatively appear to the court that the proper determination of the suit really and substantially involves a dispute or controversy as to the effect or construction of such laws.[1]

2. SAME—SUIT TO DETERMINE RIGHTS IN MINING CLAIMS.
A suit in equity to determine conflicting claims under mining locations on public lands is not within the jurisdiction of a federal court, as involving the construction or effect of the mining laws of the United States, where, so far as appears from the averments of the bill, the only controversy between the parties may be over questions of fact.

On Demurrer to Bill.

Anderson & Anderson, for complainant.

C. C. Wright, Wm. H. H. Hart, L. L. Cory, J. A. Hannah, and Bicknell, Gibson & Trask, for defendants.

ROSS, Circuit Judge. The application of a few well-settled principles of law to the bill in this case will readily determine the question of jurisdiction raised by the demurrer filed thereto. That the bill in a suit in equity brought in a circuit court of the United States must affirmatively show the jurisdiction of the court over the case is thoroughly well settled. This must be done by such a clear statement of the facts that the court can see that it has jurisdiction. It is not enough, nor, indeed, proper, for the complainant to allege such jurisdiction as a legal conclusion; but such facts must be stated as will enable the court to draw the legal conclusions, and de-

[1] As to averments necessary to show the existence of a federal question, see section 3 of note to Bailey v. Mosher, 11 C. C. A. 309, and subdivision II. of note to Montana Ore-Purchasing Co. v. Boston & M. Consol. Copper & Silver Min. Co., 35 C. C. A. 7.

termine the question of jurisdiction in the affirmative. In the present case the jurisdiction of the court is sought to be maintained upon the ground that the complainant's cause of action arises "under the laws of the United States." In such cases it must be made to appear that the proper determination of the suit really and substantially involves a dispute or controversy as to the effect or construction of some law of the United States. Water Co. v. Keyes, 96 U. S. 199; Starin v. City of New York, 115 U. S. 248, 6 Sup. Ct. 28; City of Shreveport v. Cole, 129 U. S. 36, 9 Sup. Ct. 210; City of New Orleans v. Benjamin, 153 U. S. 411, 14 Sup. Ct. 905. "A case," said Chief Justice Marshall in Cohens v. Virginia, 6 Wheat. 379, "may truly be said to arise under the constitution or a law of the United States, whenever its correct decision depends upon the construction of either," or when "the title or right set up by the party may be defeated by one construction of the constitution or law of the United States, or sustained by the opposite construction." Osborn v. Bank, 9 Wheat. 822. And the recent decisions are to the effect that jurisdiction must be shown by the complainant's statement of his own case, and to no extent depends upon the defense that the defendant may interpose. Montana Ore-Purchasing Co. v. Boston & M. Consol. Copper & Silver Min. Co., 93 Fed. 274; State of Tennessee v. Union & Planters' Bank, 152 U. S. 454, 14 Sup. Ct. 654; Chappell v. Waterworth, 155 U. S. 102, 15 Sup. Ct. 34; Postal Tel. Cable Co. v. State of Alabama, 155 U. S. 482, 15 Sup. Ct. 192; Land Co. v. Brown, 155 U. S. 488, 15 Sup. Ct. 357; Railway Co. v. Skottowe, 162 U. S. 490, 16 Sup. Ct. 869. It is clear, therefore, that unless the complainant in the present case has shown, by its statement of its own cause of action, that the determination thereof necessarily involves the construction or effect of some law of the United States, it fails to present a federal question.

Now, looking at the bill, it is seen that the complainant alleges its ownership and possession of a certain 80-acre tract of land, situated within a certain mining district in Fresno county, Cal., upon which three several mining locations were made by the predecessors in interest and grantors of the complainant, after the discovery by them of petroleum thereon, and at a time when the land was open to such respective and successive locations. It is alleged that prior to the year 1890 the quarter section of land of which the 80-acre tract forms part was surveyed and subdivided and marked in accordance with the laws of the United States, and at that date was subject to exploration, entry, and purchase under its mining laws; that prior to May 2, 1890, a mining district called "Coalinga Mining District" was organized and established in Fresno county, Cal., pursuant to law, embracing, among other lands, the whole of the quarter section referred to, which district has ever since existed; that on January 1, 1893, the quarter section of land referred to continued subject to exploration, location, claim, and purchase under the mining laws, and that on that day certain named persons, to wit, W. H. H. Hart, C. M. Wells, J. E. Wilson, H. G. Cates, George L. Arnold, M. T. Allen, J. A. Anderson, and J. A. Anderson, Jr., each of whom was a citizen of the United States.

and of lawful age, discovered valuable deposits of petroleum thereon, and associated themselves together for the purpose of locating, claiming, holding, and working, in good faith, the said quarter section as a placer mining claim, and did on that date, as an association of persons, distinctly mark the claim on the ground with monuments of stone, placing one on each of the four corners, with stakes or monuments between the corners at points of prominence, and in such manner that the boundaries of the claim were distinctly marked on the ground, and could be readily traced both with reference to the monuments erected by the locators, as well as by reference to the permanent monuments established by the government in its survey of the land; that upon the same day the locators posted upon the tract so located a notice of location thereof, signed by them, which notice contained the date of location, a description of the claim by reference to the monuments and by reference to its legal government subdivision, and designated the claim as the "Arnold Placer Mining Claim," and on the same day duly recorded the notice in the mining records of Coalinga mining district; that the location was made in all respects as required by the laws of the United States and of the state of California, and by the rules, regulations, and customs of the mining district in which the claim is situated; that on December 29, 1894, in accordance with the requirements of the act of congress of July 18, 1894, providing for the suspension of assessment work on mining claims for the year 1894, the locators mentioned caused to be filed in the records of the Coalinga mining district a notice stating that they claimed the mining claim mentioned, and that they intended in good faith to hold and work it; that since the year 1894 the locators of that claim, and their successors in interest, have continued to claim the quarter section mentioned, as a placer mining claim, but failed to perform sufficient labor thereon to constitute the annual labor required upon placer mining claims under the mining laws of the United States for the year 1895; that the said locators of the Arnold mining claim conveyed their interest therein to the complainant prior to the commencement of this suit; that on January 1, 1896, the quarter section of land mentioned and described in the bill was public land of the United States, subject to exploration, location, purchase, and claim under the mining laws, and that on that date certain named persons, to wit, W. F. Fitzgerald, C. M. Wells, J. E. Wilson, H. G. Cates, George L. Arnold, M. T. Allen, J. A. Anderson, and J. A. Anderson, Jr., each of whom was a citizen of the United States and of lawful age, discovered valuable deposits of petroleum upon the said land, and on that day associated themselves together for the purpose of locating, claiming, holding, and working in common the said quarter section of land as a placer mining claim, and did on that day, as an association of persons, distinctly mark the claim on the ground with monuments of stone, one on each of the four corners of the location, with stakes or monuments between the corners, at points of prominence, and in such manner that the boundaries of the claim were distinctly marked on the ground, and could be readily traced both with reference to the

monuments erected by the locators as well as by reference to the permanent monuments established by the government in its survey of the land; that upon the same day the locators posted upon the land a notice of its location, signed by them, which notice contained the date of location, a description of the claim by reference to the monuments and by reference to its legal government survey, and designated the claim as the "Mars Placer Mining Claim," and on the same day duly recorded the notice in the mining records of the district; that said location of January 1, 1896, was made in all respects as required by the laws of the United States and of the state of California, and by the rules, regulations, and customs of the mining district, and that on March 4, 1896, the notice of location was duly recorded in the office of the recorder of Fresno county, in the Book of Mining Claims; that on January 1, 1896, the said locators entered into the peaceable and exclusive possession and enjoyment of the lands so located, and that they and their grantees have ever since remained in its exclusive possession, enjoyment, and use; that by virtue of the laws of the United States, and of the local regulations of the mining district formed pursuant thereto, and especially by virtue of the provisions of an act of congress approved February 11, 1897 (29 Stat. 526), relating to the location of petroleum lands as placers, said locators and their grantees held, and were entitled to hold, the absolute, exclusive, and sole occupancy and right of possession and enjoyment of the claim from January 1, 1896, down to and including the 31st day of December, 1898, and forever thereafter, upon complying with the laws of the United States; that from January 1, 1896, to December 31, 1898, inclusive, the quarter section of land mentioned and described in the bill was reserved from entry, location, or claim by any adverse person or persons, and during that period to the present time has been possessed and claimed by the said locators and their grantees; that after the said location of January 1, 1896, a decision was made by the then secretary of the interior, by which it was determined that lands containing deposits of petroleum were not mineral in their character, within the meaning of the acts of congress relating to location of mineral lands, and were not subject to location as mineral lands, and that by the act of congress approved February 11, 1897, petroleum lands were declared to be subject to entry and location under the mineral laws of the United States relating to placer claims, and that it was thereby further enacted "that lands containing such petroleum, or other mineral oil, which have heretofore been filed upon, or claimed, or improved, as mineral, but not yet patented, may be held and patented under the provisions of this act, the same as if such filing, claim, or improvement were subsequent to the date of passage hereof" (29 Stat. 526); that by reason of said decision of the secretary of the interior, and of the act of congress of February 11, 1897, it appeared to the association of locators mentioned to be uncertain whether or not it was necessary to relocate the said mining ground after the passage of the act of February 11, 1897, in order to perfect their prior location, and that the said association, without any intention of abandoning the said

mining location or any rights thereunder, did on the 26th day of May, 1898, cause and procure W. F. Fitzgerald, C. M. Wells, J. E. Wilson, H. G. Cates, George L. Arnold, M. T. Allen, J. A. Anderson, and J. A. Anderson, Jr., each of whom was a citizen of the United States, and of lawful age, in behalf of the association to enter upon and relocate the north half of the said quarter section, and that they, discovering thereon petroleum, did, pursuant to such agreement, locate the said north half of the quarter section described, as a placer mining claim, under the name of "Manila Mining Claim," and did on that day mark out the boundaries of the claim distinctly on the ground by erecting monuments and stakes at the four corners of the location, and monuments at short intervals on the side lines between the corner monuments, at prominent points, and so that the boundaries could be readily traced on the ground, and posted thereon a notice of location which set forth the names of the locators, the date of the discovery, the name of the claim, and its description, by reference to the monuments and also to its legal subdivision, which notice was on the 28th day of May, 1898, recorded in the office of the county recorder of the county in which the claim is situated; that within 60 days after such discovery the complainant or its predecessors took possession of the claim, and caused labor to be performed thereon, and dug a tunnel to a depth of about 26 feet for the purpose of developing and bringing to the surface the oil therein, expending in the work a sum in excess of $50, and thereafter the complainant caused to be filed with the county recorder of the county in which the claim is situated an affidavit showing such performance of work upon the claim, and the value on account thereof, and that the locators of the Manila mining claim and their successor, the complainant herein, have at all times fully complied with the laws of the United States and with the law of the state, and local regulations not in conflict therewith, in locating and possessing the said Manila mining claim; that the discoverers and locators of said Mars mining claim, located on January 1, 1896, and the said locators of the said Manila mining claim, located on May 26, 1898, did before the commencement of the present action convey all their right, title, and interest therein to the complainant, and that since the conveyance thereof the complainant has continued in the possession of the ground, up to the time of the commencement of this suit; that at no time since January 1, 1893, except on January 1, 1896, when the said land was located by the complainant's predecessors, has the said quarter section been open or subject to exploration, location, or claim by any person or persons other than the complainant and its predecessors in interest.

The bill then alleges that, notwithstanding the discovery, location, claim, occupancy, development, and work of the complainant and its predecessors in interest, and well knowing the facts in reference thereto, the defendants and their grantors during the years 1897 and 1898 unlawfully and illegally caused notices to be posted upon the north half of the quarter section mentioned, and to be recorded in the mining records of the Coalinga mining district, or in the county recorder's office of Fresno county, Cal., claiming to

locate said north one-half of the said quarter section, or portions thereof, as placer mining ground, while the said land was not open to exploration, entry, or claim under or pursuant to the said pretended location, but was under the exclusive control and in the peaceable possession of the complainant and its predecessors in interest, and that each of the defendants claims that he has the right to locate and hold the said land, or some part thereof; that none of the defendants have completed any location of any of the said land, and have not complied with the laws of the United States or of the state of California, or with the local regulations in reference thereto, in any respect, and have not performed work or labor thereon, or made any proof thereof, as required by such laws and regulations; that said pretended location notices recorded by the defendants constitute clouds upon the title of the complainant to the premises in question, and that said pretended claims prevent and interfere with the full enjoyment and use by the complainant thereof; that the defendants threaten and intend to, and, unless restrained by this court, will, go upon the said premises and interfere with the peaceful enjoyment thereof by the complainant, and will bore wells and extract and take away mineral oil therefrom, to the irreparable injury of the complainant; that the bill is brought to prevent a multiplicity of suits; that defendants have made and still make repeated and successive claims to the said premises, or portions thereof, by posting repeated and successive notices of locations, of the character and in the manner above mentioned, sometimes upon one part of the said premises and sometimes upon another; that sometimes some of the defendants, and sometimes others, post such pretended notices covering and claiming parts of said north half of the said quarter section of land, and other defendants post pretended notices claiming parts or other portions thereof, so that full and complete relief can only be granted to the complainant in this suit; that the amount in controversy exceeds in value the sum of $5,000, exclusive of interest and costs; and that the value of the petroleum in the said land claimed by the defendants exceeds in value the sum of $5,000.

The foregoing is a full synopsis of the allegations of the bill. In all this there is nothing whatever to show that the proper determination of the suit will necessarily involve the construction or effect of any law of the United States. Indeed, there is in all this nothing whatever to show that there is any dispute between the complainant and the defendants in respect to the construction or effect of any law of the United States. It may very well be that the sole defense that the defendants may interpose to the suit of the complainant may consist of a denial that there was ever any discovery upon the disputed premises of petroleum by any of the predecessors in interest and grantors of the complainant, or that the land in question in fact contains any petroleum, or that either of the locations under which the complainant claims was ever properly marked upon the ground or posted or recorded so as to constitute a valid mining location. However this may be, and whatever the defense may be, it is, I think, very clear that the bill falls far short of showing that

the proper determination of the suit will necessarily involve the construction or effect of any law of the United States, or that there is in fact any dispute between the respective parties in respect to the construction or effect of any such law. For this reason I am of the opinion that the bill fails to show jurisdiction in this court over the cause of action, and accordingly an order will be entered sustaining the demurrer, with leave to the complainant to amend within the usual time, if it shall be so advised.

CATES et al. v. PRODUCERS' & CONSUMERS' OIL CO. et al.

(Circuit Court, S. D. California. June 12, 1899.)

JURISDICTION OF FEDERAL COURT — FEDERAL QUESTION — SUIT TO SET ASIDE PATENT TO MINING CLAIM.

A bill alleging that a patent for a mining claim was procured by defendant from the land department by fraud, and without a compliance with the statute as to notice or proofs, and that it was issued without authority of law, and asking that defendant be decreed to hold such patent in trust for complainants, as the legal owners of the claim, states a cause of action necessarily involving the construction or effect of laws of the United States, of which a federal court has jurisdiction.[1]

On Demurrer and Exceptions to Bill.

Joseph H. Call, for complainants.

L. L. Cory, Bicknell, Gibson & Trask, M. K. Harris, and C. C. Wright, for defendants.

ROSS, Circuit Judge. The case made by the bill in this suit is altogether different from that presented by the bill in the suit of Mining Co. v. Miller, 96 Fed. 1, the demurrer to which has just been sustained. In the present suit the bill alleges that the complainants, eight in number, and each, according to the averments of the bill, a citizen of the United States, and of lawful age, having discovered valuable deposits of petroleum oil upon a certain quarter section of land within the Coalinga mining district, in Fresno county, Cal., associated themselves for the purpose of locating, claiming, holding, and working in common the said quarter section of land as a placer mining claim, and accordingly did on January 1, 1893, distinctly mark the said claim on the ground, with monuments of stone placed at each of the four corners of the location, with stakes and monuments between the corners at points of prominence, and in such manner that the boundaries thereof were distinctly marked on the ground, and that the said claim was thus located by them with reference to the monuments and stakes, as well as with reference to the permanent monuments that had been established by the government in its previous survey of the land; that at the same time the complainants, as such locators, posted upon the claim a notice of

[1] As to averments necessary to show the existence of a federal question, see section 3 of note to Bailey v. Mosher, 11 C. C. A. 309, and subdivision II. of note to Montana Ore-Purchasing Co. v. Boston & M. Consol. Copper & Silver Min. Co., 35 C. C. A. 7.

its location, signed by them, and which contained the date of location, a description of the claim by reference to the monuments and by reference to its government subdivision, and designated it the "Anderson Placer Mining Claim," which notice was on the 1st day of January, 1893, duly filed and recorded in the office of the mining district in accordance with the rules and regulations thereof, and in all respects as required by the laws of the United States; that on December 29, 1894, in accordance with the requirements of the act of congress of July 18, 1894, providing for the suspension of assessment work upon mining claims for that year, the said locators caused a notice under oath to be filed and recorded in the office of the mining district, describing the said mining claim, and stating that the locators claimed it, and intended in good faith to hold and work the said claim; that during the year 1895 the complainants, as such association, commenced to work upon and improve the claim, and, because there was no water thereon for the necessary use of engines and machinery, they in that year caused a water pipe to be laid from an existing and adjacent source of water supply to, and to be constructed upon, their said claim, at an expense of more than $100, for the purpose of working the claim by the construction of oil wells, the construction of which pipe line was necessary for its working and development; that such work and labor thereon exceeded in cost the sum of $100, and that due proof thereof was made under oath, and recorded in the office of the county recorder of the county in which the land is situated, in accordance with the laws of the United States and of the state of California; that thereafter, and while the complainants were in the exclusive and peaceable possession and ownership of the said mining claim, to wit, in July, 1895, Frank Barrett, I. L. McLean, Hart H. Barrett, K. W. Brown, J. J. Bright, J. A. McClurg, Sr., Julia Barrett, and A. Barieau, acting for and in behalf of the said Frank Barrett and J. A. McClurg, and not otherwise, well knowing the right of the complainants in the premises, unlawfully and with force and violence entered upon the said mining claim, and, well knowing that the same was not open to exploration, location, or claim as mining ground, did post a pretended notice of location, claiming the same as the "Princess Petroleum Placer Mining Claim," and that neither the said locators nor their assigns, nor any other person or persons, caused the said notice to be filed or recorded in the office of the mining district within which the land is situated, or as required by the rules and regulations thereof; that in January, 1896, and in pursuance of said pretended location of 1895, and not otherwise, and while claiming possession under the said illegal and violent entry as aforesaid, the defendants and their grantors did fraudulently and with force and violence break up, destroy, and carry away the pipe line constructed by the complainants, and with threats of bodily injury and violence ever thereafter prevented the complainants from entering upon, working, or improving the said claim; that by the act of congress approved February 11, 1897 (29 Stat. 526), the United States recognized, approved, and confirmed the location, claim, and right of the complainants to the said mining claim; that in the

year 1895 the said locators of the 1895 location conveyed all of their interest in the claim to the defendant the Producers' & Consumers' Oil Company; that on the 15th day of November, 1896, that company executed a pretended lease of the premises to J. A. Chanslor and Henderson Hayward, by the terms of which lease the lessor undertook to authorize the lessees to construct and operate certain oil wells upon said land for a royalty of one-tenth of all the oil produced therefrom; that on April 20, 1897, Chanslor and Hayward transferred all their interest in the lease to the defendant Coalinga Oil Company; that the defendant Coalinga Oil Company claims some interest in the premises by virtue of that lease, or a renewal thereof, the nature of which is not known to the complainants; that since the first of the year 1896, to the present time, the defendants have continued to construct and to operate oil wells upon the said quarter section of land, and have extracted therefrom and sold during that period an amount of oil of the value of more than $10,000, and are still continuing to operate wells now constructed by them, and to construct other wells, and, unless enjoined by this court, will extract from the land all the petroleum and mineral oils therein, to the great and irreparable injury of the complainants; that on the 10th day of January, 1898, the defendant the Producers' & Consumers' Oil Company, and its officers and agents, combined and conspired together, and with divers other persons to complainants unknown, to illegally and fraudulently procure from the United States a patent to the said quarter section of land, to be issued to the Producers' & Consumers' Oil Company, in violation of the rights of the complainants, such patent to be covertly obtained, without the complainants receiving any knowledge thereof, and without their having an opportunity to be heard before the United States land office or to contest the issuance of such patent; that the Producers' & Consumers' Oil Company and its co-conspirators, without complying with the laws of the United States, and without taking the necessary jurisdictional steps therefor, did procure from the officers of the interior department of the United States a patent for the land, in due form, to the Producers' & Consumers' Oil Company; that the complainants had no knowledge or information that the patent had been applied for, nor was any notice given of the application therefor, nor of any intention on the part of the Producers' & Consumers' Oil Company to make any such application, and that the complainants did not at any time have an opportunity to be heard in the United States land office or in the interior department upon the matter of issuing such patent, and had no opportunity to contest its issuance or make any adverse claim to the land; that had such notice been given, or had they had knowledge of such application or knowledge of the intention to apply for the patent, they would have contested the issuance of such patent, and filed an adverse claim therefor, and asserted their rights to the land; that the defendants and their officers and agents, and the register and receiver of the United States land office at Visalia, and the officers of the interior department of the United States, well knew that the laws of the United States had not been complied with, and that necessary

preliminary steps had not been taken to authorize the issuance of such a patent to the Producers' & Consumers' Oil Company; that the defendants, well knowing that the complainants were the owners of the land in question, and entitled to a patent therefor, did fraudulently and illegally, and without any authority or jurisdiction of the officers of the United States, procure from the interior department the patent referred to; that no such application for a patent to the land as is required by the laws of the United States was ever made or filed in the United States land office by the Producers' & Consumers' Oil Company; that a pretended application therefor was made under oath by that company on the 10th day of January, 1898, and filed in the land office on the 29th day of January of the same year, a copy of which is annexed to the bill and made part thereof; that said pretended application did not show, under oath or otherwise, a compliance with the provisions of title 32, c. 6, of the Revised Statutes of the United States; that said pretended application did not show that previous to the filing thereof the applicant had posted upon the ground applied for a notice of such application, and did not show that previous to the filing thereof the applicant had filed an affidavit of two persons that such notice had been duly posted, and did not show that previous to or at the time of the filing thereof the applicant had filed a copy of such notice so posted in the land office; that said pretended application did not show a compliance with the rules and regulations of the mining district in which the land is situated, in this: that by the rules and regulations of the district it was required that notices of mining locations should be filed and recorded in the district, and that said pretended application did not show that any notice of location of said mining claim was filed or recorded in the Coalinga mining district, but, on the contrary, falsely stated that the said land was situated within the San Joaquin mining district, whereas, in truth and in fact, there was no such mining district in existence; that the Producers' & Consumers' Oil Company did not, prior to making its application for a patent, post a notice thereof in a conspicuous place on the land embraced in its claim, and did not show by such notice that an application would be made for such a patent or for any patent, but, on the contrary, did post on the land on January 21, 1898, a pretended notice, falsely stating that the application had in effect been made for such patent, whereas, in truth and in fact, an application had not then been made or filed in the land office; that said Producers' & Consumers' Oil Company did not, prior to or at the time of making its said application, file in the land office a copy of the notice posted by it on the land; that the register of the land office, prior to publishing notice of the filing of the application, did not designate a newspaper as published nearest to the said mining claim, in which newspaper such notice of application should be published; that prior to issuing the patent the register of the land office did not publish a notice of the application for the patent for a period of 60 days, during which period of 60 days an adverse claim to the land might be filed with the register and receiver of the land office, but on the contrary there was published in the Lemoore Leader, a newspaper published at the town of

Lemoore, Cal., a pretended notice, dated January 27, 1898, stating therein that "any and all persons claiming adversely the mining ground or premises, or any portion thereof, so described and applied for, are hereby notified that unless their adverse claims are duly filed, according to law and the regulations thereunder, within sixty days from the date hereof, with the register of the United States land office at Visalia, in the state of California, they would be barred by virtue of the provisions of said statute"; that, from the date of said notice to the expiration of 60 days therefrom (fixed in said notice within which adverse claims must be filed), the said notice was not published in any newspaper for a period of 60 days, nor for any longer period than 57 days; that said pretended notice of said register, so published, falsely described the mining claim as being situated within the San Joaquin mining district, whereas, in truth and in fact, the claim was not so situated, but was in fact situated within the Coalinga mining district; that said pretended notice of said register, so published, stated that the patent applied for by the Producers' & Consumers' Oil Company was "known and described in the location notice thereof posted on said claim January 21, 1898, as the 'Princess Petroleum Placer Mining Claim,' lying and being situated in the San Joaquin mining district"; that there never was a location notice of said mining claim posted thereon on January 21, 1898, or during the year 1898, at all, nor was any application for a patent of any such claim ever made or filed by the Producers' & Consumers' Oil Company, but, on the contrary, said pretended application filed in the said land office was for a patent of a mining claim stated in the application as follows: "That said claim was located on the 14th day of June, 1895, * * * location notice of which was duly recorded in the office of the county recorder of said county of Fresno on July 16, 1895, in volume one of Mining Claims, at page 452;" that no other notice of application than the one published in the Lemoore Leader was ever made or published by the register of the land office at Visalia, and no other application for the said patent than that already mentioned was ever made by the Producers' & Consumers' Oil Company; that prior to the issuing of the patent to that company the register of the land office at Visalia did not post a notice of such application in his office for a period of 60 days, or for any other time; that neither the register nor the receiver of the land office, nor the commissioner of the general land office, nor the secretary of the interior, had any authority or jurisdiction to award the said mining claim to the Producers' & Consumers' Oil Company, and had no authority or jurisdiction to issue a patent to that company therefor; that the said Producers' & Consumers' Oil Company now holds in trust for the complainants the legal title to the land, which it ought in equity and justice to convey to the complainants, yet, well knowing the rights of the complainants in the premises, that company has refused and still refuses so to do, although often thereto requested; that the value of the mining claim in question exceeds in amount the sum of $5,000.

The prayer of the bill asks that the defendant the Producers' & Consumers' Oil Company be decreed to hold the title to the property

in trust for the complainants, and that it be required to convey the same to them; for a writ of injunction enjoining the defendants from extracting or carrying away from the premises any petroleum or mineral oil; that an accounting be had between the complainants and the defendants for the value of all petroleum and mineral oil extracted from the land and sold by the defendants, and that they be required to pay to the complainants the value thereof; that a receiver be appointed by the court to take possession of the property, and to hold the proceeds thereof subject to the final decree of this court; and for such other and further relief as to the court may seem equitable, and for costs.

Whether the patent thus alleged to have been issued by the officers of the United States to the Producers' & Consumers' Oil Company is valid or invalid, and, if valid, whether the title thereby conveyed should be decreed to be held in trust for the complainants, and decreed to be conveyed to them, manifestly depends, according to the averments of the bill, upon the proper application of the laws of the United States to the facts. The case made by the bill therefore necessarily presents a federal question, of which this court has undoubted jurisdiction. The demurrer and exceptions to the bill are overruled, with leave to the defendants to answer within 20 days.

CALIFORNIA OIL & GAS CO. OF ARIZONA v. MILLER et al.

(Circuit Court, S. D. California. July 10, 1899.)

No. 854.

1. JURISDICTION OF FEDERAL COURTS—FEDERAL QUESTION.
   Two things are necessary to the existence of a federal question which will confer jurisdiction on a circuit court of the United States: First, an actual dispute between the parties as to the meaning of some constitutional provision or law of the United States; and, second, materiality of the construction of such provision or law to a determination of the cause; and it is now well settled that these matters must appear from the plaintiff's statement of his own claim in the form required by good pleading.[1]

2. SAME—PLEADING—SUIT TO QUIET TITLE.
   In a suit to quiet title, the complainant need not do more than to allege his own title, and that the defendant claims adversely to him. The nature of the adverse claim, its source, and the manner in which it originated, are immaterial; and, if such matters are alleged, they must be disregarded, for the purpose of determining whether the bill discloses a federal question.

3. SAME—SUIT INVOLVING TITLE TO MINING CLAIMS.
   A bill to quiet title to a mining claim, eliminating all allegations relating to the claims and contentions of defendants, though complainant's claim of title is based on the mining laws of the United States, does not show that the construction or effect of such laws is in dispute, as it is open to defendants to allege any other ground of defense, and the only controversy, after issue has been joined, may be in regard to questions of fact.

---

[1] Jurisdiction of courts in cases involving federal questions, see note to Bailey v. Mosher, 11 C. C. A. 308, and note to Montana Ore-Purchasing Co. v. Boston & M. Consol. Copper & Silver Min. Co., 35 C. C. A. 7.

4. EQUITY—SUIT TO QUIET TITLE—POSSESSION OF DEFENDANT.
A bill to quiet title in complainant to an oil claim under the placer mining laws, which alleges that defendants have entered upon the ground, and have extracted and removed oil therefrom, and are engaged in sinking a well thereon, and which asks an injunction to restrain them from proceeding with such work, and from taking and removing oil, is, in effect, a bill to obtain possession, and admits the possession of defendants; hence it is not cognizable by a federal court of equity, the remedy being at law.

On Application for Temporary Injunction.

A. H. Ricketts, Wm. H. H. Hart, and Aylett R. Cotton, for plaintiff.
L. L. Cory, J. A. Hannah, and Bicknell, Gibson & Trask, for defendants.

WELLBORN, District Judge. This is a suit to quiet complainant in the title to and possession of certain land situated in Fresno county, Cal., to wit, the S. W. ¼ of section 20, township 19 S., range 15 E. Mt. Diablo base and meridian, and to restrain defendants from prosecuting mining development and work on said land. The bill alleges: That complainant was and is the owner and in possession of, and entitled to the possession and occupation of, said land, and that complainant's title and ownership is derived wholly from the United States through and by the locations of said land under the laws of the United States, and that complainant in good faith claims that a true construction of the laws of the United States gives to complainant the title to said land, and that complainant has the right, under such construction, to extract all the petroleum and other mineral oils in said ground, land, and premises, and that defendants deny the validity of said locations. That complainant, since the 23d day of August, 1898, has been and now is engaged in mining and developing said land, and boring and sinking a well thereon for the production of petroleum and other mineral oils, and has constructed at great expense, and has thereon, a well and other works necessary for and adapted to mining and developing said land for the production of mineral oils. That on the 19th day of October, 1891, said land was a part of the public domain of the United States, unoccupied, and open to location as land containing petroleum and other mineral oils. That on said date J. L. Doyle and seven other persons associated with him, all citizens of the United States, located a mining claim known as the "Lowell Placer Mining Claim" on said land, and caused notice thereof to be duly recorded, and thereafter, to wit, on the 23d day of August, 1898, four of said locators conveyed their interests in said claim to complainant, and the other four of said locators authorized complainant to sink wells and otherwise work upon said land for the production of oil and other mining purposes. That from the date of said location to the commencement of this suit all the requirements of law in relation to placer mining claims have been fully complied with by complainant and its predecessors, and that since the date last named complainant has had and now has the legal title to an undivided one-half of said Lowell placer mining claim, and has been and now is the owner of said undivided one-half, and in the possession of the whole of said Lowell placer mining claim, ground, land, and prem-

ises, and to all the petroleum, mineral oils, and minerals therein contained, and has been and now is entitled to the quiet and peaceable possession of the whole of said ground. That on the 11th day of August, 1898, W. H. H. Hart and seven other persons associated with him, all citizens of the United States, claiming that under an act of congress entitled "An act to authorize the entry and patenting of lands containing petroleum and other mineral oils under the placer mining laws of the United States," approved February 11, 1897, said land was vacant and unpatented, made a location thereon known as the "Earl Placer Mining Claim," and thereafter, to wit, on the 27th day of August, 1898, conveyed said claim to complainant. That on the 14th day of June, 1895, Hart H. Barrett and seven other persons associated with him made a pretended location of said land as a placer mining claim, but did not make nor erect any monuments or boundaries on said land, and afterwards conveyed said pretended location to the Producers' & Consumers' Oil Company, a corporation, which corporation afterwards, to wit, in the year 1896, transferred all its right, title, and interest to the defendant Miller, and thereafter a relinquishment of said claim by said Miller was made to and accepted by the United States; and that defendants claim that by said relinquishment said land, so far as concerns the said location of June 14, 1895, was restored to the public domain, which claim is controverted by complainant. That on the 31st day of December, 1896, Ernest L. Smith and seven other persons associated with him made a pretended location of said land as a placer mining claim under the name of "Sure Shot Group of Placer Mining Claims," but did not erect monuments upon the ground in such manner that the boundaries of said location could be traced. That at the times of the last two pretended locations the aforesaid Lowell placer mining claim was a valid and subsisting location, and said two pretended locations were and are wholly void. That on the 31st day of December, 1897, said Ernest L. Smith and his associates conveyed to defendant Miller the aforesaid Sure Shot group of placer mining claims. That defendant Miller claims ownership of said land by virtue of his conveyance from said Smith and his associates, but that the claim of said Miller to said land is without right or merit, and a cloud upon complainant's title, which depreciates the value of the property, and hinders and delays complainant in its development. That said Miller claims that the location by said Smith and his associates is a valid and subsisting location because of the provisions of the aforesaid act of February 11, 1897, and that the several locations through which complainant derives title were never made, and that all of said claims are controverted by complainant. That said Miller contends that the Lowell placer claim was forfeited by failure of the claimants to do the annual work and make the annual expenditures required by law previous to the aforesaid location of December 31, 1896. That this claim as to the forfeiture of the placer mining location is disputed by complainant, who claims that under said act of February 11, 1897, no assessment work on said land was required, and that the said Lowell placer mining location was and is a prior, legal, adverse claim to said land, which precludes the acquisition of any rights to the same by said de-

fendants, or any other person, adverse to complainant. That complainant contends and insists that no valid claim to said land was ever acquired by defendants, or any or either of them, and that a true construction of said act of congress of February 11, 1897, confirms complainant's title to said land. That the matters in controversy between the complainant and defendants involve the construction of the statutes of the United States relative to locating and holding claims chiefly valuable for petroleum and other mineral oils, prior and subsequent to said act of congress of February 11, 1897, including the question whether or not such land could have been located as a placer mining claim, and, if so, what acts were requisite to such a location prior to the act of February 11, 1897, and also the question whether or not the statute requiring annual expenditure or representation of a mining claim applied to locations of lands chiefly valuable for petroleum or other mineral oils, or held as such previous to said act of February 11, 1897, and also the construction to be given the acts of congress suspending annual assessment work or representation of mining claims for and during the years 1893 and 1894, and also the effect of failure to file the affidavit required by said acts, and each of them, and also the construction of said act of February 11, 1897, as to whether or not land located thereunder is a mining claim under the mining laws of congress, and whether or not said act is curative, and confirms the title to land chiefly valuable for petroleum and other mineral oils under proceedings which had been initiated under the mineral land laws of the United States prior to the said 11th day of February, 1897. That the defendant New York Oil Company pretends that it has a right to mine said land by reason of leases from the defendant Miller, and that, as such pretended lessee, it is now engaged in the business of mining said premises for, and extracting therefrom and converting to its own use, the petroleum and other mineral oils in said land, ground, and premises contained, and that such corporation threatens to, and will, unless restrained by this court, continue to remove, take out, and extract the petroleum and other mineral oils in said ground, land, and premises contained, to the great and irreparable injury of complainant. That the defendant Miller has not now, nor has he ever had, any right to lease said land to his co-defendant, or to any person whomsoever, and that the claims and pretensions of said defendant corporation are without any right whatever. That on the 29th day of August, 1898, defendants, against the will and without the consent of complainant, entered upon said land, and then and thereafter, for the purpose of extracting the petroleum and other mineral oils therein contained, cut, made, and excavated, sunk and bored, and are now sinking and boring, a well into and under said land, to wit, the strip of land hereinafter described, and ever since said last-mentioned day have intruded and trespassed upon said land, and have extracted, taken out, and removed therefrom, and converted to their own use, petroleum and other mineral oils, and threaten, and, unless restrained by this court, will continue, to intrude and trespass upon said land, and extend said well, and make further cuts and excavations, and sink and bore other wells in said land, for the purpose of extracting petroleum and other

mineral oils therefrom, and will continue to extract, take out, and remove from said land, and convert to their own use, petroleum and other mineral oils, to the value of $2,000 and upward, and thereby take from said land the entire value thereof, to the great and irreparable injury of complainant; and that defendants threaten, and will, unless restrained by this court, prevent complainant from developing and producing oil upon and from said land, and will expel from said land complainant and its agent and employés. That said trespasses are confined solely to a strip of land near the southwest corner of said quarter section about 50 feet wide and 100 feet long, and that defendants are sinking the well aforesaid and maintaining a boring outfit for that purpose on said strip of land, and maintaining a pipe line across a portion of said land, through which defendants carry water and oil for fuel to said boring machinery, and that defendants threaten, and will, unless restrained by this court, sink and cause to be sunk other wells upon other portions of said southwest quarter, and expel by force complainant and its agents therefrom, and prevent complainant from selling and disposing of the oils produced on said southwest quarter.

The present hearing is on an application for a temporary injunction, which application defendants resist by exceptions to the bill, under rule 67 of this court, hereinafter quoted, by a motion to dismiss said bill on the ground that the superior court of the state of California in and for said county of Fresno first acquired jurisdiction of the litigation, and by affidavits to the merits. The rule of court above referred to is as follows:

"Rule 67. On a motion for an injunction, the defendant may show cause against its allowance, either by plea, answer, or demurrer to the bill, or by parol exception to its legal sufficiency, or by depositions and affidavits disproving the equity on which the motion is founded."

Defendants' exceptions to the bill are: First, that the case is not within the jurisdiction of this court; second, that the bill shows defendants to be in possession of the property in controversy, and therefore a suit to quiet title cannot be maintained against them.

1. Complainant being a corporation organized in the territory of Arizona, there is no diverse citizenship (1 Fost. Fed. Prac. § 19; Corporation of New Orleans v. Winter, 1 Wheat. 91; Barney v. Baltimore City, 6 Wall. 280; Johnson v. Bunker Hill & S. M. & C. Co., 46 Fed. 417), but it is contended on behalf of complainant that this court has cognizance of the case because it involves a federal question; that is, arises under the laws of the United States. Two things are necessary to the existence of a federal question: First, an actual dispute between the parties as to the meaning of some law of the United States; second, materiality of the construction of such law to a determination of the cause. These two constituents have been succinctly stated thus:

"A cause is not removable simply because in its progress it may become necessary to construe or apply an act of congress. Unless there is a dispute between the parties as to the meaning of the act, there is no federal controversy between them. The decision of the case, or some material issue in it, must depend upon the construction of the act claimed by one party and denied by the other. A simple averment that such is the fact is stating a conclusion,

and is not sufficient; the facts that show it to be true must be set out." Fitzgerald v. Railway Co., 45 Fed. 812; State v. Chicago, M. & St. P. Ry. Co., 33 Fed. 394.

See, also, Water Co. v. Keyes, 96 U. S. 199; Gibbs v. Crandall, 120 U. S. 106, 7 Sup. Ct. 497; Metcalf v. Watertown, 128 U. S. 589, 9 Sup. Ct. 173; City of New Orleans v. Benjamin, 153 U. S. 411, 14 Sup. Ct. 905.

All except the last of the citations in this paragraph are cases of removal, but the requirements, so far as concerns the federal question which authorizes a removal, are the same as those which confer original jurisdiction. Section 1 of each of three acts of congress below and in this paragraph named gives to the circuit courts of the United States "original cognizance * * * of all suits of a civil nature * * * arising under the constitution or laws of the United States." Section 2 of the act of congress of March 3, 1875, in one of its clauses (18 U. S. Stat. 470) provides for the removal of any suit "arising under the constitution or laws of the United States." The clause above referred to, as amended by the act of March 3, 1887 (24 U. S. Stat. 552), and corrected by the act of August 13, 1888 (25 U. S. Stat. 433), authorizes the removal of any suit "of which the circuit courts of the United States are given original jurisdiction" by section 1 of said last-named act, which section confers original jurisdiction upon the circuit courts "of all suits * * * arising under the constitution or laws of the United States." 25 U. S. Stat. 434. Where there is no dispute between the parties as to the meaning of any federal law, but the case involves issues of fact solely,—as, for instance, which of two mining locations was first made, or whether or not the boundaries of either were marked upon the ground, or whether or not assessment work has been performed,—the case is not one arising under the constitution or a law or treaty of the United States, although the respective interests or titles of the parties may be derived through such constitution, law, or treaty. Bushnell v. Smelting Co., 148 U. S. 682, 13 Sup. Ct. 771; Budzisz v. Steel Co., 170 U. S. 41, 18 Sup. Ct. 503; Theurkauf v. Ireland, 27 Fed. 769; Holland v. Hyde, 41 Fed. 897; Mining Co. v. Kinney, 46 Fed. 832; Mining Co. v. Woody, 50 Fed. 633; Argonaut Min. Co. v. Kennedy Mining & Milling Co., 84 Fed. 1; King v. Lawson, Id. 209; Montana Ore-Purchasing Co. v. Boston & M. C. C. & S. Min. Co., 29 C. C. A. 462, 85 Fed. 867; St. Paul, M. & M. Ry. Co. v. St. Paul & N. P. R. Co., 15 C. C. A. 167, 68 Fed. 2; Crystal Springs Land & Water Co. v. City of Los Angeles, 76 Fed. 148; Crystal Springs Land & Water Co. v. City of Los Angeles, 82 Fed. 114. In this last case the first paragraph of the syllabus is as follows:

"When both parties claim under Mexican grants, confirmed and patented by the United States in accordance with the provisions of the treaty of Guadalupe Hidalgo, and the controversy is only as to what were the rights thus granted and confirmed, the suit is not one arising under said treaty, so as to confer jurisdiction on a federal court."

While some of the cases cited in the preceding paragraph were on writs of error to state courts, yet, in determining when there is a federal question, such cases are equally instructive with those

originally brought in circuit courts. Railway v. Taylor, 86 Fed. 168. An action brought pursuant to sections 2325, 2326, Rev. St. U. S., where patent has been applied for, and adverse claim filed, is said to be an apparent exception to the rule above stated as to the essentials of a federal question. Mining Co. v. Kinney, supra. See, also, Rutter v. Mining Co., 75 Fed. 37; Mining Co. v. Rutter, 31 C. C. A. 223, 87 Fed. 801; Doe v. Mining Co., 43 Fed. 219; Bennett v. Harkrader, 158 U. S. 441, 15 Sup. Ct. 863; Chambers v. Harrington, 111 U. S. 350, 4 Sup. Ct. 428; Perego v. Dodge, 163 U. S. 160, 16 Sup. Ct. 971; 2 Lindl. Mines, § 748. These cases are, perhaps, sustainable on either one of the following theories: First. That the suit referred to in said section is but one step in a purely statutory procedure, which has its inception, not in the court, in which the suit is brought, but in the land office. Doe v. Mining Co., supra. Second. Said section 2326, Rev. St., provides, among other things, that "it shall be the duty of the adverse claimant, within thirty days after filing his claim, to commence proceedings in a court of competent jurisdiction, to determine the question of the right of possession, and prosecute the same with reasonable diligence to final judgment; and a failure so to do shall be a waiver of his adverse claim." It cannot be supposed that congress would subject the adverse claimant to forfeiture of his interest by reason of failure to institute suit, without providing a tribunal in which such claimant could sue as a matter of right. Now, since congress is powerless to confer jurisdiction on a state court, the presumption is a fair, if not necessary, one that said statute confers jurisdiction on federal courts. But this inquiry need not be pursued further, since the case at bar is not a suit brought under said sections 2325, 2326, Id. Before inquiring as to whether or not the two essentials above named to a federal question, namely, a dispute as to the meaning of a federal law and its materiality to a determination of the cause, are found in the present case, it is needful to determine in what way said essentials must be made to appear. On this point the authorities are now agreed that the federal question must be presented by the plaintiff's own statement of his claim; that is, "a statement of facts 'in legal and logical form,' such as is required in good pleading," showing the plaintiff's cause of action, without regard to what may be the contentions or claims of the defendant. Tennessee v. Union & Planters' Bank, 152 U. S. 454, 14 Sup. Ct. 654; Chappell v. Waterworth, 155 U. S. 102, 15 Sup. Ct. 34; Postal Tel. Cable Co. v. Alabama, 155 U. S. 484, 15 Sup. Ct. 192; Railway Co. v. Skottowe, 162 U. S. 490, 16 Sup. Ct. 869; Wise v. Nixon, 76 Fed. 3, 78 Fed. 203; Kansas v. Atchison, T. & S. F. Ry. Co., 77 Fed. 339; Mining Co. v. Miller, 96 Fed. 1. This last citation is an opinion by Judge Ross, recently delivered in this court, sustaining a demurrer to a bill, whose allegations were quite similar to the allegations of the bill in the case at bar.

When the pending matters were argued orally before me, I made the suggestion that in a suit to quiet title, such as the one at bar, the particular claims or contentions of defendants might possibly be parts of complainant's case. Subsequent reflection convinces me that my suggestion was without merit, and that the complainant need

not do more than allege his own title and that the defendant claims adversely to him. The nature of the adverse claim, and source and manner from and in which it originated, are immaterial. If such matters are alleged in the bill, they must be disregarded in determining the jurisdictional question, not merely because of their immateriality, but for the further and obvious reason that defendants may not, in their answer, make the claims or contentions which the bill anticipates. The possibility, or even probability, that a federal question may arise during the progress of a cause will not support original jurisdiction in the circuit court, but the plaintiff's statement of his own claim must show that such a question is necessarily involved, and must be determined. If the defendants should fail to answer, and the bill be taken pro confesso, the decree entered by the court would quiet complainant's title against all claims of the defendants. If the defendants should answer, and set up claims other than those attributed to them by the bill, the answer certainly would be good. Should the defendants, in their answer, simply deny that they assert the claims alleged in the bill, the answer would be bad, because implying that some other adverse title was asserted. If the defendants should deny that they ever asserted any title prior to the commencement of the suit, such denial would not present a material issue. These suppositions show that the only material allegation relating to the defendant is as above stated, that the defendant claims the property adversely to the complainant; and this conclusion is in harmony with the rulings of the supreme court of California, construing sections 738 and 739 of the Code of Civil Procedure of said state. Bulwer Con. Min. Co. v. Standard Con. Min. Co., 83 Cal. 589, 23 Pac. 1102; Castro v. Barry, 79 Cal. 443, 21 Pac. 946.

In Bulwer Con. Min. Co. v. Standard Con. Min. Co., supra, the court said (italics mine):

"Counsel for appellant claim that the findings of fact do not support the conclusions of law or the judgment 'in that there is no finding to the effect that the defendant asserted a claim adverse to plaintiff to any part of the property described in the complaint, as to the ledge in dispute, before the commencement of the action,' and hence concludes that 'the judgment should be against the plaintiff and in favor of the defendant.' But, as above shown, this conclusion does not follow, even if it is true that there is no such finding. Conceding that the averment of an adverse claim is necessary in a complaint to quiet title under section 738 of the Code of Civil Procedure, yet if the defendant, in his answer, claim an adverse interest or estate in the land described in the complaint, a denial that he has made such adverse claim before the commencement of the action would be immaterial. If, on the other hand, the defendant, as here, *expressly disclaim any estate or interest in the land described in the complaint*, and at the same time *denies that he ever made any such adverse claim*, the plaintiff would still be entitled to a decree quieting his title, but without costs. This is implied in section 739 of the Code of Civil Procedure. The object of sections 738 and 739 is to enable the plaintiff, in such action, to dispel whatever may be regarded by third persons, as well as by the defendant, as a cloud upon his title; for *even though the defendant makes no adverse claim*, third persons may regard plaintiff's title as being subject to an adverse claim by the defendant, which would be a cloud upon plaintiff's title, depreciating its value, and which he would be entitled to have removed by the decree of the court; so that his record title may appear perfect, not only to the defendant, but to all persons whom it may thereafter concern. *The only purpose of the averment of an adverse claim is to notify the defendant of*

*the nature of the action, and that he is required to set forth and litigate any adverse title he may claim, or to disclaim any such adverse title, either expressly or by default. * * * The only material issues tendered by a complaint in this class of cases relate to the title of the real property described in the complaint. Therefore there was no necessity for a finding upon the formal, but immaterial, issue as to whether the defendant had asserted an adverse title before the commencement of the action."*

In Castro v. Barry, supra, the court said (italics mine):

"The statutory action to determine an adverse claim is an improvement upon the old bill of peace. The statute enlarges the class of cases in which equitable relief could formerly be sought in the quieting of title. It is not necessary, as formerly, that the plaintiff should first establish his right by an action at law. 'He can immediately, upon knowledge of the assertion of such claim, require the nature and character of the adverse estate or interest to be produced, exposed, and judicially determined, and the question of title to be thus forever quieted.' Curtis v. Sutter, 15 Cal. 262, 263; and see Stark v. Starrs, 6 Wall. 409. *Nor is it necessary that the adverse claim should be of any particular character.* As said by Baldwin, J., delivering the opinion in Head v. Fordyce, 17 Cal. 151, the statute 'does not confine the remedy to the case of an adverse claimant setting up a legal title, or even an equitable one; but the act intended to embrace every description of claim whereby the plaintiff might be deprived of the property, or its title clouded, or its value depreciated, or whereby the plaintiff might be incommoded or damnified by the assertion of an outstanding title already held, or to grow out of the adverse pretention.' See, also, Horn v. Jones, 28 Cal. 214; Joyce v. McAvoy, 31 Cal. 287, 288. And the rule may be even more broadly stated, viz. that the action may be maintained by the owner of property to determine any adverse claim whatever. *For if the defendant, by his answer, disclaims all interest whatever*, judgment may, nevertheless, be entered against him, though in such case it must be without costs. Code Civ. Proc. § 739. Compare Brooks v. Calderwood, 34 Cal. 566, and Mining Co. v. Marsano, 10 Nev. 380, 381. The plaintiff, therefore, is not required to set forth the nature of the defendant's claim. People v. Center, 66 Cal. 552, 5 Pac. 263, and 6 Pac. 481; Mining Co. v. Marsano, 10 Nev. 380, 381; Railroad v. Oyler, 60 Ind. 392. The pleading is very simple. And it is well settled that the allegations above mentioned are sufficient. Rough v. Simmons, 65 Cal. 227, 3 Pac. 804; Heeser v. Miller, 77 Cal. 192, 19 Pac. 375."

Assuming that complainant in the present suit relies on sections 738 and 739 of the Code of Civil Procedure of California, the above-quoted decisions from the supreme court of said state, construing said sections, are binding on this court (Fost. Fed. Prac. § 375, and notes; Nobles v. Georgia, 168 U. S. 398, 18 Sup. Ct. 87), and I make the assumption indicated for the reason that equitable remedies given by the statutes of a state may be administered, under certain circumstances, in a federal court (Davidson v. Calkins, 92 Fed. 230; Clark v. Smith, 13 Pet. 195; Chapman v. Brewer, 114 U. S. 158, 5 Sup. Ct. 799; Bardon v. Improvement Co., 157 U. S. 327, 15 Sup. Ct. 650); and the bill, without such statutory aid, is open to objection on the ground of its failure to show that the possession of complainant has been disturbed by legal proceedings on the part of the defendants. Referring to a statute of the state of Oregon similar to that of California, the supreme court of the United States has said:

"This statute confers a jurisdiction beyond that ordinarily exercised by courts of equity to afford relief in the quieting of title and possession of real property. By the ordinary jurisdiction of those courts a suit would not lie for that purpose unless the possession of the plaintiff had been previously disturbed by legal proceedings on the part of the defendant, and the right of the plaintiff had been sustained by successive judgments in his favor." Stark v. Starrs, 6 Wall. 402.

As suggested by defendants in their brief, any attempt on the part of the complainant in a suit to quiet title to anticipate the nature of defendants' adverse claim is mere waste of words, as the defendants have the right to set up any claim or title or defense they may see proper, whether such claim, title, or defense is anticipated by the bill or not.

Eliminating from the bill in the case at bar all allegations relative to the claims and contentions of defendants, there remain only allegations of the sources of complainant's ownership; and it is manifest that these allegations alone do not show any dispute between the parties as to the meaning of a federal law. Indeed, the simple statement by a plaintiff of his claim can seldom present a federal question, for the reason that a dispute as to the meaning of a federal law, or in regard to any other matter, can arise only when there are conflicting claims of two or more parties, and not out of the mere presentation of the claim of one party. Suppose that defendants should hereafter file an answer admitting complainant's ownership of the property in controversy at some prior date, but claiming said property by virtue of an alleged transfer from complainant to themselves, or that they should simply deny that the boundaries of the Lowell placer mining claim had ever been marked upon the ground, or that any assessment work had been done under said claim,—would an issue be thereby raised as to the construction of any law of the United States? Surely not. These views are substantially, but clearly, expressed in New Orleans v. Benjamin, supra, where the court says:

"When a suit does not really and substantially involve a dispute or controversy as to the effect or construction of the constitution, upon the determination of which the result depends, then it is not a suit arising under the constitution. Shreveport v. Cole, 129 U. S. 36, 9 Sup. Ct. 210; Starin v. City of New York, 115 U. S. 248, 6 Sup. Ct. 28; Water Co. v. Keyes, 96 U. S. 199. The judicial power extends to all cases in law and equity arising under the constitution, but these are cases actually, and not potentially, arising, and jurisdiction cannot be assumed on mere hypothesis. In this class of cases it is necessary to the exercise of original jurisdiction by the circuit court that the cause of action should depend upon the construction and application of the constitution, and it is readily seen that cases in that predicament must be rare. Ordinarily, the question of the repugnancy of a state statute to the impairment clause of the constitution is to be passed upon by the state courts in the first instance, the presumption being in all cases that they will do what the constitution and laws of the United States require (Chicago & A. R. Co. v. Wiggins Ferry Co., 108 U. S. 18, 1 Sup. Ct. 614, 617); and, if there be ground for complaint of their decision, the remedy is by writ of error under section 709 of the Revised Statutes."

Crystal Springs Land & Water Co. v. City of Los Angeles, 76 Fed. 148, is one of the class of cases said by Mr. Chief Justice Fuller in City of New Orleans v. Benjamin, supra, to be rare, where the circuit court of the United States has original jurisdiction by reason of the case arising under the constitution and laws of the United States. In that case (Crystal Springs Land & Water Co. v. City of Los Angeles, supra), which was decided by the writer of this opinion, the rule now under consideration, that jurisdiction must appear from plaintiff's own statement of his claim, was not invoked by the defendant, but it was assumed by both parties in their briefs that in determining the question of jurisdiction the court in that case could look to all the

allegations of the bill, including the claims of the defendant as well as those of the plaintiff, and therefore the precise ground on which the jurisdiction in that case is sustainable does not appear in the opinion of the court, nor, indeed, was it considered by me at the time. That the decision was correct, however, is fully shown by a review of the case made in the brief of the defendants in the case at bar, the substance of which review is as follows:

Section 1979, Rev. St., provides that "every person, who, under color of any statute, ordinance, regulation, custom, or usage of any state or territory, subjects, or causes to be subjected, any citizen of the United States, or other person within the jurisdiction thereof, to the deprivation of any rights, privileges or immunities secured by the constitution and laws, shall be liable to the party injured, in an action at law, suit in equity, or other proper proceeding."

By subdivision 16, § 629, of the Revised Statutes of the United States, the circuit courts were given jurisdiction "of all suits authorized by law to be brought by any person to redress the deprivation, under color of any law, statute, ordinance, regulation, custom, or usage of any state, of any right, privilege, or immunity, secured by the constitution of the United States, or of any right secured by any law providing for equal rights of citizens of the United States, or of all persons within the jurisdiction of the United States." This subdivision was not expressly re-enacted in the act of congress approved March 3, 1875, entitled "An act to determine the jurisdiction of circuit courts of the United States, and to regulate the removal of causes from state courts, and for other purposes," but the cases which said subdivision describes are evidently included in the general classification of the first section of said act, namely, "all suits of a civil nature * * * arising under the constitution or laws of the United States, or treaties made or to be made, under their authority." The fifth section of the act of March 3, 1887, amendatory of the aforesaid act of March 3, 1875 (24 U. S. Stat. 552), and also the fifth section of the act of August 13, 1888, correcting the enrollment of the last-mentioned act of March 3, 1887 (25 U. S. Stat. 433), provide "that nothing in this act shall be held, deemed, or construed to repeal or affect any jurisdiction or right mentioned * * * in title twenty-four of the Revised Statutes of the United States." Said title 24 embraces section 1979, above quoted. The liability declared in said section 1979 for depriving a person of rights, privileges, or immunities secured by the constitution and laws of the United States manifestly depends upon the fact that such deprivation be under color of some statute, ordinance, etc., of a state or territory; and therefore, to constitute a cause of action under said section, the plaintiff must show, as part of his case, that the defendant claims to act under color of a statute, ordinance, etc., of a state or territory. In Crystal Springs Land & Water Co. v. City of Los Angeles, supra, the bill alleged that the defendant claimed, under a grant from the state of California, property belonging to the complainants, and that said grant was repugnant to section 10, art. 1, of the constitution of the United States, providing that no state shall pass any law impairing the obligation of contracts, and the provision of section 1 of the fourteenth amendment to said

constitution, that no state shall deprive any person of life, liberty, or property without due process of law; thus making out a case of the deprivation of property under color of state law, within the meaning of said section 1979. Hence, in that case, defendant's claims and acts, and that they were made and done under color of the statutes of California, were parts of, and essential to, the statement of plaintiffs' claim. These peculiarities of said case clearly distinguish it from Tennessee v. Union & Planters' Bank and the subsequent cases in line therewith, and it was probably for this reason that the city of Los Angeles did not, in its brief, invoke or refer to the line of authorities last mentioned. See, also, Michigan Tel. Co. v. City of Charlotte, 93 Fed. 11.

In a brief filed herein by Mr. Joseph H. Call, as amicus curiæ, it is suggested, among other things, that "a case in law or equity consists of the right of one party as well as of the other," and therefore the allegations of the bill in reference to the claims and contentions of the defendants should be considered in determining the question of jurisdiction; citing, among other cases, New Orleans M. & T. R. Co. v. Mississippi, 102 U. S. 135. When these cases were decided, jurisdiction on removal existed if a federal question appeared anywhere in the record. Under the law, however, as settled by the decision in Tennessee v. Union & Planters' Bank, supra, whatever may or may not be essential to jurisdiction on removal, it is certain that original jurisdiction does not exist in the circuit court unless the federal question be raised by the plaintiff's statement of his own claim. If, in a suit brought in a state court, a federal question material to the cause, and belonging to any one of the classes described in section 709, Rev. St. U. S., arises subsequent to the filing of the bill, that fact gives to the supreme court of the United States jurisdiction on writ of error; but, as already stated, the original jurisdiction of the circuit court depends upon the facts as they exist at the commencement of the suit, and as they are then made to appear by the plaintiff's statement of his own claim. These remarks dispose of all the cases cited by Mr. Call in this connection except City Railway Co. v. Citizens' R. Co., 166 U. S. 557, 17 Sup. Ct. 653, and Railway Co. v. Ziegler, 167 U. S. 65, 17 Sup. Ct. 728. These two cases belong to the same class as Crystal Springs Land & Water Co. v. City of Los Angeles, supra, and, as I have shown in reference to the last-named case, do not militate against, but are in harmony with, the views herein expressed. For the reason that a dispute between the parties as to the construction of laws of the United States appears only by the aid of allegations in regard to the claims of defendants, which are not essential to complainant's case, or, to use the phraseology commonly employed in the authorities cited, because the federal question does not appear from complainant's own statement of his claim, it must be held that this court is without jurisdiction of the cause.

2. The other exception to the bill, I think, is also well taken, and, if a federal question were actually involved, the bill could not be maintained, for the reason that it shows defendants to be in possession of the property in controversy. It is true that the bill does

not, in terms, allege that the defendants are in possession, but the acts charged against the defendants are such as necessarily imply actual possession or occupancy of the land. The allegations of the bill on this point are as follows:

"And your orator further shows unto your honors and avers that hitherto, and on or about the 29th day of August, 1898, the said defendants and their agents, servants, employés, and confederates forcibly and willfully, against the will and without the consent of your orator, entered in and upon the said ground, lands, and premises hereinabove described, and commenced to, and then and thereafter, for the purposes of extracting the petroleum and other mineral oils therein contained, cut, made, and excavated, sunk and bored, and are now sinking and boring, a well into and under and upon said ground, lands, and premises, to wit, on the strip of land hereinafter described, and ever since said last-mentioned day have intruded and trespassed upon said ground, and have extracted, taken out, and removed from said ground, lands, and premises, and converted to their own use, petroleum and other mineral oils therein, to the value and amount unknown to your orator."

In Erskine v. Oil Co., 80 Fed. 583, the court says:

"While the bill does not, in words, pray to acquire possession of the wells, yet, in substance and effect, that is its purpose. It seeks to restrain respondent from operating the wells or taking the oil, and these acts are, where oil and gas are concerned, the essential attributes of possession. The supreme court of Pennsylvania, in the case of Gas Co. v. De Witt, 130 Pa. St. 250, 18 Atl. 724, after discussing the peculiar character of gas and oil and their production, say: 'The one who controls the gas [the subject-matter of the case before it] has it in his grasp, so to speak; is the one who has possession in the legal as well as in the ordinary sense of the word.' A bill, then, which in substance would deprive one in possession of everything which constitutes possession, whatever it is in name, is in fact one to devest possession, or what is known as an 'ejectment bill.' In Messimer's Appeal, 92 Pa. St. 169, a bill was filed by parties claiming an undivided fourth in an oil lease and well against parties in possession. The respondent admitted complainants' title to an undivided eighth, and denied it as to the other eighth. Complainants did not ask to restrain respondent from operating the well, but prayed for a receiver and an accounting. In sustaining a decree dismissing the bill for want of grounds for equitable relief the court say: 'The case presented on bill and answer is simply the ordinary case of property claimed by one party (plaintiff) in the possession of another party (defendant). It is a mere ejectment bill, and there is nothing to give a court of equity jurisdiction.' Such conclusion is in accord with other Pennsylvania cases. See Long's Appeal, 92 Pa. St. 179; Coal Co. v. Snowden, 42 Pa. St. 488; Gloninger v. Hazard, Id. 389. In the federal courts the line between law and equity, and consequently between legal and equitable rights and remedies, has been sharply defined, and strictly observed. The provision of the constitution vesting judicial powers 'in cases in law and equity * * * between citizens of different states' recognizes the distinction. A constitutional amendment insures the right of trial by jury 'in suits at common law when the value in controversy shall exceed twenty dollars,' and the sixteenth section of the judiciary act of 1789 provides 'that suits in equity shall not be sustained in either of the courts of the United States in any case where plain, adequate, and complete remedy may be had at law.' And to such length have these provisions been extended that it has been held (Allen v. Car Co., 139 U. S. 662, 11 Sup. Ct. 682): 'If the court, in looking at the proofs, found none of the matters which would make a proper case for equity, it would be the duty of the court to recognize the fact, and give it effect, though not raised by the pleadings, nor suggested by counsel.' And rightly so, for we are here dealing with the constitutional right of the citizen, and, as was said by Mr. Justice Campbell in Hipp v. Babin, 19 How. 278, 'whenever a court of law is competent to take cognizance of a right, and has power to proceed to a judgment which affords a plain, adequate, and complete remedy without the aid of a court of equity, the plaintiff must proceed at law, because the defendant has a constitutional right to a trial by jury.' "

I have heretofore had occasion to pass upon the question now under consideration, and, after careful review of the authorities, decided that a suit to quiet title could not be maintained in the federal courts against a defendant in possession, although such a suit might be authorized by state law. Davidson v. Calkins, 92 Fed. 230. See, also, Morrison v. Marker, 93 Fed. 692.

The motion for a temporary injunction is denied, and the restraining order heretofore made vacated

---

AMERICAN SURETY CO. OF NEW YORK v. LAWRENCEVILLE CEMENT CO. et al.

(Circuit Court, D. Maine. July 17, 1899.)

1. BONDS OF UNITED STATES CONTRACTORS — ACTIONS ON — DISTRIBUTION OF PROCEEDS BETWEEN CREDITORS.
   Where there are claims against a contractor for the construction of a public work of the United States and the sureties on his bond, under the act of August 13, 1894 (28 Stat. 278), in favor of the United States, and also of individuals supplying labor or materials, aggregating a sum in excess of the penalty of the bond, the equitable rule of pro rata distribution will be applied, and no priority will be given to the United States, or to any individual creditor by reason of his having first commenced suit.

2. SAME—RIGHT OF RECOVERY AGAINST SURETY.
   A surety on such a bond cannot require the obligees to exhaust the property of the principal before enforcing the obligation of the bond, or to await the collection of indemnity by the surety.

3. EQUITY — ANCILLARY SUIT — DISTRIBUTION OF FUND BETWEEN PARTIES TO DIFFERENT ACTIONS.
   A large number of actions at law were brought in a federal court against a contractor for a public work of the United States and the surety on his bond by persons who had furnished labor or materials in the prosecution of the work. There were similar actions pending in other jurisdictions, and still other claims outstanding on which actions had not been brought, including a possible one by the United States for the extra cost of completing the work after its abandonment by the contractor; the aggregate of all the claims exceeding the penalty of the bond. *Held*, that such facts entitled the surety to maintain a suit in equity in such federal court, ancillary to the actions pending therein, through which the fund in its hands can be equitably distributed.

4. SAME—JURISDICTION—PARTIES.
   It is no objection to the maintenance of such suit that, owing to the citizenship of necessary parties, it could not be maintained in that court as an original suit, or that, as an ancillary suit, only those claimants who had suits pending therein could be made parties, since a partial distribution could be made between such parties, with due regard to the rights of all claimants, and the remainder of the fund be held, and the suit retained for final distribution, after the rights of all parties in interest have been determined.

In Equity.

Henry C. Wilcox and Thomas L. Talbot, for complainant.
Charles F. Libby and Benjamin Thompson, for defendants.

PUTNAM, Circuit Judge. The statute of August 13, 1894 (28 Stat. 278, c. 280), provides that any "person or persons" supplying labor or materials to one entering into a formal contract with the United

States for the prosecution of any public work, which labor or materials were used therein, and payment for which has not been made, "shall have a right of action, and shall be authorized to bring suit in the name of the United States for his or their use and benefit against said contractor and sureties, and to prosecute the same to final judgment and execution." It is further provided "that such action and its prosecutions [sic] shall involve the United States in no expense." The statute also contains a second section, authorizing the court "in which such action is brought" to require security for costs in case judgment is for the defendant.

While the statute uses the plural with reference to the persons whose claims may be protected under its provisions, it uses the singular wherever the suit, action, execution, or judgment are referred to. The statute, however, leaves it for the court to ascertain, as best it may, whether, in the event a bond is given the United States by the contractor for the due performance of his contract, the method of proceeding thereon shall be that always known to the common law; that is to say, by a single suit for the penalty, with such further incidental proceedings as may be necessary to determine and collect the amount due each of the various persons whose interests the bond protects, or whether every person within the purview of the statute may bring a separate suit, as has been done in the history of the case which we have now to consider. The statute is also silent on the question whether or not, with reference to claims of less than $2,000, the suits, which are nominally in the name of the United States, but in which the United States have no interest, and which are really for the benefit of individuals, can be maintained in the federal courts, under the rule, firmly established by the supreme court, that on bonds running to nominal plaintiffs the jurisdiction depends on the character of the parties having substantial interests in the litigation. These questions, however, if they are questions, are not raised in the case before us, and, of course, are more properly for consideration in the suits at law with reference to which the case now before us has arisen.

A more serious defect, however, exists in the statute, and that is its failure to declare whether or not the United States retain against the contractor, and the sureties on whatever bond may be furnished, the priority which is customary under the law, especially when insolvency appears, and, further, whether, in the event the bond is not sufficient to cover all the claims as to which the contractor is in default, the equitable rule of pro rata distribution exists between individual creditors, or whether priority can be acquired by first bringing suit, or first obtaining a judgment, against the surety. As to both of these questions, we are so clear that the equitable rule of pro rata distribution exists, not only between the United States and individual claimants, but also as between individual claimants themselves, that we do not find it necessary to elaborate the proposition. The United States, by the force of the statute which we have cited, voluntarily make themselves trustee, alike for their own interest and for the interests of the individuals intended to be protected; and, having thus voluntarily created and accepted a trust, they are

barred by equitable principles from asserting for themselves any advantage over other beneficiaries. So, also, it must be held that the rights of the individual beneficiaries, as among themselves, relate back to the execution of the bond, and arise, by relation, out of the same transaction (that is, the execution of the bond), and as of the same time (that is, the date of its execution). On equitable principles, all individuals who may acquire rights under the bond stand in the same relation to each other as holders of several obligations secured by the same mortgage or deed in trust, specified therein, but issued at different dates. There is only one underlying equity, which necessarily, on equitable principles, protects all interested, whether it be the United States or individuals, share and share according to the proportions of their several claims. It is possible that, from the necessity of things, there may be exceptional instances, where one creditor has been allowed to proceed to a prior judgment; thus, through some laches, or in consequence of other liabilities being contracted subsequently, obtaining an unavoidable preference. In the case at bar, however, there are no circumstances which would have disenabled this court from compelling an equitable distribution among all the parties interested in the bond in issue here, if it had jurisdiction over them all.

This bill is brought against numerous individuals, over 70 in all, alleged to be creditors of one William Morgan, a contractor with the United States within the purview of the statute which we have cited. It alleges that Morgan, as contractor, gave the bond referred to in that statute, in the penal sum of $18,000; that the bond was executed by the complainant, the American Surety Company, as surety; that Morgan failed to comply with his contract; that the respondents maintain that Morgan has failed to pay them for labor and materials furnished, for which they have rights of action under the statute referred to; and that the respondents and other claimants have brought 81 separate and distinct suits against Morgan and the complainant, under the statute referred to, of which nearly all were brought on the law side of this court and are still pending there. The bill also states that parties have brought suits in the circuit court of the United States for the Southern district of New York; that still other parties assert claims which the statute cited protects, though they have not yet sued; and that the amount of all such claims is $26,993.57, exceeding the penal sum of the bond, besides whatever claim in behalf of the United States is protected by the bond, if anything. As to this, it alleges, in substance, that, Morgan having failed to perform his contract, the United States annulled the same, took possession of the work, and also of the materials on the work belonging to Morgan, and proceeded to complete it, and that the cost thereof, over and above the amount due Morgan in that behalf, could not, when the bill was filed, be ascertained; and there are some further allegations in the same connection which need not be repeated. The bill further alleges that the complainant fears, and has reason to fear, that judgments will be rendered on its bond in favor of the creditors of Morgan to an amount largely in excess of the penal sum thereof; that to defend the suits separately has

been, and will be, harassing, vexatious, and embarrassing to the complainant, because the complainant cannot be informed which of the suits will be first brought to trial, and judgments recovered therein against the complainant; that, in case judgments should be rendered amounting to the penal sum of the bond in the suits first brought to trial, the complainant would not, for want of time, be able to set up and plead the same in defense of the remaining suits; that, further, the complainant will be obliged, in the defense of the suits, to unnecessarily lay out large sums of money in court costs, fees, and otherwise; that, by reason of the matters stated, the complainant is in great danger of judgments being recovered against it for sums which may afterwards be claimed by the United States; that, on the whole, the complainant may be compelled to pay far in excess of the penal sum of its obligation; and that, by reason of the premises, the complainant cannot safely pay any of the claims, either of the individual creditors or of the United States, without the aid and protection of the court.

The bill further alleges that one Thomas E. Allen, who, either alone or jointly with another, is one of the alleged creditors of Morgan for a considerable amount, joined with Morgan in an agreement to indemnify the complainant from all loss by reason of the execution of Morgan's bond as surety for him; and, further, that it may be that, on final accounting between the United States and Morgan, there will be a balance due him from the United States. Morgan and Allen are each described in the bill as citizens of New Jersey, and of Trenton, in that state. Allen was made a defendant in the suit, and voluntarily appeared, so that the court has jurisdiction over him; but it does not appear that he has any suit pending against the complainant. The United States have brought no suit against the complainant, and were not sought to be made a party respondent in this bill, and probably could not have been; but in the early stages of the case, by the order of the court, notice was given to the attorney of the United States for this district of its pendency, and afterwards the United States filed a so-called intervention, without any pleadings or becoming formally a party, merely stating that the expense of completing the work largely exceeded the contract price, and also that the United States had suffered damages by reason of the nonperformance of the contract, whereby an action had accrued to the United States on the bond, but no attempt has been made by the United States to state, even approximately, the condition of their accounts with Morgan. One of the parties respondent is the McKiernan Drill Company, a corporation existing under the laws of the state of New York, the same state whose laws created the American Surety Company a corporation, so that both the complainant and one of the respondents are citizens of the same state.

The prayers for relief are quite numerous, and need to some extent separate consideration. The complainant states that it is ready and willing to pay the penal amount of its bond to whomsoever is lawfully entitled thereto, and therefore it prays that the pending suits at law may be restrained; that persons who have not commenced suit may be likewise restrained from commencing suit; that an account

may be taken with the United States; that the court will direct the complainant to whom to make payment; and that, thereupon, the complainant shall be fully exonerated and discharged from its liability on the bond. It also prays that a receiver be appointed of the moneys, if any, found to be due to Morgan on the contract and for the materials taken by the United States, and that Morgan may be restrained from collecting any such moneys. It further prays that the amounts to come due from Allen to the complainant under the agreement of indemnity already referred to may be ascertained, and that the moneys received from the United States and from Allen be applied in payment of the various claims against Morgan, so that the complainant shall be required to pay only the balance remaining after such moneys are so applied.

On a previous occasion, this case was heard by the court on a motion for a temporary injunction. At that stage, the case was not well apprehended, and the result of the hearing was an order for a temporary injunction, if the complainant should deposit in court the amount of the bond, less a sufficient sum to protect the suits brought in the Southern district of New York. This the complainant never did, so that no injunction ever issued. The present hearing is on demurrers to the bill. A portion of the defendants have pleaded, a portion answered, and a portion demurred. At the hearing, it was found that some of the defendants had neither pleaded, demurred, nor answered; but all of these came into open court, and waived the right to demur, so the case is ripe for a hearing on the questions of law which the bill presents on its face.

It will be obvious that the first question which arises is as to the nature of this bill; that is to say, whether it is original or ancillary. Inasmuch as one of the respondents in the bill is a citizen of the same state as the complainant, it cannot be maintained, except as ancillary. As an ancillary bill, no defendants can be retained, and no decree can go against any defendant, except suitors in the cases on the common-law side of this court, already referred to. All persons named originally as parties defendant, except the suitors in this court and Allen, have been stricken from the bill. Therefore there is no difficulty in regarding it as an ancillary suit. In that view, neither the fact that the McKiernan Drill Company is a citizen of the state of New York, nor the question as to jurisdiction raised by some of the defendants, because nearly all the claims are below the jurisdictional amount, are of any consequence, even if the latter could be in any event.

Complainant calls our attention to the multiplicity of suits as a ground for equitable jurisdiction in this case; but mere multiplicity of suits affords no sufficient reason for equitable intervention, because the chancery courts cannot, as a matter of course, throw into hodgepodge numerous distinct rights which several individuals are entitled to pursue in the common-law courts, subject only to such consolidation as the rules of common law and the statute provide. Marshaling assets, however, is a favorite equitable ground of jurisdiction. In this case we have a quasi fund—that is, the penal sum of $18,000, named in the bond executed by the complainant—to be

distributed on an equitable basis among numerous claimants. It will be found, as we proceed, that this fund cannot be distributed expeditiously or justly without the aid of this court sitting in equity. On any of the suits at law which this bill is brought to restrain being brought to judgment, it would be impossible to determine in a manner which would do justice, either to the claimants or to the American Surety Company, the pro rata amount which should be awarded therein. The question must arise, once for all, in each of the common-law suits as to the actual amount of the claim in each of the others, and the determination must be final; and yet it could not be made in such way as to bind the other suitors.

A more serious difficulty would arise in the common-law suits with reference to the amounts and the rights of those claims not already in suit, but on which suits may be brought. The record shows that there are over 40 of this class, amounting, in all, to a very large proportion of the claims now in suit in this court, if not equaling the whole of them. But, on this bill, there is no difficulty in making a prompt pro rata distribution on each of the claims to which it is ancillary, to such an amount as will imperil no party concerned, and in afterwards retaining the bill for a further distribution, when the status of the claims not in suit, or sued in other jurisdictions, has been finally determined. This fact alone affords a secure basis for equitable jurisdiction. There could be no reasonable doubt that this court would have jurisdiction of a bill of this character, if all the claimants, including the United States, and also Morgan, the debtor, were parties thereto. The only question which seems to present to us any serious difficulty is whether we can retain this bill, in view of the fact that neither Morgan nor the United States, nor all the claimants, are parties hereto, and cannot be made such.

Before taking up this question, we will dispose of the prayers of the bill to the effect that the court ascertain whether, on a final settlement, there will be a balance due from the United States to Morgan, and that it realize from Allen on his agreement of indemnity given the complainant, and apply the moneys realized from the United States and Allen to the payment of the claimants, charging the complainant only the balance thus remaining unprovided for. The court can perceive no ground of equity in these aspects of the bill. The rights of the claimants against the complainant are absolute under the law, and are not to be postponed in order to enable the complainant to realize, in advance of payment of its just dues, moneys for its reimbursement. To hold otherwise would be equivalent to holding that no creditors can enforce payment against a surety until the assets of the principal debtor have been realized and applied on the debt, which is not the law in this jurisdiction or in the federal courts. The case stands entirely otherwise than it might if the claimants held securities which ought to be applied to the reduction of their debts before the complainant is called on to make good its obligation; but, in the case at bar, the right of subrogation, so far as its exists, and the consequent equitable security, belong to the complainant, and not to the claimants. Whether or not the joint holders of the claim against Morgan, in which Allen is interested, are

estopped from proceeding against the bond by reason of the fact that Allen, individually, in connection with Morgan, agreed to indemnify the complainant, is a matter for consideration when it hereafter arises at its proper stage of the case.

Returning to the question of the sufficiency of parties to this bill, we are first to observe that, as this is an ancillary bill, no persons could be made defendants except those already in the case, as, necessarily, the parties are limited to the complainant and those who have brought the suits on the law side of this court, to which this bill is incidental. Therefore, from the very nature of the controversy, it would seem that this bill ought to be sustained without further inquiry as to parties, because, in this respect, as it is ancillary, and limited in its purposes, and of a character which cannot directly affect the rights of any not made parties, it stands as an exception to the general rule that all interests necessary to enable a court in equity to close a controversy in all particulars should be before it. This exception has not been discussed by the authorities; but to disregard it would be in effect to hold that, in many cases, a defendant in a common-law suit could not avail himself of his equitable rights, as against the plaintiff, no matter how fundamental, nor how contrary to equity an unqualified judgment at law might be. The mere fact that an ancillary bill, intended to turn aside the inequities of a proceeding at law, is necessarily limited, as to its parties, to those in the suit at law, also necessarily, for the most part, excludes such bills from the general rule in regard to the joinder of defendants; and we can well rest the case on this point on that proposition.

With reference to an original bill, no case can be found which, in view of section 737 of the Revised Statutes, and of equity rules 22 and 47, goes further than California v. Southern Pac. Co., 157 U. S. 229, 15 Sup. Ct. 591. The opinion of the chief justice, at page 251, 157 U. S., and page 600, 15 Sup. Ct., puts this question:

"Can the court proceed to a decree, as between the state and the Southern Pacific Company, and do complete and final justice, without affecting other persons not before the court, or leaving the controversy in such a condition that its final termination might be wholly inconsistent with equity and good conscience?"

Although it was impossible, in that case, for the decree to directly affect the interests of the city of Oakland, and although the city of Oakland could not be made a party without ousting the jurisdiction of the court, yet the court was disinclined to proceed, stating, at page 257, 157 U. S., and page 602, 15 Sup. Ct., as follows:

"We have no hesitation in holding that, when an original cause is pending in this court, to be disposed of here in the first instance, and in the exercise of an exceptional jurisdiction, it does not comport with the gravity and finality which should characterize such an adjudication to proceed in the absence of parties whose rights would be in effect determined, even though they might not be technically bound in subsequent litigation in some other tribunal."

The purport of this seems to be that the court held itself unable to dispose of the case before it without passing directly on the questions of law which underlay the rights claimed by the city of Oakland. So, also, another instance in which the interests of parties not in the bill were directly involved is found in Gregory v. Stetson, 133 U. S. 579,

10 Sup. Ct. 422, where the court was asked, on a bill in equity, to disturb the actual status of a fund, without making parties to the bill all those who had an apparent interest therein. But, in the case at bar, neither of these classes of difficulties arise. A decree can well be shaped on this bill which will not involve, theoretically or practically, any claims made by any persons not parties to it. Therefore, there will not be found in the condition of the case any practical difficulty in the way of applying here the broad exception that, from the necessity of things, ancillary bills are not ordinarily within the general rule to which we have referred with reference to making parties defendant.

The status is not much unlike that of Wood v. Dummer, 3 Mason, 308, 30 Fed. Cas. 435. In that case, the bill was brought by a part of the holders of the circulating notes of an insolvent incorporated bank against some of the stockholders, it being shown that it was impossible to bring all the stockholders before the court. The bill was sustained, but, in framing the decree, Mr. Justice Story said (at page 322, 3 Mason, and page 440, 30 Fed. Cas.) that, in proceeding to do equity to those before the court, the court must take care that it was not the instrument of injustice to others who were not represented; and he added:

"Non constat, if the whole fund is taken from the defendants in favor of the plaintiffs, that there will remain any solvent stockholders from whom the other creditors can claim any share."

The record before the court was criticised by it as insufficient to enable it to make a just apportionment; so that, on the whole, the court made an apportionment based on the number of shares held by the defendants with reference to the entire capital stock. A more accurate basis of computation can easily be found in the case at bar, without thereby possibly incurring the hazard of doing injustice to any other party. This can be done even more satisfactorily than was done in Wood v. Dummer, or than was practicable in the several classes of cases referred to in Story, Eq. Pl. (10th Ed.) § 96, where, without the aid of section 737 of the Revised Statutes or equity rules 22 and 47, equity courts have proceeded to decrees without having before them all the parties usually regarded as interested in the controversy.

It must be understood that we are referring to instances in which original bills have thus been sustained, not because we intend to qualify what we have said as to the distinction between them and ancillary bills, but for the purpose of illustrating that a decree can go in this case without the possibility of doing injustice to interests not represented. However it might be, if we had before us an ancillary bill where it was impossible to proceed to a final decree without doing injustice to interests not represented, and though, under such circumstances, we might hold that the distinction which we make in behalf of ancillary bills would necessarily be limited, yet, as the case at bar does not involve any such difficulties, we think we ought to proceed to a decree, notwithstanding the relief which can be granted is not complete, in the sense in which it would be if all the claimants were before the court.

In view of what we have said, the bill may be sustained, so far as to take an accounting of all claims which are in suit in this court against the American Surety Company on its bond in issue here, and to order pro rata payments thereon, but with directions that the amount of the claims of parties not subject to our jurisdiction shall, for the purpose of primary distribution, be so estimated as not to jeopardize the complainant, and that there shall be included in that amount the balance due the United States, if anything, and the claims not in suit as well as those which are. Thereupon, a primary distribution can be ordered accordingly, and the bill can be retained for further distribution if subsequent events justify it. Those portions of the bill which pray for the application of moneys for which realization is asked on account of the possible indebtedness of the United States to Morgan, and by reason of Allen's agreement for indemnity, having been specially demurred to, the demurrer, to that extent, will be sustained, and those portions of the bill will be adjudged insufficient; and it will be further adjudged that there will be no further proceedings against Allen in this case.

The claims covered by the common-law suits must either be admitted by this bill, or by stipulations in the suits themselves, or, so far as not admitted, no injunction can issue restraining the prosecution of those suits so far as necessary to ascertain the validity and amount of the several claims in dispute; the burden of the taxable costs of such determinations resting on the complainant with reference to any suit in which a valid claim is found to exist.

So far as suits on the common-law side of this court represent lawful claims, the complainant is liable for taxable costs to the time of the filing of this bill. Whether or not it will be liable for further costs will be a matter for future determination. The equitable rule applies here which was made effective by the supreme court in Railroad Co. v. Clark, 153 U. S. 252, 14 Sup. Ct. 809; and, before this bill can proceed further, complainant must amend it by offering to pay taxable costs to the time of filing of the bill in each case in which a valid claim exists, and must bring into court sufficient to pay all such costs, with registry commissions and other charges in connection therewith.

Morgan was made a defendant, but he was beyond the jurisdiction of the court, and no service was made on him; neither has he ever appeared. The court understood that he was not found within the district in connection with the common-law suits referred to, that no service was made on him, and that he never appeared in those suits, and, therefore, it permitted his name to be stricken out as a defendant; but, on a careful examination of the bill, it is found that these facts thus understood by the court are not alleged, as they must be before a decree can be entered.

In view of the necessity of the bill being amended in the respects pointed out, the only order which can be made at present is as follows: Leave is granted the complainant to amend, in accordance with the opinion of the court filed this day, on or before the 1st day of August next, and, if not so amended, the bill will be dismissed as of course, without prejudice and without costs.

POKEGAMA SUGAR PINE LUMBER CO. v. KLAMATH RIVER LUMBER & IMPROVEMENT CO.

(Circuit Court, N. D. California. August 7, 1899.)

No. 12,578.

1. ESTOPPEL—WAIVER OF BREACH OF CONTRACT.
   Defendant leased to complainant for a term of seven years a large lumber plant, which required for its successful operation a larger investment of capital than defendant could command. Defendant was to receive a share of the product, and the lease provided that the mill should be operated to its full capacity. During the first season it was not operated to its full capacity, nor to the extent it could have been, which fact was known at all times by the officers and principal stockholders of defendant, who, while making some complaint, made no claim to a forfeiture of the lease, but, on the contrary, after being informed in September that it was not the intention of complainant to further operate the mill until the following spring, continued to advise with complainant in regard to improvements and expenditures in preparation for future work. In February following, when complainant was ready to start the mill, and after it had expended in improvements and in procuring logs for the season's work upward of $70,000, defendant, without notice, took possession of the mill, and forcibly held it against complainant, claiming a forfeiture of the lease on the ground of a failure to fully operate the mill. *Held,* that by its conduct defendant had waived any breach of the contract in that regard, and was estopped to claim a forfeiture therefor.

2. EQUITY JURISDICTION—INJUNCTION—ADEQUATE REMEDY AT LAW.
   In such case complainant was without a plain, adequate, and complete remedy at law which would exclude the jurisdiction of a federal court of equity to grant an injunction against the continuance of the unlawful acts of the defendant, it being shown that complainant had purchased a large tract of timber land on the faith of the lease, and had cut several million feet of logs, which would rapidly deteriorate in value if not sawed.

3. SAME—STATUTORY REMEDY AT LAW.
   A remedy at law, to oust a federal court of equitable jurisdiction, must be one which existed at common law when the judiciary act of 1789 was passed, or which has been provided by congress; and a statutory action of forcible entry and detainer not maintainable in a federal court is not such a remedy.

4. SAME—ACTION OF EJECTMENT
   Where a lessee has been forcibly dispossessed by the lessor because of a failure to comply with the terms of the lease, which worked a technical forfeiture of the lease, but which the lessor is equitably estopped to insist upon, an action of ejectment does not afford the lessee an adequate remedy which will prevent him from maintaining a suit in equity in a federal court, as the equitable rights of the parties cannot be considered by such court in an action of ejectment.

This was a suit in equity to enjoin the defendant from forcibly interfering with complainant's possession of a lumber plant and sawmill under a lease. On final hearing.

E. S. Pillsbury (F. D. Madison and James F. Farraher, of counsel), for complainant.

F. S. Stratton (S. C. Denson, W. W. Kaufman, H. B. Gillis, and James R. Tapscott, of counsel), for respondent.

MORROW, Circuit Judge. This is an action to restrain the respondent from interfering with the complainant in the occupation,

conduct, and management of its lumbering business at Klamathon, in Siskiyou county, Cal. It is alleged in the bill that complainant is a corporation organized under and by virtue of the laws of the state of California, and that respondent is a corporation organized and existing under the laws of the state of Oregon; that on February 24, 1897, respondent and one Hervey Lindley entered into a written agreement by which respondent agreed to lease to Hervey Lindley or his assigns its entire lumber plant in Siskiyou county, Cal., and Klamath county, Or., for the term of two years from and after March 30, 1897, the consideration for the lease being an annual rent of one dollar per year and a division of the profits, by which respondent corporation was to receive one-third and said Hervey Lindley two-thirds of the total profits. It was further agreed that the said Lindley or his assigns should have the privilege of continuing the lease under the same terms and conditions to March 30, 1902, which privilege was afterwards extended by an additional agreement to March 30, 1904, and the division of the profits changed for this additional period to 45 per cent. for respondent and 55 per cent. for Lindley and his assigns. It is alleged that on April 7, 1897, respondent corporation made, executed, and delivered to Lindley a lease of all the property described in the agreement of February 24, 1897, and in accordance with its terms; that upon the execution of this lease Lindley signed and accepted the same, and entered into possession of the property mentioned therein, and undertook the management and operation of it as a lumbering business; that on the 15th day of September, 1897, Lindley sold, assigned, and transferred to the Pokegama Sugar Pine Lumber Company, the complainant herein, the said instrument in writing, and all his right, title, and interest therein, and thereupon the complainant entered into the possession of said property under and pursuant to the terms of said instrument in writing, and thereafter conducted, operated, and carried on the plant and lumbering business in accordance with the terms of the lease, and kept and performed all the covenants and requirements provided in the lease until the occurrence of the interferences, unlawful acts, and interruptions described in the bill; that the lumbering plant consists of a sawmill and log jack, with booms, lumber yard, tramways from the planing mill to the yard, planing mill, etc., on the bank of the Klamath river, at Klamathon, on the line of the California & Oregon Railroad, in the county of Siskiyou; a log slide about 24 miles above the sawmill; that the logs are conveyed to this log slide by a railroad about 9 miles in length, about 2 miles of which was actually built by complainant, and complainant holds the legal title to all of the railroad, together with the rolling stock, including the engine; that the logs hauled over the railroad are cut from lands occupied by complainant, and that respondent has no right, title, or interest in the lands whereon the logs were cut; that between the 7th day of April, 1897, and the ——— day of February, 1898, the said Lindley and complainant cut and caused to be cut 15,000,000 feet of logs, to be sawn at the sawmill during the sawing season of the year 1898; that of this about 4,500,000 feet were in the woods adjacent and contiguous to

the railroad, about 6,000,000 feet ready to be loaded upon the cars, about 4,500,000 feet in the river, accessible to the sawmill at Klamathon, and about 1,000,000 feet in the booms connected with the mill; that in cutting and preparing the said logs for the mill complainant had expended more than $50,000, and had expended more than $20,000 in equipping the mill, railroad, and other portions of the plant in readiness for operating the said plant during the sawing season of 1898, which began about the ——— day of February, 1898, and for which complainant had the whole plant in readiness; that on the ——— day of February, 1898, in the nighttime, respondent, acting by and through its president, J. R. Cook, and by W. E. Cook and John S. Cook, as directors and agents of said corporation, violently and by force of arms entered the sawmill, drove the watchman of complainant out of the sawmill, excluded the complainant therefrom by force and violence, and then proceeded to block up the said mill so as to prevent the use thereof, or the taking of logs from the booms or lumber from the yard, by barricading the openings of the mill; that in so forcibly taking and occupying said sawmill respondent employed not only its president, J. R. Cook, and its directors and agents, W. E. Cook and John S. Cook, but also from four to six fighting men, who entered the mill in the nighttime, armed with shotguns and rifles, drove out complainant's watchman by threats and violence, and have ever since remained in the mill, armed with shotguns, rifles, and ammunition, and by threats and force and the exhibition of firearms have excluded and still exclude complainant, its agents, representatives, and employés from the mill, and prevented the use and occupation thereof by complainant; that the cause and purpose of the forcible and violent entry by respondent was to compel complainant to abandon the said premises, and because respondent has entered into a contract for the sale of the said property, provided that it can deliver possession to the proposed purchasers, and that respondent has threatened to annoy and harass complainant so as to prevent its operating the plant; that the acts of respondent were not preceded by any peaceable entry upon the said property, or any part thereof, or any attempt to make such entry, or any demand upon complainant for the possession of the same, or the privilege of entering thereon, or any complaint that Lindley or complainant had failed to keep or perform any of the covenants or conditions of the lease dated April 7, 1897; that, on the contrary, on the ——— day of December, 1897, at the request of respondent, complainant furnished to it a written statement showing the result of the operations of Lindley and the complainant to that date; that respondent has never since interposed any objections, but that since that date complainant has continued to cut logs, to make repairs, and to conduct the lumbering business at an outlay of more than $10,000, all of which will be lost to complainant, as well as amounts heretofore expended, and profits which would arise, unless complainant can continue to operate the plant; that, on account of the violent and unlawful acts of respondent, complainant has suffered great and irreparable injury by delay and interference in the prosecution of its lumbering business, and, unless respondent be enjoined and

restrained from a continuance of its unlawful acts, complainant will suffer still greater and further irreparable injury and damage, and more particularly in this: that the season for floating logs down Klamath river will expire about June 1, 1898; that, the water in the river being unusually low this season, a shorter season than usual is to be anticipated; that, if the logs cut are not floated this season, they will suffer a deterioration of 50 per cent. in value, and will become a total loss if not used in 1899; that complainant has sufficient logs to run said sawmill at its fullest capacity during the remainder of the year, if not interfered with; that the said sawmill is the only one available to complainant, and the only mill to which the logs can be delivered; that there is no sale and no use for the logs except to be worked at the said mill; that by a failure to work said logs during the season of 1898 complainant will lose large profits which it would otherwise obtain therefrom, and which are not capable of accurate computation, and that by the wrongful acts of respondent complainant has been and is subjected to a daily expense of $100 or more, which is a dead loss to complainant; that respondent threatens to continue its interruptions and annoyances aforesaid, and will continue them unless enjoined and restrained by this court; that respondent is insolvent, and unable to respond in damages to complainant on account of the unlawful acts and injuries mentioned, and that complainant has no plain, adequate, and complete remedy at law.

On April 2, 1898, complainant filed an amended complaint, in which it alleges, in addition to the foregoing, that any judgment which might be recovered against respondent in an action at law would be wholly worthless, and could not be satisfied in whole or in part; that practically all the property of respondent situated within the state of California is in the county of Siskiyou, the full cash value of which, as stated by respondent to the assessor of that county, and as assessed by him, is the sum of $23,000; that this comprises the whole of the property of respondent, except a tract of timber land in the state of Oregon, of the value of not more than $10,000, which tract of land is mortgaged, and a small tract of land in Minnesota, mortgaged at more than its value; that respondent, for the purpose of placing all of its property beyond the reach of any execution which might be levied against it, mortgaged, on or about the ——— day of February, 1898, all the property belonging to it under the said lease, to the amount of $92,000, at the rate of 6 per cent. per annum; that the value of respondent's property does not equal the value of the mortgage liens and other incumbrances with which it is charged, and said property could not be sold for an amount to satisfy the liens existing upon it; that said property and plant were managed by respondent at a great loss of money, in consequence of which management respondent and its officers became indebted to the amount of more than $36,000, of which the sum of more than $12,000 is due to men employed by respondent, who are unable to collect their claims; that respondent did not pay its business obligations, and in consequence thereof many creditors were obliged to bring actions at law, and to attach portions of said lum-

bering plant and property; that in many of such actions judgments were obtained, and portions of said property sold under executions issued upon said judgments; that on or about the ——— day of May, 1897, a judgment for the sum of $800, or thereabouts, was obtained against respondent in the superior court, county of Siskiyou, in this state, upon a contract debt; that a writ of execution was issued and placed in the hands of the sheriff for the purpose of satisfying said judgment; and the sheriff under this writ sold the mill mentioned in the said lease, and the land upon which it stands, for $900, and that said property has never been redeemed from such sale; that respondent has during the term of three years allowed its taxes to become delinquent, and sales to be had of said property to the state for unpaid taxes; that at the time of the execution of said lease more than 85 per cent. of the capital stock of respondent was owned by J. R. Cook, W. E. Cook, and John S. Cook, and that all and each of them are insolvent, and unable to pay their debts as they fall due, and are not possessed of any property which could be levied upon to satisfy any judgment which might be recovered against them, and any judgment which complainant might recover for the wrongful interferences, interruptions, and annoyances aforesaid would be wholly worthless.

Upon the filing of the bill, on March 17, 1898, an order was issued requiring respondent to show cause why an injunction pendente lite should not be granted, and, upon complainant giving a bond in the sum of $10,000, a stay order was issued restraining the respondent from in any manner interfering with, impeding, or hindering complainant in occupying, conducting, managing, and carrying on all the property mentioned in the lease. On April 12, 1898, the respondent moved the court for a modification of the restraining order so that the respondent be not required to surrender the possession of the mill, office, and barn mentioned in the bill of complaint; that the complainant be ordered and directed to restore all of the property mentioned in the bill to the same condition, as regards possession thereof, as the same was in at the time of the filing of the bill, in so far as such possession may have been changed or affected by any order of the court. This motion was denied. Pokegama Sugar Pine Lumber Co. v. Klamath River Lumber & Improvement Co., 86 Fed. 528.

Respondent filed its answer on May 16, 1898, in which it admits the written agreement made with Hervey Lindley May 4, 1897, as stated in the complaint, and that the agreement was modified, as stated in the bill. Admits that a lease was made, executed, and delivered to respondent as set forth in the bill; admits that, on the execution of this lease by respondent, Lindley signed and accepted the same, and entered into the property described in the lease, and undertook the management of the logging (lumber) business. Denies that between April 7, 1897, and September 15, 1897, or at any time, Lindley operated and carried on the property pursuant to the terms of the lease, and kept or performed all or any of the conditions provided in the lease to be kept and performed by him, and avers that the lease provided that "the party of the second part hereby binds himself, his executors, administrators, or assigns, to take

possession of said lumbering plant, property rights, and franchises immediately upon the execution of this lease, to operate said plant as a lumbering business to its fullest capacity in keeping with the best business interests of said parties thereto, and to its profitable operation"; that the capacity of said lumbering plant now is, and on April 7, 1897, was, over 50,000 feet of merchantable lumber per day of 10 hours, or at least 13,000,000 feet of merchantable lumber for 10 months of 26 working days per month of 10 hours per day; and that it is practicable to operate the lumbering plant at all times of the year. Avers that, if Lindley had so desired, he could have had sufficient sawlogs at the boom to have commenced sawing on May 15, 1897, and could have kept the mill in operation, and could have cut therein 50,000 feet of merchantable lumber per day of 10 hours, or, by running two shifts, could have cut 100,000 feet of lumber per day, and could have kept the mill in constant operation since that day. Avers that from April 7, 1897, to September 15, 1897, while Lindley had the management of the sawmill and plant, the sawmill was operated in all 22 days, during 19 of which Lindley sawed 1,100,000 feet of lumber on his own account, and on the remaining 3 days Lindley sawed 150,000 feet of lumber from logs furnished by J. R. Cook, so that the entire product of the sawmill between April 7, 1897, and September 15, 1897, was 1,250,000 feet of lumber, whereas a reasonable product, allowing from April 7, 1897, to May 15, 1897, for making preparations, should have been 10,400,000 feet of lumber. Denies that complainant, subsequent to September 15, 1897, operated said plant in pursuance of the terms of the lease to Lindley, but avers that the mill has never been operated by complainant, and that no lumber was sawn therein after September 15, 1897, and prior to February 12, 1898. Avers that at or immediately after the execution of said lease Lindley conceived the idea of defrauding respondent out of the said property by so mismanaging the lumbering business as to produce no profits, and so distress respondent, which was at that time embarrassed for want of sufficient funds with which to carry on its business, and, as was well known to Lindley, had leased the plant to him upon that account, principally upon his assurances that he would operate the plant to its fullest capacity, and so as to secure respondent an income from the business; and that, if respondent had not relied upon such promises, it would never have consented to the said lease; that it was fully understood between Lindley and respondent that the sawmill plant was of great value, and had cost not less than $400,000, and that the sawmill had the capacity to cut 5,000 feet of good merchantable lumber per hour, and could, by running 10 out of each 24 hours, cut and manufacture at least 50,000 feet of such lumber; and that with reasonable management and energy the said sawmill could in each year cut and manufacture 26,000,000 to 30,000,000 feet of such lumber. Avers that all the conditions were favorable to the carrying on of the business throughout the entire year; that the logs could be floated down the Klamath river from the timber lands, and a constant supply kept at the boom at any time, and that the mill could be operated at least 300 days a year; that

upon each 1,000 feet of lumber manufactured intelligently and economically in the said mill there is a net profit of from $3 to $29, and an average profit of not less than $6, and the annual net profits of the mill under reasonably good management are and should not be less than $150,000; that all these facts were well understood and known by both parties at the time the lease was made; that, if Lindley had performed his part of the contract, respondent would have had an income from the plant of not less than $50,000; that Lindley neglected to repair the logging railroad so as to keep it in order; that at or immediately after the execution of the lease George Mason, Dean Mason, and John E. Coffin combined with Lindley in his schemes to defraud respondent; that in the month of September, 1897, he and they formed the complainant corporation, to which the lease was assigned, and ever since that time they have carried on the same scheme for the injury of respondent. Denies that respondent, acting through its president, J. R. Cook, and W. E. Cook, and John S. Cook, or either or any of them, forcibly entered the mill and committed the acts complained of in the bill. Avers in this behalf that complainant had, by its neglect, damaged respondent in the sum of not less than $41,000, and that respondent's attorney had advised it that it had the legal right to reoccupy the sawmill and plant, and to hold and use it; that on or about February 12, 1898, respondent sent its employé John S. Cook and three other employés, at about 8 o'clock in the evening, to take possession of the said sawmill, and these employés did take possession of it, quietly and without force, on behalf of the respondent, and, in order to retain such possession, proceeded to and did inclose the said sawmill with lumber; that it is not true that respondent, in so occupying the sawmill, employed from four to six fighting men, nor any fighting men whatever, nor that these fighting men drove away complainant's watchman with threats and violence. Avers that when John S. Cook and others entered the sawmill complainant's watchman departed without the use of any force, violence, or threats, and respondent entered into and maintained quiet possession thereafter. Admits that respondent's agents and employés did bring guns into the sawmill, so as to make a show of force, owing to an anticipation of violence on the part of complainant's agents. Admits that it claims the right to the possession of the said sawmill and all other property embraced within the lease of April 7, 1897. Avers that, if Lindley and complainant had exercised reasonable business care and energy, a sufficient quantity of logs could have been cut, hauled, and deposited in said river, and floated down to said sawmill, during the year 1897 and January, 1898, to have kept said sawmill constantly in operation during the whole of the year 1898, but that in this respect complainant and Lindley have been careless and indifferent, and have neglected to perform their duties under the lease. Avers that respondent is solvent, and amply able to pay any judgment which complainant might obtain in an action at law against respondent. Avers that respondent in good faith executed a mortgage to B. A. Watkins for $92,000, with interest at 6 per cent. per annum, upon the premises named in said lease and other property.

which property was worth more than double the amount of incumbrance, and the execution of the mortgage was rendered necessary by the unlawful and dishonest acts of the said Lindley and complainant. Denies that the property belonging to respondent does not equal the amount of mortgage liens and incumbrances with which it is at present charged, but avers that the property can be sold for more than $100,000,—more than enough to pay the said mortgage and existing indebtedness of respondent. Denies that it is now, or has at any time been, insolvent. Denies that respondent has not paid its demands, debts, and obligations as they have arisen, and that creditors of respondent have been obliged to bring suit against it, and to attach portions of the lumbering plant and property, and that portions of said property were sold under execution for the purpose of satisfying the demands of creditors, except that in one case suit was brought, and the demand has been fully paid and settled. Denies that a judgment for the sum of $800 was obtained against respondent in the superior court of the county of Siskiyou, or in any other court, upon a contract debt or any other debt, that a writ of execution was issued thereon, that the sheriff of the said county, pursuant to this writ, sold the said mill and the land upon which it stood for the sum of $900, but avers that a judgment was obtained against a third party, upon which an execution was levied upon the said mill, and the sheriff proceeded to sell the said mill, against the protest of respondent; that since said sale said judgment has been paid and satisfied, and any cloud created upon respondent's property has been removed. Avers that respondent has settled demands for taxes, except one old unsettled demand for taxes in the state of Oregon, amounting to about $600. Denies that J. R. Cook, W. E. Cook, and John S. Cook, or any of them, are insolvent, and not possessed of sufficient property to satisfy any judgment which might be levied against them. There are many other denials and averments in the answer, but those stated are sufficient to disclose the questions at issue.

On November 17, 1898, complainant, by leave of court, filed an amendment to the bill of complaint for the purpose of presenting its case in another aspect. In this amendment to the bill it is alleged, among other things: That at the time respondent entered into said mill and commenced its interference with complainant, on February 12, 1898, respondent declared that it did so because of the noncompliance of complainant with the terms of the lease requiring complainant to operate the said plant to its fullest capacity. Avers that respondent ought not to be heard to say that complainant had forfeited any rights by reason of its operation of the said plant, because during all of the time commencing with April 7, 1897, and ending with September 15, 1897, Hervey Lindley in good faith had operated the plant in accordance with his best and honest judgment that the plant should be operated in keeping with the best business interests of the parties to the lease, and from the 15th of September, 1897, to the unlawful interference by respondent, complainant continuously operated the said plant in a manner which, according to its judgment, was the only manner in which the plant could be operated to its fullest ca-

pacity in keeping with the best interests of both complainant and respondent; that the plan adopted by Lindley and complainant was adopted about the time the lease was executed, and thereafter the plant and property were operated continuously in accordance therewith; that this plan was fully known to respondent, and respondent had full knowledge of all that was done about the operation of said plant; that prior to February 12, 1898, no objection or complaint was ever made by respondent of the manner in which the lumbering plant was operated; that during the said time money was continuously expended by Lindley and complainant in accordance with said plan, and that no complaint was made, and no notice given by respondent to complainant, that the plan of operating said plant was not in accordance with the terms of said lease as understood by respondent; that no notice was ever given by respondent to Lindley or complainant that respondent ever claimed, or would claim, that Lindley or complainant had lost or forfeited any right under said lease, or that respondent would claim the right to or would enter upon the property under the right so to do in certain events provided in said lease; that up to February 12, 1898, respondent recognized that the lease was in full force and effect, and that Lindley and complainant were entitled to all the rights and bound by all the liabilities thereunder. Avers that the plan according to which the said plant was operated by Lindley and complainant had the approval of respondent up to the time of the unlawful interferences aforesaid; that, in order to operate said lumber plant, etc., according to said plan, it became advisable and necessary for complainant to enter into a contract for the purchase of timber lands in the neighborhood of the logging railway described in said lease, and that with the knowledge and according to the advice and instigation of respondent, complainant entered into a contract with the California & Oregon Railroad Company for the purchase of 14,000 acres of timber land, and agreed to pay therefor $6.50 per acre, making a total of nearly $90,000, for which amount complainant is liable under said contract; that, if the unlawful interferences complained of in the original bill are persisted in, complainant will have no use for said timber lands, and will suffer immense damages in this respect, which will be entirely irreparable and irrecoverable against respondent.

Upon the issues thus presented by the pleadings, the case was tried upon its merits in November, 1898. Witnesses were called and examined in open court, and documentary evidence introduced in support of the claims of both sides, and particularly with respect to the main question of fact whether on February 12, 1898, the complainant had incurred a forfeiture of the lease by reason of its failure during the preceding 10 months to operate the leased property as a lumbering business to its fullest capacity, in keeping with the best business interests of all concerned. The sawmill and appurtenances constituting part of the lumbering plant described in the bill of complaint are located at Klamathon, on the Klamath river, in Siskiyou county, Cal., near where the California & Oregon Railroad crosses the river. The remainder of the plant consists mainly of a log slide or chute about 2,700 feet long, 26 miles up the Klamath river, the franchise

for floating logs from the slide to the mill, and a logging railroad extending from the slide into the timber a distance of about 9 miles, together with an engine and a number of cars for hauling logs from the logging camp to the river. It is contended on the part of the respondent that the evidence shows that the mill at Klamathon has a capacity for sawing 70,000 feet of lumber per day of 10 hours each, or 1,820,000 feet each month of 26 working days, and that it had an aggregate capacity of 12,740,000 feet for the remaining 7 months of the year 1897 after the complainant's assignor entered into the possession of the plant on April 7th and was ready to commence work, and that logs sufficient to produce this amount of lumber and keep the mill continuously in operation could have been cut, loaded on the cars, hauled to the log slide, deposited in the river, and driven or floated to the mill during this period. The evidence shows that during these 7 months the mill was in operation only 22 days in the month of August, and that the amount of lumber sawed was 1,096,223 feet of the complainant's logs and 168,959 feet of logs belonging to the Klamath River Lumber Company (John R. Cook). Upon this evidence and testimony relating to the method adopted by the officers of the complainant for operating the plant, the respondent claims that there was a forfeiture of the lease at the time it undertook to regain possession of the sawmill and other property belonging to the plant.

As the conduct of several parties connected with the two corporations that are parties to this suit will be a subject of consideration in determining the questions at issue, it will be necessary to explain preliminarily their relation to the business and affairs of these two corporations. John R. Cook, the president of the respondent corporation, its manager and principal stockholder, purchased in 1892 the property located at Klamathon, which he afterwards developed into the plant in controversy. This development he accomplished by the investment of considerable capital of his own and the incurring of individual obligations in a large amount. These individual obligations appear to have been incurred in the name of the Klamath River Lumber Company, a name assumed by Cook for the purpose of carrying on his personal business. John R. Cook has two sons, William E. Cook and John S. Cook, who have assisted their father in the management of his business, and who have been and are stockholders in the respondent corporation. In the latter part of 1896 and the early part of 1897 John R. Cook found that his personal obligations in the name of the Klamath River Lumber Company had become so large, and of such a pressing character, that he was unable to continue the operation of the lumber plant successfully without financial assistance. At this juncture of affairs, Hervey Lindley, of Los Angeles, Cal., appeared at Klamathon, in January, 1897, and looked over the plant. In February, 1897, he appeared again, and opened negotiations for an option to lease the property, making such representations as to his ability to secure means to operate the plant that John R. Cook, on February 24, 1897, entered into such an agreement on behalf of the respondent corporation. This agreement provided for the terms of a lease, and provided further that Lindley or his assigns

should have until March 30, 1897 (afterwards extended to April 10, 1897), in which to accept or refuse the propositions contained in the agreement. Before this option expired, Lindley made an examination of the entire plant, and brought to Klamathon, among others, George Mason, of Los Angeles, who was to furnish the necessary funds to carry on the enterprise, if a lease should be obtained. The result of these examinations of the property and the attending negotiations was the execution of a lease of the property by the respondent to the complainant on April 7, 1897. The complainant contends that the evidence shows that it was understood between the parties to this lease that the first year was to be a preparatory year for the balance of the term, and that the special effort of the first season was to be directed to getting out a stock of logs for the active operations of the second year. This claim is based in part upon an added condition to the original option, dated April 1, 1897, providing for an extension of the term of the lease for a period of two years from March 30, 1902, as originally provided, to March 30, 1904. In his testimony Lindley explains the circumstances under which extension was made as follows:

"After we made this trip over the property, we came to Klamathon, and discussed the matter in the office with the Cooks. John R. Cook, W. E. Cook, and John S. Cook were there. They were all of them there off and on, and most of them all the time. Mr. Mason said that the time, as contemplated in the lease, was not sufficient to justify the putting in of the money that would be necessary to operate it, and that he would not feel inclined to go into the proposition on a five-year lease. He said: 'We are none of us lumbermen. Mr. Lindley has had some experience in lumbering, but none of us outside has, and he has got the trade to learn over again, as he has been out of the business a long while;' and he said: 'Unless there is a further extension put into this lease of two years, I would not care to engage in it.' It was on the statements made by him at that time that the extension of two years was provided for in the lease."

Lindley was asked if the shortness of the first season entered into consideration in making the extension. His reply was that "it did. The statement was made there by him (Mason) that this year had gone so far past that it could not be anything more than a preparatory year at best."

George Mason, in his testimony, gives the details of this conversation, as follows:

"I objected to the arrangement on account of the shortness of the time, and during that conversation I called attention to the fact that it was then getting along in the spring pretty well; that the roads were impassable; that there were scarcely any provisions at the camp, and none down below; and that the length of time that it would require before they could get provisions in there, and before the roads would be sufficiently dried so that they could be hauled up there, and before they could have moved their camp or built another, was necessarily a lot of time; that those things would necessarily take up a lot of time. Then I went on to explain to them that we were new in the business; that we none of us understood the business very well; that, while it was true that Mr. Lindley had previously had quite a good deal of experience in the retail business, even he had had no experience to amount to anything in manufacturing, and that we practically had the business to learn; that we had to close up our affairs where we were, and get moved up there. I told him that we would absorb so much time in those things,—in learning this trade; that the trade was not only new, but that the locality was new, and we had to become familiar with the surroundings, and had to look up and establish

markets; and all those things would require a great deal of time, and the first thing we would know the season would have slipped by, and very little lumber would have been cut."

John R. Cook testified that there never was anything said by Mr. Lindley about preparatory year or experiments, or anything of that kind; that Mr. Mason did intimate something of that kind, and the witness said:

"Gentlemen, if you want this property to experiment with, I don't want you to talk any more to me. We want money. It takes money to run a sawmill. If you don't want to put the money in, I don't want you to talk any more to me."

This witness was subsequently interrogated as follows:

"Mr. Lindley says that it was represented to you that they could not go to work that year; that the first year would be a preparatory year; and, upon that representation being made to you, you agreed to the extension for two years. Is that true? A. No, sir. Q. You say that is not true? A. No, sir; that is not true. Q. That you are certain about? A. That I am certain about. That is emphatically not true. Q. What did induce you to make this extension? You made it? A. Yes, sir. I cannot think of anything any further than Lindley talking to my oldest son, and insisting on his getting my consent to this extension for fear Mr. Mason might back out of the whole trade, and it would fall through. I can't think of anything else."

W. E. Cook, in his testimony concerning this same conversation, denies that anything was said about the first year being a preparatory or experimental year. He was asked the question:

"Was anything said about the first year being an experimental year? A. No, sir. Q. Was there anything said about extending the agreement in regard to using the first year for preliminary work, or anything of that character? A. No, sir. Q. When was it agreed upon that they should commence operations? A. They were to commence immediately. Q. And how should they run after commencement? A. To their fullest capacity. And they were to make certain improvements. They were to add a re-saw to increase the capacity that year."

John S. Cook testified that he was present during most of the time the negotiations were in progress which led up to the extension of the lease for the period of two years beyond the original stipulated time. He was asked what occurred. He said:

"The entire negotiations seemed to be hanging fire just about that time. Mr. Mason did not seem to be very anxious to go in, and my father did not seem to care very much about having him come in. Finally Mr. Mason said that he did not like the terms as they then stood, and he thought they needed more time all round; that the present one would probably be a short season, and if they decided not to buy, or not to extend the lease, that they wanted more time to clean up in. He said they would have a great deal of money in the business by that time, after these number of years of operating, and it would take some time to get this money out, and he did not want to put his money in on such a short term of lease. Q. What was said about the first year being experimental or preparatory, if anything? A. I don't remember anything of that kind at all. Q. Would you have remembered it if it had occurred? A. I think so; yes, sir."

He says, however, that about that time he was called into another room by Lindley. This testimony was not admissible as varying the terms of the written contract entered into by the parties at that time, but, considering it as showing the circumstances under which the contract was made, it certainly does not establish the

complainant's claim that the first year was to be a preparatory or experimental year. It does, however, show that under all the circumstances the first year would necessarily be a short season for the operation of the plant as a lumber-producing concern. But, giving this fact all the weight to which it is entitled, it is not sufficient to explain the failure of the complainant to operate the sawmill for more than 22 days during that year, and the consequent failure to produce altogether more than 1,265,181 feet of lumber. It appears that the respondent had operated the plant from March 2, 1893, to February 3, 1894, producing 7,340,000 feet of lumber; from June 9, 1894, to September 6, 1895, producing 13,064,000 feet; and from October 13, 1895, to October 13, 1896, producing 8,660,000 feet; and these operations were not profitable, because not sufficiently large. It is in evidence that it was for the purpose of securing sufficient capital to operate the plant up to its fullest capacity, as provided in the lease, that the contract now under consideration was entered into by the respondent. The failure of John R. Cook to manage his corporation successfully does not appear to have been by reason of any lack of experience or knowledge of the lumber business, but a lack of means to meet his current obligations while producing lumber and accumulating a stock on a large scale.

This brings us to the consideration of the testimony relating to the management of the plant by Lindley in his own name from April 7, 1897, to September 15, 1897 (when the lease was assigned to complainant), and as the manager of the complainant corporation during the remainder of the year 1897. The lease of the property by the respondent to Hervey Lindley was executed April 7, 1897, and on April 12, 1897, Lindley entered into an agreement with one David Horn wherein the latter agreed to commence logging immediately on section 31, township 40 S., range 5 E., W. M., situated in Jackson county, Or., cut timber as directed, and load the same on the cars at $1.85 per 1,000 feet, payable in cash on demand upon the scale certificate of logs having been loaded on the cars. There is testimony directed to the question whether it would not have been more advantageous to have commenced logging on section 29 in the same township, rather than on section 31, for the reason that the location of section 29 was claimed to have been such that a larger and earlier stock of logs could have been secured from it than from section 31; but the testimony does not establish the fact that logging could have commenced on section 29 any earlier than on section 31, but rather the contrary. It does appear, however, that section 29 was nearer the line of railroad, after the road was extended, than was section 31, and that after such extension logging was in fact carried on more rapidly than on the latter section. In this connection it is claimed by the respondent that the mill could have been started up, had reasonable diligence been exercised, in six weeks after the lease was made, and could have been kept continually running up to the date when the Cooks undertook to obtain possession of the plant, in February, 1898; and the fact that logs were not delivered to the railroad in the timber until six weeks after the signing of the lease, and none were delivered at the mill in quantity until a drive of logs

was made in the latter part of July and the first of August, shows, it is claimed, one of the failures on the part of Lindley to carry out the terms of the lease. The sufficient answer to this claim is that Horn had been logging for the Cooks the previous year, and had the necessary horses, wheels, and gear constituting the outfit for this particular character of work, and no one else in that country had all these appliances. It appears further that Lindley did endeavor to hurry the commencement of the work. He urged Horn to commence bringing in logs as soon as possible, to use his men to the best advantage, and to get out as many saw logs as he could; and the latter testifies that he did the best he could, but the preliminary arrangements took time, and besides the ground was too soft to log before May 18th, when the logging did in fact commence. This evidence does not appear to support respondent's claim that there was a failure at this time to carry out the contract. It was apparently good judgment to commence logging on section 31, and logs were obtained from that section as soon as possible. But, after logging had commenced, and had been carried on for a short time, Lindley does not appear to have been so urgent as at first in rushing the work to secure a large supply of logs for the mill during the first season. Horn's logging contract provided that he should cut timber as directed by Lindley. Under this authority Lindley undoubtedly had the power to require Horn to work to the full capacity of his outfit, and even to enlarge it if necessary, to get out logs during the spring and summer in sufficient quantities to supply the mill to its fullest capacity for the whole season. But, instead of pushing logging operations at a time when such activity would be of substantial advantage in securing early and continuous results in the production of timber at the mill, he limited Horn in the use of an outfit, and required that he should not use, on section 31, to exceed 24 head of horses and corresponding appliances. This limitation reduced logging operations on this section to little less than the capacity of the railroad to transport the logs to the river. Horn testifies that there were times when waiting for the loading of cars the trains were delayed, and at other times trips were lost. Horn further testifies that when he first started logging Lindley was very anxious to have the logs in so he could get the mill started, and he hoped to keep it running, but later on Lindley told him that he was going to saw up what logs he could get into the river until they went down, and then he was not going to saw any more until next year. Lindley testifies that he made no such statement to Horn. Horn, on the other hand, testifies that Lindley's reputation for truth, honesty, and veracity is bad, and the testimony of Dr. G. W. Dwinelle is to the same effect. This last witness also testifies that in the summer of 1897 Lindley told him that he had operated the plant sufficiently to demonstrate that lumber could be produced at a profit, and that was all he cared to do that summer. The deposition was taken of W. W. Hall, the foreman logger under Horn. He testifies that he talked with Lindley about the logging, and advised him that they could do better to log first from section 29, and afterwards from section 31. Lindley replied that he supposed they could, but he did not intend to do a great

deal the first year; he just intended to get ready, and log the second year. This conversation occurred about the middle of June. There is other testimony substantially to the same effect, but it is not necessary to pursue the subject further. The fact appears sufficiently established that there was no great effort on the part of Lindley to secure from the logging operations a full supply of logs for the mill for the first year.

Turning now to the railroad, we find in its later operations, during the season, evidence of the same purpose not to carry logs to the river so that they might be driven down the river to the mill in large quantities during the summer and early fall of 1897, but a design to postpone this work until the next season. The first logs were delivered at the railroad on May 19th, and these were hauled to the log chute or slide on the river and deposited in the river on the same day. The evidence shows the operations of the railroad as follows:

Logs hauled and placed in river between May 19th and 31st	504,368	feet.
Logs hauled and placed in river between June 1st and 24th	913,288	"
Logs hauled and placed in river between July 7th and 14th	485,612	"
Logs in river on July 14th	1,903,268	"
On July 14, 1897, the first drive of logs was made from the chute to the mill. The drive was completed on August 11, 1897, and resulted in delivering at the mill about	1,000,000	"
Leaving in the river between the mill and chute	903,268	"
Logs hauled and placed in river between August 11th and 31st	1,207,589	"
Logs hauled and placed in river between September 1st and 22d	995,787	"
Logs in the river September 22, 1897, when cutting on section 31 had been completed	3,106,644	"

Between May 19th and July 14th the railroad was in operation 35 days, and idle 13 working days. It is explained on behalf of the complainant that these idle days were caused by the breaking of the log chute. Between July 14th and September 22d the railroad was in operation 34 days, and idle 26 working days. It is explained that these idle days were also caused by the breaking of the chute, and the further fact that the railroad train was in the custody of the sheriff for the period of 10 days under an attachment against the property of John R. Cook. Deducting these 10 days when the train was in the hands of the sheriff as not properly chargeable to any fault of the complainant or his assignor, there remain 28 working days in a period of 4 months for which there is no explanation except that the train was stopped because the log chute was being repaired. It must be apparent that in an enterprise of this character, where

so many men were employed, and such large interests were involved, this explanation is not entirely satisfactory. There is testimony tending to show that the chute was not properly looked after, and that more care and attention in making timely repairs would have prevented much of the damage it received. This was probably the fact, but it is clear that the chute either ought not to break so often, or be repaired with less loss of time, if the plant as a whole was to be worked to its full capacity.

When cutting on section 31 had been completed, on September 22, 1897, there remained on that section logs skidded up alongside of the railroad to the amount of ..... 342,527 feet.

Logging was then commenced on section 29, township 40 S., range 5 E., W. M., but these logs were not hauled to the river. They were skidded up near the railroad track, and kept there until the next year. The logs skidded were as follows:

September 30th.....	135,705	"
October 1st to 31st.....	2,423,016	"
November 1st to 8th.....	562,149	"
Total logs skidded.....	3,463,397	"

Why were not these logs hauled to the river, and floated or driven to the mill during the months of September, October, and November? There were logs left in the river from the July drive amounting to about 903,268 feet, which would have made the total quantity about 4,366,665 feet. Lindley was asked this direct question when he was on the stand:

"Why did you not put any more in the river, and why did you not make a drive? State why you did not, and why you skidded the logs alongside of the railroad track." His reply was: "We made that one drive, and it was expensive. I talked with Mr. Will Cook in particular about it, and he advised me not to drive any more. We had in the river as many logs as we cared to take the chances of losing in the freshets in the winter rains. We did not dare put any more in the river for fear we would lose them. We thought the best way was to skid them along the railroad track. I instructed them to skid them here at the top of the log chute, but they failed to do it. They did skid them along the track, which was better than to drop them in the river, and take the chance of losing the logs by a rush of water in the winter time. They claimed that that river was susceptible to floods at certain seasons,—in January, and perhaps February,—and they have floods there that have taken large quantities of logs over the dam. When they go over the dam, they are lost."

Lindley's theory was that, as the river was subject to floods in January and February, the logs in the river at that time were liable to be carried down the river, and over the dam, and lost, and that the better policy was to accumulate a stock of logs at the log chute, on the river bank, and commence depositing these logs in the river as soon as the danger of a flood had passed in February, and continue this operation during the months of March, April, May, and June. In this way it was claimed that many logs would reach the mill without driving, and the expense under such circumstances would be from 15 cents to 25 cents per 1,000 feet, while driving the

river later in the season, and during low water, would cost much more. He testified that the cost of the drive that was made in July, 1897, was 90 cents per 1,000 feet; that in 1898 four drives of the river were made, the first one commencing the latter part of May, and the last one ending in the fall. The aggregate of these drives was about 9,100,000 feet. The cost of the first drive, of 1,300,000 feet, was 35 cents per 1,000 feet; the second, of 2,700,000 feet, was 70 cents; the third, of 2,500,000 feet, was 90 cents; and the fourth, of 2,600,000 feet, was $1.25,—the average for the whole season of 1898 being 86 cents per 1,000 feet. It appears from this statement that the increase in the cost of driving the river as the season advanced and the water became low, which was an objection in 1897, was not an insuperable objection in 1898. If it was good policy to drive the river in 1898, even under an increase of expense, in order to furnish the mill with logs to keep it in operation, it would seem to have been good policy to have carried out this plan in 1897. Moreover, the decking of the logs by Horn alongside of the railroad in 1897 was an extra expense for which Lindley had to pay 25 cents per 1,000 feet. This expense would have been avoided if the logs had been hauled directly to the river. The excuse advanced by Lindley that the driving of logs down the river in the fall of 1897 would have been expensive is not, therefore, under the circumstances, a sufficient reason for keeping the sawmill in idleness for months after sawing up the small stock of 1,000,000 feet in August.

Lindley's next reason for not driving the river after August, 1897, was that William E. Cook advised him not to drive any more. William E. Cook testifies that he gave no such advice; and John R. Cook, whose experience and interest entitle his views to some consideration, testifies that he urged Lindley to keep putting in more logs. He was of the opinion that the river could be driven every day of the year, and that the work should not be stopped. Lindley's next reason for not keeping logs moving down the river in the fall was that they had in the river as many logs as they cared to take the chances of losing in the freshets in the winter rains. These freshets, he says, were liable to occur in January and February; but, notwithstanding his apprehension in this respect, it appears that the railroad did commence hauling logs again on December 28, 1897, and between that time and February 10, 1898,—the most dangerous period of the year,—there were placed in the river a stock of logs amounting to 927,758 feet, which, together with the logs already in the river (3,106,644 feet), made an aggregate of 4,034,402 feet of logs in the river during all the winter months. Whatever danger there may have been in the loss of a considerable quantity of logs from freshets in January and February was, therefore, in fact incurred by the accumulation of this large stock of logs in the river. It is manifest that under these conditions the safer course was to have driven these logs down the river to the mill, and had them taken out and sawed into lumber; and this was precisely the plan of operation pursued during the season of 1898, when, notwithstanding the water was lower in the river than in 1897, over 9,000,000 feet of logs were driven down the river between May and Novem-

ber, and at the latter time no considerable number of logs remained in the river in danger of being lost, while a large stock of lumber was accumulated at the mill for the market. Now, if, in addition to driving the 3,106,644 feet of logs that were actually placed in the river prior to September 22, 1897, the logs skidded in the timber prior to November 8, 1897, and amounting to 3,463,397 feet, had also been hauled to the river as they were being cut, and the whole stock of 6,470,041 feet driven down during October and November, the driving would have been entirely safe, and there would have been a saving of expense, not only in the amount paid for skidding the logs in the timber, but in the less expense proportionately for making large instead of small drives. This method of operating the plant would have kept the mill running to its full capacity for four or five months during 1897, and placed lumber on the market with profit to all concerned, leaving six or seven million feet of logs in the timber with which to commence operations in the following spring. In determining that the plant could have been operated successfully in this way during the season of 1897, and should have been so operated to comply with the terms of the lease, the fact is not overlooked that after September 22, 1897, the railroad was extended a distance of a mile and a half or two miles through section 29 and into section 19, and that the rolling stock of the road was used to carry rails and ties in this work of construction; that there was also during this time some repairing done to the main line and to the rolling stock of the road; but it does not appear that this work need to have interfered with the hauling of logs to the river for any great length of time, and certainly cannot be considered as any excuse for suspending the operations of the railroad for a period of four months.

But another aspect of this case remains to be considered. The Cooks resided at Klamathon, and during the season of 1897 they observed the plan pursued by Lindley and his associates in carrying on the work and business affairs of the plant, and, while it is true that John R. Cook continually urged Lindley to adopt methods of operation that would have secured more immediate and possibly better financial results, he gave no notice or warning to the lessee that he would claim a forfeiture of the lease until he and his sons undertook to regain possession of the plant on the night of February 12, 1898. When the placing of logs in the river from section 31 was suspended, on September 22, 1897, the Cooks knew that no more logs were to be driven down the river that season, and no more lumber could be sawed at the mill until the next season. Indeed, this fact was known to John R. Cook as early as September 1, 1897, when Mason testifies that he had a conversation with Cook about the operations of the plant, and the latter complained that Lindley had promised to assist him in getting a loan, and had failed to do so. Mason says:

"He [Cook] said he might be mistaken; he hoped he was (the old gentleman talked very nicely about it); but he said he did not think Mr. Lindley was going to be a success in the business. I asked him why, and he said there was not being as much accomplished as there should be; that we had virtually

gotten through sawing, and that there would not be any more cut. That was understood in our conversation,—that they would not do anything to saw any more that year,—and he seemed to think there had not been as much accomplished in that way as there should have been. I called his attention to the conversation that we had had in the spring, and told him that we had gotten along about as well as I had supposed we could in getting ready; and when I called his attention to that conversation it seemed to change his mind quite a good deal."

Here was a period of more than six months, during which time all the facts were present upon which a forfeiture could be claimed by the respondent on the ground that the plant was not being operated as a lumbering business to its fullest capacity, but the Cooks stood by during all this time, and made no move, except that John R. Cook, in September or October, communicated to one of his Eastern creditors the information that the contract was not being carried out, and he believed that it was going to be a "freeze out." This information appears to have been the commencement of negotiations with other parties for the formation of a corporation to operate the plant after possession had been obtained by the forcible seizure of the mill and appurtenances as finally executed by the Cooks on the night of February 12, 1898. But all these proceedings prior to the assertion of a claim of forfeiture of the lease were carried on without the knowledge of Lindley or his associates. The bad faith involved in these proceedings on the part of the Cooks is disclosed by a brief statement of some of the acts of Lindley and his associates in carrying out the terms of the lease upon the plan of operations adopted by them. One of the reasons given by John R. Cook for leasing the property was that it could only be operated successfully by the investment of a large amount of capital. There is no complaint that this was not done by the lessee. It appears from the testimony that prior to February 12, 1898, the complainant had expended upon the plant and in securing the stock of logs then on hand upward of $70,000, and the only means it had for reimbursing itself for this outlay were these logs and the proceeds from the sale of about 1,000,000 feet of lumber. The value of the logs to the complainant was dependent almost entirely upon having possession of the mill, and being able to cut them into lumber, since there was no other mill in the neighborhood. With the mill in the hands of the respondent or a corporation under the control of the Cooks, the complainant would be helpless to protect itself in disposing of this large quantity of logs. It appears further that no timber lands were included in the lease, but logs were obtained by the complainant from lands purchased from the California & Oregon Railroad Company, the complainant succeeding to the interest of the Cooks in certain contracts between them and the railroad company. The last of these contracts assumed by the complainant was for the purchase of 13,851 acres of timber land at $6.50 per acre, amounting to $90,000, and the contract between the complainant and the railroad company was dated December 6, 1897. But not only did the Cooks give a passive assent to these extensive preparations for future operation of the plant, but it appears that they conferred with Lindley with respect to certain details. About September 24, 1897, Lindley visited the East to see about the placing of lumber in

the Eastern markets, and to ascertain whether it would be safe to make a large cut of lumber with any expectation that a market could be found for it. On Lindley's return, about November 21st, he stopped at San Francisco to examine a donkey engine to be used in the woods for logging purposes. When he arrived at Klamathon, about November 24th, he repeated to the Cooks what he had found in the East, and the prospects of the lumber market. He also conferred with them at that time about the advisability of purchasing a donkey engine for use in the woods when the ground was soft, and wheels could not be used, and he exhibited the cut of one he thought suitable for the work. John R. Cook advised the purchase of a better one, on the ground that the best was the cheapest, regardless of cost. Lindley purchased the one he had examined at a cost of between $1,700 and $1,800, and when it arrived at Klamathon the Cooks assisted in unloading the engine from the cars and loading it onto wagons for transportation to the woods. On October 15, 1897, James Steel, the secretary of the respondent corporation, located at Portland, Or., addressed a communication to Lindley, as the manager of the complainant, demanding a statement of the business, as follows:

"Hervey Lindley, Esq., Klamathon, Cal.—Dear Sir: Please prepare and forward a statement of the business of the Klamath River Lumber & Improvement Company from the time you took possession under your lease until the present time, showing condition of the business under your management. This request is made upon you under the terms of the lease. Your prompt attention and compliance with this request will greatly oblige,

"Yours, very truly,

"Klamath River Lumber & Improvement Company,

"By James Steel, Secretary."

It will be observed that it is expressly stated that the demand is made under the terms of the lease. This communication was acknowledged by Lindley under date of November 22, 1897, and a statement forwarded in a letter dated December 17, 1897, as follows:

"James Steel, Esq., Secretary Klamath River Lumber & Improvement Co., Portland, Oregon—Dear Sir: In accordance with your request, we hand you herewith balance sheet December 1, 1897. We have everything in good shape for a business of 15,000,000 this year, and have 10,000,000 logs now cut. Will start the mill in January, weather permitting. Hope to have a railroad from mill to timber next season. The river is the trouble here.

"Yours, truly, Hervey Lindley, Manager."

A further statement was called for by Steel under date of December 21, 1897, to which Lindley replied, under date of December 24, 1897, as follows:

"James Steel, Esq., Secretary Klamath River Lumber & Improvement Co., Portland, Oregon—Dear Sir: Your letter 12/21/97 at hand, and in reply to your inquiry as to general information about the business we are doing will say we sawed in all a little over a million of our own stock. Getting a late start, and everything disorganized, we could only make this year virtually a preparatory year for the coming one, and we hope, barring accidents, to cut 15,000,000 this coming year, and expect we have 10,000,000 now cut, and expect to start the mill in January, and run it ten months, and hope we may get good results, and, with market as at present, prospects are good. We have had a great deal of expense, almost as much as we should have for a full year's business, and this plant can only be operated on a large scale to pay,

and we will try that, and see if that can be made profitable. With compliments of the season, and expressing our desire to hear from you often,

"Yours, truly, Hervey Lindley, Manager."

To these statements by Lindley as the manager of the complainant no objection was made by the respondent, and no complaint made that the lease had been forfeited. About the 4th or 5th of February, Lindley had a conference with John R. and William E. Cook concerning the addition of a box factory to the plant. There was one already on the premises, not in use, belonging to the Pioneer Box Factory, holding a lease from the respondent. The Cooks undertook to negotiate on behalf of the complainant for the right to use this factory in connection with the sawmill, and one of them did write a letter in this behalf to the party controlling the right; but pending further negotiations the mill and other property belonging to the plant was seized by the Cooks in the interest of a combination to which they were parties, and formed for the purpose of operating the plant when possession of it should be obtained.

Assuming that the complainant failed to fully perform the conditions of the lease entered into with the respondent, as stated in a former part of this opinion, and that this failure resulted in the right of the respondent to demand a forfeiture of the lease in September, 1897, it is nevertheless clear that the subsequent transactions just related give to the case a different aspect. Every consideration of right and justice required that under the circumstances the forfeiture should have been asserted promptly, and a return of the property demanded as soon as the default of the complainant had become an established fact. But here we have the officers of the respondent standing by while large expenditures were being made for the benefit of the plant, and dealing with the manager of the complainant with respect to important matters with every appearance of assenting to the continuance of preparations for the future operation of the plant on a large scale. The fact that John R. Cook persisted in his objections during the season of 1897 that the plant was not being operated successfully, or to its full capacity, is not sufficient. He knew all the facts, and should have asserted then the right of forfeiture now claimed by the respondent as a defense to this action. It is assumed that Cook's complaints were not merely personal, but that he represented the respondent in his relations with the complainant and in his dealings with its officers. This conduct, under the circumstances, amounted to a waiver of the forfeiture, and the respondent will be estopped from afterwards exercising its legal right to claim it in opposition to such waiver. Bishop, in his work on Contracts (Enlarged Edition) states the rule, in section 792, as follows:

"Waiver is where one in possession of any right, whether conferred by law or by contract, and of full knowledge of the material facts, does or forbears the doing of something inconsistent with the existence of the right or of his intention to rely on it. Thereupon he is said to have waived it, and he is precluded from claiming anything by reason of it afterwards."

In Swain v. Seamens, 9 Wall. 254–274, the rule is stated in the following language:

"Where a person tacitly encourages an act to be done, he cannot afterwards exercise his legal right in opposition to such consent, if his conduct or acts of encouragement induced the other party to change his position, so that he will be pecuniarily prejudiced by the assertion of such adversary claim."

This doctrine is too well established, and the cases where it has been applied too numerous, to require any further reference to authorities. It is sufficient to say that it is peculiarly applicable to the facts of the present case, and determines that the respondent was not, under the circumstances, in a position to demand a forfeiture of the lease, or disturb the complainant in its possession of the leased property on February 12, 1898, because of the failure of the latter to operate the plant to its fullest capacity prior to that date. In this view of the case, other questions discussed by counsel in their briefs need not be considered.

The question of the equitable jurisdiction of this court was necessarily involved in the motion to modify the restraining order (Pokegama Sugar Pine Lumber Co. v. Klamath River Lumber & Improvement Co., 86 Fed. 528), and in the proceedings for contempt (Id. 538), and, while not discussed in the opinion, was considered and determined in favor of the equitable jurisdiction of the court.

The respondent contends that upon the facts stated in the bill of complaint there was for the injury complained of a remedy at law. Section 723 of the Revised Statutes provides that suits in equity shall not be sustained in either of the courts of the United States in any case where a plain, adequate, and complete remedy may be had at law. Under this statute the remedy at law, in order to exclude equity, must be as practical and as efficient to the ends of justice and its prompt administration as the remedy in equity. Boyce's Ex'rs v. Grundy, 3 Pet. 210, 215; Insurance Co. v. Bailey, 13 Wall. 616, 620; Tyler v. Savage, 143 U. S. 79, 95, 12 Sup. Ct. 340. In the present case the prompt interposition of a court of justice was imperative to preserve the property for the benefit of both parties. The respondent had taken possession of the property without regard to the requirements of law in such proceedings, and for a time maintained the possession thus illegally obtained by the display of force. The court cannot close its eyes to the real meaning and character of such proceedings. They were inaugurated in defiance of law, and were meant to be maintained against its ordinary processes. This is shown conclusively by the fact that this court was only able to enforce its orders at first by resort to the power of punishment for contempt, and any delay or hesitation at this time would unquestionably have resulted in the destruction of valuable property, and possibly in the loss of life. But it is contended the complainant might have proceeded in the proper court, under a statute of this state, for forcible entry or forcible detainer. The diverse citizenship of the parties entitled the complainant to come into this court with its cause of action, and obtain the remedy which this court has the power to give. The civil action of forcible entry and detainer has been provided by the law of this state, but not by the laws of the United States. The remedy at law that will oust this court of its equitable jurisdiction is not what may be found in the state laws, but

what was provided in the common law as it existed in this country when the judiciary act of 1789 was enacted, or in some act of congress providing such a remedy. Robinson v. Campbell, 3 Wheat. 212; Boyle v. Zacharie, 6 Pet. 658; McConihay v. Wright, 121 U. S. 206, 7 Sup. Ct. 940; Cropper v. Coburn, 2 Curt. 465, Fed. Cas. No. 3,416; Railway Co. v. Elliott, 56 Fed. 772. The civil action of forcible entry and detainer did not prevail at common law, and has not been provided by congress.

The action of ejectment is subject to the objection that it did not afford an adequate remedy. As against the legal forfeiture of the lease claimed by the respondent, the complainant asserted certain equities to defeat respondent's right of possession based upon such forfeiture. But in an action of ejectment in a United States court, where the legal title prevails, such equities could not be considered. Miller v. Courtnay, 152 U. S. 172, 14 Sup. Ct. 517; Carter v. Ruddy, 166 U. S. 493, 17 Sup. Ct. 640. I think it sufficiently appears from the testimony that complainant would have suffered irreparable damage had not the respondent been enjoined from committing the acts of interference complained of in the bill of complaint. The facts need not be repeated. They have been sufficiently referred to in this opinion and in the previous opinions that have been rendered in the progress of this case. Here is a large plant, embracing various properties, depending for its success and value upon capital and management, the supply of timber, and the conditions of distant markets. The complainant had furnished the necessary capital, found a profitable market, and, independently of the lease, had secured and obligated itself to purchase a large tract of timber land, which, at that time, at least, furnished the only supply of logs in quantity accessible to the mill. The possession of the mill by the respondent under its claim of right would have given it no claim or title to these timber lands. What, then, could it have done in the way of operating the plant, under the existing conditions, except to make more certain the condition of financial embarrassment from which it and its principal stockholders were trying to escape? The fact that a new corporation was to take hold of the property simply furnishes additional evidence that whatever damages the complainant might suffer by the proceedings would be irreparable.

Let a decree be entered in favor of the complainant in accordance with this opinion.

McGRAW v. WOODS et al.

(Circuit Court, D. West Virginia. August 3, 1899.)

EQUITY PLEADING—BILL—ALTERNATIVE PRAYERS.

Under the rule that a bill may be framed with a double aspect with prayers for alternative relief, when such relief is founded on the same facts, and is in response to the allegations of the bill, a bill is not demurrable which, after setting out the facts relating to a sale of land by defendant under a mortgage, prays that such sale be set aside as illegal, or, if adjudged legal, that an agreement made by defendant to resell the land to complainant after defendant's purchase at the foreclosure sale be enforced.

In Equity. On demurrer to bill.

Simms & Enslow and Ambler & McCluer, for complainant.
Smith D. Turner, for defendants.

JACKSON, District Judge. The bill in this cause alleges: That on the 12th day of July, 1897, the defendant Woods conveyed 1,000 acres of land in Pocahontas county, in this state, to the plaintiff, McGraw. That the consideration for the land was $8,500, one-third of which consideration was cash in hand, and the balance of the purchase money was divided into two equal installments, payable in 6 and 12 months, with interest from date. That the deferred payments were secured by a deed of trust on the land. The cash payment was made, and the first note being the second payment was also paid, and after the second note—being the second deferred payment—fell due, McGraw having failed to pay it at maturity, Woods caused the lands to be advertised for sale in the Pocahontas Times, a weekly newspaper, at Marlinton, in said county, on the 13th day of August, 1898, to satisfy the last payment for the purchase money due on the land. That at the sale which took place under the deed of trust, Woods, the holder and owner of the note, amounting to $2,833.33, became the purchaser of the land for the sum of $3,045. That on the day of sale, and shortly thereafter, Woods executed the following paper:

"I agree that John T. McGraw may have ten days in which to repay me the purchase money of land and two hundred and fifty dollars in full costs, etc., and on payment of which I will resell land to him or cancel this sale to-day, and all trust deeds on said tract for my benefit.

"August 13, 1898. [Signed] Samuel B. Woods."

The bill further alleges that before the sale was completed by the trustee the plaintiff caused to be tendered by the Grafton Bank of Grafton, W. Va., through one of the banks of the town of Charlottesville, Va., the home of the said Woods and of the said trustee, to the said Samuel B. Woods, the defendant, the full amount of the balance due upon the purchase money of said land, with interest and costs up to that date; and that afterwards, within 10 days from the day of sale, he caused to be tendered in the same manner to the said Samuel B. Woods the full amount of $3,295, which he declined and refused to accept; that the said McGraw has always been ready and willing and anxious to carry into effect his contract of August 13, 1898. The bill also alleges that the pretended sale made by the trustee was not in compliance with the terms and provisions of the statute of West Virginia regulating sales made under deeds of trust. It also appears that McGraw had sold the land to the Greenbrier River Lumber Company prior to the sale under the deed of trust, and executed his deed for the same. It is not necessary to notice the other allegations of the bill upon a demurrer to it. It is insisted by the defendant that, the plaintiff having parted with his title, and being out of possession of the land conveyed, he cannot maintain a bill to quiet title. I do not understand that the scope of this bill is for any such purpose. It is true that it is framed with a double aspect with alternative prayers, but the facts

set out in the bill as the foundation for relief are the same. It is unnecessary to discuss upon a demurrer the question whether the sale was made according to the terms and provisions of the statute of West Virginia. That question is strictly one which arises upon the merits of the controversy.

The real question to be now considered is whether a contract entered into between Woods and McGraw on the 13th day of August, immediately after the sale, can be enforced by McGraw. This contract provides for the reconveyance of the land by Woods upon the payment of the note for which the land was sold, with $250 added to cover costs and expenses. It was a new contract, entered into between the parties, by which Woods agreed to convey the land sold under the deed of trust to McGraw for a certain consideration, which did not in any wise involve the original contract between McGraw and Woods, but was a separate and distinct contract which McGraw and Woods had a right to make without any regard to the previous contract between them, and without any reference to the fact that McGraw had sold the property to the Greenbrier River Lumber Company. Under the terms and provisions of this contract the Greenbrier River Lumber Company is not a necessary party to the suit. If McGraw acquired the title to this land under the second contract with Woods, that company could unquestionably compel him, if it became necessary, to convey this newly-acquired title to them. It is a matter of no moment to Woods what the purpose or object of McGraw was in entering into this new contract with him, whether it was to quiet title, or whether it was to set up title in his own name against the Greenbrier River Lumber Company. That is a matter entirely between McGraw and the Greenbrier River Lumber Company. If the Greenbrier River Lumber Company had filed a bill to remove this cloud upon its title, of course it would be necessary for it to have possession, as well as the title, but the contract between Woods and McGraw on the 13th of August is a contract to resell the land or cancel the sale under the deed of trust. Upon this contract the bill is mainly founded, and it seems to me that the bill has not two separate and distinct objects inconsistent with each other in view. The two prayers of the bill are: First, that the pretended sale by the trustee be set aside; second, in the event that the court is of the opinion that this prayer for relief could not be granted, then that the said Woods be required to convey the land according to his agreement of August 13, 1898. They are not inconsistent or incompatible with each other, and they are alternative prayers founded upon the same facts, relating to the same subject-matter in controversy. It is a well-settled principle of equity that a bill may be framed with a double aspect with prayers for alternative relief, but the relief sought must be founded upon the same facts, and must be in response to the allegations of the bill. Shields v. Barrow, 17 How. 130; Hardin v. Boyd, 113 U. S. 756, 5 Sup. Ct. 771; Maynard v. Tilden, 28 Fed. 703; Fisher v. Moog, 39 Fed. 667. For the reasons assigned, the demurrer is overruled.

ELDRED et al. v. AMERICAN PALACE-CAR CO. OF NEW JERSEY et al.

(Circuit Court, D. New Jersey. July 28, 1899.)

CORPORATIONS—SALE OF PROPERTY BY MAJORITY OF STOCKHOLDERS—PRELIMINARY INJUNCTION.

A majority of the stockholders of a corporation entered into an agreement for the sale of all its property to another corporation in consideration of the payment of its indebtedness and the issuance to its stockholders of one share of the stock of the purchaser, which had the same amount of capital, in exchange for each two shares they held in the selling corporation. The property was transferred, but at the end of two years none of the indebtedness of the selling company had been paid, its stockholders had not been notified of the sale, nor asked to assent thereto, or to exchange their stock, and it appeared that the selling company had attempted to sell the stock to which they were entitled under the agreement, the proceeds to be paid to a stranger. *Held*, that there was sufficient evidence of fraud in the transaction to entitle nonassenting stockholders of the selling company, on a bill filed for that purpose, to a temporary injunction restraining the purchaser from making any disposition of the property pending a final hearing as to the validity of the sale.

On Application for Preliminary Injunction.

Edward Q. Keasbey, for complainants.
Robert H. McCarter, for defendants.

KIRKPATRICK, District Judge. The bill of complaint in this cause is filed by Byron A. Eldred and others, stockholders in the American Palace-Car Company, a corporation organized under the laws of the state of Maine, on their own behalf and for the benefit of such other stockholders as may elect to join in said suit, asking, among other things, that the American Palace-Car Company of New Jersey may be restrained from assigning, transferring, selling, exchanging, or in any way disposing of, changing, or altering the status of any of the patent rights or other property now or formerly of the American Palace-Car Company of Maine, including any equitable or other interest of said company in the palace car Boston. The bill sets out that the complainants are stockholders in the American Palace-Car Company of Maine, and that until a short time prior to the filing of their bill they were ignorant of the matters complained of therein, and that prior to the bringing of their suit they had vainly endeavored to have the suit brought by the said company for the protection of their rights. The bill recites that the said Maine corporation was organized under the laws of that state with a capital stock of $1,500,000, consisting of 15,000 shares of the par value of $100 each, the whole of which, excepting 5 shares, was paid out for the acquirement of certain letters patent of the United States granted to one Charles J. Seymour, relating to an improvement in railway cars; that the company began business in 1892, and continued therein until August, 1897; that in May, 1897, a notice was sent to the complainants and other stockholders in said company, setting out that it was necessary to raise $15,000 in order to meet the pressing obligations of the company, and requesting each stockholder to loan the com-

pany a sum of money equal to $3 for each share of stock held by them, the loan to be repaid in not less than six months nor more than one year after date, with interest at 6 per cent.; that in response to said request Eldred, one of the complainants, as the holder of 10 shares of the stock of the company, sent to the treasurer $30, and received, under date of June 10, 1897, the note of the company for said amount, payable six months after date, with interest at 6 per cent. On the 9th of June, 1897, the annual meeting of the company was held, which was adjourned from time to time and until August 11, 1897, at which time, by a majority vote of the stockholders, it was resolved to accept the proposition theretofore made by Lawrence S. Mott, Hayward A. Harvey, and Hobart Tuttle, by which all the patents and property of the company should be turned over to the American Palace-Car Company of New Jersey, in consideration of the assumption by the last-named company of the debts of the Maine corporation, and the exchange of one share of stock of the New Jersey corporation for every two shares of the Maine corporation. In pursuance of this resolution, on the 12th day of August, 1897, a bill of sale of all of the personal property of the Maine corporation, together with assignments of their patents and certificates for 7,000 shares of the capital stock of the company, standing in the name of George A. Denham, treasurer, were delivered to Scott Lord, to be held by him in escrow, and delivered to the New Jersey corporation upon their performance of the terms of the agreement, all of which said property was afterwards, on August 23, 1897, transferred by said Scott Lord to Lawrence S. Mott, the vendor named in the agreement, and for which said Mott stated in receipt given by him that he would "deliver one share of the stock of the American Palace-Car Company of New Jersey for two of the above shares of the American Palace-Car Company of Maine; and I further agree to deliver to said Lord one share of the stock of the American Palace-Car Company of New Jersey for every two shares of the American Palace-Car Company of Maine that he shall deliver to me." Prior to such transfer, Mott had agreed to sell all the property of the Maine corporation so to be acquired to the American Palace-Car Company of New Jersey, in which his associates Harvey and Tuttle were directors, upon that company's assumption of the debts of the Maine company, which were stated to be about $29,000, and the delivery to him (Mott) of $1,499,000 of its capital stock, of which he agreed to return to the treasury of the company $250,000, to be held by the treasurer as trustee for the benefit of the New Jersey company.

That Mott did not deliver to Scott Lord any of the shares of the American Palace-Car Company of New Jersey called for in the agreement is evident from the fact charged in the bill, and admitted in the affidavit of Mott to be true, that 14,998 shares of the capital stock of the American Palace-Car Company of New Jersey, together with all the books and papers of said company, were deposited with the State Trust Company of New York, with authority to deliver the same to one Charles D. Hauk, who seems to have been an intermediary for Denham, or his order, on payment of the sum of $60,000

at any time within seven days from the date thereof, May 21, 1898. It is also apparent from an inspection of Mott's affidavit that the debts of the Maine company had not then been paid, for out of the proceeds of sale of such stock the State Trust Company is authorized to pay the debts of the Maine company, a schedule of which was furnished, and which, since the date of the transfer of its assets, had swollen from $29,000 to $35,000. After the payment of these debts, the balance of the $60,000 purchase price for said stock and assets was to be paid to Mr. Charles D. Hauk, to be disposed of as he saw fit, so far as the papers show. It is admitted in the affidavit of Mr. Denham that no notice of the transfer of the assets of the Maine company was given to any of its stockholders, and that no request was ever made that they should exchange their stock for that of the New Jersey corporation on the terms of the proposition. It is not asserted that the assent of any of the stockholders of the Maine company was sought to the proposed sale of its assets held by the New Jersey company.

As the case presents itself on the bill and answering affidavits, it appears that a majority of the stockholders of the American Palace-Car Company of Maine have caused to be transferred to the American Palace-Car Company of New Jersey all of the property and assets of the former company in consideration of an agreement to pay its debts and give its stockholders one-half the number of shares in the purchasing company having an equal amount of capital for those which they hold in the Maine company. Although nearly two years have passed since the agreement was made, the debts of the Maine company have not been paid, the stockholders have not been notified of the proposed exchange of stock, nor their assent thereto asked, but in the meanwhile an attempt has been made to sell without their knowledge the stock to which they were entitled, if the contract of sale were valid, as is contended by defendants, and turn over the proceeds of such sale to a stranger. The bill charges fraud, which is denied in the answering affidavits, but actions speak louder than words. It may be that no actual fraud was intended, but to sell a man's property without his knowledge or consent, and appropriate the proceeds to other uses than expressly authorized by him, is not within the limit of fair dealing as prescribed by law. The bill also sets out a scheme devised for mortgaging the property now held by the New Jersey company and acquired from the Maine company, as has been set out, and charges fraudulent intent in regard to same. All of these charges of fraud are denied, and it is alleged in the affidavit of Mr. Denham that the plan was to have the mortgage made by the stockholders, and that, in order to carry out his plan, it was necessary that all stockholders should join therein. Whether Mr. Denham contemplated procuring the assent of all the stockholders of the Maine or New Jersey company he does not say. It is immaterial for the present purpose. The complainants are stockholders in one or the other company, and the plan cannot be carried out without their assent. It is contended on the part of the complainants that the assets of the Maine company could not, by a vote of a majority of stock-

holders, be disposed of in the manner provided in the resolution of August 11, 1897, and that the transfer in accordance therewith is void. It was admitted by defendants' counsel on the argument that, while this is the general rule in regard to the assets of a solvent going concern, it is not applicable to insolvent corporations. If the law be as so contended for, the proofs in the case are not of such a character as to enable me to determine that the case at bar is within the excepted class. It is true that there were pressing claims against the company, and that an effort was being made to raise money by an assessment on the stock. The car Boston, upon which the company had made large outlays, was, subject to certain liens, the property of the company. It does not appear that any effort was made to preserve this equity, or that a judicial sale was resorted to in order to ascertain its value. Messrs. Mott, Harvey, and Tuttle, in a manner unexplained, were permitted to acquire the rights of the company without compensation to it, and hold the car in trust for the New Jersey corporation. The defendants insist that the complainants are estopped by the laws of Maine (chapter 84, Laws 1891) from objecting to the sale at this time, because that law provides that if, after sale authorized by a majority of stockholders, one fails to file his dissent within two months, he shall be deemed to have assented to such vote. I have not had the opportunity to examine this law to see if any provision is made for notifying nonattending stockholders of the result of any action taken at stockholders' meeting in regard to sale of company's assets. In this case it appears from the affidavit of Mr. Denham that "the Maine stockholders (under the advice of its counsel) have not yet been requested to surrender their stock pursuant to the deal of August 11, 1897, it being considered advisable that some definite arrangement for the payment of the balance of the liabilities of the Maine company should be completed before such transfer should be made to the New Jersey company." Pending the hearing of this cause, many stockholders have filed petitions asking to be joined in this suit as parties, and to obtain the benefit of same. Upon the whole case I am of the opinion that the interests of the complainants and those who have so joined require that the present status of the assets of the Maine company should be preserved until a final hearing of the cause. The preliminary injunction heretofore granted will be continued.

McILWAINE et al. v. ISELEY et al.[1]

(Circuit Court, W. D. North Carolina. August 5, 1899.)

No. 139.

1. CONTRACTS—WHAT LAW GOVERNS.

A building and loan association of Tennessee, doing business in several states, used in all the same form of notes and mortgages, which conformed to the laws of Tennessee, and contained a provision that they were made with reference to such laws. All applications for membership and loans were required to be sent for approval and acceptance to the home office, where all contracts and notes purported to be made and were made pay-

[1] For supplemental opinion, see 96 Fed. 775.

able, though local agencies were established in other states, through whom applications and payments might be made for convenience. *Held*, that a note and mortgage made in conformity to such requirements by a resident of another state could not be construed as an attempt to evade the usury laws of such state, but that the parties must be held to have understood and intended in good faith to make the note and mortgage Tennessee contracts, in so far as it was in their power to do so.

3. FEDERAL COURTS—FOLLOWING STATE DECISIONS—USURY IN MORTGAGE CONTRACTS.

Under the decisions of the supreme court of North Carolina, mortgage contracts relating to lands in that state must be construed with reference to its usury laws, regardless of the expressed intention of the parties, since such contracts are only enforceable by courts within the state. Such decisions further hold that mortgages given to building and loan associations are subject to the same rule as to usury as other mortgages. *Held* that, in a suit in a federal court to foreclose a mortgage given to a building and loan association of another state on land in North Carolina, the court would follow the rule of such decisions, which is in the nature of a rule of property.[1]

This was a suit by the receiver of an insolvent building and loan association to foreclose a mortgage given by a stockholder to such association.

John W. Hinsdale, for plaintiffs.

L. M. Scott, for defendants.

SIMONTON, Circuit Judge. The Covenant Building & Loan Association is a corporation created under the laws of the state of Tennessee. Having become insolvent, it was placed in the hands of the receivers named in the title of this case. Ancillary proceedings were then instituted in this court, and the same receivers were recognized and appointed. These receivers, having in their hands certain notes and mortgages, assets of the association, applied for and obtained leave to foreclose the same in this court. Pursuant to this, this bill of foreclosure was filed. The charter of this insolvent corporation is that of a building and loan association strictly. It expressly declares "that by no inference whatever shall said corporation possess the power to discount notes or bills, deal in gold and silver coin, issue any evidence of debt as currency, buy and sell any agricultural products, deal in merchandise, or engage in any business, outside the purpose of this charter." Its principal place of business is at Knoxville, Tenn. It had authority to establish branch offices elsewhere, and did in fact establish such branch offices in some ten or more states of the Union. The by-laws of the corporation provided that, in establishing these branches, local boards could be appointed to superintend them, subordinate to the home board, and dues, fines, and interest could be paid to the treasurer of the local board. But it was also provided in these by-laws that all money due from the members of the association, and all from it to members, shall be payable at the home office in Knoxville, Tenn., and all contracts and mortgages shall be deemed to be made in Tennessee, and under the laws of Tennessee. Speaking of this by-law,

[1] As to state laws as rules of decision in federal courts, see note to Wilson v. Perrin, 11 C. C. A. 71, and note to Hill v. Hite, 29 C. C. A. 553.

and of the charge that it was adopted to evade the usury laws of the state of North Carolina, two witnesses, officials of the company, say:

"This statement is wholly erroneous and untrue. These provisions were in entire good faith, and are necessary to insure uniformity, equality, and mutuality among members of the association. As the association does business in eleven different states, without this stipulation this equality, uniformity, and mutuality could not be secured."

The by-laws direct the mode in which the loans of the company can be made and secured. Several members of the bar of Tennessee, lawyers of learning and experience, have testified that in this respect the by-laws are strictly in conformity with the laws of that state and the decisions of its court of last resort. The mode is this: Each month, at a meeting of the directors, the money of the corporation is lent to the person bidding the highest premium therefor. Stockholders of the company have the preference in all such cases, but, if there be no stockholders who desire to bid, the money can then be lent to other persons, who may then bid upon it. The loans, in every instance, must be secured by mortgages of real estate. Any person may become a subscriber to the capital stock of the association, making application therefor. The application may be made through a branch office, or directly to the home office. In every instance, the application to a branch office must be forwarded to the home office for consideration and determination. If the application be granted, a certificate of the number of shares allowed is issued to the applicant at the home office; he first paying a membership fee. This certificate, on its face, declares that payments of the subscription must be made monthly, subject to the conditions indorsed on the certificate, that the by-laws are a part of the certificate, and that at the maturity of the stock the owner may draw from the association $100 per share. The conditions, thus indorsed, may be thus summed up: The monthly payment is 60 cents per share,—that is to say, 50 cents on the stock subscription, and 10 cents for general purposes of the corporation,—payments to be made to the home office, or to the local treasurer for transmission to the home office; the local treasurer to be selected by the local board. Failure to pay these monthly installments as they accrue subjects the subscriber to a fine of five cents per share, and, if the default continue for six months, it works a forfeiture of the stock. Shares may be withdrawn and surrendered at any time on terms fixed by the by-laws, but fees paid for membership cannot be repaid. The profits of the company are ascertained every six months, and apportioned among the shares, and, when the aggregate of these profits amounts to $100 per share, that share is deemed to be matured. After holding the stock for a short time, the stockholder has the privilege of borrowing money from the company, by bidding therefor, as stated above. This bidding may be either orally or in writing. He gets the loan if the premium he bids be higher than that of other bidders, or, if it be equal to others, his bid is prior in point of time. The bid being approved, he will get the money upon executing a note or bond promising to pay the sum borrowed on or before a day certain, with interest thereon at 6 per cent. per annum;

also, the premium he bid thereon in the installments agreed upon; also, the monthly dues on his subscription for the stock as they accrue, and all fines incurred under the by-laws. To secure this note, he executes a mortgage of real estate, containing covenants to pay all taxes on the realty accrued and to accrue, and the premiums for keeping the buildings on the land insured to an amount agreed upon. Finally, as further security, he assigns his stock certificate to the corporation as a collateral. At the maturity of the stock, all conditions having been fulfilled, its matured value is taken by the corporation, and applied to the satisfaction of the mortgage. If the borrower fails to fulfill all the conditions, or if the corporation becomes insolvent, before the maturity of the stock, an account is taken, in which interest is calculated on the loan at 6 per cent. per annum, and the borrower is credited with all sums of money paid by way of interest or premium, but with nothing paid on account of the stock subscription or membership fee. The difference is the debt due.

The charter under which this company was organized, the by-laws adopted by it, the method in which its money is lent, the mode by which it is secured, the interest charged thereon, the premiums demanded on the loans, have all been declared valid under the laws of Tennessee, and the decisions of the court of last resort in that state. This is proved by the testimony of several eminent members of the bar of Tennessee, taken in this cause. This association, being a going concern, and having a local board and treasurer in Burlington, N. C., issued to W. C. Iseley and A. A. Iseley a certificate of stock for 20 shares in the company, in the manner and form prescribed as above. The application for the stock, dated January 7, 1893, was made through a soliciting agent of the company, resident in Burlington, was duly forwarded and referred to the officers of the company at the home office in Knoxville, Tenn., and was considered and granted by them. The Iseleys, having subscribed to the stock, for the purpose of getting a loan of money, exercising their privilege as stockholders, made an application for a loan of $1,000. This application was made through the local agent, was forwarded to the home office at Knoxville, was considered, and granted them. It was dated June 14, 1893. W. M. Ashmore, the secretary of the company, testifies to this point as follows: The application was received by the attorney and manager of the loan department, and was by him presented to the board, as the application and bid by the applicants for the priority and preference in securing a loan, along with other applications and biddings for premium, presented at the same time, and was so treated, acted upon, and accepted by them, subject to the approval of the executive committee as to the sufficiency of the security. That committee reported favorably upon this application, and the loan was granted and consummated, and the note and mortgage in controversy executed, on July 1, 1893, though the mortgage bears date June 14, 1893. The note for the loan is headed Knoxville, Tenn., and is dated June 14, 1893. It is for $1,000, and promises to pay to the Covenant Building & Loan Association, the principal, on or before 9 years from date, and a

premium of $5 per month, as well as interest on the $1,000 at the rate of 6 per cent. per annum. It recites that the note is for money borrowed on 20 shares of the 37th series of stock of the company, and that it is secured by a mortgage of even date therewith upon a lot of land in Alamance county, North Carolina. The condition of the note is the prompt payment of the interest on the $1,000 monthly, of the monthly installments of premium on the loan bid by the makers, of the monthly payments upon the subscription to the stock, and all fines assessed by the association, of the taxes accruing on the land, and all premiums necessary to keep up an insurance of $1,300 on the house on this land, until the stock becomes fully paid, of the value of $100 per share. Then, upon the surrender of 10 out of the 20 shares of the stock, the note will be fully paid and canceled. The failure to fulfill each and every of these conditions for a period of six months gives the option to the corporation to declare the whole indebtedness at once due and payable, and gives the right to foreclose the mortgage. The note, which is for the most part in print, concludes with these words, printed: "It is further understood that this note is made with reference to and under the laws of Tennessee." It is signed by each of the Iseleys and by Mrs. Lena Hall Iseley, and is under seal. Contemporaneous in date with the note, the mortgage is executed of the lot of land in Alamance county, reciting the same conditions as the note, which is fully set out. In case of a breach, power is given to the corporation mortgagee to foreclose and sell the land. The mortgage is said to be made June 14, 1893. The certificate of the probate of the deed and of the separate examination of Mrs. Lena Hall Iseley is dated June 26, 1893. The deed was filed for registration June 26, 1893. As has been seen, the loan was granted July 1, 1893. The Iseleys fulfilled the conditions of the note until May, 1897. Up to that time, they had paid monthly installments of premiums, $215; monthly payments of interest, $215,—$430; monthly payments on stock, $564. They had failed to pay a premium for insurance for $21.25. Not crediting on the loan any part of the $564 paid on the stock, the complainants claim that there is now due on the loan $717.16, and interest on $686.72 from March 1, 1898. In the meantime, the Covenant Building & Loan Association had become insolvent. Proceedings were instituted in the circuit court of the United States for the Northern division of the Eastern district of Tennessee, and on February 22, 1893, by the order and decree of that court, the receivers in this cause received their appointment, and subsequently, as has been stated, by ancillary proceedings in this court, they were recognized and appointed receivers in this jurisdiction. This bill for foreclosure having been filed against W. C. Iseley, A. A. Iseley, and Mrs. Lena Hall Iseley, the first and last named answer. A. A. Iseley is dead. They admit the main facts of the subscription to the stock, and the loan, the execution of the note, and of the mortgage. They do not admit that the note states that it was made under and with reference to the laws of Tennessee; denying any knowledge on this point. The note in evidence, however, has this provision on its face. Mrs. Iseley signed the note, and joined in the execution of the mortgage,

in order to pass her dower in the land owned in part by her husband, W. C. Iseley. Their line of defense is this: The note and mortgage were made and executed in the town of Burlington, N. C. That in that town the association had a local board and a local treasurer, with whom they dealt, and to whom they made payments. That so the contract was a North Carolina contract, governed by the laws of that state. That the provisions in the contract that dues, interest, and premiums should be paid at the home office in Tennessee were inserted to give color to the idea that this was a Tennessee contract, while in fact it was not, and in order to evade the usury laws of North Carolina. They also aver that they did not subscribe to the stock as an investment, but solely for the purpose of obtaining a loan. That this subscription and the loan were all parts of one transaction; the subscription having been made upon and because of the promise of the local agent that the association would lend them the money. There can be no question that under the laws of Tennessee this would be a valid contract, not tainted with usury. McCauley v. Association, 97 Tenn. 421, 37 S. W. 212; Post v. Association, 97 Tenn. 408, 37 S. W. 216; Hughes v. Association (Tenn. Ch. App.) 46 S. W. 362. But, this association being insolvent, the same mode of settlement would be adopted in Tennessee, whether the contract be usurious or not. Rogers v. Hargo, 92 Tenn. 35, 20 S. W. 430; Post v. Association, 97 Tenn. 408, 37 S. W. 216; Clark, J., in Lamar v. Association (exhibit to the bill in this case). There is equally no question that, by a current of decisions in North Carolina, a contract like this would be held to be tainted with usury. Meroney v. Association, 116 N. C. 882, 21 S. E. 924, and cases cited. If it be a Tennessee contract, then the rule laid down by Judge Clark in the case cited supra will be followed. The debtor will be charged with the amount loaned, and with interest at 6 per cent. thereon from the date thereof. He will be credited with all sums paid by way of interest on the loan and by way of premium, on the principle of partial payments. He will not be credited with monthly payments of subscription on his stock, nor with his membership fee. If it be a North Carolina contract, the debtor will be charged with the sum lent, and with interest thereon from the date of the loan. He will be credited, on the principle of partial payments, with all sums paid,—as for interest, installments of premium, and monthly installments of subscription on the stock used in getting the loan.

This, then, is the decisive question in the case: Must this court, in enforcing this contract, follow the mode of settlement provided by the laws of Tennessee, or that provided by the law of North Carolina? The papers in the case, which were signed by the defendants, were prepared for and were signed by them in North Carolina. These papers were, if we may so speak, the inducement to the contract. The application for subscription to the stock and the proposal for the loan were presented by the defendants, and by them were placed in the hands of the local agent at Burlington, N. C. But of themselves they did not constitute a contract. They were to be forwarded to the directors of the corporation at Knoxville, Tenn., to be considered by them, and to be submitted for their acceptance.

They were so forwarded and submitted. With them were also submitted the note for the loan, duly signed and sealed, and the mortgage of the land in North Carolina, framed and executed, recorded and perfected, in accordance with the laws of North Carolina in that behalf prescribed. These two complete instruments were forwarded with the proposal for the loan in escrow, and were submitted with this proposal. The proposal was accepted, and the note and mortgage were approved. This acceptance and approval were the consummation of the contract, and thenceforward it was the contract of the parties. So the contract was in fact made and completed at Knoxville, Tenn. 7 Am. & Eng. Enc. Law, 136. Shattuck v. Insurance Co., 4 Cliff. 598, Fed. Cas. No. 12,715. The note tendered and accepted gives the contract in detail, and is made to bear date as of Knoxville, Tenn. By this contract, all dues are payable at Knoxville, Tenn. Thus the association had the right to require the payments to be made at that place, notwithstanding that, for the sake of convenience, the payments could be made through the local treasurer. Were we left to inference only on this point, it could reasonably be inferred that the parties contracted with reference to the laws of Tennessee. Bigelow v. Burnham (Iowa) 49 N. W. 104; Healy v. Gorman, 15 N. J. Law, 328. But we are not left to inference only. The note itself expressly declares that it "is made with reference to and under the laws of the state of Tennessee." Parties competent to contract are presumed to know the meaning of their own acts. In the absence of evidence tending to show fraud, misrepresentation, or duress, it may safely be concluded that the parties understand and mean what they say. The defendants' reply to this is that all this is delusive, intended to cover usury, and to defeat the laws of North Carolina. The agents of the corporation deny this in toto. They show that the form of the contract is the one adopted and in use without change in the state of Tennessee, and in all the many other states in which the corporation did business; that it was adopted so as to have one uniform standard in the construction of their contracts, and to secure equality, uniformity, and mutuality among all the members of the association, from which class the borrowers come. If there were collusion to evade the law of North Carolina, it must have been with the concurrence of defendants. Does this recommend their effort to defeat the express language of their contract in a court of conscience? The conclusion seems clear that, when this contract was made, the parties to it understood and intended that, so far as in them lay, it should be construed as a Tennessee contract. But this does not free the case from difficulty. This note was secured by a mortgage of lands in North Carolina. This mortgage would be incomplete and inoperative, unless it was made, executed, and recorded in accordance with the provisions of the statute of North Carolina. In this suit for foreclosure the mortgage is the gist of the action. Does this give to the law of North Carolina the control in the enforcement of the mortgage contract? Upon this question there is great diversity of opinion among text writers, and a difference of decision in the reported cases. The very learned counsel for com-

plainants, in his complete and exhaustive brief, has arrayed a vast number of authorities sustaining that position of Judge Story that the fact that the loan is secured by a mortgage of lands in a country other than that of the contract will make no difference. Story, Confl. Laws, § 293. On the other hand, the supreme court of North Carolina, in a very able opinion in Meroney v. Association, 116 N. C., at page 891 et seq., 21 S. E. 927, take the opposite view, and adopt the test applied by Wharton in his Conflict of Laws (section 507), as follows:

"The true test is, was the mortgage merely a collateral security, the money being employed in another state, and under another law, or was the money employed on the land for which the mortgage was given? If the former be the case, then the law of the place where the money was actually used, and not that of the mortgage, applies. If the latter, then the law of the place where the mortgage was situate must prevail."

The rule laid down in this Case of Meroney, affirmed and reiterated in Rowland v. Association, 116 N. C. 878, 22 S. E. 8, on rehearing, seems to be this: Whatever may be the apparent intent of the parties, if the loan be secured by a mortgage of lands in North Carolina, ipso facto it is a North Carolina contract, and in the enforcement of the mortgage, and in applying the remedy thereunder, the court will be governed by the laws of the state of North Carolina. If the contract which the mortgage was intended to secure be usurious under the laws of that state, it will not permit the mortgage to be used to secure it in its entirety, but only to the same extent as the laws of North Carolina would apply it in the cases of usurious contracts. The principle upon which this proceeds seems to be this: It is impossible to enforce this contract,. secured by a mortgage of lands in North Carolina, except on application to, and in accordance with, the laws of North Carolina, by foreclosing the mortgage. Therefore, the law of North Carolina must be applied before the remedy can be had. Jackson v. Mortgage Co. (Ga.) 15 S. E. 812; Pine v. Smith, 11 Gray, 38; Thompson v. Edwards, 85 Ind. 414; Pancoast v. Insurance Co., 79 Ind. 172; Falls v. Building Co. (Ala.) 13 South. 25. In Rowland v. Association, 115 N. C. 830, 18 S. E. 965 (a case reheard and reaffirmed in 116 N. C. 877, 22 S. E. 8), the court declare that a bargain like the one at bar could not be enforced in North Carolina by the foreclosure of a mortgage, because it is unconscionable; maintaining, evidently, that when a suitor seeks the aid of the court in North Carolina in enforcing his contract, that court has a discretion in granting the remedy, and in directing how it shall be applied. Both of these cases deny that building and loan associations stand upon a different footing from other lenders of money. With them, as with all other lenders, every device by which it is sought to obtain for the use of money a greater rate than that fixed by law is tainted with usury. In this conflict of persuasive authority, and in the absence of any decision of the supreme court of the United States, this court in this case will follow the courts of North Carolina. There is no federal question involved. The jurisdiction of this court attaches because of a diversity of citizenship. The is-

sue relates to realty situate in the state of North Carolina. The rules laid down by the courts of that state as to the enforcement of mortgages of realty therein are very much in the nature of rules of property. A conflict of decision upon a matter of local law between the state and the federal courts should always be avoided, if possible. If a doubt exists, that doubt should be solved in favor of the decisions of the state court. The contract in this case must be treated as a North Carolina contract, and the decree will accord with the decisions of that state thereon.

By the terms of the note, it is clear that the defendants used 10 of their shares for borrowing purposes, and that 10 were considered as an investment. The note was to be surrendered and satisfied upon the surrender of 10 shares. Let an account be stated, in which the complainants will be credited with the sum lent, and with interest thereon from the date of the loan, at the rate of 6 per cent. per annum, and also with all sums paid by way of taxes or premiums for insurance, with interest from date of said payments. In this account let there be charged against complainants all sums paid by way of interest, installments of premium, and subscription upon 10 shares of stock, upon the principle of partial payments, and no more. The costs of the case to be paid by defendants.

WESTERN NAT. BANK OF NEW YORK v. RECKLESS.

(Circuit Court, D. New Jersey. August 3, 1899.)

1. CORPORATIONS—ACTION TO ENFORCE STATUTORY LIABILITY OF STOCKHOLDERS.
   The liability of a stockholder in a Kansas corporation to any judgment creditor of the corporation, created by the constitution and statutes of that state, is one arising upon contract; and an action for its enforcement is transitory, and, in the absence of a statute affecting the right, may be maintained in the courts of any state, or in any federal court, having jurisdiction of such matters and of the parties.

2. CORPORATIONS—ACTION TO ENFORCE STATUTORY LIABILITY OF STOCKHOLDER —NEW JERSEY STATUTE.
   The constitution of New Jersey provides (Const. art. 4, § 7, par. 3) that "the legislature shall not pass any * * * law impairing the obligation of contracts or depriving a party of any remedy for enforcing a contract which existed when the contract was made." By the act of March 30, 1897 (Laws 1897, p. 124), the legislature provided that "no action or proceeding shall be maintained in any court of law in this state against any stockholder, officer or director of any domestic or foreign corporation by or on behalf of any creditor of such corporation to enforce any statutory personal liability of such stockholder, officer or director for or upon any debt, default or obligation of such corporation, whether such statutory personal liability be deemed penal or contractual, if such statutory personal liability be created by or arise from the statutes or laws of any other state or foreign country; and no pending or future action or proceeding to enforce any such statutory personal liability shall be maintained in any court of this state other than in the nature of an equitable accounting for the proportionate benefit of all parties interested, to which such corporation and its legal representatives, if any, and all of its creditors and all of its stockholders shall be necessary parties." *Held*, that a

creditor of a corporation of another state, who was given by its laws a personal right of action against any one of its stockholders for the collection of his debt in the event of the insolvency of the corporation, had, prior to the passage of such act, not merely as a matter of comity, but under the general principles of jurisprudence, a remedy for the enforcement of his contract in the law courts of New Jersey, of which remedy the act deprived him, and that, as to contracts made prior to its passage, such act was within the constitutional prohibition and void.

3. SAME.
The fact that such act, while forbidding the maintenance of an action at law by an individual creditor against an individual stockholder, apparently sanctions a proceeding in the nature of an accounting in equity, in which all the creditors and all the stockholders of a foreign corporation should be necessary parties, does not render it one merely changing the form of the remedy, without destroying the substantial right of action which the creditor had for the enforcement of his contract; the two rights of action being essentially different.

4. CONSTITUTIONAL LAW—IMPAIRING OBLIGATION OF CONTRACT.
The prohibition of state legislation impairing the obligation of contracts contained in the federal constitution, and as well that in the constitution of New Jersey, which is in the same language, but, in terms, extends such prohibition also to legislation taking away the remedy for the enforcement of contracts, applies to all contracts, wherever made; and a remedy existing in New Jersey for the enforcement of a contract made in another state is protected by such provision, equally with those for the enforcement of domestic contracts.

This is an action at law by a judgment creditor of a Kansas corporation against a stockholder to enforce the defendant's personal liability under the constitution and statutes of Kansas. Heard on demurrer to declaration.

William M. Lanning, for plaintiff.
William H. Vredenburgh, for defendant.

GRAY, Circuit Judge. This case stands upon a demurrer to the first two counts of plaintiff's declaration, and is submitted to the court on written arguments of counsel, which fully and ably discuss the points raised. For the purposes of this opinion, the facts set forth in the declaration may be summarized as follows:

The Western National Bank of New York, the plaintiff in the case, is a corporation of that state, and for the purposes of jurisdiction a citizen thereof; and Catharine P. P. Reckless, the defendant, is a citizen and resident of the state of New Jersey. It is averred that the plaintiff in February, 1892, became a creditor of the Western Farm Mortgage Trust Company, of the state of Kansas, in the sum of $25,000, which indebtedness was evidenced by a judgment recovered against the said Western Farm Mortgage Trust Company in the supreme court of the state of New York. Judgment was afterwards obtained in Kansas, upon a suit brought there upon the aforesaid judgment by the plaintiff against the defendant therein, a judgment being recovered for the amount thereof, less certain sums deducted on account of credits of the Kansas company on the books of the plaintiff. The Western Farm Mortgage Trust Company was incorporated in 1887, under the provisions of the statutes in that behalf, in the state of Kansas, and organized and did business as such corporation in that state. The second section of article 12 of

the constitution of Kansas, then and ever since in force, provides as follows:

"Dues from Corporations. Dues from corporations shall be secured by individual liability of the stockholders to an additional amount equal to the stock owned by each stockholder, and such other means as shall be provided by law; but such individual liability shall not apply to railroad corporations nor corporations for religious or charitable purposes."

Section 32 of a statute of the state of Kansas (Gen. St. 1868, p. 198), as then and ever since existing, provides as follows:

"If any execution shall have been issued against the property or effects of a corporation, except a railway or a religious or charitable corporation, and there cannot be found any property whereon to levy such execution, then execution may be issued against any of the stockholders to an extent equal in amount to the amount of stock by him or her owned, together with any amount unpaid thereon; but no execution shall issue against any stockholder except on order of the court in which the action, suit or other proceeding shall have been brought or instituted, made upon motion in open court, after reasonable notice in writing to the person or persons sought to be charged; and, upon such motion, such court may order execution to issue accordingly, or the plaintiff in the execution may proceed by action to charge the stockholders with the amount of his judgment."

And the plaintiff avers that said provisions of the constitution and statutes of Kansas have been so in force in said state ever since a time prior to said incorporation of the said the Western Farm Mortgage Trust Company. Plaintiff also alleges that the liability imposed on stockholders, under and by the provisions of the constitution and statutes of Kansas, is, and has been by the court of last resort of said state construed to be, a contractual, and not a penal, liability. On the assumption of such contractual liability, the present suit is brought, and the logical and technical averments are made of the promise on the part of the defendant, in consideration of such liability, to pay, etc. It is alleged that the defendant became a stockholder prior to the contraction of this debt to the plaintiff, and before it was reduced to judgment. It is also averred that an execution has been issued against the Kansas company, and returned nulla bona. The only other counts are common counts. To the two counts which substantially set forth the facts above stated, the defendant demurs generally, specifying the causes of demurrer as follows:

"(1) Because the supposed liability of a stockholder under the constitution and statutes of the state of Kansas, set forth in the said counts, respectively, is not such as can be enforced in an action at common law by a judgment creditor of said corporation in any of the courts of the state of New Jersey, or of the United States for the district of New Jersey. (2) Because by the statute of the state of New Jersey approved March 30, 1897 (Laws 1897, p. 124), entitled 'A supplement to an act entitled "An act concerning corporations" (Revision, 1896), approved April twenty-first, one thousand eight hundred and ninety-six,' which statute took effect on the 30th day of March, A. D. 1897, and enacted that 'no action or proceeding shall be maintained in any court of this state against any stockholder, officer or director of any domestic corporation for the purpose of enforcing any statutory personal liability of such stockholder, officer or director, for or upon any debt, default or obligation of such corporation, whether such statutory personal liability be deemed penal or contractual, if such statutory personal liability be created by or arise from the statutes or laws of any other state or foreign country,' and that 'no action

or proceeding shall be maintained in any court of law in this state against any stockholder, officer or director of any domestic or foreign corporation by or on behalf of any creditor of such corporation to enforce any statutory personal liability of such stockholder, officer or director for or upon any debt, default or obligation of such corporation, whether such statutory personal liability be deemed penal or contractual, if such statutory personal liability be created by or arise from the statutes or laws of any other state or foreign country, and no pending or future action or proceeding to enforce any such statutory personal liability shall be maintained in any court of this state other than in the nature of an equitable accounting for the proportionate benefit of all parties interested, to which such corporation and its legal representatives, if any, and all of its creditors and all of its stockholders shall be necessary parties,' the maintenance of a common-law action and of the present action to enforce the supposed liability set forth in said counts, respectively, is prohibited in the courts of the state of New Jersey, in consequence whereof no such action can be maintained in a court of the United States for the district of New Jersey. (3) Because the several undertakings and promises of the said defendant set forth in said counts, respectively, are, and each of them is, without consideration and void."

We must assume the correctness of the statements in the declaration, in consideration of this demurrer, that under the Kansas constitution and laws, and the construction put upon them by the court of last resort in that state, an action at law by a single judgment creditor lies against a single stockholder to enforce the liability created and provided for by said constitution and laws of said state. The correctness of this statement is, moreover, established by an examination of the said provisions of the constitution and laws of that state, and of the decisions of the supreme court as to their construction. See Grund v. Tucker, 5 Kan. 70; Hentig v. James, 22 Kan. 326; Howell v. Manglesdorf, 33 Kan. 194, 5 Pac. 759; Abbey v. Dry-Goods Co., 44 Kan. 415, 24 Pac. 426. It is too late now to question the proposition that an action to enforce a liability thus created by, or existing under and by virtue of, the statute law of a state, is transitory in its nature, and may be maintained in the courts of another state, or (where diverse citizenship exists) in a federal court in another state, against a stockholder who resides there. Indeed, it is not understood that any question as to this proposition is made by the defendant's counsel. It is abundantly supported by the authority of many late cases, both state and federal. The supreme court of the United States, in Dennick v. Railroad Co., 103 U. S. 11, 18, by Mr. Justice Miller, states the doctrine thus clearly:

"Whenever, by either the common law or the statute law of a state, a right of action has become fixed, and a legal liability incurred, that liability may be enforced, and the right of action pursued, in any court which has jurisdiction of such matters, and can obtain jurisdiction of the parties."

See, also, Flash v. Conn, 109 U. S. 371, 3 Sup. Ct. 263; Railroad Co. v. Cox, 145 U. S. 593, 605, 12 Sup. Ct. 905; Railroad Co. v. Babcock, 154 U. S. 190, 197, 14 Sup. Ct. 978; Bank v. Rindge, 57 Fed. 279; McVikar v. Jones, 70 Fed. 754; Bank v. Whitman, 76 Fed. 697; Id., 28 C. C. A. 404, 83 Fed. 288; Rhodes v. Bank, 13 C. C. A. 612, 66 Fed. 512, 516; Mechanics' Sav. Bank v. Fidelity Insurance, Trust & Safe-Deposit Co., 87 Fed. 113; Dexter v. Edmands, 89 Fed. 467; Cook, Corp. § 223; Mor. Priv. Corp. § 872.

Unless, therefore, the statute of New Jersey of 1897, set out in the causes of demurrer above, presents a bar to the present action, it must be held that such an action at law for damages for a breach of the contract, under the provisions of the Kansas statute, lies against the defendant individually. The action being transitory, the plaintiff comes into the state of New Jersey clothed with its right to pursue the defendant for a breach of the contract, if she can be brought within the jurisdiction of the courts of that state, or, inasmuch as the citizenship is diverse, if she can be brought within the jurisdiction of the federal court in that state. The sole question, therefore, that remains to be determined upon this demurrer, is, does the said act of New Jersey of 1897 deprive this court of jurisdiction in this case? The defendant contends that it does, and the language of the statute, its scope and effect, must therefore be carefully considered. The statute has been above recited. It went into effect on the 30th day of March, 1897, and provided that no action or proceeding against a stockholder of a domestic or foreign corporation, by or on behalf of any creditor of such corporation, should be maintained in any court of law of that state, to enforce any statutory personal liability of such stockholder, if such liability be created by, or arise from, the statutes or laws of any other state or foreign country, and that "no pending or future action or proceeding to enforce any such statutory personal liability should be maintained in any court of this state, other than in the nature of an equitable accounting for the proportionate benefit of all parties interested, to which such corporation and all of its creditors and all of its stockholders shall be necessary parties." The jurisdiction of this court is concurrent with that of the courts of the state of New Jersey, and under the provisions of the judiciary act the law and jurisprudence of that state will be administered by it. It will not be held by this court in this case that a statute of the state, such as this, though binding upon a state court, would not be binding upon a federal court. If the statute just referred to, and relied upon by the defendant as a bar to the present action, were the only part of the law of New Jersey to be considered, it would then be necessary to determine whether, according to the contention of plaintiff's counsel, said statute was or was not within the scope of the prohibition of section 10 of article 1 of the constitution of the United States, forbidding any state to pass a law impairing the obligation of contracts. But our attention must also be directed to paragraph 3 of section 7 of article 4 of the constitution of New Jersey, which reads as follows:

"The legislature shall not pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts, or depriving a party of any remedy for enforcing a contract which existed when the contract was made."

The statute in question did not go into effect until March 30, 1897, and the contract of this defendant, out of which her liability to the plaintiff arose, must be held to have been made as early as February, 1892. During all that interval between these dates the contract was a subsisting contract, and the liability for a breach of it capable of enforcement in an action at law in the common-law courts of New Jersey. Of this remedy, which undoubtedly existed when

the contract was made, the plaintiff was deprived by the statute of 1897. It is said by the defendant that this right of action existed only ex comitate. We do not think so, but, be that as it may, the remedy did exist. It will be observed that this provision of the constitution of New Jersey places upon the legislative department of the state a restraint expressed in language exactly similar to that of the contract clause of the constitution of the United States, and that it adds to that the express denial to the state legislature of the power to deprive a party of any remedy for enforcing a contract which existed when the contract was made. It may be quite true, as contended by counsel for defendant, that this latter clause was inserted by the framers of the state constitution in order to meet certain decisions of the supreme court of the United States which seemed to limit somewhat the scope of the contract clause of the constitution of the United States. In Bronson v. Kinzie, 1 How. 311, 316, the supreme court used this language:

"Whatever belongs merely to the remedy may be altered according to the will of the state, provided the alteration does not impair the obligation of the contract. But, if that effect is produced, it is immaterial whether it is done by acting on the remedy, or directly upon the contract itself. In either case it is prohibited by the constitution."

Whether there is or is not anything inconsistent in this language with the later position taken by the supreme court in regard to this clause of the constitution, it remains true, nevertheless, that the framers of the constitution of New Jersey have seen fit, by express words, to protect beyond all cavil or doubt the remedy which existed at the time the contract was made, for enforcing the same. This the people of New Jersey had a right to do in their organic law, and impose upon their legislature what they thought an additional restraint to that imposed by the constitution of the United States. Though, under recent decisions of the supreme court, the contract clause of the constitution more efficiently protects the remedy than it was thought to do at the time the New Jersey constitution was framed, it may still be argued, in the language of the supreme court in Bronson v. Kinzie, that "whatever belongs merely to the remedy may be altered, according to the will of the state, provided the alteration does not impair the obligation of the contract." But no such contention as this can be made under the last clause of the New Jersey constitution just referred to. Here the inhibition of the state legislature is express and positive. It is forbidden to deprive a party of any remedy for enforcing a contract which existed when the contract was made. In view of this provision of the constitution of the state, it would not be competent for a court of New Jersey to declare that a statute of that state which deprived a party of such a remedy was operative because, in its opinion, such dealing with the remedy did not impair the obligation of the contract. If that be true in a state court, how can it be otherwise in this court, when admittedly administering the law and jurisprudence of that state?

The demurrant in this case invokes the law of 1897 as a bar to the present proceeding. But it is clear that, in considering the scope

and effect of this law, we must consider whether it is really efficient as a rule of action under the organic law of the state. If that organic law denies to the legislature power to make such an act efficient as a rule of action in a given case, then, as to such case, it is no law, and cannot be efficient as such, either in a state court or in this court. Under the doctrine, as already stated by the court, the plaintiff in this case comes into the state of New Jersey clothed with a right of action, complete in its nature, and, under well-established rules of international jurisprudence, justiceable in the courts, state and federal, having jurisdiction of the parties. The liability of the defendant who resides in the state, although created by the law of Kansas, is a contractual liability, and resulted from her voluntary act in entering into the contract which was embodied in her subscription to the stock of the Kansas corporation. The liability on the one hand, and the corresponding right of action on the other, are recognized and justiceable under general rules of jurisprudence, common to civilized countries, and so clearly stated by Mr. Justice Miller in Dennick v. Railroad Co. It may be admitted that this is only true subject to the proviso that the contract, though made pursuant to, and receiving its validity from, the law of a foreign state, shall not be repugnant to, or inconsistent with, the law or settled policy of the state in which it is sought to be enforced. According to the doctrine established by the cases, and the philosophy of the law, the contract between the plaintiff and the defendant exists in the state of New Jersey, and the liability for a breach of it also exists there, and is enforceable by the plaintiff whenever he may bring the defendant within the jurisdiction of the courts in that state. The contract and the liability under it have so existed since the time it was entered into,—certainly since, and as long as, the defendant has resided in New Jersey. The remedies for the enforcement of contracts that existed by the law of New Jersey at that time, and up to the law of 1897, were applicable to this contract as well as others, and were available, at any time within the period of legal limitation, to the plaintiff. If the effect of the law of 1897 is as contended for by defendant, then it has deprived the plaintiff of a remedy for enforcing his contract which existed when the contract was made. But this is the thing which the constitution of the state has forbidden the legislature to do, and, so far as the act assumes to do this, it is a nullity. To avoid this conclusion, however, counsel for defendant makes an able and ingenious argument. He says the law of 1897 is not opposed to the peculiar provision of the state constitution as to the deprivation of a remedy. "That clause," he says, "applies only to preserve the remedy upon those contracts whose obligation is protected from impairment by the preceding clause." And he quotes the language of Mr. Justice Dixon in Munday v. Rahway, 43 N. J. Law, 340, where he says:

"The juxtaposition of the last two clauses of this paragraph renders it highly probable, on settled rules of interpretation, that whatever contracts are guarded by the language concerning their obligation are referred to in the language concerning the remedy. No reason appears for an opposite conclusion."

He also quotes the late Chief Justice Beasley, in Rahway v. Munday, 44 N. J. Law, 415, where he says that this clause, in regard to the remedy in the state constitution—

"Has little force since the decision of the supreme court in the case of Louisiana v. New Orleans, 102 U. S. 203, where it is laid down broadly that the provision of the constitution of the United States securing the inviolability of the contract is, as a necessary consequence, protective of the remedy; such construction being justified from the consideration that the obligatory force of a contract, in the constitutional sense, resides in its legal enforceability, and that, when the contract is preserved from invasion, the means by which the parties to it can be compelled to observe its stipulations are likewise. Whether we, therefore, regard this provision as it exists in the constitution of the United States, or as it exists in this state, the same inquiry is presented, viz. whether this statute of 1880 deprives this defendant of a remedy which was in force at the time he entered into these engagements with the state."

But this only amounts to saying that the contract clause of the constitution of the United States protects the remedy, in the case with which the chief justice was dealing, as fully as the express words of the state constitution. If, however, we go further, as counsel for defendant is compelled to do, and say that the constitution of the United States only protects the obligation of contracts from hostile legislation of the states in which the contract is made, and it is the remedy of this class of contracts only which the constitution of the United States intended to protect, then, it seems to us, we read into that provision of the constitution words which its framers, ex industria, omitted, and which greatly narrow its scope and meaning. Two classes of contracts would thereby be created,—one within the protection granted, and the other without. For the doing of this, we have been referred to the authority of no decided case, and we have been able to find none. In Rader v. Township of Union, 44 N. J. Law, at page 260, Mr. Justice Dixon, in delivering the opinion of the supreme court of New Jersey, after referring to the case of Louisiana v. New Orleans, said:

"Thus, it appears that the constitutional obligation of a contract is not anything inherent directly in the contract itself, but is to be found in the law which governs it. There is nothing in the language of our organic laws suggestive of any distinctions among the obligations of contracts. All such obligations, as widely as they can be the subject of legislation, are referred to as though embraced in a single class. In the provision of our state constitution concerning remedies, only those existing when the contract was made are protected; but the clause regarding obligations is unlimited, and whatever may with propriety be termed the obligation of a contract is rendered inviolable."

We cannot, therefore, agree with the contention that either the learned chief justice or Mr. Justice Dixon intended to limit the scope of the first clause of the constitution of New Jersey, or that of the contract clause of the constitution of the United States, to contracts made in that state, and to confine the language in the last clause of the constitution of New Jersey, protecting the remedy, to the class thus defined. If the obligation of a contract may be said to "reside in its legal enforceability," then it would seem that the legislation of a state, though not the place of the contract, which destroys the right to the transitory action for its enforcement which previously existed, would impair its obligation, and so be within the inhibition

of the constitution of the United States, and also that of the state of New Jersey. If the contract here in question exists in the state of New Jersey, as we think we have shown that it does, and that the right of action accruing and the liability incurred by reason of it are cognizable before any court in that state having jurisdiction of the parties, then a law which impaired its obligation is as much in violation of the constitution of the United States as though the contract were made in the state of New Jersey. The constitution of the United States is not localized in this regard. It pervades all the states, like an atmosphere, and it withers and destroys all legislation inconsistent with its provisions. If it were otherwise, only a small portion of the contracts existing and enforceable in any state would be protected from adverse legislation of that state. The contract in question was lawfully made, and, as such, was binding upon the defendant, a party to it, in the state of New Jersey. Hundreds of such contracts, though not made in that state, are, on principles of universal jurisprudence, so binding in it; and the courts of that state, as those of the other states, are every day administering the law of such contracts, and enforcing their obligation. The rules of international law carry them, with their obligations, into the state where they are sought to be enforced. The efficiency of the whole lex mercatoria depends upon the recognition of this principle. Nor does its recognition at all diminish the force of the rule that the courts of a state are not bound to enforce contracts inconsistent with, or contrary to, a settled public policy of a state. This they are not bound to do, whether the contract in question be of domestic or foreign origin.

This brings us to say that we have discovered no public policy of the state of New Jersey that would forbid the enforcement of a contract like the one before us. It certainly, as Chief Justice Magie has said, is not contrary to good morals; nor can we regard the absence of legislation in New Jersey providing for the liability of stockholders prior to the act of 1897, after the manner of the Kansas law, as any evidence of that settled public policy which would stay the hand of the court in enforcing a contract of that kind. Nor do we think that the act of 1897, which forbids the maintenance of an action at law in behalf of an individual creditor against an individual stockholder, but apparently sanctions a proceeding in the nature of an accounting in equity, in which all the creditors of the foreign corporation and all its stockholders should be necessary parties, merely changes the form of the remedy theretofore existing, without destroying the substantial right of action which the plaintiff had for the enforcement of its contract. To use the language of Judge Lowell in Dexter v. Edmands, 89 Fed. 469:

"The difference between a right vested in all the creditors to proceed in one action against all the stockholders, and a right vested in each individual creditor to proceed against any individual stockholder, is much more than a difference between two remedies. It is a difference between two substantive rights."

But even if the inhibition of the constitution of the United States, and of that of New Jersey upon its legislature, to pass any law im

pairing the obligation of contracts, be addressed only to the legislatures of the state where the contract was entered into, we are of opinion that the peculiar provision of the New Jersey constitution, prohibiting its legislature from depriving any party of a remedy to enforce his contract which existed when the contract was made, is not thereby limited and confined to contracts made in the state of New Jersey. We think that this provision was intended to extend the protection of the contract clause, and, by the exigence and force of its plain language, did extend that protection, under circumstances like those of the present case, to a contract, wherever made.

It is with much interest that we have read the opinion of the present chief justice of New Jersey in the case of Western National Bank v. Skillman, tried September 28, 1898, which, although not published, has been brought to our attention by the counsel for the plaintiff, from stenographic notes revised by the chief justice himself. This report we will take to be correct, as it is not challenged by the other side. It is true that the opinion was a nisi prius opinion on a motion for a nonsuit; but the fact that the plaintiff was the same plaintiff, and the cause of action precisely the same as in the present suit, seeking to enforce the liability in New Jersey of a stockholder of the same Kansas corporation, together with the high character and ability of the judge rendering the decision, give the opinion much weight in this court. Precisely the same questions were involved in the motion for a nonsuit that are made in the present case; the only difference, in fact, being that the New Jersey act of 1897 was passed after the suit had been begun. As to this point, the court cannot see that this at all affects the principle involved in the decision, which turned on the constitutionality of said act of 1897. The learned chief justice, in the conclusion of his opinion refusing the nonsuit, says:

"I think that this act both takes away the obligation of the contract, because it deprives the party of a mode of suing, which, under my construction, he had, and also, under the unusual clause connected with this part of our constitutional provision, it deprives a man of a remedy that he had when the contract was made."

This court feels much sustained by such an opinion from such a source, as, but for it, the case now before the court would be one of first impression. The first two grounds of demurrer having been covered by what has already been said, it only remains to say that the third ground of demurrer, namely, "that the undertakings and promises of the said defendant set forth in said counts, respectively, are, and each of them is, without consideration and void," cannot be sustained, for the reason that the contract which is declared upon and set up by the declaration rests upon the statutory liability created by the laws of Kansas, and no other consideration is necessary to support the promise declared upon. The demurrer must therefore be overruled, and let judgment be entered accordingly.

ERICKSON v. PACIFIC COAST STEAMSHIP CO.

(Circuit Court, D. Washington, W. D. August 14, 1899.)

1. ACTION FOR WRONGFUL DEATH—WHAT LAW GOVERNS.
A right of action for wrongful death is governed by the law of the place where the tort which caused the death was committed.

2. SAME—ALASKA STATUTES.
Under the statutes of Oregon, adopted by act of congress as the laws of Alaska, which give the personal representative of a deceased person a right of action for the wrongful death of his decedent, where the latter, had he lived, might have maintained an action for the act or the negligence which caused the death, the wrongful or negligent killing of a person in Alaska creates a cause of action in favor of his administrator, though appointed in a different state, where the decedent was domiciled, which may be enforced in any court having jurisdiction of the subject-matter and the parties.[1]

This is an action by an administrator to recover damages for the wrongful death of his decedent. On demurrer to complaint. Overruled.

Pritchard & Haight, for plaintiff.
S. H. Piles and Donworth & Howe, for defendant.

HANFORD, District Judge. The demurrer to the complaint in this case raises the question whether the administrator of the estate of a deceased person in the state of Washington can maintain an action to recover damages for a personal injury to his decedent causing death, the injury being committed in Alaska, and there being no widow or children of the deceased to benefit by the recovery. The complaint in this case contains no allegation that the deceased person, of whose estate the plaintiff is administrator, left surviving him any widow or children, and presumably there are no such relatives. As the laws of this state do not authorize an action by an administrator to recover damages for the infliction of an injury causing death, except for the benefit of the immediate family,—that is, wife and children of the deceased (Noble v. City of Seattle, 19 Wash. 133, 52 Pac. 1013),—it is insisted that the plaintiff has no right to maintain the action. If the injury complained of had been inflicted in this state, the defendant would be certainly right in the position it has taken, but the law of the place where the wrong was committed must determine the rights of the parties. Railroad Co. v. Babcock, 154 U. S. 190, 203, 14 Sup. Ct. 978.

The laws of the state of Oregon, which by an act of congress have been adopted as laws of Alaska, confer upon the personal representatives of a deceased person a right of action to recover damages for the wrongful act or omission of another, causing death, in cases in which the deceased, if he had lived, might have maintained an action for the injury to himself by the same act or omission. The serious question in the case is whether this statute creates any right in favor of personal representatives residing and acting beyond the

[1] As to death by wrongful act, see note to Railroad Co. v. Wilson, 1 C. C. A. 33.

limits within which the laws of Alaska have force, and whose authority to represent the deceased does not spring from the laws of Alaska. I consider, however, that the question is practically settled in favor of the plaintiff by the decisions of the supreme court of the United States in the cases of Dennick v. Railroad Co., 103 U. S. 11–21, and Stewart v. Railroad Co., 168 U. S. 445–450, 18 Sup. Ct. 105, and upon the authority of these decisions I will overrule the demurrer.

McBRIDE v. SUNSET TELEPHONE CO.

(Circuit Court, D. Washington, W. D. August, 1899.)

1. DAMAGES—BREACH OF CONTRACT—MENTAL SUFFERING.
   Mental anguish and distress alone cannot be made the basis for a recovery of damages for a breach of contract.[1]
2. TELEPHONE COMPANIES—FAILURE TO DELIVER MESSAGE—MEASURE OF DAMAGES.
   A complaint in an action against a telephone company, alleging that by reason of the failure of defendant to deliver a message sent to plaintiff by his son as his agent, and plaintiff's consequent failure to respond to such message, as he would have done had he received it, his wife and children became estranged from him, and his family was broken up, states no ground for the recovery of more than nominal damages, as plaintiff's domestic trouble cannot be presumed to have been the direct or proximate result of the failure to deliver the message, and, if it were, it cannot be considered as a natural result of a breach of the contract which was within the contemplation of the parties.

Action for damages for the negligent failure on the part of the defendant to transmit a message sent to the plaintiff by his son, who, in sending the message, was acting in the interest of the plaintiff and as his agent, the plaintiff being at the time absent from home, and the message was to inform him of the serious illness of his daughter, and to request a remittance of money of which the family were in need. The complaint alleges that in consequence of his not receiving the message the plaintiff remained ignorant of the illness of his child until after her death, and because of his apparent neglect his wife and children have become estranged, and his home has been broken up, and he has suffered great mental anguish and distress. Heard on demurrer to the complaint, which, by agreement, was argued and submitted for the purpose of testing the question as to the proper measure of damages. Demurrer sustained for the reason that the defendant is liable only for nominal damages and costs.

Frank S. Carroll and Frank Allyn, for plaintiff.
Struve, Allen, Hughes & McMicken, for defendant.

HANFORD, District Judge (after stating the facts as above). The complaint certainly states a cause of action, and shows the

[1] As to mental suffering as an element of damages, see notes to Railway Co. v. Caulfield, 11 C. C. A. 571; Telegraph Co. v. Coggin, 15 C. C. A. 250, and Telegraph Co. v. Morris, 28 C. C. A. 62.

plaintiff to be entitled to recover at least nominal damages and costs, but by agreement of the parties the case is to be considered with respect to the rule of damages. In their brief, counsel for the plaintiff say: "The doctrine that one may recover for mental anguish alone is, in our opinion, taking advanced grounds in judicial decisions and in the opinions and minds of the best lawyers." It is the business, however, of courts in adjudicating the rights of individuals, to apply the rules of law as they exist, and not to take advanced grounds, or to depart from fixed principles. Whenever courts assume legislative functions by attempting to give relief in a hard case, when, in order to do so, it is necessary to overstep the limits of judicial power, more harm is likely to result than benefit. The only cases in which courts may legitimately take advanced grounds is when new conditions present new problems to be solved, but even then the object should be to merely accomplish the adjustment of individual rights affected by new conditions consistently with the existing laws, and leave to the legislature the task of changing, amending, or creating laws. The authorities cited upon the argument leave no doubt in my mind that the amount of damages to be awarded for the breach of a contract cannot, consistently with legal principles governing the assessment of damages, be increased on account of mental distress. If mental distress is to be compensated, the amount of damages should correspond with the degree of suffering. The degree of suffering will depend rather more upon the temperament and physical condition of the injured party than upon the degree of culpability of the wrongdoer. To render fair compensation for the mental anguish of a person of refined ideas and sensitive organization, or to a person whose suffering may have been greatly augmented by nervous debility at the time, would subject the defendant to consequences quite as severe as the rule of vindictive damages applicable in cases of malicious torts, and he would have to pay for his adversary's infirmity, rather than for the natural or probable effect of his own wrongful act or neglect. The plaintiff in this case, however, does not ask for damages alone upon the ground of mental anguish, but claims that in consequence of the wrongful failure on the part of the defendant to properly direct and transmit the message sent by his son to inform him of the serious illness of his daughter, and requesting him to remit money necessary for the use of his family in the situation in which they were placed by reason of his absence and the fatal illness of his daughter, he was prevented from making such a response to the message as he would have made if he had received it; and, not receiving such a response to the message as they had a right to expect, the members of his family were so shocked and outraged in their feelings that they have ceased to regard him with affection or respect, and they have since refused to accept any explanation of his conduct, and have separated from him, so that his relations with his wife and children have been severed. Admitting that the law will award damages as compensation for such a loss as the plaintiff alleges that he has sustained when caused by the meddlesome or malicious act of another in purposely making false representations for the purpose

of alienating the affections of a wife or husband or child, still the claim made in this case does not rest upon similar ground. The gravamen of this case is a mere breach of a contract through the negligence of the defendant's servants and employés, involving no malice or purpose on the part of the defendant to injure the plaintiff. The failure to transmit the message is not the direct or approximate cause of the disruption of the plaintiff's family. If he is a kind and dutiful husband and father, the refusal on the part of his wife and children to accept a reasonable explanation of his apparent neglect proves conclusively such perversity and unlovely dispositions in them that the distress and humiliation and loss which the plaintiff alleges he has suffered must be attributed to their unreasonable behavior, rather than to the defendant's breach of its contract. It is true that the plaintiff charges that all the unpleasantness in his domestic affairs is due to the breach of the contract, but this is a mere conclusion, and not controlling. The facts set forth in the complaint must be considered, and it is for the court to determine whether the facts support the conclusion. At any rate, in awarding damages for a broken contract, the party in fault can only be held liable for such natural consequences of a breach of contract as may be fairly inferred were in contemplation of the parties at the time of entering into the contract. A party undertaking to carry or transmit a message under the circumstances described in this complaint, if he stopped to consider what might be the consequences of his failure to deliver the message, would not be apprised, nor have any reason to infer, that his neglect would be visited upon the sendee of the message, and be made the ground for a permanent separation from him by his wife and children. I hold that no more than nominal damages and costs can be recovered in this case, because mental anguish alone affords no basis for the computation of damages; and the breaking of the contract cannot be presumed to be the direct or approximate cause of the domestic trouble alleged in the complaint, and, if it were so, the trouble cannot be presumed to have been a natural consequence of the breaking of the contract which the parties could have had in contemplation at the time when it was made. Demurrer sustained, but, unless the pleadings shall be amended, the judgment to be rendered will be in favor of the plaintiff for the sum of one dollar and costs.

GILBERT et al. v. McNULTA.

(Circuit Court, N. D. Illinois. March 16, 1899.)

No. 25,013.

NATIONAL BANKS—RIGHT TO SUE RECEIVER.

The receiver of a national bank may be sued in a federal court in relation to a contract made by him on behalf of the estate in the course of its administration.[1]

---

[1] As to jurisdiction of cases involving federal questions, see note to Bailey v. Mosher, 11 C. C. A. 308, and, supplementary thereto, note to Montana Ore-Purchasing Co. v. Boston & M. Consol. Copper & Silver Min. Co., 35 C. C. A. 7.

On Demurrer to Plea to Jurisdiction.

James S. Harlan and S. S. Gregory, for plaintiffs.
J. A. Baldwin, Henry R. Baldwin, and J. D. Hood, for defendants.

SEAMAN, District Judge. The sole question raised by the plea is whether the receiver of a national bank appointed under the act of congress is suable in this court upon his contract made on behalf of the estate in the course of its administration. It is established by authority that the receiver in such case is "not the officer of any court, but the agent and officer of the United States," in the performance of his duties. Ex parte Chetwood, 165 U. S. 443, 458, 17 Sup. Ct. 385. But it is equally well settled that officers of the United States are not granted immunity from suits in all cases, even in respect of matters in which their possession or acts are exclusively for the United States (U. S. v. Lee, 106 U. S. 196, 1 Sup. Ct. 240; Tindal v. Wesley, 167 U. S. 204, 17 Sup. Ct. 770), and that courts of law may determine as to the rights of parties dealing with such officers, although they may not interfere with the discharge of official duties (Gaines v. Thompson, 7 Wall. 347; Litchfield v. Register, 9 Wall. 575). In the case at bar the act provides for the comptroller to have the charge of winding up the affairs of the insolvent bank for the benefit of creditors and stockholders, and the receiver is appointed by him as a trustee or agent to that end. While the funds which come to the hands of the receiver are paid over "to the treasurer of the United States, subject to the order of the comptroller," they are in no sense public funds, but belong to the stockholders after all liabilities are discharged. The argument against jurisdiction rests mainly upon the proposition that there is no express statutory authority for its exercise, and therefore there can be no cognizance in a federal court under its well-settled limitations. I am of the opinion that the proposition is not well founded, as the administration of the affairs of the insolvent bank arises exclusively under the act of congress (Rev. St. §§ 5234–5238); and by another act, of August 13, 1888, jurisdiction is conferred upon the circuit courts "of all suits of a civil nature at common law or in equity when the matter in dispute exceeds, exclusive of interest and costs, the sum or value of $2,000, and arising under the constitution or laws of the United States." See Hallam v. Tillinghast, 75 Fed. 849; Smithson v. Hubbell, 81 Fed. 593; Snohomish Co. v. Puget Sound Nat. Bank, Id. 518. The case is distinguished from Bausman v. Dixon (decided by the supreme court Feb. 20, 1899) 19 Sup. Ct. 316, and from Capital Nat. Bank of Lincoln v. First Nat. Bank of Cadiz, 172 U. S. 425, 19 Sup. Ct. 202, there cited. No ground of public policy appears to oppose action by the courts to determine the rights of claimants against the funds which are in course of administration under the act, aside from the fact that the machinery of the government is employed therein. On the other hand, the claimant is without remedy; is, in effect, denied due process of law, if his suit cannot be entertained. The inhibition must be clear to oust jurisdiction in such case, and this statute expressly provides for action by the court when application is made under sections

5234 and 5237, and recognizes by section 5236 that claims may be adjudicated "in a court of competent jurisdiction." See Bank of Bethel v. Pahquioque Bank, 14 Wall. 383. In the case of Merrill v. Bank, on appeal from the United States circuit court of appeals, Fifth circuit (21 C. C. A. 282, 75 Fed. 148), the opinions filed in the supreme court February 20, 1899 (19 Sup. Ct. 360), are instructive, as jurisdiction was there entertained of a bill filed against the receiver by a secured creditor to obtain dividends upon the face of his claim without deduction for collaterals. The prevailing opinion is delivered by the chief justice, and there are dissenting opinions by Mr. Justice White (concurred in by Justices Harlan and McKenna), and by Mr. Justice Gray, in all of which the discussion is upon the merits; and the question of jurisdiction, which was clearly presented, if not raised, finds no comment, but was evidently accepted as not open to dispute. It is insisted, however, on behalf of the receiver, that he cannot be sued in any court upon a claim or contract arising in the course of administration, whatever may be the liability as to adjudication of claims existing against the insolvent bank. Of the numerous authorities cited in the brief of counsel none appears to sustain this contention, aside from a suggestion by Judge Hall in Van Antwerp v. Hulburd, 8 Blatchf. 282, Fed. Cas. No. 16,827, which is clearly obiter. Nor is any authority called to my attention which passes upon the question of jurisdiction as raised here. But it was clearly presented on the face of the pleadings or on the undisputed facts in at least three cases cited on behalf of the plaintiff, namely, Gibson v. Peters, 150 U. S. 342, 14 Sup. Ct. 134; Ex parte Chetwood, 165 U. S. 443, 17 Sup. Ct. 385; and Brown v. Tillinghast, 84 Fed. 71. In each of these cases the action was entertained, founded upon the contract or acts of the receiver in the course of administration, and there was full consideration upon the merits, and Gibson v. Peters is directly in point upon the facts. Although the jurisdiction does not appear to have been questioned in that or the Chetwood Case, they are of strong inferential value to sustain it under the circumstances shown. I am of the opinion that the demurrer to the plea must be sustained, and it is so ordered.

In re OLIVER.

(District Court, N. D. California. May 15, 1899.)

No. 2,905.

BANKRUPTCY—POWERS OF REFEREES—CITATION TO BANKRUPT.

The referee to whom a case in bankruptcy has been referred has jurisdiction and power, on the petition of the trustee, to cite the bankrupt to appear before him, and show cause why he should not be ordered to surrender to the trustee property in his possession, claimed by the trustee as assets of the estate.

In Bankruptcy. The trustee filed a petition with the referee, praying that the bankrupt be cited to appear before the referee, and show cause why he should not be ordered forthwith to surrender to the trustee certain property in said bankrupt's possession. To this peti-

tion the bankrupt demurred, contending that the referee had no jurisdiction, power, or right to issue such a citation to him, or compel his appearance thereto. The cause was before the referee in pursuance of rule No. 1, in bankruptcy, of the United States district court for the Northern district of California, which provides that all cases in bankruptcy are referred without special order to the referee in the district where the bankrupt resides, and that such referee shall thereafter exercise all the authority conferred upon him by the bankruptcy act, and shall also give notice of the first meeting of creditors. The referee overruled the bankrupt's demurrer, and the latter caused the decision to be certified to the judge for review.

J. G. Swinnerton, for trustee in bankruptcy.

DE HAVEN, District Judge. E. P. Foltz, the referee to whom said cause has been referred under bankruptcy rule No. 1 of this court, has certified the following question, arising in the course of the proceedings in said cause before him, for my opinion: "Question. Has the referee jurisdiction to cite the bankrupt to appear and show cause why certain property in his possession should not forthwith be delivered to the trustee as assets of said bankrupt's estate, and to make an order to that effect?" This question must be answered in the affirmative, and the ruling of the referee overruling the demurrer of the bankrupt to the petition of the trustee praying that said bankrupt be cited to appear before the referee, and show cause why an order should not be made that he forthwith deliver to the trustee all of the property referred to in the petition, was correct, and is hereby affirmed.

In re VAN ORDEN.

(District Court, D. New Jersey. July 29, 1899.)

BANKRUPTCY—PROVABLE DEBTS—ALIMONY.

Under Bankruptcy Act 1898, § 63, providing that debts may be proved against a bankrupt's estate which are "a fixed liability, as evidenced by a judgment," a claim of the bankrupt's divorced wife for unpaid monthly installments of the alimony awarded her by the decree of the court granting the divorce is a provable debt, and she will be enjoined from prosecuting a suit against the bankrupt on such claim in a state court.

In Bankruptcy.

S. M. Hitchcock and Henry Young, for bankrupt.
Skinner & Ten Eyck, for creditor.

KIRKPATRICK, District Judge. On the 26th day of June, 1899, John M. Van Orden was adjudged a bankrupt by this court upon his own petition, and on that day an order was entered restraining Margaret J. Van Orden, his wife, from prosecuting a suit brought by her against the said bankrupt, and then pending in the court of chancery of New Jersey. The claim which Mrs. Van Orden seeks to enforce in said suit arises under the following circumstances: Prior to the year 1897, Mr. and Mrs. Van Orden were residents of

the state of New York, and Mrs. Van Orden filed her complaint in the supreme court of that state asking for a divorce a mensa et thoro from her husband, and for other relief. Such proceedings were had therein that on the 31st day of August, 1897, a judgment was rendered in favor of Mrs. Van Orden and against her husband, in and by which the husband was decreed to pay to the plaintiff the sum of $300 surgeon's charges, $650 for nursing and attendance, the sum of $263.87 taxed costs, and, commencing May 1, 1897, the sum of $150 per month during her natural life, for which several sums it was ordered that the plaintiff should have execution. Nothing was realized on this judgment. The defendant removed to the state of New Jersey, and afterwards, about July, 1898, suit was brought by Mrs. Van Orden for the recovery of said sums in the court of chancery of New Jersey. This suit, though founded on the judgment recovered in New York, was brought in a court of equity, because of the still existing marital relations of the parties. In the bill of complaint filed on her behalf, the complainant alleges "that there is now due your oratrix under said decree [referring to the New York judgment, a copy of which is annexed to her bill] the sum of twenty-two hundred and fifty dollars, being fifteen of the monthly payments at one hundred and fifty dollars per month directed to be paid to your oratrix, and also the sums of three hundred dollars and six hundred and fifty dollars mentioned in the decree, and the costs therein taxed, namely, two hundred and sixty-three dollars and eighty-seven cents; making in all the sum of three thousand three hundred and sixty-three dollars and eighty-seven cents, with interest from August 31, 1897." The prayer of the bill is that "John M. Van Orden be directed to pay, pursuant to said decree of the New York court, the said sum of $3,363.87, with interest." The matter now comes before the court upon a rule to show cause why the order staying such suit should not be set aside. It is insisted on behalf of Mrs. Van Orden that she should be permitted to prosecute her suit because her debt is not such a one as is provable in bankruptcy, nor would it be discharged by the decree of this court in proceedings had therein. Section 1 of the bankruptcy act of 1898 provides that "a 'discharge' shall mean the release of a bankrupt from all of his debts which are provable in bankruptcy except such as are excepted by this act." The debts which are excepted and referred to in section 1 are to be found specifically set out in section 17 of the act. It is admitted, and, if it were not, it would be perceived at a glance, that the debt of Mrs. Van Orden is not included in any of the excepted classes. The only question before the court, then, is whether the debt for which Mrs. Van Orden has brought her suit against the bankrupt is one provable in bankruptcy. In order to ascertain what debts may be proved, reference must be had to the sixty-third section of the act, where, under the title of "Debts which May be Proved," the following provision is found:

"(a) Debts of the bankrupt may be proved and allowed against his estate which are (1) a fixed liability, as evidenced by a judgment or an instrument in writing absolutely owing at the time of the filing of the petition against him,

whether then payable or not, with any interest thereon which would have been recoverable at the date, or with a rebate of interest upon such as were not then payable and did not bear interest."

As used in this act, the word "debt" differs from the same word as used in the bankruptcy acts which have preceded it, in that it has not the limited or restricted meaning which has been given to it in text-books. The act itself defines the word, and carries it beyond "a sum of money due by certain and express agreement," and declares that for the purposes of the act it shall include any "fixed liability evidenced by judgment." In 8 Am. & Eng. Enc. Law (2d Ed.) p. 986, it is stated that "the words 'debt' and 'liability' are not synonymous * * * as applied to the pecuniary relations of the parties. Liability is a term of broader significance than debt. * * * Liability is responsibility." In Joslin v. Spring Co., 36 N. J. Law, 145, liability is defined to be "a state of being bound or obliged in law or justice." "It signifies that condition of affairs which gives rise to an obligation to do a particular thing to be enforced by action." Haywood v. Shreve, 44 N. J. Law, 94. The support and maintenance of a wife by the husband is an ever-recurring liability from which he cannot, by any act of his, be freed. It is an obligation founded in law and justice, which may be enforced by action. Until the necessity for its enforcement arises, the extent of this liability is vague and uncertain; but when the aid of the court has been invoked, and it awards alimony, it thereby determines the amount of the husband's liability, and by its judgment or decree requires the amount so fixed to be paid the wife for her maintenance and support. "From that time the husband is, in effect, a debtor, owing his wife the amount adjudged and determined in the decree." Wetmore v. Wetmore, 149 N. Y. 521, 44 N. E. 170. That which before was a mere liability now becomes a debt. The judgment establishes the indebtedness, and makes fixed and certain that which was before uncertain, and becomes the evidence of the debt which it creates. Black v. McClelland, 12 N. B. R. 431, Fed. Cas. No. 1,462; Zimmer v. Schleehauf, 115 Mass. 52; Crouch v. Gridley, 6 Hill, 250; Nichols v. Dissler, 31 N. J. Law, 473. It follows from what has been said that the debt which Mrs. Van Orden seeks to recover from the bankrupt in her chancery suit is a liability of the bankrupt, the amount of which is fixed and determined and evidenced by the judgment of a court. As such it is a provable debt in bankruptcy, and she should be enjoined from its further prosecution. The rule to show cause will be discharged.

In re STARK.

(District Court, S. D. New York. March 18, 1899.)

BANKRUPTCY—OPPOSITION TO DISCHARGE—KEEPING BOOKS.

Where, in 1891, an execution upon a judgment by confession was levied upon the debtor's stock, including the safe in which the books of account were kept, and the debtor, becoming bankrupt under the act of 1898, testified that he had never seen the books of account since that time, and

did not know what had become of them, *held*, that the evidence was not sufficient to show that the loss or disappearance of the books in 1891 was brought about by any "fraudulent intent" on the part of the bankrupt to "conceal his true financial condition," and constituted no ground for refusing his discharge in bankruptcy.

In Bankruptcy. On certificate from referee in bankruptcy.

The issues arising upon the bankrupt's application for discharge in this case, and the specifications in opposition thereto, were referred to the referee in bankruptcy, to ascertain and report the facts. He found that in 1891 Isidor Stark, the bankrupt, who was then a member of the firm of Isidor Stark & Bros., confessed judgment to a brother for borrowed money. Under an execution issued on such judgment, the sheriff levied on the assets of the partnership, and took possession of their store. The firm kept the usual books of account, which at the time of the levy were in a safe in the store. The bankrupt testified that he had never seen them since, and that he did not know what had become of them. Objections to the bankrupt's discharge were based solely upon an allegation that he had, "with fraudulent intent to conceal his true financial condition, and in contemplation of bankruptcy, destroyed, concealed, or failed to keep books of account or records from which his true condition might be ascertained." Bankruptcy Act 1898, § 14, cl. b. The referee reported: "In my opinion, the proof does not show, on the merits, that the bankrupt destroyed, concealed, or failed to keep books of account. If the bankrupt had destroyed or concealed his books of account in the year 1891, that would, in my opinion, not have been an act in contemplation of bankruptcy, within the meaning of section 14 of the act. The term 'bankruptcy' is sometimes loosely used to mean insolvency; but 'contemplation of bankruptcy,' within the meaning of the present act, is, in my opinion, an actual, legal bankruptcy, under a bankrupt act, and not a mere general condition of insolvency at a time when no bankrupt act was in existence."

Hays, Greenbaum & Hershfield, for the bankrupt.
Black, Olcott, Gruber & Bonynge, for opposing creditors.

BROWN, District Judge. It is not necessary to consider here whether the words "in contemplation of bankruptcy" in section 14, cl. 2, of the act of 1898, are broader in their signification than under prior acts (Buckingham v. McLean, 13 How. 167; In re Craft, 6 Blatchf. 178, Fed. Cas. No. 3,317; In re Goldschmidt, 3 Ben. 379, Fed. Cas. No. 5,520; In re Freeman, 4 Ben. 245, Fed. Cas. No. 5,082) or not; for I am of opinion that the evidence is not sufficient to warrant the finding that the loss or disappearance of the books of account in this case in 1891 was with any "fraudulent intent of the bankrupt to conceal his true financial condition" or with any other fraudulent intent. I do not see any sufficient reason for such an implication or inference. His acts done at that time were lawful. There would be no apparent motive for such concealment and it is denied.

Discharge granted.

In re SHORER.

(District Court, D. Connecticut. May 15, 1899.)

No. 69.

1. BANKRUPTCY—OPPOSITION TO DISCHARGE—KEEPING BOOKS.
The destruction or concealment of books of account by a debtor, with intent to conceal his financial condition, is no ground for refusing to grant him a discharge in bankruptcy, unless committed since the enactment of the bankruptcy law.

2. SAME.
Evidence that the books of account used by the bankrupt in his business in 1897 were at that time transferred to his brother-in-law, who bought the business, and that the latter, though residing within the state, had not been requested to produce the books or called as a witness for either side in the bankruptcy proceedings, *held* not sufficient to show a fraudulent concealment or destruction of books by the debtor since the enactment of the bankruptcy law, such as to forfeit his right to a discharge.

In Bankruptcy. On application of the bankrupt for discharge.

Warren H. Bristol, for the bankrupt.

Watrous & Day, for opposing creditors.

TOWNSEND, District Judge. The opposition to the petition for a discharge was based on the ground that, long prior to the passage of the bankruptcy act, the bankrupt had, with fraudulent intent, concealed his financial condition, and destroyed or concealed his books of account, etc. This is insufficient. In re Stark, 1 Nat. Bankr. News, 232, 96 Fed. 88; In re Holtz, 1 Nat. Bankr. News, 204.

The referee does not find that the bankrupt, since the passage of the bankruptcy act, has destroyed or concealed said books, except in so far as might be inferred from certain facts, the most important of which are that the books used by him in his business were in 1897 transferred to his brother-in-law, who purchased his business, and that said brother-in-law, William Froelich, is now residing at New Haven, and that no evidence was produced of a request that he produce said books, and said Froelich was not called as a witness for either side. This finding is insufficient to show a fraudulent concealment or destruction of books. The discharge is granted.

In re PUGET SOUND REDUCTION CO.

(Circuit Court, D. Washington, N. D. August 16, 1899.)

1. CUSTOMS DUTIES—ASSESSMENT—METHOD OF ASSAYING LEAD ORES.
Paragraph 6 of the sundry civil appropriation act of March 2, 1895 (2 Supp. Rev. St. p. 430), which requires the secretary of the treasury to prescribe regulations for the sampling and assaying of imported lead ores for the purpose of the assessment of the duty thereon, which "shall provide that the method of sampling and assaying such ores shall be the same as that usually adopted for commercial purposes by public sampling works in the United States," was not repealed by implication by paragraph 181 of the tariff act of 1897 (Act July 24, 1897), which provides that ores containing lead on their arrival "shall be sampled according to commercial

methods," that the government assayer shall make a "proper assay" of the sample on which the duties shall be liquidated, and authorizes the secretary to make necessary regulations for enforcing such provisions.

2. SAME—COMMERCIAL METHOD—QUESTION OF FACT.
Said paragraph 181 is entirely consistent with the act of 1895, and under the latter the secretary has no power to adopt any other than the commercial method either of sampling or assaying, and what constitutes such method is a question of fact to be determined upon evidence.

3. SAME—"FIRE PROCESS"—"WET PROCESS."
It being shown by uncontradicted testimony that what is known as the "fire process," which gives the quantity of lead in an ore that can be saved by smelting, is exclusively used in making assays for commercial purposes, and is known as the "commercial method," instructions issued by the treasury department adopting for customs purposes what is known as the "wet process" of assaying, which shows the actual quantity of lead in an ore, making no allowance for loss in smelting, require the payment of a higher duty than is contemplated by the tariff act, and are in contravention of the positive requirement of the act of 1895.

This is an appeal by the Puget Sound Reduction Company from a decision of the board of general appraisers affirming the action of the collector in the assessment of duty on certain imported ores containing lead.

F. H. Brownell, for appellant.

Wilson R. Gay, U. S. Atty., and Charles E. Claypool, Asst. U. S. Atty.

HANFORD, District Judge. This is an appeal taken pursuant to section 15 of the act of congress approved June 10, 1890 (1 Supp. Rev. St. U. S. [2d. Ed.] p. 751), under which section the appellant is entitled to have a review of the questions of law and fact involved in the decision of the board of general appraisers with respect to certain duties upon imported ores containing lead, which were paid by the appellant under protest. The appellant alleges that by reason of the improper method of assay for ascertaining the weight of lead contained in the ores the collector of customs for the Puget Sound district required payment of excess duties on the lead contained in said ores, amounting to $1,074.15. The board of general appraisers has made a return to this court, showing that several protests respecting the alleged excess of duties were duly transmitted to the board; that through a clerical error the notice of the date of hearing was misdirected, and presumably was not received by the appellant, and it failed to appear at the time appointed for consideration by the board of said protests; that no evidence was introduced, and for lack of "evidence to controvert the correctness of the official assays" the board determined that such assays were correctly made, and affirmed the decision of the collector of customs in accordance therewith. It is an admitted fact in the case that the assays upon which the duties were based were made according to a chemical process known as the "wet process," and the appellant contends that the 181st paragraph of Schedule C of the tariff law known as the "Dingley Law" (Act July 24, 1897), under which the duties were collected, requires the government officers to determine the quantity of lead contained in imported ores by a "proper assay" of samples taken according to commercial

methods of sampling mineral ores, and that a proper assay under the laws of the United States must be by the process known as the "fire method," which is the usual and customary way in trade for ascertaining the quantity of lead contained in mineral ores. The evidence introduced by the appellant in this court shows that in the business of buying and selling mineral ores containing lead the fire method of assay is exclusively used for ascertaining the quantity of lead, and is known as the commercial method; and that, while the wet process is the best for estimating accurately the actual quantity of lead contained in ore, the fire method is the fairest in a business sense, for by that method the amount of lead which can be saved by the process of smelting can be more accurately ascertained; the difference between the two methods is approximately the amount of lead which is necessarily lost in the process of smelting. The government, instead of offering rebutting evidence, relies upon the last clause of the 181st paragraph of Schedule C, which is as follows: "And the secretary of the treasury is authorized to make all necessary regulations to enforce the provisions of this paragraph." And it is contended that certain rulings and decisions heretofore made by the board of general appraisers and by the treasury department have the force of regulations promulgated by the secretary of the treasury under the authority of this statute, and that the practice, pursuant to said rulings and decisions, of making assays according to the wet process, being sanctioned by a regulation prescribed by the secretary of the treasury, must be conclusively presumed to be the true method for making a proper assay within the meaning of the phrase "proper assay" as it is used in the statute. It is shown that on September 10, 1894, upon a protest of one F. A. Hartman against the decision of the collector of customs at San Francisco as to the rate and amount of duties chargeable upon certain silver ore containing lead, which was imported December 20, 1893, the board of general appraisers made a decision to the effect that "the common commercial and correct test for lead is by the wet process." In a letter to the treasury department, dated October 7, 1898, the Chicago & Aurora Smelting & Refining Company of Aurora, Ill., challenged the correctness of said decision by the board of general appraisers, and in a letter under date of October 12, 1898, the assistant secretary of the treasury said:

"In reply, you are informed that, whatever may be the method of assay actually used for 'commercial purposes,' the 'wet assay' alone is adopted for purposes of assessment of duties on the lead contained in imported ores, inasmuch as such assay insures the maximum of accuracy."

And he refers to a letter written by himself under date of May 21, 1898, to the collector of customs at El Paso, Tex., in which he said:

"The director of the mint, to whom the matter has been referred, reports that the method proposed by Mr. Johnson is unsatisfactory, as the results obtained are, in the case of refractory ores, uniformly too low, and that the wet assay adopted by the department insures the maximum of accuracy attainable in a limited time with uniformity of practice."

In a letter to the director of the mint, dated October 9, 1897, the acting secretary of the treasury set forth certain letters showing the method of appraisement in practice at the port of New York, from

which it appears that the lead contents of imported ores were ascertained by the wet method. These several matters have been printed and issued by the treasury department as circulars of instruction, but it is not shown that the secretary of the treasury has in any other manner promulgated any regulations affecting the question under consideration. In the argument it is said that the decision of the board of general appraisers made October 10, 1894, having been acquiesced in by the treasury department, established the wet assay as the method in use by the department at the time of the passage of the Dingley law, and therefore it should be presumed that the wet method was regarded by congress as the true method for a proper assay. But this argument leaves out of view the express declarations in the laws enacted by congress indicating a different intent. Paragraph 165 of Schedule C of the tariff act known as the "Wilson Law," approved August 27, 1894 (2 Supp. Rev. St. U. S. p. 278), contains the following provisions:

"Provided, that silver ore and all other ores containing lead shall pay a duty of three-fourths of one cent per pound on the lead contained therein, according to sample of assay at the port of entry. The method of sampling and assaying to be that usually adopted for commercial purposes by public sampling works in the United States."

Paragraph 6 of the sundry civil appropriation act, approved March 2, 1895, provides as follows:

"The secretary of the treasury shall prescribe regulations for the sampling and assaying of lead ores imported into the United States, and such regulations shall provide that the method of sampling and assaying such ores shall be the same as that usually adopted for commercial purposes by public sampling works in the United States. * * *" 2 Supp. Rev. St. U. S. p. 430.

That portion of the Wilson law above quoted was repealed by the Dingley law, but the act of March 2, 1895, has not been repealed, unless by necessary implication, because repugnant to the provisions of the Dingley law. I am unable to find that it is inconsistent with the Dingley law in any particular; on the contrary, paragraph 181, above referred to, indicates quite plainly that congress intended to adhere to the policy of resorting to the commercial method for ascertaining the quantity of lead in imported ores. That law provides that:

"On the arrival of the ores * * * they shall be sampled according to commercial methods under the supervision of government officers, * * * who shall submit the samples thus obtained to a government assayer, * * * who shall make a proper assay of the sample and report the result to the proper government officers, and the import entries shall be liquidated thereon. * * *"

It would require a very strained construction of the law to find that congress, after having, in 1894, and again in 1895, enacted statutes requiring the sampling and assaying of ores for the purpose of collecting duties thereon to be according to commercial methods, and without having expressly repealed the law of 1895, could have intended in this law of 1897 to continue the same policy as regards the methods of sampling, and yet depart from that method for the purpose of assaying. Such a construction for the purpose of making the burden upon commerce heavier would be contrary to the rule sanctioned by the supreme court of the United States in the case of

Hartranft v. Wiegmann, 121 U. S. 609, 7 Sup. Ct. 1240, in the following words: "Duties are never imposed on the citizen upon vague or doubtful interpretations." In other decisions of the supreme court it has been held that in construing tariff laws "the terms used, being addressed to merchants, are to be understood in their mercantile sense, the ascertainment of which is matter of fact, depending upon evidence." Stuart v. Maxwell, 16 How. 150–163; Two Hundred Chests of Tea, 9 Wheat. 430–438; U. S. v. One Hundred and Twelve Casks of Sugar, 8 Pet. 277; Elliott v. Swartwout, 10 Pet. 151; Arthur v. Morrison, 96 U. S. 108. It is my opinion that the secretary of the treasury is required, by the positive provisions of the acts of congress above referred to, to prescribe regulations for the assaying of lead ores by the commercial method, and that what is the commercial method is a question of fact, for the decision of which resort must be had to evidence. In this case the evidence is all one way, and it is in all respects satisfactory and convincing. From it I find that the commercial method for ascertaining the quantity of lead contained in imported ores is the fire process, and any other method of assaying does not meet the requirements of the law. I direct that findings and a judgment in favor of the appellant be entered herein for the amount of excess of duties which it has paid, as shown by the statement by which this appeal was initiated.

In re HEMPSTEAD (two cases).

(Circuit Court, E. D. Pennsylvania. August 9, 1899.)

Nos. 71 and 47.

CUSTOMS DUTIES—UNUSUAL FORMS OF COVERINGS.

Glass tubes, in which chloride of ethyl, used by surgeons and dentists as a local anæsthetic, is imported, are so made that the liquid, which is very volatile, can be directly applied therefrom in the form of a spray or vapor to the part to be treated, being volatilized by the warmth of the hand. After the contents are exhausted, the tubes are worthless, and are thrown away. *Held*, that the fact of such use does not render the tubes separately dutiable, under the provisions of section 19 of the customs administrative act of June 10, 1890, as an unusual form of holding or covering designed for use otherwise than in the bona fide transportation of the liquid.

These are appeals by William O. Hempstead, trading as O. G. Hempstead & Son, from an order of the general appraisers affirming the collector's action in assessing duty on certain coverings of imported merchandise.

Frank P. Prichard, for petitioner.

Michael F. McCullen and James M. Beck, for the United States.

GRAY, Circuit Judge. In each of the above cases the classification of similar articles is in question, and by agreement, therefore, the cases have been treated and will be considered together. The imported articles consisted of chloride of ethyl in certain glass coverings. These coverings were vials having a cap somewhat similar to those found on paint tubes and cologne bottles. The chloride of

ethyl or ether was intended for use in minor surgical operations by dentists and surgeons. By the pressure and warmth of the hand, after the metal cap of the covering is removed, the chloride of ethyl, which is an extremely volatile liquid, escapes from the covering in the form of a spray, which is applied directly to the gum or other part of the body which is to be operated upon. The importer, asserting that these coverings were simply intended for the protection and transportation of the ether until it was used, and were of no separate value or use apart from their contents, or after the contents were exhausted, claimed that they were not liable to a separate duty, inasmuch as they were the usual coverings for merchandise paying a specific duty; and that, in any event, if the vials were liable to a separate duty, they were dutiable, under paragraph 88 of the act of August 27, 1894, as vials holding less than one-fourth of a pint. The collector assessed a separate duty on them as manufactures of which glass is the component material of chief value, under paragraph 102 of said act.

In section 19 of the act of June 10, 1890, it is provided that:

"If there be used for covering or holding imported merchandise, whether dutiable or free, any unusual article or form designed for use otherwise than in the bona fide transportation of such merchandise to the United States, additional duty shall be levied and collected upon such material or article at the rate to which the same would be subject if separately imported."

The question presented to the court, then, is whether the appraisers were right in finding that these glass coverings of the chloride of ethyl were unusual in substance and form, and designed for use otherwise than in the bona fide transportation of such merchandise to the United States. The chloride of ethyl is an exceedingly volatile liquid, and escapes from the container in the form of a spray, and is used by dentists and surgeons as a local anæsthetic. The glass tubes in which it is imported are closed with a metal cap with a rubber lining, the tubes being drawn out to a small end with an exceedingly small aperture. The warmth of the hand volatilizes the liquid, and the vapor or spray escapes through this fine aperture at the end, and may thus be used by dentists and surgeons for local application in the glass tube in which it is imported. It is in testimony that prior to the importation in such tubes with a metal cap and rubber lining it was hermetically sealed, and, when once the container was unsealed, the whole contents had to be used, or it escaped; whereas, in the present form of importation, the cap can be replaced, and the remaining liquid preserved for future use. It is also in testimony, and is not contradicted, that these tubes, after their contents are exhausted, are of no value, and are thrown away; that the tube, as imported, has no value apart from its contents. We are of opinion that this tube, considering the peculiar character of the article it is intended to contain, and the necessity of protecting it from evaporation, is not an unusual article or form of "holding or covering" for the liquid imported. The fact that it can be used for the purposes for which it was intended without taking it from its original package will not destroy the bona fides of the use of this particular covering for transportation. We think our views in this matter are entirely consonant

with the principle covering the decision in Slattery's Appeal, 59 Fed. 450. The finding and order of the general appraisers in both cases are therefore reversed, and the appeals sustained, and the coverings in question declared not liable to a separate duty.

SHOE v. GIMBEL et al.

(Circuit Court, E. D. Pennsylvania. August 9, 1899.)

1. PATENTS—IMPROVEMENTS—UTILITY AND INVENTION.
   Mere utility does not establish patentability, and it is not every slight improvement that is the result of the exercise of inventive faculty.
2. SAME—BICYCLE SADDLES.
   The Shoe patent, No. 558,218, for an improvement in bicycle saddles having flat springs, and consisting in providing a support against which the under surface of the spring may impinge in case of sudden jolting, thereby preventing breakage of the spring, is void for want of patentable invention. And, even if the claim can be sustained, it must be restricted to the forms shown and described, and is therefore not infringed by defendant.

This was a suit in equity by William W. Shoe against Jacob Gimbel and others, trading as Gimbel Bros., for alleged infringement of a patent for an improvement in bicycle saddles.

Thomas D. Mowlds, for complainant.
W. A. Redding, for respondents.

GRAY, Circuit Judge. This is a suit brought to restrain the defendants from infringing letters patent No. 558,218, granted to William W. Shoe, and dated April 14, 1896, for an improvement in bicycle saddles. The bill alleges an infringement, and prays the usual relief of injunction, and an account of profits and assessment of damages. The answer formally denies the fact of invention, and sets up the defense of anticipation, and consequent nonpatentability, and noninfringement. The object and character of the invention are stated in the specifications of the patent, in lines 15 to 50, p. 1, as follows:

"My invention relates to bicycle saddles that are made with a flat spring, and the object of my improvement is to provide a support against which the under surface of the saddle spring impinges when the spring is depressed or bent down by the weight of the rider, and by this means avoid the breakage so common in springs of this class. I accomplish the desired result by attaching the spring directly upon the saddle post, or by extending the wedge-shaped block that is usually placed between the spring and the saddle post on a line practically parallel with the horizontal part of the saddle post. As ordinarily constructed, all bicycle saddles using a flat spring have a wedge-shaped block, about an inch long, interposed between the underside of the spring and the top surface of the horizontal part of the saddle post. The top of this wedge block is, by means of the set screw in the saddle clamp, forced up against the underside of the spring, the whole upper surface of said wedge being in binding contact therewith. Consequently, when the spring is depressed by the weight of the rider it bends sharply over the front and rear corners of the wedge, and in case of a sudden jolt, occasioned by the wheels of the cycle striking a rut or any obstruction, the spring will very often break at these places. With my improvement the liability to breakage from this cause does not exist, as the spring, when depressed, does not bend over any corner, but is supported all

along the part that is bent down when the cycle is in use, without in any manner diminishing the elasticity of the spring."

Lines 68–94, p. 1, and lines 1–3, p. 2:

Fig. 1.

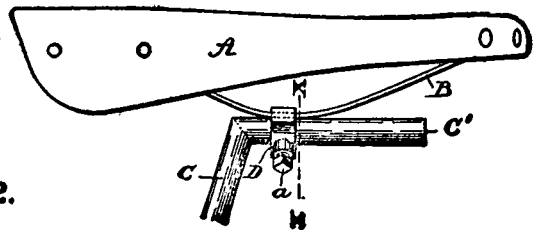


Fig. 2.

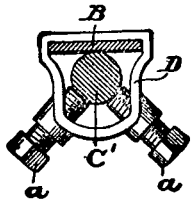
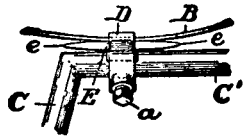


Fig. 3.



"In Fig. 3, the interposed block or wedge, E, is provided with the front and rear extension e, e. The upper surfaces of these extensions are on a line practically parallel with the horizontal part of the saddle post, and do not touch the under surface of the spring, except when the spring is bent down by the weight of the rider on the saddle. In the form shown in Fig. 1, when the spring is depressed the under surface thereof will come in contact with the saddle post, and be supported thereby, along the whole of the bent-down portion. When the saddle is properly secured to the post, and the spring supported in the manner shown, unless there is a defect in the material, it is almost impossible to break the spring by any weight that may be placed on the saddle, or from any sudden jolt. When the spring is set directly upon the saddle post, without the intervening wedge or block, E, it is very desirable to use the two set screws, a, a, placed in the angular position shown in Fig. 2, instead of one, as commonly used. By this means the saddle is held more firmly in position, and can be set lower on the frame of the bicycle, than if the set screw was placed directly in the middle of the clamp, D, as in that case the set screw would strike the top of the frame when the saddle post was lowered."

When the complainant filed his application for this patent, he presented six claims, in language as follows:

"Having thus described my invention, what I claim as new, and desire to secure, is: (1) A bicycle saddle having a flat spring resting immediately upon a support that extends thereunder, back and forward of the spring clamp, the under surface of the saddle spring impinging against the extended portions of the support only when the spring is bent down, substantially as shown, and for the purpose described. (2) A bicycle saddle having a flat spring clamped directly upon the horizontal part of the saddle post, substantially as and for the purpose described. (3) In a bicycle, the saddle, A, having therein the flat spring, B, in combination with the block, E, having the extension, e, e, and clamp, D, securing the whole to the saddle post, as shown. (4) In a bicycle saddle, the combination of the saddle, A, having therein the flat spring, B, resting directly upon the saddle post, and the clamp, D, having therein two set screws at an angle to each other, and binding upon the saddle post, substantially as shown, and for the purpose described. (5) A clamp for flat bicycle springs, having therein two set screws, set at such an angle that the points of contact upon the saddle post will be equidistant from the saddle spring.

and out of line with the frame of the bicycle, substantially as shown, and for the purpose described. (6) A wedge block for bicycle saddle springs, having thereon forward and rear extensions that project beyond the spring clamp, and impinge upon the undersurface of the spring only when said spring is depressed, substantially as shown, and for the purpose described."

When the application for this patent was considered by the examiner in the patent office, he rejected all the claims, except claim 5, and in his letter of rejection stated as follows:

"Claims 1, 2, 3, and 6 are rejected on Clarke, 334,164, Jan. 12, 1886, Hale, 339,289, April 6, 1886, and Jett, 433,172, July 29, 1890 (saddles). Claim 4 is rejected, since the form of clamp specified is old. Centering devices for lathes, and journal bearings, take such a form; and, broadly, there is no invention in arranging the set screws at an angle. The function attributed to the construction is not necessarily accomplished by arranging the set screws at an angle. Claim 5, which specifies the specific arrangement of the set screws, is, as at present advised, allowable."

The complainant fully acquiesced in the conclusion of the examiner, and canceled all the rejected claims, and accepted the patent with the single claim, which is substantially the same as claim 5 of those presented with his application. The patent therefore contains only one claim, which reads as follows:

"A clamp for bicycle springs, having therein two set screws, set at such an angle that the points of contact upon the saddle post will be equidistant from the saddle spring, and out of line with the frame of the bicycle, substantially as shown, and for the purpose described."

Even with the presumption in favor of patentability which arises from the issuance of a patent, it is hard to understand on what principle this claim, as allowed, covers a device which, as the result of invention, is patentable. If, as we have seen, the contrivance of a steel block in the clamping ring, between the underside of a flat spring and the top of the saddle post, with tapering extensions front and back, as set forth in the specifications and drawings, had been anticipated in principle, and lacked novelty, the claim seems to rest upon the invention of a combination of this device with a clamped ring held by two set screws instead of one. There is also, it will be observed in the specifications, a modification, in which the flat saddle spring rests directly on the saddle post, which is held securely in position by the two set screws. The advantage claimed, in case a block with extensions as shown is used, between the saddle spring and post, is that it presents a bearing all along its surface for the spring when bent down by the weight of the rider, and does away with the liability of the spring to break when pressed over the sharp edge of the block without such tapering extensions. The same advantage is claimed when the spring rests directly on the saddle post, without the intervention of the block, the post being held securely by the two set screws. It is also claimed that the two set screws, instead of one, underneath, permit a wider adjustment of the saddle on the saddle post, both up and down and horizontally. The patentee in this case does not claim the invention of two set screws for securing the saddle to a saddle post. What he claims, to use the language of his brief, is:

"A claim for bicycle springs, constructed substantially as shown, and having therein two set screws, set at such an angle that the points of contact upon the

saddle post will be practically equidistant from the saddle spring, and out of line with the frame of the bicycle."

It is difficult to see how the claim, as thus stated, involved any invention. If, as it is admitted, the use of the two set screws instead of one is not new, the setting of them at such an angle as to avoid contact with the frame of the bicycle can hardly be said to have been an exercise of the inventive faculty. The contrivance is one which we think would naturally suggest itself to any good mechanic who had that object in view. Nor does the combination of this old device with the contrivance for creating a bearing for the saddle spring that would tend to prevent breaking appear to have produced any new result; each part of the combination acting in the old way, and accomplishing the result for which it was intended, independently of the other part of the combination. Doubtless, the clamp, as arranged by the complainant, was useful, and had some of the advantages stated, in the construction of bicycles. But mere utility does not establish patentability. It is not every slight improvement in a mechanism that is the result of the exercise of the inventive faculty. In the progress of the arts, such improvements are constantly developing themselves, almost, but are at any rate clearly the result of obvious mechanical suggestion. As has been said by the supreme court more than once, to grant patent monopolies for such improvements would not be to encourage invention, but would impose upon mechanics and the public generally burdens for which there would be no adequate compensation.

But, irrespective of this view of the case, undoubtedly the claim of complainant's patent, in connection with what is set forth in the specifications, and in the light of the prior state of the art, must be limited and restricted to a clamp when provided with a wedge-shaped block, constructed with the front and rear extensions, as shown in Fig. 3 of the drawing, and described in the specifications of the patent, so that all the portion of the saddle spring which is bent down or depressed under the weight of the rider will bear on a continuous surface of the wedge-shaped block, and not be bent over sharp edges or corners which have a tendency to break or snap the spring. To protect the spring from the tendency to break, when thus adjusted, over a block with square upright edges, seems to have been the chief object of the complainant's device, as gathered from the specifications. In the specifications of the patent, as already recited (lines 28–44, p. 1), it is stated as follows:

"As ordinarily constructed, all bicycle saddles using a flat spring have a wedge-shaped block, about an inch long, interposed between the underside of the spring and the top surface of the horizontal part of the saddle post. The top of this wedge or block is, by means of the set screw in the saddle clamp, forced up against the underside of the spring, the whole upper surface of said wedge being in binding contact therewith. Consequently, when the spring is depressed by the weight of the rider it bends sharply over the front and rear corners of the wedge, and in case of a sudden jolt, occasioned by the wheels of the cycle striking a rut or any obstruction, the spring will very often break at these places."

The structures put in evidence by complainant as having been bought from defendants, and constituting the infringement com-

plained of, fit precisely this description of bicycle saddles, "as ordinarily constructed." They have a flat spring, and a wedge-shaped block, about an inch long, interposed between the underside of the spring and the top surface of the horizontal part of the saddle post. The top of the wedge or block is, by means of the set screws, forced up against the underside of the spring, the whole upper surface of said wedge being in binding contact therewith. Consequently, when the spring is depressed by the weight of the rider it bends sharply over the front and rear edges of the wedge, and in case of a sudden jolt the spring will very often break at these places. This, then, is the very fault that the complainant alleges in his specifications he desired to obviate, and places the defendants' clamps outside of the complainant's alleged invention, as stated by himself. To hold otherwise would accord to the complainant the invention of, and a patent monopoly for, the use of two set screws instead of one, which, as we have shown, cannot be done. The bill of complaint in this case therefore must be dismissed, with costs to be taxed.

RYAN v. NEWARK SPRING MATTRESS CO.

(Circuit Court, D. New Jersey. July 20, 1899.)

1. PATENTS—VALIDITY—PRIOR PATENT TO SAME INVENTOR.
   A patent is not rendered invalid by the fact that all the elements of the claim are contained in the claim of a prior patent to the same inventor, when such prior patent also has in combination additional mechanism necessary to enable the device to accomplish the purpose for which it was designed, and when the subsequent patent discloses a new use for one of the elements, entirely separate and distinct from that specified or claimed in the prior patent, and one which it required inventive skill to discern.
2. SAME—ANTICIPATION.
   It is not sufficient to constitute anticipation that the device relied on might, by modification, be made to accomplish the function performed by that of the invention, if it were not designed by its maker, nor adapted, nor actually used for the performance of such function.
3. SAME—INFRINGEMENT BY CORPORATION—NOTICE—LACHES.
   Where one of the two officers who organized the defendant company was, at the time of such organization, a licensee under plaintiff's patent, and the other had recently made a compromise for past infringements, *held*, that their knowledge was the knowledge of the company, so as to preclude it from claiming that its infringement was entered upon in the belief that plaintiff's rights were worthless and abandoned.
4. SAME—BED OR MATTRESS SUPPORTING FRAMES.
   The Palmer patent, No. 251,630, for a bed or mattress supporting frame, construed, and *held* not anticipated, valid, and infringed.

This was a suit in equity by James B. Ryan against the Newark Spring Mattress Company for alleged infringement of a patent.

Stephen J. Cox, for complainant.

Milton E. Robinson and Mark W. Potter, for defendant.

KIRKPATRICK, District Judge. The complainant in this cause is the holder by assignment of certain letters patent, No. 251,630, issued to Frederick A. Palmer, December 27, 1881, for a bed or mat-

tress supporting frame. The object of the bill is to restrain the defendant from the use of the patented device as set out in the first claim of the said patent, which is as follows:

(1) "A bed bottom or supporting frame for beds and mattresses, which comprises in its construction end rails, A, A', which project beyond its side rails, B, B', and a woven wire or other suitable fabric, C, which extends laterally outward beyond and above the side rails, B, B', substantially as and for the purpose described."

The sole question to be determined by the court is the validity of the patent, because it is admitted by the defendant that, "if the patent is valid, the defendant's construction comes within the terms of the first claim."

Fig 1.

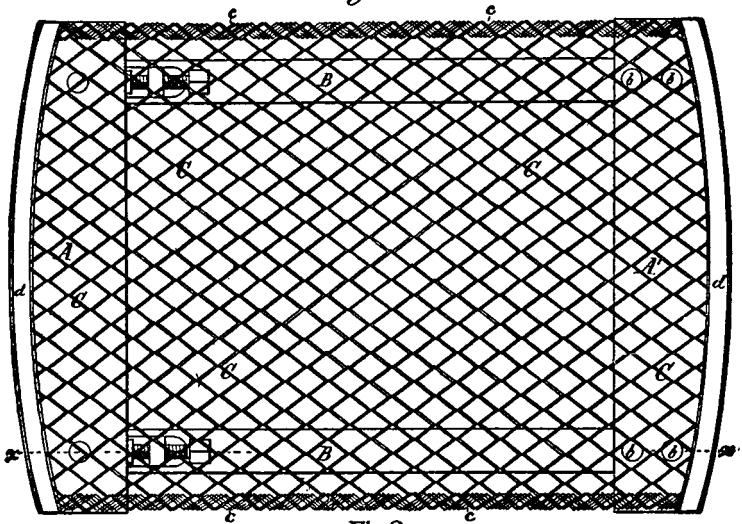


Fig 2.

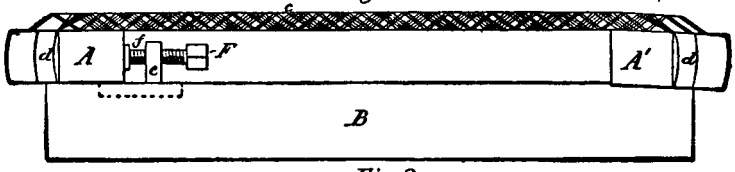
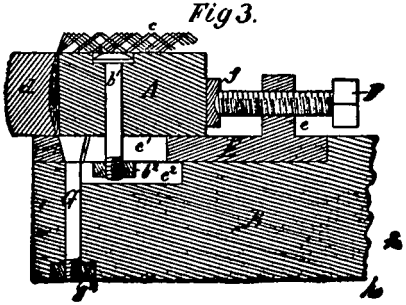


Fig 3.



Prior to the granting of the patent in suit, wire mattresses had been supported on slats, but this means was objectionable on account of the height to which the bed was raised by the placing upon the wire mattress of the superincumbent hair or other mattress which it was necessary to use in connection therewith. To obviate this difficulty, "Z" irons were used in the corners of the bedsteads, whereby the wire mattress was lowered. The "Z" irons were shaped with two right angles, the long side extending up to the top edge of the side rail, and then a flange thrown out, and hooked on the angle iron of the bedstead, to form a support. The other, or lower, end of the "Z" iron was fastened to the underside of the mattress frame. In order that the wire mattress could be so supported by the "Z" irons, it was necessary that it should be from 5 to 6 inches narrower than the bedstead, whereby a space of 2½ to 3 inches on each side was not covered by the bedding. The objects sought to be secured by the complainant's patent were to obviate these objections, to dispense with the use of "Z" irons, thereby saving cost, and at the same time keep down the height of the bed, and carry the sides of the fabric of the wire mattress over the side rails of the bed, so that persons might sit upon a substantial support, instead of in a hole or depression in the surface. That the complainant's device accomplished these results is not denied. Its utility and desirability is shown by its general adoption by the trade, and its novelty and patentability acquiesced in by many large manufacturers of woven wire mattresses, who accepted licenses to use the same. The patent in suit was granted by the patent office without interference or reference to any prior patents, as appears from the file wrapper. The defendant, in its answer, charges that this was the result of fraud, but no evidence has been adduced in its support. The defendant insists that the patent in suit is void, because the subject-matter of claim 1 therein was described in a prior patent granted to Frederick A. Palmer, February 8, 1881 (No. 237,586). The claim of this last-named patent to which it refers is in these words:

"A mattress frame or bed bottom which comprises in its construction—First, side rails, with both ends sloping outwardly as shown; second, end bars applied upon the sloping portions of the side rails, and extending beyond the side rails; third, a woven wire or other fabric, W, applied upon the end bars, and extending beyond or overhanging the side rails of the frame; and, fourth, mechanism for holding the end bars in position upon the side rails, and for adjusting the woven wire or other fabric, substantially as described."

The object of this patent is declared in the specification to be "to provide an improved movable frame or mattress to be used in bedsteads, * * * and in place of slats, springs, or other appliances for the support of the bedding." It will be noticed that, while all the elements of claim 1 of the patent in suit are contained in the claim of patent No. 237,586, the latter patent has in combination an additional mechanism for holding the end bars in position upon the side rails, and for adjusting one of the end bars in order to stretch the woven wire or other fabric. This mechanism in patent No. 237,586 is necessary to enable the device to accomplish

the purpose for which it was designed, viz. to secure a tip-back end bar, the obtaining of a curved end, and a means for adjusting the tension of the fabric; but none of these devices affect the operation of the overhanging end bar when used in connection therewith, nor does the overhanging end bar affect the operation of the said devices. There is no co-operation or co-ordination between them. There is nothing found either in the claim or specification of patent No. 237,586 which suggests any function for the overhanging end bar, and it was not until it was specified in patent No. 251,630 that it became apparent as a means of affording a support for the wire mattress. The claims of the patents are not co-extensive, and the inventor was entitled to a separate patent for each. Vulcanite Pav. Co. v. American Artificial Stone Pavement Co., 36 Fed. 378. "Claims are not co-extensive where one specifies all the features of any or all the parts of its subject while one omits one of those subjects." Thomson-Houston Electric Co. v. Elmira & Horseheads Ry. Co., 69 Fed. 257. I have no doubt that the patent in suit discloses a new use for the projecting end bars, which is entirely separate and distinct from that specified or claimed in the prior patent, and one which it required inventive skill to discern. Under these circumstances it should not be denied the merit of patentability. Manufacturing Co. v. Cary, 147 U. S. 623–637, 13 Sup. Ct. 472; Ansonia Brass & Copper Co. v. Electrical Supply Co., 144 U. S. 11–18, 12 Sup. Ct. 601. The question whether the claim of the patent in suit was a separate and distinct invention from that embraced in patent No. 237,586 is presented to the court here with no further or other evidence than that which was before the patent office. It will be presumed that the patent office acted understandingly, and the court will not disturb their finding.

It is also contended on the part of the defendant that the device of the complainant's patent lacks novelty; that the invention is fully anticipated by the patent to Tracy (No. 202,302, dated April 9, 1878), by the Boda patent (No. 170,333, dated November 23, 1875), Richardson patent (No. 126,743, dated May 14, 1872), Young patent (No. 170,040, dated November 16, 1875), and by the Kelso bed (defendant's Exhibit No. 10). If these several patents, with their specifications, be examined, it will be seen that none of them describe, claim, or mention a single element of the invention of complainant's patent, and that none of them are designed to furnish a woven-wire mattress which could be supported by its projecting end rails resting upon the side rails of the bedstead. Projecting end rails may be shown in the drawings accompanying the patent applications, but they are not so full or complete as to describe the invention of complainant's patent, or enable one skilled in the art to attain the same result. So, too, in the Kelso bed (defendant's Exhibit No. 10), it is constructed with end bars extending beyond the side rails, but, if all that is claimed for them be true, it cannot be construed as showing anticipation, because the extended end bars were not adapted to perform the functions of those of the patent in suit. "It is not sufficient," said the court in Topliff v. Topliff, 145 U. S. 156, 12 Sup. Ct. 825, "to constitute anticipation, that the device relied on

might, by modification, be made to accomplish the functions performed" by that invention, "if it were not designed by its maker, nor adapted, nor actually used, for the performance of such functions." Following this guide, the circuit court for the Western district of Pennsylvania held that "a mere accidental use of the features of an invention, without recognition of its benefits, does not anticipate a patent." Burner Co. v. Diamond, 72 Fed. 182.

The defendant also charges the complainant and those through whom he claims with laches. Roberts, the president of the Hartford Woven-Wire Mattress Company, is the only witness produced to substantiate the charge. He says that he, on behalf of his company, early in the life of the patent denied its validity, and that no suit was ever brought against them. He declines to say upon cross-examination whether the company has paid or is paying royalty for the use of the patented device. The defendant corporation was incorporated in the latter part of October, 1897. On November 1, 1897, the bill of complaint in this cause was filed. At the time of its incorporation, P. B. Rooney, the president of the company, was a licensee under complainant's patent, and Wilfred A. Manchee, the treasurer of the company, had recently made a compromise with the complainant for past infringements. Together Rooney and Manchee owned 99 out of 100 shares of the capital stock of defendant company. Whether the corporation was a mere cover for the improper acts of Rooney and Manchee, and therefore estopped by their acts from denying the validity of complainant's patent, it is not necessary to decide. It is certain that their knowledge was the knowledge of the company, and it cannot, therefore, be said that the infringement was entered upon under the belief that the complainant's alleged rights were worthless, or abandoned. Galliher v. Cadwell, 145 U. S. 372, 12 Sup. Ct. 873. Decree should be for complainant.

STOKES BROS. MFG. CO. v. HELLER et al.

(Circuit Court, D. New Jersey. July 26, 1899.)

1. PATENTS—PATENTABLE PROCESSES—FUNCTION OF MACHINE.
   A method or process involving merely the mechanical operation of a combination of mechanical elements, without any chemical or other elemental operation, as in the case of a machine for cutting or punching from a blank and forcing up into proper position the teeth of a rasp, is not the proper subject of a process patent.
2. SAME—RASP-CUTTING MACHINES.
   The Stokes patents, Nos. 376,400 and 397,254, for rasp-cutting machines, cover a new, useful, and patentable invention, but the claims must be limited to the specific combinations shown and described, and are not infringed by machines not having such an arrangement of parts as will enable it to perform the work done by the machine of the patent.
3. SAME—RASPS.
   The Stokes patent, No. 383,999, for a rasp, as an improved article of manufacture, construed, and *held* valid, and not infringed.
4. SAME.
   The Stokes patent, No. 408,936, for a process or method of forming teeth on a rasp blank, is void as covering the mere mechanical operation or function of a machine.

This was a suit in equity by the Stokes Bros. Manufacturing Company against Elias G. Heller and others for alleged infringement of certain patents relating to the manufacture of rasps.

William H. Doolittle, for complainant.
John Dane, Jr., for defendants.

KIRKPATRICK, District Judge. The bill of complaint in this cause charges the defendants with infringement of certain patents owned by the complainant, and prays for an injunction and account. The answer denies infringement, and sets up want of novelty by reason of prior patents and publications. The patents sued upon are as follows: No. 376,400, dated January 10, 1888, to James and George Stokes; No. 383,999, dated June 5, 1889, to Philip Stokes; No. 397,254, dated February 5, 1889, to Philip Stokes; No. 408,936, dated August 13, 1889, to Philip Stokes. Two of these patents (No. 376,400 and No. 397,254) relate to rasp-cutting machines, one (No. 383,999) to the improved article produced, and one (No. 408,936) for the method of forming teeth on a rasp blank. The most satisfactory method of forming rasp teeth prior to the time of Stokes, the complainant in this case, was by hand. The teeth were punched up from the rasp blank by means of a punch struck with a hammer and held by the hand of the operator. Each tooth was punched separately, and was entirely dependent for its regularity upon the skill and care of the eye and hand of the operator. Consequently the teeth varied greatly in size and shape, and the depth of the indentation from which each tooth was cut was also variable, and often too deep for the best working of the rasp. It is true that before the Stokes inventions efforts had been made, with more or less success, to obviate the necessity of using the hand-punching method, and to construct machines for punching rasps automatically, and a number of patents granted for rasp and file cutting machines have been cited to show that the art was well advanced, and that Stokes was not a pioneer; but for the most part the inventions related to means for cutting files. Stokes' patent relates to rasps as distinguished from files, and his machines are essentially rasp-cutting machines. The improvement was one which looked to the better formation of rasp teeth. The apparatus was not that adapted peculiarly to cutting by an angularly inclined chisel the teeth of a file each of which is but a burr extending entirely across the surface of the file at an angle, and raised therefrom by the impact of a cutter moving in a practically straight line, but was expressly for the purpose of punching up the metal from a blank, and forming rasp teeth thereon, which are distinctly different both in their formation and uses. In cutting files, the cutter is forced into the body of the metal in a nearly straight line, inclined to the surface of the file blank. In cutting rasps, the operation differs as much from this as does the rasp tooth differ from the file tooth. In forming rasp teeth, the cutter point enters the metal at a small angle, but upon the continued application of the pressure tending to force the punch into the rasp blank the angle changes, and the cutter takes a curvilinear gouging motion.

and digs out, as it were, the metal from the body of the blank, and forces it up into the form of a rasp tooth, leaving a furrow indicating the path of the cutter directly in front of each tooth. The line of motion of the file cutter is nearly straight, and at an angle with the surface of the blank. The line of motion of the rasp punch is that of a curve something like a parabola, and differing entirely from the motion necessary in an apparatus for cutting files. File-cutting machines operating automatically in the manner above suggested do not anticipate the Stokes device for cutting rasps. There are also several patents for rasp-punching machines which are relied upon by the defendants as being anticipations of the patents in suit, but neither in the specifications nor drawings is there found evidence that the patentees either conceived the same necessity for improvement in the art as did Stokes, or embodied in their mechanisms the same combination of elements for the attainment of similar results. The combinations forming the machines set out and described in letters patent Nos. 376,400 and 397,254 were new and useful inventions. So far as the record shows, they were not conceived by any other person at an earlier date, but were, for the purpose he designed them to accomplish, new additions to the art of making rasps. They were the successful result of an attempt to make new and useful improvements in the art in a new and practical manner. The purpose accomplished by these machines of Stokes was the production of a rasp having certain distinct peculiarities and new features different from the hand-punched rasp or those automatically punched by other devices. The teeth are now perfectly formed, are more uniform in shape and size, and are of greater length, though raised from recesses of less depth than rasps made in the usual manner. They possess great strength, being re-enforced by the surplus metal forced into them by the curvilinear motion of the rasp punch, and can be brought to a very sharp point without curling or breaking. The shallow recesses from which they are punched are curved, and do not, therefore, so easily clog when in use. The rasp was an improved new article, and therefore patentable. In my opinion, the patents No. 376,400, No. 397,254, and No. 383,999 are valid, as new and useful inventions. There is, however, the patent No. 408,936, dated August 13, 1889, granted to Stokes for the method or process used in forming the particular kind of rasp teeth claimed by him as an invention. The process is simply the mechanical operation of a combination of mechanical elements. There is no chemical or other similar elemental action involved in producing the desired result. This being true, we find that the operation as described is simply the function of the rasp-cutting machines, and as such not the subject of a patent. Locomotive Works v. Medart, 158 U. S. 71–84, 15 Sup. Ct. 745.

It remains to be considered whether the defendants infringe the claims of these valid patents. It is apparent that the body of Stokes' invention lies in the peculiar appliance which he devises for holding the rasp punch so that it may take on the particular movements necessary to form that kind of rasp teeth he undertakes to produce. The importance of having the proper adjustment and freedom to the punch-holding apparatus is very great. Without it, a Stokes-shaped

rasp tooth could not be formed. This is so because the character and form of the rasp tooth is almost entirely dependent upon the shape of the cutter, the number of blows given to it, and the angle at which it is held during the operation of cutting it. It is upon this freedom of movement of the punch holder, and consequently upon the construction thereof, and its relation to the other elements of the machine, that the angle and line of motion of the punch depend. In considering the question of infringement by the defendants it will be sufficient to confine ourselves to a comparison of that part of complainant's and defendants' apparatus which has to do with holding the punch and controlling its movements during the operation of forming the rasp tooth. Let us observe what a comparison of the devices shows. Claim 5 of patent No. 376,400 is as follows: "In a rasp-cutting machine, the combination of a punching hammer head, E, the adjusting screw, 33, the flat spring, and the punch, 34, substantially as set forth;" and claims 1, 2, 3, 6, and 10 of patent No. 397,254 are in these words: Claim 1: "The punch stock held in the anvil frame, and pivoted at or about its center, in combination with a spring or springs applied to its upper end above the pivot, the cutter or punch being held in the stock with its point below the pivot, substantially as shown and described." Claim 2: "The hammers, J and J′, acted upon by springs and cams, one preceding the other, in combination with the anvil frame, and the punch stock, and the punch, substantially as described." Claim 3: "The anvil frame and pivoted punch stock, H′, in combination with the two hammers, J, J′, and means for operating the hammers so that one will deliver its blow before the other, substantially as described." Claim 6: "The punch stock, H′, attached to rod, H^2, and punch stock, laterally in combination with the hammers, means for operating them, the table, F, feed table, F′, and means for moving the same, substantially as described." Claim 10: "The inclined table, F, the punch stock, means for operating them, in combination with the feed table, F′, held in the inclined table, F, and means for intermittently moving the same longitudinally, substantially as described." The state of the art at the time the complainant's patents were granted requires us to limit the claims and the embodiment thereof to the exact form of apparatus shown and described by the patentee. We cannot read any unexpressed intention or construction into them. The defendants' machine, to be an infringement, should embody the combination of elements claimed or described in the patent or shown on the drawings attached. The record fails to show that the defendants' apparatus or machine for cutting rasps embodies any or all of the claims above set forth.

The evidence of complainant relating to infringement consists of the testimony of two former employés in the defendants' factory, Bock and Hoefle by name, who attempt to describe the construction of the defendants' machines, and give a description and explanation of their method of operation which will enable their expert, who has not seen the machines, to find similarities which he characterizes as infringements. In so far as these witnesses testify to the infringing character of defendants' machines, it is contradicted by Mr. Abbott,

defendants' expert, who has had the opportunity to see and carefully examine the machines. The value of the testimony of Bock and Hoefle is, when taken as a whole, very small. Bock, upon cross-examination, admits that when he visited the defendants' factory in 1893 he paid no particular attention to the machines then in use; that he merely glanced at them, probably three-quarters of a minute, could not tell how many he saw; that he neither examined nor could describe them. Respecting the machine he worked upon while in defendants' employ making rasps, he says it was about the same as the Weed cutting machine, and later admits that he knew little or nothing of the Weed machine. He undertook to give a description of the rasp-cutting machine in use by defendants when he was in their employ, and upon which he worked making rasps, but such attempted description was vague, indefinite, and practically unintelligible. He says it was about the same as the Weed cutting machine, of which he afterwards admits he knew little or nothing. Hoefle's testimony was equally vague and indefinite. When asked to describe the defendants' machines, and their operation in cutting, he failed entirely, replying: "That's a hard thing to do. I could not explain the proper condition, that's sure." This answer is characteristic of all his testimony. On the other hand, Mr. Elias Heller testifies that the machines used by the defendants are identical with the Weed machine, except that he had added a rachet arrangement for controlling the movement of the carriage carrying the rasp blank; that the machines now in use by defendants, or those similar thereto, have been used by defendants up to the time of beginning this suit, and prior thereto for some 15 years. That, while slight modifications in their machines have been made from time to time, yet in none has there been a change in the punch-holding apparatus for the purpose of attaining in it more flexibility of movement. In so far as Bock testifies to the infringing characteristics of defendants' machine, he is contradicted by Mr. Abbott, the expert witness of defendants, who has had the opportunity to see, and has carefully examined, the same, and who points out with clearness the differences between them and that covered by complainant's patents. Comparing the defendants' machine, as he saw it, with claim 5 of patent No. 376,400, he says that the defendants' machine has no hammer head in the lower part of the hammer, which has pivoted thereto, and forming a part thereof, a tooth-holding frame; the defendants' hammer being entirely separate from his tool holder, and capable of being moved independently. It has no screen which in location or function corresponding with the adjusting screw, 33, of the patent in suit, nor any spring either similarly located or with a similar function to spring 32 as set out in the patent. The machine used by defendants has not such an arrangement or combination of parts as will enable it to perform the work done by complainant's machine. It will be observed that of the claims of the patent No. 397,254 which are charged to be infringed Nos. 1, 2, 3, and 6 have, in combination, an anvil frame as one of the elements performing a necessary function. In claim 1 it has pivoted to it a punch stock; and claims 2, 3, and 6 call for it in combination with a plurality of hammers, each actuated with an

independent spring. Claim 6 calls for a plurality of hammers, with separate springs for actuating them. I am satisfied from the evidence that the defendants' machines contain neither an anvil frame with pivoted punch stock, nor a plurality of hammers with separate springs, and that these are material differences between the devices, both in the particular construction of the elements in the manner and order of their combination, and in the function performed by each. In my opinion, the defendants' machines do not infringe any of the claims of the patents. The differences in the machines above noted are of such a character as necessarily to produce a different result. We have already referred to the distinctive marks and advantages of the rasps made by the complainant's machines. These we consider to be the result of the manner of their manufacture. Rasps made on defendants' machines differ materially from those of complainant, and lack so many of the peculiarities which are claimed to be advantages that I cannot, on the record, adjudge them to be similar or infringing. The complainant's bill should be dismissed.

OLSON v. OREGON COAL & NAVIGATION CO.

(District Court, N. D. California. August 3, 1899.)

No. 11,432.

1. SEAMEN—PERSONAL INJURIES—LIABILITY OF OWNER OF SHIP.
   The master of a ship and a seaman are fellow servants in all matters pertaining to the navigation of the ship while on a voyage from one port to another, and each assumes the risk of the other's negligence in the discharge of the duties incident to their common employment.
2. SAME—NEGLIGENCE OF MASTER.
   The owners of a ship are not liable in damages for the personal injury of a seaman received while on a voyage by falling, or being thrown by the rolling of the vessel, down a hatchway which had been left open through the negligence of the master or other officer, where a proper hatch was provided, and no claim is made of negligence in the selection of the officers.

This is a suit in admiralty by a seaman against the owners of the vessel to recover damages for a personal injury.

H. W. Hutton, for libelant.

Geo. W. Towle, Jr., for respondent.

DE HAVEN, District Judge. This is a suit in admiralty to recover $15,000 damages for personal injuries alleged to have been received by the libelant on board the steamer Empire. The libel alleges, in substance, that on the 22d of February, 1897, the defendant was the owner of and engaged in operating the steamer Empire, and the libelant was employed thereon in the capacity of ship carpenter; that on the date named the said steamer, with the libelant on board, left the harbor of San Francisco, bound on a voyage to Coos Bay, in the state of Oregon; that she had no cargo on board, and was light, and "by reason thereof liable to sudden, unusual, and violent motions when in waters agitated by the wind"; that on the day named there was a heavy sea on the bar at the

entrance of San Francisco Harbor; that, although there were hatch covers on board the steamer, the defendant negligently and carelessly operated her on that day with the after-hatch uncovered, "and thereby made the deck of the said steamer Empire unsafe and dangerous; and while the libelant on said day was performing his duty upon the said steamer, as such ship carpenter, and in the performance of his duties as such carpenter was going from the after part of the said vessel to the forward part, he, without any fault on his part, was thrown from his feet by a roll of the said steamer Empire, and, by reason of the after-hatch of the said steamer being uncovered, he was thrown down the after-hatch of said steamer, * * * and thereby suffered a compound comminuted fracture of the right thigh," and by reason thereof was compelled to go to the United States Marine Hospital at San Francisco, where he has been since confined, "and has suffered great physical pain and mental anguish by reason of the premises aforesaid, and for like reason has become permanently and totally disabled; * * * all to the libelant's damage in the sum of fifteen thousand ($15,000) dollars." It is not alleged in the libel that defendant or its servants refused or neglected to properly treat or care for libelant after the injury received by him. To this libel certain exceptions have been filed, which make it necessary to consider whether the facts alleged are such as to render the defendant liable in this action.

1. The defendant is a corporation, and therefore can only act through its agents or servants, so that the negligence with which it is charged must necessarily have been the personal negligence of some one employed by it; and for the purpose of passing upon the exceptions it will be assumed that this person was the master, to whom the navigation of the ship had been intrusted for the voyage mentioned in the libel. It is distinctly alleged that the steamer was provided with necessary hatch covers, and the act of negligence charged is that upon the occasion referred to in the libel the steamer was carelessly operated with the after-hatch uncovered. The question, then, is whether the defendant, as owner, is liable for this act of negligence upon the part of the master of the steamer. It will be readily conceded that no cause of action is stated against the defendant unless the libel shows upon its face that the defendant failed to perform some positive duty which it owed to the libelant as its employé. The duties which the owner of a ship owes to the seamen employed in its service are to see that the ship is seaworthy, properly manned, and equipped with all necessary appliances for the seamen's safety, and for the use of the ship; to provide them with sufficient food, and with medical attendance and care in case of sickness (Gabrielson v. Waydell, 135 N. Y. 1, 31 N. E. 969); to use due care in the selection of the master and other officers of the ship (Brown v. The D. S. Cage, 1 Woods, 401, Fed. Cas. No. 2,002; Hill v. Murray, 6 Ben. 141, Fed. Cas. No. 6,495); and he may also, under the general principles which govern the relation of master and servant, owe certain special duties to minors and seamen known to be inexperienced. Is there anything in the libel which can be construed as a charge that the defendant failed in the performance of any one of

these duties? I think not. The negligence complained of, namely, leaving uncovered the hatchway into which the libelant fell, was that of the master, or other officer whose duty it was to see that it was properly closed with the cover provided for that purpose by the defendant. Assuming this to have been the fault of the master, it was the negligence of a fellow servant of the libelant, for which the defendant, as owner of the steamer, is not liable to respond in damages. While it is true the master of a ship is a servant of higher grade than that of a seaman, and represents the owner in respect to the personal duties and obligations which the latter owes to the seamen, still in all matters pertaining to the navigation of the ship the master and seamen are fellow servants, engaged in one common employment, and each assumes the risk of the other's negligence in the discharge of the duties incident to such common employment. Gabrielson v. Waydell, 135 N. Y. 1, 31 N. E. 969; Scarff v. Metcalf, 107 N. Y. 211, 13 N. E. 796; Loughlin v. State, 105 N. Y. 159, 11 N. E. 371; The City of Norwalk, 55 Fed. 98. The cases of The Titan, 23 Fed. 413, and The A. Heaton, 43 Fed. 592, seem to hold that the master of a ship and his seamen are not fellow servants, because the latter, when at sea, are under the absolute control of the former; and in Jansen v. The Sachem, 42 Fed. 66, the same rule is stated, although the question was not involved in that case. Support for this conclusion was said in each of these cases to be found in Railway Co. v. Ross, 112 U. S. 377, 5 Sup. Ct. 184. In reference to the case just referred to, it will only be necessary to say that, if it can be considered as authority for the proposition that when servants are working for a common master, and one is placed in authority and control over the others in the performance of the work they are employed to do, the relation of fellow servants does not exist between them as to any matter connected with such common employment, then the doctrine of that case in this respect has been modified by the later case of Railroad Co. v. Baugh, 149 U. S. 368, 13 Sup. Ct. 914, in which it was said:

"Prima facie, all who enter into the employment of a single master are engaged in a common service, and are fellow servants, and some other lines of demarkation than that of control must exist to destroy the relation of fellow servant. All enter into the service of the same master to further his interests in the one enterprise. Each knows, when entering into that service, that there is some risk of injury through the negligence of other employés, and that risk, which he knows exists, he assumes in entering into the employment."

And, speaking of the liability of the master to one servant for the negligent act of another, the court in that case further observed:

"The question turns rather on the character of the act than on the relations of the employés to each other. If the act is one done in the discharge of some positive duty of the master to the servant, then negligence in the act is the negligence of the master; but, if it be not one in the discharge of such positive duty, then there should be some personal wrong on the part of the employer before he is held liable therefor."

This is in harmony with the later and best-considered cases. See Daves v. Southern Pac. Co., 98 Cal. 19, 32 Pac. 708; Crispin v. Babbitt, 81 N. Y. 516; Stockmeyer v. Reed, 55 Fed. 259.

Tested by this rule, it is difficult to see how the respondent can

be held liable for the damages claimed on account of the matters alleged in the libel. The master of the steamer and the libelant were engaged in a common employment; each in a different station, it is true, but still a common employment,—that of navigating the steamer from the port of San Francisco to Coos Bay, in the state of Oregon; and, conceding that it was negligence upon the part of the master to permit the hatchway to remain uncovered, still it was not negligence against which the owner of the steamer was required to guard. The law does not impose upon the owner of a vessel the duty of keeping its hatchways closed, when at sea, for the protection of seamen on board. It is one of the ordinary duties of the master, or other officer having charge of the deck, to see that they are closed at all proper times, and the seaman assumes whatever risk or danger may attend upon the negligent omission of the master or other officer to perform his duty in this respect; and the owner is no more responsible to a seaman for the negligence of a master in permitting the hatch to remain uncovered, whereby he was hurt, than he would be for the negligence of the master in allowing a cask, box or coil of rope to remain on deck out of its proper place, making an obstruction over which the seaman might fall, and receive injuries, while obeying the orders of such master. In the case of The City of Alexandria, 17 Fed. 392, it was held that a seaman was not entitled to recover damages from the owner of a steamship for injuries suffered by him in falling down an open hatchway while endeavoring to obey an order given him by the steward. One of the grounds upon which that action was sought to be maintained was that there was negligence upon the part of the officers of the ship in leaving open the hatch through which the libelant fell, and in disposing of the question thus presented the court said:

"Whatever negligence there was,—whether in leaving the hatches uncovered, or in not notifying the libelant as he went down,—was negligence on the part of those on board the ship, and in no way traceable to the owners themselves. It was neglect of the officers or men aboard in the performance of their ordinary duties; a neglect against which the owners could not possibly guard. * * * The navigation of a ship from one port to another constitutes one common undertaking or employment, for which all the ship's company in their several stations are alike employed. Each is in some way essential to the other, in furtherance of the common object, viz. the prosecution of the voyage. Each one, therefore, upon the principles laid down in the common-law courts, takes the risk of any negligence in the performance of his duties by any of his associates in the common employment."

The views thus expressed by the learned judge in delivering the opinion of the court in that case are sound in the principle which they announce, and are entirely applicable to the facts stated in the present libel. The exceptions will be sustained.

IRON MOUNTAIN R. CO. OF MEMPHIS v. CITY OF MEMPHIS et al.

(Circuit Court of Appeals, Sixth Circuit. July 5, 1899.)

Nos. 696–715.

1. JURISDICTION OF FEDERAL COURTS—CONSTITUTIONAL QUESTION—DUE PROCESS OF LAW—AGENCY OF CITY FOR STATE.

The exercise by a city of its general power given it by the legislature of controlling the streets and of making and enforcing contracts with reference to their occupancy by individuals or corporations, is action by the state, within the meaning of the provision of the first section of the fourteenth constitutional amendment, which prohibits any state from depriving any person of property without due process of law; and the passage of a resolution by the council of a city, assuming to declare a forfeiture of a contract previously made with a railroad company, under which the company occupies a street with its tracks, and a declaration by the city of its intention to dispossess the company, and take possession of the street by the use of its police, is a threatened violation of the constitutional rights of the company, which a federal court has jurisdiction to restrain by injunction.

2. INTERSTATE COMMERCE—ATTEMPT BY STATE TO REGULATE—ENFORCEMENT OF CONTRACT BY CITY.

Where a railroad company bound itself by a contract with a city not to discriminate in rates against the city or its inhabitants, a resolution of the city council, declaring rates charged by the company between the city and points in other states to be discriminative, and requiring their reduction under penalty of a forfeiture of the contract, is not a law attempting to regulate interstate commerce, but an attempt merely to enforce a lawful contract.

3. CONSTITUTIONAL LAW—IMPAIRMENT OF OBLIGATION OF CONTRACTS—WHAT CONSTITUTES A STATE LAW.

A resolution of a city council, passed with all the forms required for the passage of ordinances, adjudging that there has been a breach by a railroad company of a contract by which the city granted to it an easement and franchise in a street, and declaring a forfeiture of the rights granted, and a resumption of possession of the street by the city, although conditioned upon a failure of the company to comply with certain requirements within a specified time, which time has elapsed, and the condition has not been complied with, is a law of the state, within the meaning of section 10 of article 1 of the constitution, against the impairment by a state of the obligation of contracts.

4. SAME—JURISDICTION OF FEDERAL COURTS.

If there had not been in fact any breach of the contract by the railroad company, which either in law or fact would authorize a forfeiture of its rights, such resolution, in assuming to devest the company of its title and right of possession thereunder, was an impairment of the obligation of the contract, and a circuit court of the United States has original jurisdiction of a suit by the company to declare the resolution unconstitutional, and enjoin its enforcement, though such suit involves the determination of questions both of law and fact.

5. FEDERAL COURTS—ENJOINING SUIT IN STATE COURTS—PROTECTING PRIOR JURISDICTION.

Where a federal court, by a suit brought by a railroad company to enjoin the enforcement of a city ordinance on the ground of its unconstitutionality as impairing the obligation of a contract, has acquired lawful jurisdiction of the subject-matter, it is its duty to protect such jurisdiction by enjoining the prosecution by the city of an action commenced some time afterwards in a state court for the enforcement of the ordinance.

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

These are cross appeals in a suit in equity begun by the Iron Mountain Railroad Company of Memphis against the city of Memphis and the members of the legislative council of that city. The object of the bill was to enjoin the city of Memphis and its legislative council from attempting to enforce a forfeiture of the rights of the complainant under a contract made between the complainant and the predecessor of the corporation of the city of Memphis, the taxing district of Shelby county, whereby the right was given to the complainant to occupy Kentucky avenue within the taxing district for one mile with a double-track railroad for the term of 55 years, subject to certain conditions precedent and subsequent. The bill further prayed that the legislative council and the citizens of Memphis, by permanent mandatory injunction, might be required to cancel and annul the resolution of March 25, 1898, declaring the forfeiture.

Complainant avers in its bill: That it was chartered and organized in 1886 under the laws of the state of Tennessee as a railroad corporation and a common carrier of freight and passengers, having its principal office in the city of Memphis, for the purpose of constructing, owning, and operating a railway in Shelby county and the city of Memphis, with the right to run its line along or across the streets and alleys of the city, and along and across the public roads of Shelby county, and over private property. That on the 13th of November, 1886, for the purpose of carrying out its corporate objects, it entered into a contract with the taxing district of Shelby county. That thereby the taxing district granted to the complainant the right to enter upon Kentucky avenue at the southern boundary of the taxing district, and to lay down, maintain, and operate with locomotive power a double-track railroad on either side of the central line of the avenue, the tracks not to exceed 13 feet from center to center, and to be in the middle line of the street. That the term granted was 55 years. That the complainant agreed to pave the street from curb to curb from the point where its track entered the street to the point where it left the street. That complainant agreed to build a freight depot within 5 years after it should begin the use and enjoyment of the privileges granted, and to complete the paving of Kentucky avenue in 18 months. That sections 15 and 16 of the contract were as follows: "(15) It is further agreed that said second party will at no time during the term of this contract unequally discriminate against the first party or its citizens in its rates for the carriage of freight and passengers to and from the taxing district. (16) It is further agreed and understood that the original and continued performance of each and every stipulation hereof on the part of said second party is a condition of the grant herein contained, and that failure of said second party to perform same, or any part thereof, or its failure to perform the same within the time herein stipulated, or to exercise the privilege herein granted within the time herein stipulated, shall, at the option of the said first party, work an entire forfeiture and cessation of all rights and privileges in said second party under this contract, and the first party may, in the event aforesaid, at once retake and resume its possession and control of the said premises, as if this contract had never been made. But it is agreed that such forfeiture shall not be enforced unless said second party shall for thirty days after notice neglect to perform such obligations, or to exercise such privileges."

The bill further avers that on the faith of the contract complainant purchased a large amount of property in the city of Memphis for its depot grounds and other purposes, and made large and expensive improvements, all of which involved an expenditure of upward of $330,000; that it constructed its main tracks and side tracks in accordance with its contract, graded and paved Kentucky avenue from its depot grounds as far south as its line extended; that Kentucky avenue had been entirely unpaved and unused before this, and had a bayou crossing it almost at right angles, with no bridge; that complainant, besides paving the street, constructed a culvert and bridge over the bayou, costing $30,000; that upon the improvements thus made by it complainant has paid taxes aggregating a large amount, to the city of Memphis, since the contract was made. The bill further avers that on the 7th day of October, 1897, the Memphis Freight Bureau, an association of the merchants of Memphis, presented to the legislative council of that city a complaint alleging that the St. Louis, Iron Mountain & Southern Railway Company was the successor to the

Iron Mountain Railway Company, the complainant, and as such successor became liable to the conditions of the occupancy of Kentucky avenue; that the St. Louis, Iron Mountain & Southern Railway Company had, in violation of section 15, unequally discriminated against the city of Memphis and its citizens in rates published and assessed on merchandise and commodities shipped from Memphis to stations on the lines of said St. Louis, Iron Mountain & Southern Railway Company in the state of Arkansas and Missouri, and on commodities shipped from said stations to the city of Memphis; that the petition prayed the legislative council to give notice to said St. Louis, Iron Mountain & Southern Railway Company that, unless the said alleged discriminations complained of were corrected within the period of 30 days, a forfeiture of its rights and privileges under the contract with the city would be at once declared; that the St. Louis, Iron Mountain & Southern Railway Company was a foreign corporation under the laws of the state of Missouri and Arkansas, and was not the successor of the complainant, and had not succeeded to the burdens or benefits of the contract between the complainant and the city of Memphis; that the St. Louis, Iron Mountain & Southern Railway Company appeared by its freight agent and solicitor before the legislative council of Memphis, denied that any rates which it had established on freight originated at or destined to Memphis, which it carried over its lines, were unreasonable, or resulted in an unequal discrimination against the city of Memphis or its citizens, and had contended that the rates complained of were interstate rates; that the legislative council had, therefore, no power to fix or control them, and that any question connected therewith could be considered only by the interstate commerce commission or by the federal courts in proper proceedings instituted therein; that, notwithstanding these objections, the legislative council proceeded with the hearing of the petition, and on the 9th day of December passed resolutions declaring that the complainant had been and was unequally discriminating against the city of Memphis and its merchants in rates of freight, and demanded that within 50 days thereafter it should revise and readjust its rates to and from the city of Memphis so as to obviate the inequality and discrimination; that the time of 50 days was, on February 4, 1898, extended 30 days; that on February 23, 1898, it was extended for an additional 30 days, and on the 25th of March, 1898, the legislative council passed the final resolution upon which the case turns, a copy of which appears below.

Plaintiff further avers that it was never called upon to appear before the legislative council to defend or explain any rates which it had put into effect on its railroad, and that no complaint was ever made that any rates charged for transportation over its road were unreasonable or unequally discriminatory; that, though all the proceedings were directed against the St. Louis, Iron Mountain & Southern Railway Company, the resolutions passed by said legislative council were, however, directed to, and were sought to be made effective against, complainant, because of alleged discrimination in rates which are interstate, which rates complainant did not make or promulgate, and for which complainant was in no way responsible. The bill further avers that the resolutions passed by said legislative council were so vague, indefinite, and uncertain that no party to whom they were directed could know or ascertain therefrom what rates should be changed, or the extent of the changes to be made. The bill further avers: "That it is the declared intention of the defendants, if the said resolutions were not complied with within the time therein mentioned, to enforce against your orator, the Iron Mountain Railroad Company of Memphis, in pursuance of said resolution of March 25, 1898, the forfeiture of all rights and privileges granted to it under the contract hereinbefore mentioned, and hereto attached, marked 'Exhibit B,' and your orator avers that any such enforcement of forfeiture on the part of the city of Memphis or its legislative council will result in immediate incalculable and irreparable loss and damage to your orator. Your orator avers that it has a vested property right in said contract; that upon the faith of said contract your orator has expended large sums of money in property, fixed and immovable, in said city of Memphis; and that an enforcement of forfeiture of said contract by said legislative council or by the said city, and a dispossession of your orator of its said property, would involve direct, immediate, and irreparable injury to said vested property rights of your orator. Your orator is advised and charges that it is the intention of

the defendants, having thus declared a forfeiture of said contract as aforesaid, to attempt, through its police and other officers, by force to oust your orator from the possession of its property in the city of Memphis, and to deprive it of the use of the same, and prevent it from exercising the rights which are vested in it by its charter as a railroad corporation of the state of Tennessee, and the rights which are vested in it under said hereinbefore mentioned contract with the taxing district of Shelby county and said city of Memphis. Your orator avers that the demand made by the legislative council and the city of Memphis that your orator shall reduce rates on shipments made beyond your orator's line of railroad is unreasonable, unjust, and oppressive, and is one which your orator has not the power to comply with, even if it had a desire so to do. Your orator is informed and believes that no rates which are or have been put into effect by the Missouri Pacific Railroad Company, or by the St. Louis, Iron Mountain & Southern Railway Company, are unreasonable or unjust, or unfairly discriminate against Memphis or its citizens, but, on the contrary, your orator avers that the rates which have been put into effect by the said last-named companies are fair and just, and do not discriminate either against Memphis or its people. Your orator avers that said declaration by said legislative council of forfeiture of said contract, or any attempted enforcement of same, will, at the expiration of the time mentioned in said resolution of March 25, 1898, subject your orator to a multiplicity of suits with the city of Memphis, and especially suits by abutting property owners along the line and on both sides of Kentucky avenue and contiguous thereto; that in said suits it would be claimed that your orator was occupying said Kentucky avenue and other streets and other property of said city without authority of law, and to the damage of said abutting property owners, and that the action of said legislative council in the forfeiting of said contract would be claimed in said suits to be conclusive of the unlawful occupancy of said streets by your orator; that your orator would be compelled in each of these suits to attack and call into question the injustice and illegality of the action of the defendant in declaring said forfeiture; that vast expense would be imposed upon your orator in the preparation and defense of the multitude of suits which would grow out of the situation, and that the burden of expense thus imposed upon your orator might and probably would be so great as to overtax its financial means, and make it impossible for your orator to defend its rights, and thus your orator would, in the loss of its property, sustain serious and irreparable damage." In the eighth paragraph of the bill the complainant, without admitting that discriminatory rates imposed either by itself or by the St. Louis, Iron Mountain & Southern Railway Company, would constitute a ground of forfeiture under section 16, denies that unequal discriminating rates have been imposed by either company.

Complainant further avers that, notwithstanding the fact that the contract makes no provision for a forfeiture of the same, because other companies, which are on their own line, fix rates which are unreasonable and discriminatory, the legislative council adjudged complainant guilty of a violation of the contract on the 13th of November, 1886, in a proceeding to which it was not a party, before a tribunal not a court, which was one of the parties to the contract in controversy, and to be benefited thereby; and the legislative council upon this adjudication declared a forfeiture of complainant's rights under said contract, and threatened forcibly to dispossess complainant of the property to the use of which it is entitled under said contract, and thus to impose upon complainant great and irreparable loss and damage. Complainant avers that the declaration of the forfeiture and the ousting of complainant from the possession of the property would be in violation of section 1 of the fourteenth amendment to the constitution of the United States, which provides that no state shall deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws. Complainant avers that the acts of the legislative council in declaring a forfeiture and in ousting complainant from the possession of the property under the resolution of March 25, 1898, and any action taken in the enforcement thereof, are and would be in violation of section 10, art. 1, of the federal constitution, providing that no state shall pass any law impairing the obligation of the contracts. Complainant further avers that the freight rates

complained of are interstate freight rates, and that the action taken by the legislative council is an attempt to regulate and control commerce between the states of Tennessee and Arkansas and Missouri, and that such action is contrary to section 8, art. 1, of the constitution of the United States, which provides that congress shall have power to regulate commerce with foreign nations and among the several states, and with the Indian tribes, and that such action is therefore void. By paragraph 11 complainant avers that the matter in controversy exceeds in value $5,000, and that the case is one arising under the constitution and laws of the United States. The prayer of the bill is that an injunction may issue out of this court restraining and enjoining said city of Memphis and said legislative council from further proceeding in the matter complained of in the petition filed by said Memphis Freight Bureau, and from in any way enforcing or attempting to enforce forfeiture as against complainant of the before-mentioned contract, or of any rights and privileges now enjoyed by it under the contract. Appended to the bill as exhibits are the contract with the railroad company, the complaint of the freight bureau, and the various resolutions of the legislative council. The resolution of December 9, 1897, after reciting the petition of the Memphis Freight Bureau, referring to the fifteenth section of the contract, stated: "And whereas, a full hearing of the matters involved in said petition, and of the defenses thereto made by said railroad company, has been had, in which hearing the said railroad company was represented by its attorneys and officers, therefore, be it now resolved: That after full investigation and consideration of the matters and charges contained in said petition of the Memphis Freight Bureau, this council finds and adjudges that said railroad company has been and is unequally discriminating against the city of Memphis and its merchants in the rates of freight established by it to and from said city; and, be it further resolved: That said railroad company be and it is hereby called upon within fifty days from this date to revise and readjust its rates of freight to and from the city of Memphis, to the end that the inequalities and discrimination in said rates against the city of Memphis may be obviated and determined. Be it further resolved, that the secretary of the council be instructed to immediately transmit an authenticated copy of these resolutions to said railroad company, to the end that said railroad company may have full opportunity within the period aforesaid to revise and readjust its rates, as herein called upon to do; and that until the expiration of said period further action in the premises will not be taken by this council." After two extensions the resolution upon which the case turns was passed. It reads as follows: "Whereas, the railroad companies have offered in full settlement of this matter to revise and readjust their tariff of rates between Memphis and certain points upon their lines, but they declined to revise their rates to and from the other points on their lines; and whereas, this council finds that as between these last-named points and the city of Memphis the said railroad companies unequally discriminate against the city of Memphis and its citizens in rates for the carriage of freights: Therefore, be it resolved by the legislative council of the city of Memphis, that unless the Iron Mountain Railroad Company of the city of Memphis, the Missouri Pacific Railroad Company, and the St. Louis, Iron Mountain & Southern Railroad Company shall, on or before April 10, 1898, revise and readjust their rates for the carriage of freight between the city of Memphis and all points on their lines so as not to unequally discriminate against the city or its citizens, then it is hereby declared that such a failure on the part of said companies, or any of them, shall work an entire forfeiture and cessation from and after April 10th of all rights and privileges granted by the city of Memphis to the Iron Mountain Railroad Company of Memphis, under the contract of November 13, 1886, and the city will then retake and resume its possession and control of said premises and rights and privileges in said contract granted, as if said contract had never been made."

A motion for a preliminary injunction was made, but before it was heard the defendant filed an answer. The answer first averred that the complainant had lost its rights in Kentucky avenue by permitting a foreign corporation to use the tracks, and by not itself using the privileges conferred by the contract. The answer then sets out in considerable detail the alleged unequally discriminating rates charged by the St. Louis, Iron Mountain & Southern

Railway Company. It further avers that the complainant and the St. Louis, Iron Mountain & Southern Railway Company are both corporations, the stock of which is all owned by the Missouri Pacific Railroad Company, and the latter company names all the directors and managers of both companies; that the Missouri Pacific Company and the St. Louis, Iron Mountain & Southern Company have adopted the contract between the city and the complainant company, and by using the franchises therein have subjected themselves to the liabilities attached to the grant. The answer further avers as follows: "Defendants deny that any irreparable loss or damage will ensue to the complainant from the resolution of March 25, 1898. The only effect of that resolution was to declare that, if discrimination existed on and after April 10, 1898, then such failure should work a forfeiture of the privileges granted to the complainant. * * * Defendants deny that a dispossession of the complainant of said privileges would work an irreparable injury to any property rights of said complainant therein. Defendants deny that they have any intention to disturb the vested rights of the complainant. Their only purpose is to compel the complainant and its privies to fulfill their undertakings and obligations to the city of Memphis and its citizens. * * * Defendants deny that the request for a revision of rates is unreasonable, unjust, or oppressive, or that complainant is without power to comply therewith. Defendants deny that the rates now in force are not unreasonable and unjust; and they deny that said rates do not discriminate against the city and its citizens. Defendants deny that the resolution of March 25, 1898, will subject the complainant to a multiplicity of suits. In point of fact, the occupation by complainant of said street prior to the passage of said resolution was unlawful, as hereinbefore set forth, and, if a multiplicity of suits result, it is no fault of these defendants. * * * Defendants deny that the city has no right to forfeit privileges granted by said contract because of discriminations on the line of the St. Louis, Iron Mountain & Southern Railroad Company, and defendants deny that they have threatened to forcibly dispossess the complainant of any of its property, or vested rights, or to impose an irreparable loss upon complainant. Defendants deny that any action of theirs, past or contemplated, or any threat upon their part, has been or would be in violation of section 1 of the fourteenth amendment of the constitution of the United States, or any other provision of the constitution. They deny that the acts of the council, past or contemplated, with respect to the complainant, or its property, are in violation of section 10, art. 1, of the constitution of the United States. Defendants deny that the discrimination complained of is wholly upon interstate commerce. In point of fact the discrimination extends over the property of complainant within the state of Tennessee. Defendants deny that any past or contemplated action upon their part is an attempt to regulate or control commerce between the states, or that such action was or would be in contravention of section 8, art. 1, of the constitution of the United States; and defendants deny that this is a suit arising under the constitution and laws of the United States, or that there is any federal question involved herein."

At the hearing upon the preliminary injunction, evidence was filed as to the discrimination in rates. The court sustained the motion in so far as to grant a temporary injunction enjoining the city of Memphis and the legislative council from proceeding to enforce the forfeiture declared by the resolution of the legislative council March 28, 1898, against the defendant company, through its police or other officers, or by force to oust the plaintiff company from the possession of its property in the city of Memphis, or to deprive it of the use of the same under its contract with the city, or its charter, otherwise than by the judgment of a court of competent jurisdiction, as provided by law.

Subsequently the complainant tendered a supplemental bill, in which it averred that since the beginning of its injunction suit, the city of Memphis had filed a suit in ejectment against the complainant seeking thereby to have its rights in Kentucky avenue judicially forfeited, and it ousted from the street. Other averments were as follows: "Your orator avers and shows that all of the questions of law and fact above specified are raised and pending in this cause before this honorable court, and that they constitute the controversy between the defendants and your orator of which this honorable court has taken cognizance, and of which it has exclusive jurisdiction. Your orator further avers that, if

the said city of Memphis and the other defendants herein shall be permitted to prosecute its said suit in the said state court, your orator will suffer great and irreparable injury in this: that if the judgment against your orator in said suit in ejectment shall be rendered in said state court, your orator will be harassed by a multitude of suits which will inevitably be brought by citizens whose property abuts upon the streets used by your orator under said contract, who will predicate their claims upon the fact that a court of law has declared the possession of your orator in said streets to be unlawful. * * * Your orator further avers and shows that the many issues involved in said original cause in this court and in the said suit in ejectment in the state court include questions of law and fact of such a nature as to render it impracticable to have the same fairly and fully considered and determined by a jury; that any investigation of the question of reasonable or unreasonable rates, or of whether certain rates are or are not discriminatory, will require the examination of numerous and implicated tariff rates, and a consideration of many natural and artificial conditions. * * * Your orator avers that a just and fair examination and decision of these complicated questions of rates cannot be secured through a trial by jury in an action at law, but that said issues ought in justice to be tried by a court of chancery, the machinery of which is alone suited to the investigation of such complicated questions."

The prayer of the supplemental bill was as follows: "Wherefore your orator, averring that the state court has no jurisdiction to take cognizance of, hear, or determine any of the questions submitted to it in said suit in ejectment, but that the sole and exclusive jurisdiction is vested in this court, and averring that it will sustain serious and irreparable loss, injury, and damage unless the said city of Memphis shall be enjoined from further prosecuting its said ejectment suit in said state court, humbly prays this honorable court to grant its writ of injunction restraining and enjoining the said city of Memphis and the other defendants herein from further prosecuting said suits in said state court, and that pending a hearing for said injunction your orator may have a temporary restraining order embracing the relief herein prayed."

The court refused to permit the supplementary and auxiliary bill to be filed, and denied the prayer for preliminary injunction. Subsequently the plaintiff applied for additional time in which to take proof, the time under the rules having expired. The court denied this permission substantially on the ground that upon the face of the bill and answer, the complainant was entitled to the perpetual injunction in the form in which the preliminary injunction had been granted, to wit, an order restraining the city and legislative council by use of the police force or otherwise from forcibly ousting the complainant from occupation of Kentucky avenue under the resolution of March 25, 1898, because said action would be an attempt to take the property of the railroad company without due process of law, and that complainant was entitled to no other relief. The rulings of the court in refusing the preliminary injunction prayed for in the supplemental bill and in declining to allow the supplemental bill to be filed, and in refusing to grant a permanent injunction enjoining the city from continuing the prosecution of its ejectment suit in the state court were all assigned by the complainant for error. By cross appeal the city challenges in this court the jurisdiction of the circuit court to issue the injunction which it did issue, contending that the action of the legislative council was not an attempt to take property of the complainant without due process of law.

L. McFarland and A. G. Cochran, for appellants.
John H. Watkins and Luke E. Wright, for appellees.

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

TAFT, Circuit Judge (after stating the facts as above). The first question which arises on this record is whether the action taken and proposed to be taken by the city was an attempt by the state to take the property of the complainant without due process of law.

Kentucky avenue was one of the streets of the city of Memphis. Title to the easement or the fee in the street was held in trust by the taxing district of Shelby county and the city of Memphis for the use of the public at large. The power to contract with reference to the street, and the power to exercise control over it, was originally vested in the legislature, and the city derived the power to control the street and to contract with reference to its use by delegation from the state through its legislature. Judge Dillon, in his work on Municipal Corporations (volume 2, § 656), states this principle as follows:

"Public streets, squares, and commons, unless there be some special restriction, when the same are dedicated or acquired, are for the public use; and the use is none the less for the public at large, as distinguished from the municipality, because they are situate within the limits of the latter, and because the legislature may have given the supervision, control, and regulation of them to the local authorities. The legislature of the state represents the public at large, and has, in the absence of special constitutional restraint, and subject (according to the weight of more recent judicial opinion) to the property rights and easements of the abutting owner, full and paramount authority over all public ways and public places. 'To the commonwealth here,' says Chief Justice Gibson, 'as to the king in England, belongs the franchise of every highway as a trustee for the public; and streets regulated and repaired by the authority of a municipal corporation are as much highways as are rivers, railroads, canals, or public roads laid out by the authority of the quarter sessions,'"—citing O'Connor v. Pittsburgh, 18 Pa. St. 187.

Section 47 of the charter of the city of Memphis, enacted by the general assembly of the state, is as follows:

"The general council shall have power to regulate the laying of railroad iron and the passage of railroad cars through the city."

Section 50 of the charter is as follows:

"The general council shall have power to improve, preserve and keep in good repair the streets, sidewalks, public landing and squares of the city; to open and widen streets, and to lay off new streets and alleys necessary, always paying the party injured therefor; and by unanimous vote to close up, transfer or sell any street, alley or public easement; and shall have and exercise complete and perfect control over all the streets, squares and other property of the city, whether lying within or without the limits of the city. They shall also have the power to compel the owner or owners of any ground or private alley to keep the same clean; or, if necessary thereunto, to compel him or them to improve the same, and remove any nuisance from the same."

In the control of the streets, in contracting with reference to their use, in the declaration of nuisances upon the streets, in the resumption of the complete control over the streets after the termination of easements in the street enjoyed by any private person or corporation, the city is acting as trustee, not alone for the citizens and residents of the city, but as a trustee for the public at large, and is exercising a power delegated to it by the state, and in the exercise of such a power is necessarily, therefore, a state agency. That this is true in Tennessee appears from the case of Williams v. Taxing District, 16 Lea, 531. That case presented the question whether the taxing district of Shelby county was liable in damages to the person whose property was injured by a failure to keep the streets in repair. Section 19 of the act creating it provided that the taxing district should not be liable for damages or injuries to person or property by reason of defects in the street under its control. It was contended that this act was

in violation of the constitution (article 1, § 17) of the state of Tennessee, which provided:

"That all courts shall be open; and every man, for an injury done him in his lands, goods, person or reputation, shall have remedy by due course of law and right and justice administered without sale, denial or delay. Suits may be brought against the state in such manner and in such courts as the legislature may, by law, direct."

It was held that, because such suits were really against the state of Tennessee, it lay within the power of the legislature to grant or deny the right to private persons to bring suits for neglect to repair streets by a municipal corporation. Judge Cooper, in delivering the opinion, said:

"By the common law the citizen had no remedy against a county for an injury caused by the neglect of the county to keep the public roads in good repair. And such is the state of the law to this day, although the county is a municipal corporation. Wood v. Tipton Co., 7 Baxt. 112; White's Creek Turnpike Co. v. Davidson Co., 14 Lea, 73. The reason is that the county, in its municipal capacity, is only an arm or instrument of the state to carry out its sovereign prerogative in opening and keeping up public roads, and the legislature may give it only such powers as it deems best, and limit its liabilities accordingly. * * * The current of authority, while recognizing the exemption of counties from liability for injuries caused by failing to keep the public roads in repair, nevertheless holds an incorporated town liable for a similar injury occasioned by neglect of its public streets. The reason of the distinction is that municipal corporations of this class, while still arms of the state government, are more complete entities, and are enjoined and given the power to maintain the streets in a safe condition."

The ratio decidendi of the court's conclusion is that the legislature may give to a corporation such power as it chooses, but that in doing so it only vests it with the power of the state as a state agency. When, therefore, the taxing district of the county of Shelby made a contract with the complainant company by which it secured to that company for 55 years occupancy of Kentucky avenue, it was acting as an agent of the state, and as a trustee of the public at large. When now the city of Memphis, as the successor of the taxing district, comes to assert the rights secured to it by that contract, it is asserting the rights of the state and of the public at large as a state agent.

Among the prohibitions of the first section of the fourteenth amendment to the constitution of the United States is this: "Nor shall any state deprive any person of life, liberty or property without due process of law." The first question presented is whether action by the legislative council of the city of Memphis under its general power of controlling the streets and of enforcing contracts with reference to their occupancy by individuals or corporations, is action by a state within the operation of this amendment. There can be little doubt upon this point. In Ex parte Virginia, 100 U. S. 339, Mr. Justice Strong, speaking for the supreme court, said:

"We have said the prohibitions of the fourteenth amendment are addressed to the states. * * * They have reference to actions of the political body denominated a state, by whatever instruments or in whatever modes that action may be taken. A state acts by its legislative, its executive, or its judicial authorities. It can act in no other way. The constitutional provision, therefore, must mean that no agency of the state, or of the officers or agents

by whom its powers are exerted, shall deny to any person within its jurisdiction the equal protection of the laws. Whoever, by virtue of public position under a state government, deprives another of property, life, or liberty, without due process of law, or denies or takes away the equal protection of the laws, violates the constitutional inhibition; and as he acts in the name and for the state, and is clothed with the state's power, his act is that of the state. This must be so, or the constitutional prohibition has no meaning. Then the state has clothed one of its agents with power to annul or to evade it."

The principle was applied in Ex parte Virginia to the judge of a county court who had excluded jurors from a jury in a state court on account of race, color, and previous condition of servitude. It was followed and restated in Neal v. Delaware, 103 U. S. 370–397, where the particular act under investigation was the act of the officers charged by the law with the selection of jurors. This was held to be state action, and in so far as the officers excluded from the jury men on account of their race it was held to be a violation of the fourteenth amendment. The same principle is laid down in the Civil Rights Cases, 109 U. S. 3–17, 3 Sup. Ct. 18. In Yick Wo v. Hopkins, 118 U. S. 356, 6 Sup. Ct. 1064, the ordinance of a municipal corporation with reference to regulating the carrying on of public laundries which conferred arbitrary power upon the municipal authorities to give or withhold consent to the carrying on of such business was held to be state action violative of the guaranty of protection in the first clause of the fourteenth amendment. In Missouri Pac. R. Co. v. Nebraska, 164 U. S. 403, 17 Sup. Ct. 130, it was held that the order of the board of transportation acting under a state law, requiring a railroad corporation to furnish land for the erection of a grain elevator to a private person, was a taking of private property by the state in violation of the fourteenth amendment. In Smyth v. Ames, 169 U. S. 466, 18 Sup. Ct. 418, and in Reagan v. Trust Co., 154 U. S. 362, 14 Sup. Ct. 1047, action by a state railroad commission in the regulation of rates under a statute authorizing regulation generally was held to be state action, and within the fourteenth amendment, if it resulted in depriving a person of his property without due process of law. The principle was approved in Scott v. McNeal, 154 U. S. 34, 14 Sup. Ct. 1108, and applied to the action of a state court as an agency of the state. It was held that the judgment of the highest court of a state by which a purchaser, at an administrator's sale under order of a probate court, of land of a living person, who had no notice of its proceedings, was held to be entitled to the land as against him, deprived him of his property without due process of law, contrary to the fourteenth amendment of the constitution. In Chicago, B. & Q. R. Co. v. City of Chicago, 166 U. S. 226, 17 Sup. Ct. 581, the principle was reasserted in a case which involved the question whether the supreme court of the state had by its decision deprived a citizen of his property without due process of law in a condemnation proceeding.

It necessarily follows that if, in the case at bar, the resolution of the legislative council, under its authority to control the streets, has deprived, or was about to deprive, the complainant of its property without due process of law, complainant was entitled to a judicial remedy, under the United States circuit court jurisdiction act of 1887–1888 and the fourteenth amendment, against such action. The aver-

ment of the bill was that the council passed a resolution of forfeiture, and of the declaration of its purpose to take possession of the street, intending to use the police force in enforcing such declaration. It could only use the police force in its governmental capacity as a branch of the state government. We concur with the court below in the opinion that the answer does not deny the charge of the bill that the intention of the legislative council in passing the resolution of March 25, 1898, was to carry out that resolution, and put the city in possession by use of its police power. The denial of the defendants possibly directed to the specific charge of the bill that they intend to use the police force to enforce the forfeiture declared, and oust complainant from the street, is as follows: "Defendants deny that they have threatened to forcibly dispossess complainant of any of its property or vested rights." As the answer denies that complainant had any property or right in the streets, this cannot be regarded as a denial at all of the charge. A similar denial that they have any intention to disturb the vested rights of the complainant is equally defective and insufficient. The court below held, and, we think, rightly, that whether the action of the railroad company with reference to rights was a breach of the condition, and justified a forfeiture or not, an attempt by the city, through a resolution by its legislative council, declaring the forfeiture on that account, and the forcible taking possession, would together constitute the taking of property of the railroad company without due process of law.

It is argued that the resolution was in exact accord with the stipulation of the parties, and in the language of the condition itself contained in the contract by which the railroad company entered upon the occupancy of the street. It is contended that it left to the city the right to declare such forfeiture at its option, and upon the declaration of such forfeiture to resume possession of the street. The language of the conditions of the contract and of the forfeiture clause are like an ordinary condition subsequent in any lease or deed conveying an estate. Such forfeiture clauses always provide that upon the breach of the condition the lessor or the grantor may re-enter upon the premises, and have the same in his former estate; but it would be novel law to hold that under such a clause the lessor or grantor might lawfully by force and arms repossess himself of the estate, after a breach of the condition, if such repossession were resisted by the lessee or grantee. In Railroad Co. v. Johnson, 119 U. S. 608, 7 Sup. Ct. 339, the supreme court laid down the rule which has been the common law ever since the statute of 5 Rich. II. c. 7, and was probably then only declaratory of the law that a lessor entitled to possession may acquire such possession by lawful entry, but that entry by force is not lawful. Referring to forcible entry and detainer statutes, the court, speaking by Mr. Justice Miller, said:

"The general purpose of these statutes is that, not regarding the actual condition of the title to the property, where any person is in the peaceable and quiet possession of it, he shall not be turned out by the strong hand, by force, by violence, or by terror. The party so using force and acquiring possession may have the superior title, or may have the better right to the present possession, but the policy of the law in this class of cases is to prevent disturbances of the public peace, to forbid any person righting himself, in a case of

that kind, by his own hand, and by violence, and to require that the party who has in this manner obtained possession shall restore it to the party from whom it has been so obtained; and then, when the parties are in statu quo, or in the same position as they were before the use of violence, the party out of possession must resort to legal means to obtain his possession, as he should have done in the first instance."

The case just cited arose under the statutes of Arkansas, but the general principle was applied without respect to the statute in the case of Railway Co. v. Harris, 7 Sup. Ct. 1286. The language just quoted was quoted with approval in that case, which arose out of an attempt by one railroad company to seize a railroad in possession of another railroad company on the ground that the first railroad company had the right of possession. The leading case upon this subject is that of Newton v. Harland, 1 Man. & G. 644, and a number of American cases upholding the same principle will be found cited in Ames, Cas. Torts, 143, note. In such cases as the present, where resistance would create a riot, and lead to the irreparable injuries so frequently resulting therefrom, equity will enjoin the threatened use of force without respect to the question who has the right of possession. In Cooke v. Boynton, 135 Pa. St. 102, 19 Atl. 944, the plaintiff was the lessee of certain coal mines. The lessor claimed that he had forfeited his rights as such, and that the lessor was entitled to enter. The lessor tore up by force a tramway laid under the lease, and an injunction was then issued and sustained in enjoining the lessor from a continuance of such interference with the possession of the lessee, and this without regard to the merits of the controversy. The same rule was laid down in Easton, S. E. & W. E. P. Ry. Co. v. City of Easton, 133 Pa. St. 505, 19 Atl. 486, where a municipal corporation attempted to oust a street-railway company from the use of its streets on the ground that it was not complying with the terms of its grant. The same doctrine is laid down in Delaware County & P. Electric Ry. Co. v. City of Philadelphia, 164 Pa. St. 457, 30 Atl. 396, and in Asheville St. Ry. Co. v. City of Asheville, 109 N. C. 688, 14 S. E. 316, which were also cases of the interference by a municipal corporation with the occupation of streets by street-railway companies. See, also, Brooklyn Cent. R. Co. v. Brooklyn City R. Co., 32 Barb. 358, 367. It is difficult to reconcile these cases with that of Pacific R. Co. v. Leavenworth, 1 Dill. 393, Fed. Cas. No. 10,649, which can hardly be supported.

It is argued with much vigor and force that to hold that the resolution of the city declaring a forfeiture and its intention to resume possession of the premises is nothing but the declaration of the existence of a breach of the contract between two private persons by one of them, and that to hold that it comes within the inhibition of the fourteenth amendment, will be to hold that any tort or improper seizure by the officials of a municipal corporation is the act of the state, and a taking of property without due process of law, contrary to the federal constitution. It is true that a municipal corporation, when it exercises state authority as a state agency, may, by its torts and breaches of contract, come within the fourteenth amendment, or some other clause of the federal constitution, where a private

individual would not. It does not follow, however, that all its torts and all its breaches of contracts are within those prohibitions, because in the case of some of its contracts it acts only as a private corporation. With respect to the occupancy of a street, however, which it controls by virtue of its being an agent of the state, and a trustee for the public, its action in depriving persons having vested property rights in the street will, if without due process of law, be state action, within the inhibition of the fourteenth amendment. For our present purpose, it is not important whether this threatened taking possession of a street under a resolution by force is to be regarded as legislative or executive action, for either, as we have seen, is within the inhibition of the clause of the first section of the fourteenth amendment, which forbids a state to deprive a person of his property without due process of law. What has been said necessarily leads to the conclusion that the court below was right in sustaining its jurisdiction on the ground that the action of the city taken and contemplated would constitute a violation of the fourteenth amendment, and might be prevented by injunction. In so far as the appeal of the city is concerned, therefore, the decree of the court below must be affirmed.

We come now, however, to a much more difficult question, which arises on the appeal of the complainant below, the railroad company. The court below held that there was no jurisdiction under the bill, except that which arose out of the threatened taking possession of the street, and ousting the railroad company therefrom by force, without due process of law. It enjoined the city only from taking forcible possession of the street. This injunction might properly have been founded on the relative situations of the parties as they were admitted to be. The fact that the railroad company was in possession of the street, gained lawfully, and that the city could not rightly enforce a forfeiture without judicial proceedings, was a sufficient ground for granting the injunction which the court below granted; and it became immaterial, therefore, in furnishing this remedy, whether the railroad company had violated a condition forfeiting its estate. If the threatened use of the police to enforce the resolution of forfeiture was essential to the federal jurisdiction, then it would seem that the order of the court below disposed of the entire controversy before it. If, however, the resolution of the legislative council was a law of the state regulating interstate commerce, or was a law of the state impairing the obligation of contracts, or depriving a person of its property without due process of law, then the complainant could invoke the jurisdiction of the court below to enjoin its enforcement, without regard to the method by which it was proposed to carry it into effect.

This brings us to the next question in the case. Was the action of the city a law attempting to regulate interstate commerce? Plainly it was not. A railroad company has a right to make a contract with respect to interstate commerce, and to bind itself to certain rates, if it chooses to do so. It bound itself here to impose no rates which were unequally discriminating against the city of Memphis. This was its duty under the interstate commerce law, if it had any power

to fix rates upon such commerce, and it might contract with any person or city to do that which it was its duty to do under the law. The action of the city, therefore, was merely an attempt to enforce a contract right, and not to regulate interstate commerce, except in so far as the common carrier had lawfully bound itself to the city contractually with respect to a particular part of that commerce.

We come, then, to the question: Did this resolution violate that part of section 10, art. 1, of the constitution of the United States, declaring that "no state shall * * * pass any * * * law impairing the obligation of contracts"?

First. Was the resolution a law of the state within the meaning of this clause? It has frequently been decided that, where a municipal council passes an ordinance in pursuance of authority vested in it by the state legislature, which is legislative in its character, and which is merely the exercise of delegated power to make laws that the legislature might have made directly, such an ordinance is a law within the inhibition of the constitution if it impairs the obligation of a contract. Murray v. Charleston, 96 U. S. 432; U. S. v. New Orleans, 98 U. S. 381, 392; Meriwether v. Garrett, 102 U. S. 472; Waterworks Co. v. Rivers, 115 U. S. 674, 6 Sup. Ct. 273; City of Walla Walla v. Walla Walla Water Co., 172 U. S. 1, 19 Sup. Ct. 77. If such ordinance is administrative, rather than legislative, then it is not within the constitutional inhibition, even though it impairs the obligation of a contract. New Orleans Waterworks Co. v. Louisiana Sugar Refining Co., 125 U. S. 18, 8 Sup. Ct. 741. The resolution in the case before us is admitted to have been passed with all the forms required, and by the vote necessary to enact an ordinance. It concerned the occupancy of the streets, which, as we have seen, the legislative council controls under delegated authority from the state legislature, as an agency of the state and a trustee for the public at large. It purported to find and adjudged the ground to exist for declaring a forfeiture of a grant of an easement and a franchise in the streets which the legislative council as the agent of the state had made, and it exercised the option reserved to it in the grant of insisting upon such grounds as a forfeiture unless the grantee within 50 days should change its course of conduct. It is conceded that the grantee did not change its course of conduct, and that the resolution has become operative by its terms, if it can have any efficacy to effect a divestiture of title. Where the sovereign makes a grant upon condition subsequent, the breach of the condition does not of itself devest title and right of possession, but the power is in the sovereign, as grantor, to manifest his will that the condition shall be enforced, and this manifestation of his will is by legislative action. In this case the condition expressly requires that the council should exercise an option before forfeiture should ensue. In exercising such an option, the council is acting in a legislative capacity. Its declaration is a law. In Schulenberg v. Harriman, 21 Wall. 44, 63, in dealing with the question of enforcing forfeiture of grants of public lands granted upon condition, and the divestiture of title, Mr. Justice Field, speaking for the court, said:

"And it is settled law that no one can take advantage of the nonperformance of a condition subsequent annexed to an estate in fee but the grantor or his heirs, or the successors of the grantor if the grant proceed from an artificial person; and, if they do not see fit to assert their right to enforce a forfeiture on that ground, the title remains unimpaired in the grantee. The authorities on this point, with hardly an exception, are all one way from the Year Books down. And the same doctrine obtains where the grant upon condition proceeds from the government. No individual can assail the title it has conveyed on the ground that the grantee has failed to perform the conditions annexed. In what manner the reserved right of the grantor for breach of the condition must be asserted so as to restore the estate depends upon the character of the grant. If it be a private grant, that right must be asserted by entry or its equivalent. If the grant be a public one, it must be asserted by judicial proceedings authorized by law, the equivalent of an inquest of office at common law, finding the fact of forfeiture and adjudging the restoration of the estate on that ground; or there must be some legislative assertion of ownership of the property for breach of the condition,—such as an act directing the possession and appropriation of the property, or that it be offered for sale or settlement. At common law the sovereign could not make an entry in person, and therefore an office-found was necessary to determine the estate; but, as said by this court in a late case, 'the mode of asserting or of resuming the forfeited grant is subject to the legislative authority of the government. It may be after judicial investigation, or by taking possession directly under the authority of the government without these preliminary proceedings.' In the present case no action has been taken, either by legislation or judicial proceedings, to enforce a forfeiture of the estate granted by the acts of 1856 and 1864. The title remains, therefore, in the state as completely as it existed on the day when the title by location of the route of the railroad acquired precision and became attached to the adjoining alternate sections."

In U. S. v. Repentigny, 5 Wall. 211, 268, it was said, "The mode of asserting or of assuming the forfeited grant is subject to the legislative authority of the government." See, also, Farnsworth v. Railroad Co., 92 U. S. 49, 66; Van Wyck v. Knevals, 106 U. S. 360, 368, 1 Sup. Ct. 336; Railroad Co. v. Mingus, 165 U. S. 413, 17 Sup. Ct. 348. An examination of these cases makes it entirely clear that a declaration of a forfeiture of a public grant for condition broken is legislative in its character. It is not conclusive, of course, of the facts asserted, and may be judicially resisted (see Railroad Co. v. Mingus, 165 U. S. 413, 434, 17 Sup. Ct. 348); but, if the condition in fact has been broken, it operates to devest the title and the right of possession. The resolution in question was a declaration enacted in form of law by the legislative council, a state agency, vested with legislative authority over the streets, by which, if valid, the title of the city and state and public in the streets granted to the complainant was devested from it, and revested in the grantors. Clearly, the resolution was and is a law of the state within the meaning of the constitution. It is contended that it cannot be a law, because it does not declare a present forfeiture, but only a future one, contingent on conduct of the grantee. We do not think this feature of the resolution deprives it of its legislative character. The operation of laws is frequently postponed to a future day, and made to depend on a contingency. When, as is conceded in the present case, the time of suspension is passed, and the contingency has happened, they are as efficacious as if they had contained no conditions. This resolution found and adjudged a condition to be broken, and declared that the

council exercised its option to declare a forfeiture and to resume possession if the breach continued 50 days. The conduct declared by the council to be a breach, it is conceded, has continued, and the declaration of forfeiture has become operative.

There are many cases in which the supreme court has declared a city ordinance to be a law within the contract clause of the constitution which have much less of legislative character than public forfeitures of rights in the streets by municipal legislatures. Such a case is that of City of Walla Walla v. Walla Walla Water Co., 172 U. S. 1, 19 Sup. Ct. 77. The water company filed a bill to enjoin the city of Walla Walla and its officers from erecting waterworks in pursuance of an ordinance of the city to that effect. The water company had a contract with the city by which the city stipulated that during the term of the contract it should not erect, maintain, or become interested in any waterworks except the one provided for in the contract, which it was given power to condemn. Subsequently the city passed an ordinance for the erection of new waterworks, and the question was whether that was a law impairing the obligation of a contract such as to give a federal court jurisdiction to enjoin its enforcement. The court, speaking by Mr. Justice Brown, states the objection to the jurisdiction as follows:

"The argument of the defendant in this connection is that the action of the city in contracting with the water company, and in passing the ordinance of 1893, providing for the erection of waterworks, was not in the exercise of its sovereignty; that in these particulars the city was not acting as the agent of the state, but was merely exercising a power as agent of its citizens, and representing solely their proprietary interests; that the council in such cases, as trustee for the citizens, stands in the relation to them as directors to stockholders in a private corporation, acting solely as the agent of the citizen, and no wise as the agent of the state, and therefore that neither the state, nor the city as its agent, can be charged either with the making or the impairing of the original contract; that for these reasons the constitution of the United States has no application to the case, the federal court has no jurisdiction, and the bill, upon its admitted facts, presents only a violation by a citizen of the state of its contract with another citizen, and the plaintiff is bound to resort to the state courts for its remedy. It may be conceded, as a general proposition, that there is a substantial distinction between the acts of a municipality as the agent of the state for the preservation of peace and the protection of persons and property and its acts as the agent of its citizens for the care and improvement of the public property and the adaptation of the city for the purposes of residence and business. Questions respecting this distinction have usually arisen in actions against the municipality for the negligence of its officers, in which its liability has been held to turn upon the question whether the duties of such officers were performed in the exercise of public functions or merely proprietary powers. It is now sought to carry this distinction a step further, and to hold that, if a contract be made by a city in its proprietary capacity, the question whether such contract has been substantially affected by the subsequent action of the city does not present one of impairment by act of the state or its authorized agent, but one of an ordinary breach of contract by a private party; and hence the case does not arise under the constitution and laws of the United States, and the court has no jurisdiction, unless there be the requisite diversity of citizenship. How far this distinction can be carried to defeat the jurisdiction of the court or the application of the contract clause may admit of considerable doubt if the contract be authorized by the charter; but it is sufficient for the purposes of this case to say that this court has too often decided for the rule to be now questioned that the grant of a right to supply gas or water to a municipality and its inhabitants through pipes and mains laid in the streets, upon condition of the performance of its service

by the grantee, is the grant of a franchise vested in the state, in consideration of the performance of a public service, and, after performance by the grantee, is a contract protected by the constitution of the United States against state legislation to impair it. New Orleans Gaslight Co. v. Louisiana Light & Heat Producing & Manufacturing Co., 115 U. S. 650, 660, 6 Sup. Ct. 252; Waterworks Co. v. Rivers, 115 U. S. 674, 6 Sup. Ct. 273; St. Tammany Waterworks Co. v. New Orleans Waterworks, 120 U. S. 65, 7 Sup. Ct. 405; Crescent City Gaslight Co. v. New Orleans Gaslight Co., 27 La. Ann. 138, 147. It is true that in these cases the franchise was granted directly by the state legislature, but it is equally clear that such franchises may be bestowed upon corporations by the municipal authorities, provided the right to do so is given by their charters. State legislatures may not only exercise their sovereignty directly, but may delegate such portions of it to inferior legislative bodies as, in their judgment, is desirable for local purposes. As was said by the supreme court of Ohio in State v. Cincinnati Gaslight & Coke Co., 18 Ohio St. 262, 293: 'And assuming that such a power [granting franchises to establish gas works] may be exercised directly, we are not disposed to doubt that it may also be exercised indirectly, through the agency of a municipal corporation, clearly invested, for police purposes, with the necessary authority.' This case is directly in line with those above cited. See, also, Wright v. Nagle, 101 U. S. 791; Hamilton Gaslight & Coke Co. v. Hamilton City, 146 U. S. 258, 266, 13 Sup. Ct. 90; Bacon v. Texas, 163 U. S. 207, 216, 16 Sup. Ct. 1023; New Orleans Waterworks Co. v. City of New Orleans, 164 U. S. 471, 17 Sup. Ct. 161. * * * We know of no case in which it has been held that an ordinance alleged to impair a prior contract with a gas or water company did not create a case under the constitution and laws of the United States. Granting that in respect to the two classes of cases above mentioned responsibilities of a somewhat different character are imposed upon a municipality in the execution of its contracts, our attention has not been called to an authority where the application of the constitutional provision as to the impairment of contracts has been made to turn upon the question whether the contract was executed by the city in its sovereign or proprietary capacity, provided the right to make such contract was conferred by the charter. We do not say that this question might not become a serious one; that, with respect to a particular contract, the municipality might not stand in the character of a private corporation; but the cases wherein the charter of a gas or water company have been treated as falling within the constitutional provision are altogether too numerous to be now questioned, or even to justify citation."

Here the contract, the obligation of which was found to be impaired, concerned only the furnishing of water to the citizens of a municipal corporation,—a subject-matter certainly not regarded as more within the governmental functions of a city than the supervision and control of the streets, and the granting and resuming of public rights therein; and the law which was held to impair the obligation of the contract was merely another ordinance providing for the construction of other waterworks by the city. Such municipal action as the building of waterworks has usually been regarded as proprietary, rather than governmental, and yet the ordinance directing it was held to be a law in violation of the federal constitution.

Second. Does the resolution impair the obligation of the contract contained in the grant? If what the complainant has done and is doing is a breach of the condition of the grant, then the resolution was certainly neither a breach nor an impairment of the contract. It was only legislative action equivalent to a re-entry upon condition broken in its effect upon the title and right of possession, and was, therefore, in exact accord with the terms of the contract and grant. If, however, the condition has not been in fact and in law broken, then the resolution as law assumes to devest title and the right of

possession, when not permitted by the terms of the contract, and purports to secure a right to the city and her officers of resuming possession which would be violative of its provisions. This is certainly an impairment of the obligation of a contract. It is true that the question whether the resolution impairs the obligation of a contract turns on mixed questions of law and fact,—First, whether the contract provides for a forfeiture upon a breach of the covenant that the complainant will not charge to Memphis and her citizens unequally discriminating rates; and, second, whether complainant, or any corporation for whom complainant is responsible, is charging such rates. That the application of the constitutional restriction depends partly on a question of fact is no reason for holding that the case is not one in which it may be relied on. The existence of the contract, the impairment of which is averred, may often be an issue of fact. The circumstances which render the operation of the law an impairment of the obligation of the contract may often be brought to the knowledge of the court by parol proof.

Nor does it avoid the application of the constitutional restriction to say that, if the condition was not broken, this resolution was a mere breach of the contract, and not an impairment of its obligation. To begin with, it may be doubted whether a mere declaration of forfeiture, when the condition is not broken, not followed by forcibly taking possession, is a breach of the contract and grant. It forms a cloud upon the grantee's title, but does it break any covenant in the grant? It is not necessary to discuss this question, because it is immaterial whether it is a breach of the contract or not. It impairs the obligation of a contract if it purports by force of law to authorize any one to do that which would be a breach of the contract. This the resolution certainly does, assuming the condition not to have been broken, for by declaring the revestiture of title and right of possession in the city, it authorizes the city officers peaceably to take possession of the street, and to take up the tracks, and would doubtless authorize the bringing of suits by abutting owners for a nuisance peculiarly harmful to them. The language of Chief Justice Waite in Brown v. Colorado, 106 U. S. 95, 98, 1 Sup. Ct. 175, on a point not in judgment, might, upon first reading, justify the conclusion that the fact that a law is a breach of a contract previously made with the state prevents it from impairing the obligation of the contract, but such is not the proper construction of the words of the chief justice. The case was one coming to the supreme court from the highest court of the state under the twenty-fifth section of the judiciary act, to review a judgment in ejectment in favor of the state of Colorado against one who had granted the land to the state, and who defended on the ground that a condition of the grant was that the capitol was to be built thereon, and it had been broken by a statute placing the capitol elsewhere. The state court had found there was no such condition in the grant. The supreme court held that the validity or invalidity of the statute and its impairment of the contract were not in question, because the state did not admit the condition, and did not rely on the statute as a justification for a breach of it. The chief justice said, in effect, not generally that a breach of a contract by a state

law would not impair its obligation, but only that in the case then before the court, where the statute was not relied on by the state as authority for its alleged breach of its contract, the statute did not impair the obligation of the contract in such way that the defendant could make, in that case, a federal question on its validity, upon which to reach the supreme court. Certainly, the chief justice meant to lay down no general rule that a law which violates a contract does not impair its obligation, for cases in the supreme court supporting a contrary view are too numerous. In the Walla Walla Case, cited above, it is difficult to see in what respect the ordinance of the city directing the construction of waterworks impaired the obligation of the prior exclusive grant, except in that it was an express breach of the covenant of the city in the grant that the city would not construct waterworks of its own, but would buy those of the grantee. In the case at bar we have a law which, if that which is recited to be a fact by its terms is not a fact, purports to give state authority to commit acts which would be breaches of a contract. It purports to restore the street to the city, so that private citizens would be authorized thereby to treat the same as city property, and city officers would be authorized to take peaceable possession, peaceably to take up the tracks, and to remove other property of the grantee therefrom. It seems to us that this is a law impairing the obligation of a contract if founded on a nonexistent breach of a condition.

It is unnecessary for us to discuss at length the reasons for holding that the resolution was a law depriving the complainant of its property without due process of law, if, in fact, the condition had not been broken, for they are substantially the same as those just stated for concluding that the resolution is a law of the state impairing the obligation of the contract. If this resolution violates the federal constitution, there can be no doubt that complainant is entitled to equitable relief. It is certainly a cloud upon the title of the railroad company in its occupancy of the street, which it may ask a court of equity to remove, and to enjoin any claim under it. We conclude, therefore, that the bill stated a good cause of action on the ground that the resolution of the city of March 25, 1898, impaired the obligation of the contract under which the railroad company occupied Kentucky avenue, if it be true, as averred in the bill, that no condition of the contract had been broken justifying forfeiture. This gave to the court below jurisdiction of the whole controversy between the city and the railroad company; and, inasmuch as the suit had been brought a considerable time before the state suits were brought, it justified and required the court below to enjoin the suits in the state court as an impairment of its jurisdiction over the controversy with which it had been invested by the filing of the bill. That such a remedy is not in conflict with section 720 of the Revised Statutes, forbidding the federal courts to issue injunctions against proceedings in a state court, is abundantly established by authority. French v. Hay, 22 Wall. 250–253; Dietzsch v. Huidekoper, 103 U. S. 494–498; Fisk v. Railroad Co., 10 Blatchf. 518, 9 Fed. Cas. 167; Union Mutual Life Ins. Co. v. University of Chicago, 6 Fed. 443; Sharon v. Terry, 36 Fed. 337; Garner v. Bank, 16 C. C. A. 86, 67 Fed. 833. In this view of the

case, the court below should have permitted the filing of the supplementary bill, and should have granted the injunction to restrain the suits in the state court. We are of opinion that the fifteenth section of the contract was one of the conditions referred to in section 16, and, therefore, that the only issue made is whether section 15 has been violated or not. Upon this issue the court below should allow evidence to be taken, and should declare the rights of the parties accordingly.

The decree of the court in so far as it refused the further relief prayed for by the complainant in its bill is reversed, with directions to take further proceedings not inconsistent with this opinion.

BENTON v. McINTOSH.

(Circuit Court, N. D. Illinois, N. D. May 21, 1899.)

No. 25,162.

FEDERAL COURTS—PROCEDURE—OBJECTIONS TO SUFFICIENCY OF SERVICE.

It is the practice of the federal courts to dispose of objections to the sufficiency of the service summarily on a motion to quash the return, rather than by a jury trial on a plea in abatement, regardless of the state practice.

On Plea to Jurisdiction.

Ernest Dale Owen, for complainant.
Swift, Campbell & Jones, for defendant.

KOHLSAAT, District Judge. In this matter defendant has filed a plea to the jurisdiction, averring facts tending to show that he was fraudulently induced to come within this jurisdiction for the purpose of service of process. Complainant moves to strike the plea from the files on the ground that in the federal courts the defendant is not entitled to file a plea under such circumstances, but should proceed by motion to quash the return, and the decision should be by the court on hearing of affidavits, instead of trial by jury, as necessitated by issue on the plea. The case of Wall v. Railway Co. (decided by the circuit court of appeals of this circuit at the October term, 1898) 95 Fed. 398, is cited in support of this contention. That decision does hold that the federal court may ignore state practice in such a matter, and that a motion to quash the service, and not a plea in abatement, has been the usual practice in the federal courts to reach such a defense. The decision does not hold that it would have been error to follow the state practice, however, and the question of convenience and dispatch seems to be the basis of the different decisions cited. On this latter ground I will enter an order that the plea already filed stand as a motion to quash the service, that the same may be supported by additional affidavits filed within five days, and that complainant have five days thereafter within which to file counter affidavits.

COLLINS v. AMERICAN SPIRIT MFG. CO.

(Circuit Court, N. D. Illinois, S. D. May 18, 1899.)

1. CORPORATIONS—SERVICE OF PROCESS ON—ILLINOIS STATUTE.
   Under the statutes of Illinois, a sheriff's return of service on a corporation defendant by reading and delivering a copy of the summons to its auditor, without showing that the president could not be found in the county, is insufficient.

2. REMOVAL OF CAUSES—PROCEEDINGS AFTER REMOVAL—MOTION TO QUASH RETURN.
   An objection to the sufficiency of the return of service on a defendant may be made after the cause has been removed to a federal court.

On Motion to Quash Return.

Brennen & Brennen and Foster & Carlock, for plaintiff.

Moran, Kraus & Mayer and Stevens, Horton & Abbott, for defendant.

KOHLSAAT, District Judge. This is a motion by defendant to quash the sheriff's return on the summons herein. The cause was originally in the state court, and has been removed to this court by defendant under the statute. The return shows service on defendant by reading the summons to, and leaving a true copy thereof with, one Wilkinson, auditor of defendant company. The return does not state that the president of the company cannot be found in said county, and therefore the return is insufficient. Chicago Planing-Mill Co. v. Merchants' Nat. Bank, 86 Ill. 587. It is not too late to make the objection after removal to this court. Railway v. Brow, 164 U. S. 271, 17 Sup. Ct. 126. The motion to quash is allowed.

NEVADA NICKEL SYNDICATE, Limited, v. NATIONAL NICKEL CO. et al.

(Circuit Court, D. Nevada. August 7, 1899.)

No. 641.

1. PRINCIPAL AND AGENT—AGENCY FOR TWO PRINCIPALS—AGREEMENT FOR DISCRETIONARY POWERS.
   Where the parties to a contract agree upon an agent, who is given discretionary power in carrying out the contract on the part of one party, he becomes the agent of both, and his acts within the scope of his agency are binding upon both.

2. CORPORATIONS—INFORMAL EXECUTION OF MORTGAGE—ESTOPPEL.
   A corporation may be estopped to question the validity of a mortgage duly executed by its officers over its corporate seal, though not authorized by any action of its directors, where they individually knew and approved of its execution, but, by reason of the absence of some of their number, a meeting could not be held to take formal action thereon.

3. SAME.
   A contract between two corporations, duly authorized by their boards of directors, gave the first corporation a lien on property of the second for advances made, and further provided that the second should execute such other deeds or documents as might be required or deemed necessary by the legal advisers of the first to perfect the security under the local laws where the property was situated. Such advisers required the giving of a

mortgage, which was then duly executed by the officers of the second corporation, with the knowledge and approval of its directors, who agreed to ratify such action, though it was impossible at that time for a meeting to be held to take formal action thereon. In a similar manner a further agreement was made for an increase in the amount to be advanced. In reliance upon such action the first corporation accepted the mortgage and made the advances. *Held*, it appearing that both parties acted in good faith, that the directors of the second corporation were bound in equity to ratify the action taken, and the corporation was estopped to deny the validity of the mortgage.

4. CONTRACT—PARTIAL ENFORCEMENT—UNCONSCIONABLE PROVISIONS.

A corporation entered into a contract with a second corporation, which owned mines, and had secured a contract for the sale of a certain quantity of the mineral therefrom, but was without works to reduce the ore, by which it agreed to advance the money to purchase machinery and erect the necessary works, and to produce the quantity of mineral required to fill the order, for which it was to be repaid the sum advanced, together with a bonus of 200 per cent.; the same to be a charge on the property and product of the second party until paid. The money was to be expended entirely under the direction of the first corporation, and the work to be in charge of its agent, who was agreed upon and named in the contract. An amount of money equal to that limited in the contract was advanced, and reduction works were built; but they failed to operate successfully, and the undertaking was abandoned. *Held* that, in the absence of any usury law affecting the contract, it was legal, and the lien given thereunder would be enforced by a court of equity to the extent of the amount of money advanced in good faith, and expended under the direction of an agent selected by both parties, with interest, without regard to the cause of failure, but that, as the second corporation received no benefit from the contract, the principal inducement for which was the production of the mineral which it had sold, it would be unconscionable to compel the payment of the stipulated bonus when such mineral was not produced.

This suit was brought by complainant to recover from the defendant the National Nickel Company the sum of $85,512.33, and to foreclose a mortgage lien for said amount upon certain mining property and premises owned by said defendant, situate in Churchill county, Nev. The complainant is a corporation organized under the laws of Great Britain. The defendant the National Nickel Company is a corporation organized and existing under and by virtue of the laws of the state of Illinois.

The original bill was filed July 20, 1897. Frederick B. Pierce, Milo T. Sipe, R. Peterman, and Louis Smith were made parties defendant on the ground that they had, or claimed to have, some interest in the property, which, it was alleged, was subsequent to, and subject to, the claim of the complainant. An amended bill was filed September 6, 1897, to which Charles Bell was added as a party defendant. The supplemental bill was, by leave of the court, filed October 25, 1897. Charles E. Brooks was made a party defendant thereto. The supplemental bill prayed for relief against two judgments obtained by default against complainant in the state district court for Ormsby county, Nev.,—one by the National Nickel Company for $26,080 damages for breach of the contracts A and C; the other in favor of Charles E. Brooks, a stockholder in the National Nickel Company, to set aside and cancel Exhibit B. Both of these judgments, after the filing of the supplemental bill herein, were set aside by the state courts, and hence are eliminated from this suit, except in so far as they may tend to sustain complainant's allegations of fraud against the defendant corporation. An answer of the National Nickel Company to the amended bill was filed September 29, 1897, and to the supplemental bill on April 5, 1898. A separate answer of Louis Smith was filed October 14, 1897, and a separate answer of Charles E. Brooks to the supplemental bill was filed April 5, 1898.

The complainant's right to recover herein rests upon the construction which is to be given to certain contracts and instruments of writing executed by the respective corporations, and upon the testimony of witnesses as to whether the covenants in said contracts and instruments, to be performed by complainant, have been performed in such a manner as to be binding upon the defendant corporation. These contracts are hereby designated as Exhibits A, B, and C.

Exhibit A reads as follows:

"Articles of agreement made the fifteenth day of October, one thousand eight hundred and ninety-four, between the Nevada Nickel Syndicate, Limited, whose registered office is situate at 40 Great Tower street, in the city of London (hereinafter called the 'syndicate'), of the first part; the National Nickel Company, a company formed under the laws of the state of Illinois (hereinafter called the 'company'), of the second part; and John Leighton, of 7 Nottingham place, Marylebone road, in the county of London, gentleman, of the third part: Whereas, the company are the owners of the nickel mines, particulars of which are mentioned and set forth in the schedule hereto; and whereas, they are desirous of erecting plant for the purpose of working the said mines; and whereas, Mess. Thomas Bolton & Sons, of Oakamoor Mills, near Cheadle, North Staffordshire, have agreed to purchase from the company one hundred and twenty-five tons contained nickel in matte, at a price which will amount to ten thousand five hundred pounds, or thereabouts; and whereas, the company have applied to the syndicate to provide such a sum as may be necessary for the erection and preliminary working of the machinery necessary to manufacture and ship a limited quantity, not exceeding the amount of matte required to provide for the order above mentioned, which the syndicate agree to do upon the terms hereinafter mentioned: Now, it is hereby agreed as follows: (1) The company will forthwith instruct Frederick William Martino, of Sheffield, or, in the event of his declining or being unable to act, some other person of equal position, to be approved by the syndicate, to proceed to Nevada for the purpose of purchasing and erecting the machinery necessary for the purpose above mentioned, and will arrange with the said Frederick William Martino, or such other expert as aforesaid, to superintend the purchase, erection, and preliminary working of such machinery as aforesaid. (2) The syndicate will from time to time provide the moneys necessary to pay for such machinery as may be deemed necessary by the said Frederick William Martino for the purpose aforesaid, and for the traveling expenses of the said Frederick William Martino, not exceeding two hundred pounds, and for the salary of the said Frederick William Martino, and for the wages of the men required for the erection and preliminary working of the said machinery, but so that the aggregate amount to be provided under this clause, including the costs and expenses connected with the negotiations for and completion of these presents, and the formation and registration of the syndicate, and all costs, charges, and expenses to which the syndicate may be put in connection with the business, the subject of this agreement, and also including the traveling expenses of a representative of the company, not exceeding two hundred pounds, and those of a representative of the syndicate, who is to proceed to Nevada as hereinafter mentioned, and which are agreed at the sum of two hundred pounds, shall not exceed four thousand pounds. (3) The company hereby agree, for the considerations aforesaid, to pay to the syndicate a sum equal to the aggregate amount provided by them under clause 2 of this agreement, together with a bonus of eight hundred pounds, within ten days after bills of lading for a sufficient portion of the said one hundred and twenty-five tons of contained nickel to produce the said aggregate amount, and the eight hundred pounds, after providing for discount, first arrive in England, but so that under no circumstances shall payment of the said amount be delayed beyond the first day of August, one thousand eight hundred and ninety-five. (4) The company further agree to pay the syndicate a further bonus of seven thousand two hundred pounds in manner following: That is to say, the sum of eight hundred pounds on the first day of November, one thousand eight hundred and ninety-five, and the sum of one thousand six hundred pounds on the first day of November in each of the four following years. (5) The syndicate shall be entitled to send a representative to the said mines, who shall have the disbursement of all moneys in connection with the said works, and have general superintendence of the

works. (6) For the purpose of securing the payment of the moneys payable by the company to the syndicate as provided in clause 3 hereof, the company hereby transfers to the syndicate absolutely all ore at present mined, or which may during the continuance of the security be mined, by the company, and all plant, machinery, and other assets of the company for the time being at the said mines; and they agree forthwith to give possession to the syndicate of such ore so mined as aforesaid, and such plant, machinery, and assets, and, further, that such possession shall be given to the representative of the syndicate by the representative of the company who is to proceed forthwith to Nevada, to the end that the absolute control of the said mines and all other assets of the said company on the said mines shall be and remain in the custody of the syndicate, by way of security to them for the repayment to them of the moneys payable under clause 3 as aforesaid. (7) By way of further security for the payment of the said moneys payable by the company under clause 3 as aforesaid, the company hereby charge with the payment thereof the contract of the company with the said T. Bolton & Sons for the purchase of the said one hundred and twenty-five tons contained nickel, and the proceeds of sale thereof. And these presents shall be a sufficient authority to the said T. Bolton & Sons to pay the proceeds of sale of the said contained nickel in matte in cash to the syndicate, and the receipt of the syndicate, or of any officer duly authorized by them, shall be a sufficient discharge to the said T. Bolton & Sons for all moneys payable in respect of the said one hundred and twenty-five tons of contained nickel. (8) By way of security for payment of the sums which will become payable in the year one thousand eight hundred and ninety-five, and each of the four subsequent years, by the company, under clause 4 of these presents, the company hereby charge the first products of the mines during each of such years, respectively, with the payment of the amount payable in such year, except that as regards the year one thousand eight hundred and ninety-five the charge shall only operate after the said one hundred and twenty-five tons of contained nickel has been produced. (9) The company hereby guaranties that it has not and will not issue any debentures which can in any way take priority over the charges hereby created, and it is expressly stipulated that the syndicate shall not be bound to make any advances other than the necessary cost of traveling expenses and current salary of Mr. Martino, unless and until the syndicate shall be satisfied, by an examination of the registers necessary under the law of Nevada, that no such charges exist; and, in the event of any such charges being discovered, the company hereby agree forthwith to repay all moneys then advanced by the syndicate, together with all expenses and costs as hereinbefore mentioned, and together with interest thereon at five per cent. per annum. (10) The above agreement has been entered into by the syndicate at the request of the said John Leighton, who is largely interested in the company; and the said John Leighton, in consideration thereof, hereby guaranties the due payment of the moneys payable by the company under clause 3 of these presents, and, further, that the company shall and will make, do, execute, and perfect all such deeds and documents, and make and complete all registrations necessary to give the syndicate a valid and effectual charge on the products of the mines, as provided by clause eight of these presents, and as may be required or deemed necessary by the legal advisers of the syndicate in Nevada for perfecting this security according to the laws there in force.

"In witness whereof, the Nevada Nickel Syndicate, Limited, have caused their common seal to be hereunto affixed, * * * and these presents to be signed by its president and assistant secretary, the day and year first above written.

John Leighton, President.

"[Corporate Seal.] S. F. Field, Assistant Secretary.

"John Leighton."

(This agreement was properly witnessed, stamped, and duly acknowledged.)

Exhibit B:

"This indenture, made this thirty-first day of December, in the year one thousand eight hundred and ninety-four (1894), between the National Nickel Company, a corporation duly organized and existing under the laws of the state of Illinois, party of the first part, and the Nevada Nickel Syndicate,

Limited, of the city of London, England, a corporation, party of the second part, witnesseth, that the party of the first part, for and in consideration of the sum of ten dollars, gold coin of the United States of America, to it in hand paid by the party of the second part, the receipt whereof is hereby acknowledged, does by these presents grant, bargain, sell, remise, release, and forever quitclaim unto the party of the second part, and to its successors and assigns, the following nickel mines and mining claims situate in the Table Mountain mining district, Churchill county, state of Nevada, to wit: First, the claim known as the 'London'; second, the claim known as the 'Liverpool'; third, the claim known as the 'Royal George'; fourth, the claim known as the 'Ætna'; fifth, the mining ground situated at the junction of Cottonwood and Bolivia cañons, in Churchill county, and located for town-site and mill and furnace purposes January 2nd, 1893, containing about twenty-three (23) acres. The said mines, mining claims, and mining ground are the same mentioned in certain articles of agreement entered into between the parties hereto, and dated the fifteenth day of October, 1894. [Clauses 3 and 4 of the original agreement are here set forth in full.] Together with all the dips, spurs, and angles, and also all the metals, ores, rock, and earth in said mines and mining claims, and all the rights, privileges, and franchises thereto incident, appendant, and appurtenant, or therewith usually had and enjoyed, and also, all and singular, the tenements, hereditaments, and appurtenances thereto belonging or in anywise appertaining, and the rents, issues, and profits thereof. To have and to hold, all and singular, the said premises, together with the appurtenances and privileges thereto incident, unto the party of the second part, its successors and assigns, as and for additional security to said party of the second part for the performance by the party of the first part of, all and singular, the terms and conditions by said party of the first part to be performed under and by virtue of said articles of agreement between the parties hereto, dated October 15, 1894; and when the purposes and objects of said agreement have been fully carried out, and all of the obligations of the party of the first part thereunder fully performed by it, then the property hereby conveyed shall be reconveyed to the party of the first part by the party of the second part. Upon the payment to said party of the second part of all moneys agreed to be paid by said clause 3 of said agreement, the said party of the second part shall immediately deliver to said party of the first part, its successors or assigns, the possession of all the property hereby and herein conveyed, and after such delivery, and until the payment of the moneys and bonus provided by said clause 4 of said agreement, this conveyance shall be and continue as a mortgage to secure to said party of the second part the payment of said bonus, which payment may be made as follows, to wit: The sum of eight hundred pounds on or before the first day of November, one thousand eight hundred and ninety-five, and the sum of one thousand six hundred pounds on or before the first day of November in each of the four following years.

"In witness whereof, said party of the first part has caused these presents to be signed by its president, and its corporate seal to be hereunto affixed by its secretary, both thereunto duly authorized, the day and year first hereinabove written. The National Nickel Co.,

"A Co. Formed under the Laws of the State of Illinois.

"By John Leighton, Prest.

"[Corporate Seal.] By S. F. Field, Asst. Secy."

(Duly stamped and acknowledged.)

Exhibit C:

"Memorandum of agreement made the twentieth day of May, one thousand eight hundred and ninety-five, between the within-named Nevada Nickel Syndicate, Limited, of the first part, the within-named National Nickel Company, of the second part, and the within-named John Leighton, of the third part: Whereas, further sums beyond the sum of four thousand pounds within mentioned are required for the purposes within mentioned, and the company has applied to the syndicate to advance such sums as may be required, not exceeding one thousand five hundred pounds, which they have agreed to do in consideration of the company and the within-named John Leighton entering into these presents: Now, it is hereby agreed as follows: (1) The within written agree-

ment shall be read and construed as if the sum of five thousand five hundred pounds were inserted in the second clause in lieu of four thousand pounds, and as if the sum of one thousand one hundred pounds were inserted in lieu of eight hundred pounds throughout the said agreement, and as if the sum of two thousand two hundred pounds were inserted in lieu of one thousand six hundred pounds throughout the said agreement, and as if the sum of nine thousand nine hundred pounds were inserted in lieu of seven thousand two hundred pounds in the fourth clause of the said agreement. (2) All securities and guaranties which have been sealed and executed in relation to the within written agreement shall have the same force and effect as if the said agreement had originally been modified as provided in clause one hereof.

"In witness whereof, the National Nickel Company has caused its common seal to be hereto affixed and these presents to be signed by its president and assistant secretary the day and year first above written.

"John Leighton, Pres.
"S. F. Field, Asst. Secy. [Corporate Seal.]
"John Leighton."

(Duly witnessed, stamped, and acknowledged.)

Attached to this agreement was a memorandum giving a description of the property, the same as is set forth in Exhibit B.

In order to fully understand the legal issues presented in this suit, it will certainly be proper, if not absolutely necessary, to give an outline history of some of the various transactions between the respective parties which led up to the execution of these documents, and of the manner in which the subsequent affairs relating thereto were conducted. The record is voluminous, the pleadings verbose, the testimony prolix, the arguments of counsel lengthy and exhaustive. To quote from one of the briefs of counsel, "We are driven to the task of wading through a labyrinth of mazy rubbish of straw and chaff to get down to the small quantity of grain for which the court will seek in unraveling this tangle in its final judgment."

History of the Case.

The National Nickel Company, defendant herein, was incorporated August 27, 1886. The object for which it was formed was the "mining, working, and refining of nickel and other mineral ores and metals, and the purchase and sale of nickel and other metals and mineral ores, in the state of Nevada and elsewhere," with a capital stock of $5,000,000, consisting of 500,000 shares, of the par value of $10 each; having its principal office located in Chicago, Ill. The record only shows two meetings of the board of directors, which are here given: (1) "Meeting of the board of directors of the National Nickel Company, held on January 1, 1894, at No. 3 Popesead alley, Cornhill, London, England. Present: John Leighton, S. F. Field, W. R. Goodbody, D. J. Noyes. * * * The certified copy of the proceedings of the stockholders at their annual meeting held at Chicago, Illinois, December 7, 1893, was then submitted to the meeting. On motion duly seconded, the board proceeded to elect officers of the company for the ensuing year, with the following result: John Leighton, president; John W. Lanehart, secretary; Charles E. Brooks, assistant secretary,—by unanimous vote." An amendment to the by-laws was then adopted, relative to the election of an assistant secretary. (2) "Meeting of the board of directors of the National Nickel Company held on the 13th day of October, 1894, 3 p. m., at No. 7 Nottingham place, Marylebone road, London, pursuant to the call of the president. Present: John Leighton, Wm. R. Goodbody, Daniel J. Noyes, and Sylvester F. Field. The meeting was called to order by the president. After reading and approval of the minutes of the meeting, a resolution authorizing the execution of the contract submitted with the Nevada Nickel Syndicate, providing for the erection of plant at the company's mines in Nevada, was unanimously adopted. All voting. On motion duly seconded, a resolution granting to W. R. Goodbody an allowance of five per cent. of the net profits of the company on the working, after this date, of its mines, was, after full discussion and consideration, unanimously adopted. All voting." And at this meeting William J. Potter, who had been elected a director at a meeting of the stockholders, declined to accept the position, and

Frank Pooton was chosen to fill the vacancy in the board of directors. The meeting adjourned, subject to the call of the president.

Notwithstanding the large number of stockholders (over 250), this corporation, with its paid-up capital, was short of funds required to carry out its object of working its mines. Among the stockholders who figure prominently in the testimony in this case are John Leighton, its president, having 135,150 shares of its capital stock; Charles Bell, the original locator and owner of the nickel claims in the state of Nevada, 25,000 shares; William R. Goodbody, 25,000 shares; D. J. Noyes, with 5 or 6 shares,—just enough to authorize his election as a director. Goodbody and Noyes are the most important witnesses in this case,—Goodbody for the complainant, and Noyes for the defendant. They were the principal promoters of the mining venture, enterprise, or scheme, for the carrying out of which the corporations herein were respectively organized. In 1889 a contract was entered into by John Leighton with William R. Goodbody and D. J. Noyes in relation to the sale of Leighton's shares of stock in the company, and also of certain other shares placed under his control for that purpose. By the terms of this contract the shares were to be sold at the par value of $10 each, and Goodbody and Noyes were to receive for their services a commission of 50 per cent. of the moneys received from such sale. Under this contract Goodbody and Noyes in 1889 disposed of $18,000 worth of stock. These sales were principally made by Goodbody to his brothers, and other relatives and friends, in England and Ireland. In 1891 Leighton visited England, and endeavored to enter into negotiations for the floating of the stock of the company through Abel Rey & Co. Pending these negotiations a further contract was made between Leighton and Goodbody and Noyes whereby they agreed for a commission of 20 per cent. on the amount of shares that might be taken by Rey and his friends, but this scheme fell through. The attention of the promoters was then directed to other channels. Pending the negotiations with Rey they learned that F. W. Martino, whose name figures prominently in the subsequent proceedings, had the confidence of Rey & Co., Thomas Bolton & Sons, and others of prominence and influence. They consulted together as to the formation of a new scheme to raise £10,000, which they considered would be sufficient to erect a plant for the reduction of the nickel ore. In discussing the plan to be adopted, Goodbody suggested that if they could control the services of Mr. F. W. Martino as an engineer to put up a plant, and could also procure an order from Thomas Bolton & Sons for enough nickel to supply a sufficient amount to repay the money which the plant would cost, he could secure the formation of a syndicate with subscriptions among his friends to that extent, provided a contract between the National Nickel Company and such a syndicate could be procured, by which the syndicate would advance the money, and receive through the sale of this contained nickel in matte the repayment of the principal advanced, and the bonus on such principal of 200 per cent., which should be payable out of the product of the mines. They had no authority in this matter, and no interest therein, except the benefits that might accrue to them by the erection of the plant, and obtaining such products from the mines as would enable them to make a sale of the shares of stock, and realize their commissions under their contract with Leighton. Among other preliminaries, Noyes obtained £100 from Leighton, and went to Sheffield, and secured a month's option on Mr. Martino's services as an engineer, and expert in the refining of nickel, at a salary of £1,000 a year. If the option was accepted within the month, the £100 was to go on the year's salary, and, if not accepted, the money was to be forfeited. Mr. Noyes then visited Mr. Bolton, and obtained from him an agreement to purchase a limited quantity of contained nickel in matte; the object being to provide the necessary means for the repayment of the money to the syndicate. Armed with these and other assurances, Goodbody went to his wealthy relatives and friends. The syndicate complainant herein was organized October 15, 1894, for the purpose of furnishing the necessary capital to erect a plant to reduce the ore, and ship the product thereof to Thomas Bolton & Sons. The directors of this corporation were Alfred Goodbody, Thomas A. Goodbody, Samuel Watson, W. C. Goodbody, and Theodore Godlee. Mr. Goodbody, as the representative of the syndicate, Mr. Noyes, as the representative of the National Nickel Company, or of John Leighton, its president, clothed with author-

ity to turn over the property to the syndicate, and Mr. Martino, with the authority expressed in the contract A, started for America the latter part of October, 1894. Mr. Walter C. Goodbody, brother of W. R. Goodbody, accompanied them. On the way to America there was much discussion between these parties as to their relative duties, positions, status, powers, and authority. Goodbody testifies that Noyes came as the representative of the National Nickel Company, that Martino came as the agent or representative of the National Nickel Company, and that he (Goodbody) was to pay out such moneys as would be remitted to him by the syndicate, and that he came as the representative of the syndicate. According to the testimony of Noyes, Goodbody claimed to have full control of all matters to be performed under the contract, that he was the superintendent, and had control over Martino, and that the National Nickel Company had nothing whatever to do with Martino, and that his (Noyes') duty was limited to the provisions of the contract, and was simply to turn over the property, as the agent of the National Nickel Company, to the syndicate, and that his powers would then cease in connection with the whole affair.

The parties arrived in America, and visited Chicago, where Martino and Goodbody examined and priced machinery that might be needed. At Denver and Salt Lake they examined some smelting works and machinery for the purpose of acquiring information with reference to the cost of machinery, and ascertaining the most available methods of erecting the plant. The parties arrived at Lovelock, Nev., a railroad station near the mines. Charles Bell, then superintendent of the National Company, had been telegraphed for, and met them at the station. Mr. Godlee, the solicitor of the syndicate, had previously requested the recorder of Churchill county to give a certificate as to whether or not there were any debentures on the property of the National Nickel Company. An abstract of title and the certificate were delivered to Goodbody at Lovelock. At this point Noyes testifies that Martino was anxious to go to San Francisco at once; that Goodbody positively refused so to do, asserting that he had sole authority and direction as to what was to be done, and that he had determined that an inspection should be first made of the mines; they all visited the mines; remained there about two days. Noyes testified that on this visit he offered to deliver the property to Goodbody, as the superintendent of the syndicate, but that Goodbody declined to accept the possession until he had the opportunity of consulting an attorney, and obtaining an opinion as to whether the certificate of the recorder was in proper form, so as to give adequate assurance that there were no mortgage debentures on the property. The parties proceeded on their journey to San Francisco, and upon their arrival there Goodbody received the original contract, A. This was read over and examined by Goodbody, Noyes, and Martino. Noyes testified that he sat down with Goodbody, and went over the contract particularly to show him that the only condition, in limiting the performance of the contract by him as the representative of the syndicate, was the question of whether there were any mortgage debentures upon the property. Noyes contended that the certificate of the recorder of Churchill county showed that there were no mortgages on the property, but suggested to Goodbody that it would be a good idea to return that certificate to the recorder, and have him certify that there were no judgments, attachments, or liens of any kind of record against the property, and that this was done. Divers conversations were had; Noyes constantly urging Goodbody to accept the property, and to do something in regard to it. In the meantime Goodbody, who testified that he acted as the representative of the syndicate and under their instructions, called upon Mr. Deal, an attorney at law, and employed him for the purpose of obtaining legal advice whether the syndicate had good security for the money that was about to be advanced, and that he was advised by Mr. Deal that the agreement A, as drawn in London, was not good security, under the laws of the state of Nevada, for the moneys proposed to be advanced. Further meetings were had between the parties. The attorney visited the county seat of Churchill, made an examination of the title, and found that no location of the Ætna had ever been recorded. The syndicate's representative was informed that it could not be compelled to advance the money called for by the contract. Consultations were had. Bell relocated the Ætna, and conveyed it to the National Company.

Then came the suggestion that Bell, having been superintendent of the National Nickel Company, might have a claim or lien against the property. This was disposed of by getting Bell to consent to the postponement of any lien which he had or might have to that of the syndicate under their contract. An agreement to this effect was thereafter properly and satisfactorily executed. Goodbody next informed Noyes that the syndicate would insist upon having a deed of the entire property, to be executed in their favor by the National Company, and assured him that, if this should be done, they could then go on with the execution of the contract. Meetings were held, matters discussed, and Noyes replied that Goodbody was asking for something that was absolutely impossible to be done, that there was no such provision in the contract, and that it was impossible for the National Company to execute either a deed or a mortgage, because no quorum of a board of directors could be obtained to act with reference to it. The upshot of this controversy was that through the aid of a Mr. Abbott, who had some interest in the success of the enterprise, as a friend of Leighton, it was finally agreed by Abbott, Bell, and Noyes, on condition that the syndicate, by its representatives, should at once proceed vigorously to perform its contract, that they would use their best endeavors to secure the ratification of Exhibit B, which had been changed in form from an absolute deed, so as to make it in legal effect a mortgage, provided Leighton executed it. On December 11, 1894, the discussions between the parties culminated in the execution and delivery of Bell's agreement to waive his priority of lien in favor of the syndicate, and a deed of the Ætna claim, by Bell to the syndicate, an agreement by the syndicate to employ Bell, and an instrument, executed by Noyes, transferring the possession of the property to Goodbody as the representative of the syndicate.

Leighton testified that he received letters from Noyes, Abbott, and Bell in the latter part of December, 1894, but was unable, after careful search among his papers, to find any of them. He stated the substance of the letters, substantially in accord with the testimony of Mr. Noyes, as follows: "All those letters stated that a demand had been made by W. R. Goodbody for additional security, in the form of a mortgage deed, which could not be given by the National Nickel Company, because of the absence from London of two of the directors, not leaving a sufficient number to constitute a legal meeting of its directors for action. The substance of these letters, aside from the above statement, was to the effect that after consuming a considerable time in urging the representative of the syndicate and its superintendent of works, W. R. Goodbody, to proceed with the work in accordance with the contract, Exhibit A, and the stipulation on the part of the syndicate therein contained, an arrangement had been effected with him by them that work would go on, and the contract would be promptly and vigorously carried out, provided I would execute a mortgage deed such as had been prepared and forwarded to Theodore Godlee,—this deed to be given and accepted subject to the further action, approval, and ratification of the board of directors of the National Nickel Company, when a legal quorum of the board could be convened,—and that these three persons, viz. Messrs. Abbott, Noyes, and Bell, had personally agreed with the representative of the syndicate, W. R. Goodbody, that on condition the contract, Exhibit A, was so faithfully carried out by the syndicate, that they would exert all their influence and endeavor with the company and myself to secure such ratification, and validate such deed, if given by me." Then, with reference to what occurred between himself and Godlee, he testified as follows: "I received the deed [Exhibit B] from Theodore Godlee at his office, 26 Cannon street, London, E. C. When I called for it I stated to Mr. Godlee that I should execute and deliver the deed under the arrangement made with W. R. Goodbody at San Francisco, of which I had been advised by letters, the substance of which I then stated to him, inasmuch as it seemed to be the only way to secure progress, although I had no authority whatever, and could obtain none, for doing so. Mr. Godlee replied that he knew nothing about the matter till receipt of the deed a day of two previously, and that he and the syndicate relied entirely on their representative (W. R. Goodbody) in San Francisco, and he (Godlee) would not take any responsibility; I must do as I thought fit in regard to it. I then executed the deed, and delivered it to him, with the distinct statement that its validity and effect was to be subject to the actual ap-

proval and confirmation of the board of directors of the National Nickel Company, and its action, but that I thought the board would ratify and confirm it if the contract [Exhibit A] was promptly and vigorously executed by the syndicate."

Goodbody, Noyes, and Martino remained in San Francisco about three weeks after the preliminaries were settled. Goodbody notified Noyes that he and Martino were daily at work, devoting their time assiduously to the performance of their duties, and had made considerable progress in the arrangements for freight, purchasing materials for carrying on the work, and various other matters connected with it. Noyes left San Francisco and went to New York about the 1st of January, 1895. Goodbody testified that during January, 1895, Martino secured the services of H. P. Gregory & Co. to purchase the necessary machinery, and employed Henry Gray, of that firm, as an assistant engineer, to erect a plant, and that Martino also employed Charles Bell as assistant superintendent at a salary of $150 per month; that Martino also purchased from John Taylor & Co., purveyors of chemicals in San Francisco, an invoice of chemicals amounting to $504.18, to be used in a laboratory that he afterwards established at the mine. There are hundreds of pages of testimony detailing the purchases that were made by Martino and Goodbody, of itemized bills, receipts therefor, and checks that were drawn in payment thereof, and of like bills, receipts, and checks for labor at the mine.

The erection of the plant was commenced under Martino's supervision in April, 1895, and completed in June, 1895. The plant consisted of a reverberatory furnace, made of fire bricks and iron, a tubular boiler of the value of $300 or thereabouts, a 23 horse power engine of like value, pulleys and shafting, etc. In the erection of the furnace about 20,000 bricks were used. They paid $42 per 1,000 for the bricks. They were bought in San Francisco. A competent brick burner in Nevada offered to burn and deliver the bricks at the mines for $13 per 1,000. The building or shed over the works was 60 by 30 feet. The roof was made of corrugated iron, supported by six cast-iron posts, three on each side, measuring about 13 inches in diameter, and weighing about 1,800 pounds. 4x4 wooden posts, obtainable at the mine, would have been amply sufficient to sustain the roof. No attempt was ever made to smelt any ore in this reverberatory furnace. Mr. Martino informed Goodbody that he could smelt the nickel ore, but that it could not be done with a profit. At this point Goodbody said that he could not see any object in going on with the work, if that were so. They both left the mines, and went to San Francisco. Martino did not return. He left in apparent disgust, and, to quote his words, "went home a sadder and wiser man." In a report made by Goodbody to the syndicate, explaining why no smelt was made, and why he assumed management without authority, he, among many other things, said: "Although I understood from Mr. Martino that the plant was complete, and ready to commence smelting, still day after day passed by without anything being done; Mr. Martino spending the greater part of his time in the laboratory. I asked him at last when he intended to commence smelting. He replied that he was making some very important tests, and that when they were finished he would have a consultation with me. The following evening he * * * told me that he had completed his tests; that he was sorry to say that the result proved the whole business to be a swindle; that, although there was plenty of nickel in the mine, it was of an entirely different character from the samples that had been supplied to him at Sheffield; that, had the bulk been of the same character as the sample, it would have almost fluxed itself, but that as it was it would take about three tons of added material to reduce one ton of this ore, and that he did not know how this material could be obtained, but that, if it could be obtained, the cost of buying it and delivering it at the mine, taken in conjunction with the large amount of fuel consumed in fluxing the ore, together with the cost of labor, freight, etc., would result in the matte costing more to make than it was worth. He then proceeded, in very vigorous language, to denounce the National Nickel Company and Mr. Bell, and wound up by saying that if I thought well of it, after what he had told me, he would go on with the smelting I said in reply, in the face of the statement he had just made, I could not see how it could be to the interest of either the syndicate or National Nickel Company to do so." After stating that Martino made certain sugges-

tions as to how a plan could be arranged for raising more money, and that he (Goodbody) questioned whether the syndicate would be a party to such a plan, and that Martino said: "Why not? That it would only be swindling swindlers, and, so far as he was concerned, nothing would give him greater pleasure," —he proceeded to give an account of his subsequent management. Among other things, he said: "On arriving at San Francisco, I saw Mr. T. E. Jewell, * * * and laid all the facts of the case before him. He told me that he had known of the National Nickel Company's mines for several years, and would be glad to assist me in any way in his power. He said further that, from the many conversations he had had with Mr. Martino from time to time, he had made up his mind that, whether his claim to be a great scientist and chemist was true or not, he had long since decided that he knew nothing about the smelting of ores,—at any rate, in America. Mr. Jewell advised me to engage a competent smelter, and erect a small water-jacket furnace, for the purpose of demonstrating whether the ore could be profitably smelted or not. I thought the matter carefully over. There appeared to be two courses open to me, —one, to abandon the enterprise altogether, and return home, in which event it seemed to me the money of the syndicate would probably be lost; the other, to take the responsibility on myself of risking the loss of the balance of the syndicate's capital by following Mr. Jewell's advice. I decided to take the latter course. The first step I took was to telegraph to Dr. Banks to send me down some fair samples of ore. On receipt, I had them assayed, and found that they contained, contrary to Mr. Martino's statement, a large percentage of arsenic." He also states in the report that Mr. Noyes "told me that he highly approved of the action I was taking, and that I could rely on his backing me up in every way in his power. At the same time he undertook not to interfere in any way." Further on in the report he says: "It was unfortunate that I was not advised by the syndicate of the supplemental contract entered into by them, undertaking to advance the National Nickel Company an additional fifteen hundred pounds. The first I knew of it was being shown a copy by Mr. Noyes. Had I known from the time I took over the administration that I could rely positively upon receiving this amount, even though it was remitted in installments, I should have made very different arrangements, which would have resulted in the smelting being permanently established. * * * I should like to say in conclusion that, from the personal knowledge I have gained of the mines and their surroundings, I believe that with an additional capital of about two thousand pounds, and with a confirmatory order from Messrs. Bolton & Sons, a very large and profitable business could be done."

Mr. Martino, in a letter found in the testimony in this case, charged Goodbody with being ungrateful, and, among other things, said "that he had never consented to be made either a fool or a rogue of, nor a cat's-paw to pull chestnuts out of the fire for others"; that he went out to establish an industry by which those who sent him should not lose their money; that, when he came to examine the ore on the dumps, he "found about thirty-eight per cent. of common stones, containing not a trace of nickel"; that the remainder was an ore of an entirely different character from what they had been led to believe; that he reported the facts to Mr. Goodbody, and discussed the subject in all its bearings, "when I, as an expert, not only as a smelter, but as a buyer of matte, and as a refiner of matte, of over thirty years' experience, pointed out to him that the discovery altered the whole aspect of affairs; that now, instead of having an excess of the so-called agitator [the arsenic], we have nothing like the sufficient quantity; that the ore itself, instead of being an easy-smelting one, is, by virtue of its constituents, a refractory one; * * * that we could smelt them, but that we could not smelt them at a profit; that in fact his people were likely to lose money by every sale of such matte. * * * I threshed out the whole subject, as an expert, and proved my arguments step by step, and he fully concurred. * * * I said: 'We have now to decide whether we are to go on, which means, are we to use the one thousand pounds which your people remitted, and then ask for more, and continue this little game until they find out for themselves that we are losing their money, knowing all the time we are playing a dishonest game, or had we not better stop short, right here, go home, and make a clean breast of

everything?" The actual time that Martino and Goodbody expended at the mines was about 30 days.

After Mr. Martino left for England, Goodbody employed Dorwin as a smelter, at a salary of $250 per month, and T. E. Jewell as assistant smelter, at a salary of $150 per month. When a fire was started in the reverberatory furnace for the purpose of burning out the bridges, the furnace cracked in several places in such a manner as to render it entirely useless, and it was torn down. Then a small water-jacket, 16-inch furnace, which would reduce about 3 tons of nickel ore a day, was erected, and 12 or 14 tons of ore, averaging about 16 per cent. nickel, were run through the furnace, when it exploded. In the language of one of the witnesses, "the furnace took a rise and went out of the building," injuring several of the workmen. About 3 tons of contained nickel in matte were obtained from this working of the ore, and this was the actual result in value of the "entire output of all the expenditures made at the mine by the Nevada Nickel Syndicate, Limited." The life of the enterprise as a going concern expired with the collapse of the furnace.

W. E. F. Deal, for complainant.

G. W. Baker, for defendants.

HAWLEY, District Judge (after stating the facts as above). The foregoing statement of facts was prepared for the purpose of shedding a calcium light, by the rays of which the general nature and character of this suit might be more clearly seen and better understood. The statement will at least serve as an X-ray to enable the court the better to diagnose the conditions, troubles, and difficulties under which the respective parties acted. Under the free and unlimited strictures of counsel in their oral arguments, the respective parties and their witnesses have been presented to the court as "perjurers," "swindlers," "thieves," "Shylocks," "robbers," "idiots," and "fools," who have been guilty of all the frauds in the catalogue of superlative rascalities. To such an extent did these charges and counter charges go, that the court was almost convinced that the case ought to be dismissed as one unworthy of consideration in a court of justice. A plain, unvarnished statement of the facts was all that was needed to enable the court to arrive at the truth. Much of the testimony seems to have been given for the express and only purpose of showing that the witness under examination was free from fault, and that all the blame and censure should be placed on some other person. The suit, disrobed of all the opprobious epithets which have been so freely interspersed, while in many respects peculiar,—exhibiting much incompetency and lack of practical knowledge upon the part of the men who had control of the business affairs, and involving a great outlay of money wholly unnecessary,—is but one of many where a mining enterprise has been inaugurated under bright hopes and overabundance of confidence, whereby the promoters, by floating the scheme abroad, and selling the shares of stock at their par value (on paper), expected to realize an immense fortune. Such wild and visionary schemes are generally detrimental to the community where the mines are situated, and often result injuriously to all parties concerned. No one connected with this enterprise seems to have thought, or even dreamed, of such a thing as failure. No precautions were ever taken by either party or any person to guard against such a result. A moment's consideration of the difficulties that might be

met would have suggested many steps that should have been taken, and many clauses in the contracts that ought to have been added, in order to afford protection to the parties against extravagance in the management of the business. But the bright side was the only one which either party looked at. In the preliminary steps all was harmonious, pleasant, and agreeable. All were men of high character, well qualified to perform the duties assigned them, and all absolutely above reproach. It was not until the dark side turned up suddenly,—until failure, instead of success, was the reward of their venture,—that the expressive terms before alluded to were hurled at each other as thick and fast as hailstones in a heavy storm. The fact is that, looking backwards, any person could easily point out many mistakes made by the parties on both sides. But, above and beyond all the personal feeling so bitterly engendered, it must be constantly remembered that in most, if not all, of the transactions, both parties acted with their eyes wide open,—with full knowledge of all the facts,—and must be bound by the legal consequences which result from the character of their agreements and conduct. It is well settled, as a general rule, that all contracts must be mutual in their obligations and in their remedies. To authorize the enforcement of the contracts in the present case, it should not only appear that they are entirely free from fraud, misrepresentation, mistake, or illegality, but it must also be clearly shown that they are perfectly fair, equal, and just, not only in their terms, but in their circumstances. The contracts and the situation of the parties must be such that the remedy of specific performance will not be harsh, unjust, or oppressive.

The contention of the defendant is that it was the duty of Goodbody, as the superintendent of the syndicate, to see that Martino did not waste the money in an extravagant and useless manner; that defendant should have been allowed to inspect the plans of Martino before the plant was erected, as it was to be charged with the money expended for its construction, and had the legal right to examine the same in order to protect itself from fraud, imposition, or loss; that Noyes had no authority from the defendant to represent or bind it by any declarations, acts, or conduct on his part in approval of the course which Goodbody pursued, either before or after Martino left; that the only authority he had in the premises was to deliver to Goodbody, as the syndicate's representative, the possession of the property; that defendant cannot, in any event, be held responsible for the additional advances made by the syndicate, not provided for in the contract A, which it claims was procured by the false and fraudulent telegram sent by Martino and Goodbody with reference to the completion of the plant; that the syndicate must be held responsible for the acts of Goodbody, its superintendent; that Goodbody had no authority, under the terms of the contract, to refuse to allow Martino to proceed with the smelting and reduction of the ores when the first furnace was completed; that Goodbody, without the consent or approval of the defendant, could not make it liable for the employment of Dorwin and Jewell, and the expenses incurred in the erection of the second furnace; that the syndicate did not, on its part, comply with the terms of the contract; that the contracts A and C are

unconscionable and inequitable in their terms, and should not be upheld or enforced in a court of equity; that the mortgage B was obtained without consideration; that it was never legally executed by the defendant; that its execution was never ratified by it; and that it should not, for these reasons, be enforced. There are divers other minor grounds specified in the brief of defendant's counsel why the syndicate should not recover the relief it seeks by its bill.

Is complainant, under the pleadings and evidence herein, entitled to a decree? The original contract between the parties was not illegal. There was no fraud in its execution, no concealment of any fact, nor any hidden meaning in any of its covenants. Its terms were freely discussed and well understood by the promoters, who engineered the transactions, and who were the principal factors that organized the respective corporations. Four of the stockholders in the syndicate were brothers of one of the promoters (W. R. Goodbody), two were his cousins, one a brother-in-law, and the other their solicitor. Both of the promoters were stockholders and directors of the defendant corporation, and one of them (Noyes) was the confidential friend and trusted agent of John Leighton, the president and a director of the defendant. At a meeting of the directors held pursuant to a call of its president, as provided for in its by-laws, a resolution was unanimously passed authorizing the execution of the contract. Its proper officers thereafter, acting under the authority of this resolution, executed the contract, and affixed the seal of the corporation thereto. It is true that, like the bond of Shylock, the contract was exacting in its terms, and, like a jug handle, was one-sided. It was so written that common knowledge would enable any person of ordinary understanding to see at a glance that the covenants and conditions therein contained were all in favor of the syndicate. There were no covenants that the plant should be erected in a workmanlike manner, or that any economy, care, or skill should be exercised in its construction, or that defendant should have any voice, control, or knowledge as to the character of the materials to be used, or the kind of works that should be constructed. Everything was left entirely to an agent selected and named for that purpose. The defendant was powerless to interfere. The money advanced by the syndicate was to be handled and paid out by its own agent. There was no agreement on the part of the syndicate to erect any substantial buildings or any particular kind of a furnace, or whether the plant would be of any particular advantage or permanent benefit to the defendant, beyond obtaining the 125 tons of contained nickel in matte, and upon that product the syndicate was to have a lien for all money it had advanced, and the bonus therein specified. It was also to have the exclusive possession and control of all the property belonging to the defendant, free and clear of all liens. F. W. Martino was the agent selected by both parties as a proper, suitable, and competent person to have the charge, management, and control of the erection of the plant and the reduction of the nickel ore. Moreover, he was a man in whom the people interested in the purchase and sale of contained nickel in matte had confidence, and the evidence in this case clearly shows that this was the strongest

incentive which induced the respective parties to procure his services. His scientific and expert knowledge was conceded by both to be first-class. His practical knowledge as to the erection of a suitable plant, the purchase of materials, employment of men, and actual management of the business affairs was not discussed or considered by either side. For all his acts performed within the scope of his agency, whether he was competent or incompetent, whether his work was well or poorly done, each party is jointly responsible. He was their joint agent. Both parties must therefore be legally bound by his acts and conduct. The maxim that "no man shall serve two masters" does not prevent the same person from acting as agent for certain purposes for two or more parties interested in the same transaction, when their interests do not conflict, and where loyalty to one does not necessarily constitute a breach of duty to the other. Especially is this true in a case like the present, where both parties, with full knowledge of all the facts, consented to such an appointment.

The facts leading up to the execution of the mortgage, B, are sufficiently stated in the general history of the case. It will be noticed, by a careful reading thereof, that Mr. Noyes, assuming to act for the defendant, claimed that the execution of such an instrument was not called for by the contract, and urged Goodbody to accept the possession of the property, on the ground that the contract only required that a certificate of the recorder should be first obtained, to the effect that there were no mortgage debentures on the property. But the fact is that the contract contains provisions in clause 10 which permitted the syndicate to make demand, as it did, for more perfect security under the laws of the state of Nevada. Was the mortgage executed in such a manner as to make it binding on the corporation? When its execution was demanded by Goodbody, Noyes claimed that the demand could not be complied with,—that it was impossible for the directors to meet and authorize it to be executed; but, after many consultations, he and Goodbody, two of the directors, stated that, if Leighton would execute it, they would do all they could to procure a ratification of his acts. Leighton stated to the solicitor of the syndicate that he had no authority from the defendant corporation to execute it, and that, to be binding upon the corporation, it would have to be ratified by the board of directors, and that he would favor its ratification. From a legal standpoint it may be stated, as a general rule, that the power and authority of a corporation to execute documents is vested in a board of directors, and that this authority can only be exercised when duly authorized by its directors, and that this principle applies as well to the acts of the president of the corporation as to any other director or officer of the corporation. The individual directors, when not acting as a board, have no general authority, unless conferred by the by-laws of the corporation, to execute a deed or mortgage on its behalf. Gashwiler v. Willis, 33 Cal. 11, 20; Alta Silver-Min. Co. v. Alta Placer-Min. Co., 78 Cal. 629, 632, 21 Pac. 373; Hay-Press Co. v. Devol, 72 Fed. 717, 721; Edwards v. Water Co., 21 Nev. 469, 34 Pac. 381; England v. Dearborn, 141 Mass. 590, 6 N. E. 837; People's Bank of City of New York v. St. Anthony's Roman Catholic

Church, 109 N. Y. 512, 521, 17 N. E. 408; Grant v. Railway Co. (Minn.) 69 N. W. 23; Limer v. Traders' Co. (W. Va.) 28 S. E. 730; 3 Thomp. Corp. §§ 3906, 3908. It is equally as well settled that a document signed by the president and secretary of a corporation, with the corporate seal thereto affixed, is prima facie evidence that it was legally executed. The books are full of cases which discuss the question as to how the authenticity of a corporate seal should be established, and as to what the seal proves when it is properly authenticated. In 4 Thomp. Corp. § 5105, the author says:

"While the genuineness of the seal must be established as a fact in the mode elsewhere prescribed, yet when it is established it carries with it presumptive or prima facie proof of everything else which is necessary to the validity of the instrument. It is presumptive or prima facie evidence that the deed is the deed of the corporation, and that the officers who signed, sealed, and acknowledged it were duly authorized so to do; and the instrument is therefore admissible in evidence, if otherwise relevant. In other words, the seal carries with it prima facie evidence of the assent of the corporation to the deed. But the evidence is prima facie only. The effect of it is to shift the burden of overthrowing the deed upon the party objecting to it, and to require him to prove by clear and satisfactory evidence the want of authority to execute it."

Numerous authorities are cited in support of the text.

See, also, Ang. & A. Corp. § 224; McDonald v. Chisholm, 131 Ill. 274, 281, 23 N. E. 596.

If it be admitted that the defendant has overcome the prima facie case established by the seal, it would not, under the facts in this case, destroy the validity or binding force and effect of the mortgage. It would serve no useful purpose to discuss the exceptions to the general rule that have grown into existence by the customs, usage, and methods of transacting corporate business in different communities, under the varied conditions and surroundings in which the respective parties may be placed. So extensive has this become, that the courts have often said:

"The classes of cases which constitute exceptions to the rule have become so numerous that the exceptions have almost abrogated the rule." G. V. B. Min. Co. v. First Nat. Bank of Hailey, 95 Fed. 23, 30, and authorities there cited.

Moreover, the powers of officers of a corporation are so different in the different states and countries, owing partly to a difference in the statutes and partly in the general course and habit of dealing, that it may be said that the decisions of the courts in one state or country should have but little, if any, weight in another state or country, unless all the conditions of the cases are alike, and that questions of this character ought to be solved, not so much upon the principles of the general rule, as upon the peculiar circumstances of each particular case. If this be true, there are strong reasons why the defendant should, in the present case, be estopped from denying the authority of its officers to execute the mortgage, and to justify the court in holding that, if it did not actually consent to its execution, except in the method provided for in its by-laws, its conduct was such as to amount to a ratification thereof. To fully understand the position of the parties, we must put ourselves in their place. The defendant, being unable to erect a plant for the reduc-

tion of ores to enable it to put its mines in such a condition that its shareholders could realize money by selling shares of stock, made a contract with the syndicate whereby the necessary money could be obtained for that purpose upon certain conditions therein specified. The law implied, whether the contract was expressed in direct terms or not, that both parties should faithfully carry out the conditions imposed upon them. It was the intention of both parties that the syndicate should have security for the money it advanced in pursuance of its agreement. The contract A only provided for security upon the products of the mines resulting from the reduction of the ores, but it contained what might be termed a saving clause, on the part of the syndicate, by further providing that the defendant should execute such other deeds and documents "as may be required or deemed necessary by the legal advisers of the syndicate in Nevada for perfecting this security according to the laws there in force." The legal adviser of the syndicate deemed it necessary, in order to perfect the security under the laws of Nevada, that the mortgage, B, should be executed by the defendant. Two of the directors of defendant were present in San Francisco when the demand was made for its execution. What they did and how they acted has already been fully stated in the history of the case. Suffice it here in brief, again, to say that two of the directors said that, although they could not get a quorum of the board to hold a meeting, they would favor a ratification of the act of the president and secretary in executing the mortgage; that the president, when signing it, expressed the opinion that the board would ratify it. These three directors (Noyes, Goodbody, and Leighton) were the real representatives of the defendant in all its business plans and operations. They organized and controlled the corporation in all of its business affairs, and were the active spirits in its behalf in securing the contract with the syndicate. Field, the only other director who had ever participated in the meetings of the board, signed the mortgage in his capacity as secretary of the defendant. Now, when they agreed to ratify the execution of the mortgage, it must be presumed that they were acting in good faith, that they meant what they said, and that they would do what they agreed to do. The defendant had expressly agreed to give the security to execute any documents that might be required by complainant for that purpose. Its president and the other directors were anxious to have the money advanced by the syndicate at once, without the delay that would be necessarily incurred if they had to wait until a meeting of the board of directors could be held. Acting upon their apparent good faith, the syndicate accepted the mortgage as signed by the president and secretary of defendant, with the corporate seal affixed. No meeting of the directors as a board was thereafter had. No protest or objection was thereafter made by any stockholder, director, or other officer of the defendant, until after the enterprise in which they were engaged proved to be a failure instead of a success. In the meantime the money was advanced by the syndicate without any objection upon the part of the defendant, its officers or stockholders. Under all the facts, I am of the opinion that the defendant must be legally con-

sidered as having ratified the execution of the mortgage. The assent of the directors to its execution without a formal meeting of the board, with full knowledge on their part of all the facts, in advance of, and at the time of, its execution, ought, in equity, to be deemed the equivalent in law to a ratification thereof by the board. New York & N. J. Globe Gaslight Co. v. Metropolitan Inv. Co. of New York (Sup.) 41 N. Y. Supp. 797. This thought is in line with the principles announced in Henry v. Water Co., 10 Colo. App. 14, 24, 51 Pac. 90, 93. There the question under discussion was whether or not the trial court erred in rejecting testimony tending to show that the directors of the corporation had been informed by the president of all his acts in making a certain contract. The court said:

"We are not prepared to admit that T. C. Henry's declarations on this subject were not legitimate as original testimony. The testimony was certainly legitimate for the purpose of proving the knowledge of the directors, and therefore a ratification by the company. We cannot assent to the authorities which are cited by counsel in the petition for rehearing, that the knowledge brought home to the directors of the company is not legitimate for the purpose of establishing ratification, even though that knowledge be brought home to them individually, and not while sitting as a board. There are many authorities to the effect that notice to individual directors is not enough. But this is neither notice nor information conveyed to an individual director, nor to the members of the directory by a stranger. It must be remembered that T. C. Henry was the president of the company. He was then engaged in the active management of all of the business affairs of the corporation, charged with the duty, not only of conserving its interest, but of advising the members of the directory of his acts, that he might have the benefit both of their advice and their approval. We think it quite within the range of legitimate testimony to prove that the president, who did the act, and had apparent authority to do it, told the members of the directory what he had done, and that those directors, when thus informed of it by the president, approved of his acts. If, with this knowledge, no action whatever was taken to interfere with the contract, and the parties proceeded to its execution and completed it, it brings the case, as far as we are able to see, entirely within the range of the law of ratification."

As before stated, it was the intent of the parties that the security should be properly given, and in this light the original contract, A, might in equity be regarded as an executory agreement for a mortgage, and a mortgage executed in pursuance of its terms as a security in accordance with the expressed intention of the parties, so that in equity it would be held binding upon the parties, although not duly executed in the manner and form prescribed by the by-laws of the defendant. A court of equity will not yield to technical rules of law, by which the intention of the parties may be defeated, and it therefore can, and often does, declare that there is an equitable mortgage in cases where a court of law might be compelled to say that there was no mortgage. The mortgage, B, should therefore be upheld upon the ground that equity considers that as done which the parties agree to have done, and which in equity and good conscience ought to have been done.

In Daggett v. Rankin, 31 Cal. 322, 326, the court said:

"The doctrine seems to be well established that an agreement in writing to give a mortgage, or a mortgage defectively executed, or an imperfect attempt to create a mortgage or to appropriate specific property to the discharge of a particular debt, will create a mortgage in equity, or a specific lien on the property so intended to be mortgaged. 1 Am. Lead. Cas. Eq. 510; In re Howe,

1 Paige, 125. The maxim of equity upon which this doctrine rests is that equity looks upon things agreed to be done as actually performed, the true meaning of which is that equity will treat the subject-matter, as to collateral consequences and incidents, in the same manner as if the final acts contemplated by the parties had been executed exactly as they ought to have been. Story, Eq. Jur. §§ 64, 790; Will. Eq. Jur. 298, 299."

See, also, Racouillat v. Sausevain, 32 Cal. 376, 389; Peers v. McLaughlin, 88 Cal. 294, 26 Pac. 119; Ice Co. v. Meader, 18 C. C. A. 451, 72 Fed. 115, 118; Chase v. Peck, 21 N. Y. 581, 583; Payne v. Wilson, 74 N. Y. 348, 351; Fidelity Insurance, Trust & Safe-Deposit Co. v. Shenandoah Valley R. Co., 33 W. Va. 761, 771, 11 S. E. 58; Margarum v. Christie (Fla.) 19 South. 637, 639; Cummings v. Jackson (N. J. Err. & App.) 38 Atl. 763, 765; Jones, Mortg. (4th Ed.) § 162; Walker v. Brown, 165 U. S. 654, 664, 17 Sup. Ct. 453; 10 Am. & Eng. Enc. Law, § 127, and authorities there cited.

In Payne v. Wilson the court said:

"An equitable mortgage may be constituted by any writing from which the intention so to do may be gathered, and an attempt to make a legal mortgage, which fails for the want of some solemnity, is valid in equity. Miller, Eq. Mortg. 1, 2. And it has been held that an agreement for a mortgage is, in equity, a specific lien upon the land. In re Howe, 1 Paige, 125; Chase v. Peck, 21 N. Y. 581."

The vital question is whether the syndicate has fully complied with its agreement, so as to entitle it to recover from the defendant the amount of money it advanced, together with the bonus as specified in the contract. The original contract necessarily implied that suitable works should be erected. The syndicate was bound to exercise reasonable care in the erection of the buildings, in the purchase of necessary machinery, and the construction of the furnace. The testimony does not show that the machinery purchased by Martino was defective or unsuitable, nor that the furnace, as constructed, but for the accident, would not have proved effective in the reduction of the ore. But, be that as it may, one thing is certain: For the extravagance and incompetency of the men in charge both parties were equally at fault, and, the defendant having expressly covenanted that the men selected should have the charge and management of the work, it cannot deprive the syndicate of the right to recover the amount of money actually expended by it because the men selected by both parties were incompetent.

The moneys obtained under the supplemental contract, C, and money actually expended by Goodbody after Martino left, present a further question, by no means as easy of solution. It is earnestly contended by counsel that defendant cannot be held responsible for the money advanced under the supplemental contract, because the defendant was induced to sign this contract upon the statement contained in a telegram as follows:

"4 Mo. 26, 1895. To Godlee, Solicitor, Cannon Street: Plant completed. Capital expended. Martino's corrected measurements show eleven hundred tons good ore. Fifteen hundred pounds necessary to make and ship matte. Martino. Goodbody."

This telegram was sent before the first furnace was completed, and its contents were not absolutely true. But, from all the testi-

mony in regard thereto, I am of opinion that it was sent without any design to actually defraud anybody. It was highly colored, because the senders thought they would, and did, need the money to complete the contract. The money thus obtained was actually advanced by the syndicate, and afterwards expended by Goodbody in endeavoring to complete the works. Goodbody may not have selected the best course to be pursued after Martino left. It may be that it would have been better, as he said, "to abandon the enterprise altogether and return home," or, as expressed by Martino, "better stop short, right here, go home, and make a clean breast of everything." But as much could have been said against that course as is urged now, perhaps more. Without going into all the details of Goodbody's action, it is deemed enough to say that the syndicate advanced the money in apparent good faith, without any fraud,—intent or design to defraud the defendant or deprive it of its property. Noyes and Leighton, who were the sponsors for the defendant, made no objection to such further steps being taken, and they knew what was going on. The defendant acted upon their knowledge, and signed the supplemental contract, and for all the money actually advanced by the syndicate thereunder it must be held responsible.

But how about the bonus? While a court of equity endeavors to promote and enforce justice, good faith, uprightness, fairness, and conscientiousness on the part of the parties who occupy a defensive position in judicial controversies, it no less stringently demands the same from the parties who come before it as complainants. Whoever comes into a court of equity must come with clean hands. The contract contemplated that 125 tons of contained nickel in matte should be produced. The money was advanced for that purpose. This was the inducement for the defendant to sign the contract. This part of the contract was never complied with. The contract A, as before stated, does not contain any covenant touching the conditions that might arise by the failure of the enterprise. It was drawn upon the theory that success was sure to crown their efforts, provided the money as specified therein was advanced by the syndicate. Such was evidently the view entertained by the syndicate, as well as the defendant, and by John Leighton. It was the intention of all the parties to the agreement that 125 tons of contained nickel in matte should be produced, and, when this matte was ready for shipment, then the bonus provided for became due. This is to be implied by a fair and reasonable construction of clauses 3 and 4 of the original contract, A, and the interpretation to be given them necessarily controls the provisions contained in the supplemental contract, C. The reasons heretofore given for holding defendant liable for the money advanced by the syndicate do not apply to the bonus. After carefully reading the contract A, and especially clause 3, can it be said that it was the intention of the parties, if the 125 tons of contained nickel in matte was not produced, that the bonus mentioned therein was to be paid? I think not. When the object and purpose of the agreement, the situation and surroundings of the parties, are considered, it seems to me that the construction given to these clauses is within the intent

of the parties, and within the meaning of the words, as expressed in the original contract. But, in any event, the bonus ought not, in equity, to be decreed upon the contract, because to allow a recovery therefor, under all the facts and circumstances of this case, would be unconscionable. If the "pound of flesh" is to be given to the syndicate, without proving that any actual benefit has been received by the defendant, it certainly ought to show that it has literally complied with all the provisions of the contract on its part to be performed. In holding the defendant liable for all the money advanced, the court has proceeded upon the theory that it could not take advantage of its own wrong and refuse to pay anything because the contract was not literally complied with; that it was but fair and just that it should pay back this money for its own folly in entering into such a one-sided contract. But there is no sound reason why it should be further mulcted in a bonus of 200 per cent. It never agreed to pay the bonus upon condition that the works erected by the syndicate should prove a failure. If it had so agreed, such a contract could not have been enforced, because it would be invalid and without consideration. No one could be held responsible for such an inequitable, unjust, and unconscionable agreement; and yet that is substantially, in effect, what is contended for by the syndicate in the present case.

If the matte had been produced as specified in the contract, it would have been worth about $50,000, and there could have been several strong reasons advanced on behalf of the syndicate as to its right to recover the bonus. Such compliance with the contract as was contemplated by the parties would have put the defendant, financially, on its feet, and might have enabled the promoters to have successfully carried out their scheme of disposing of the stock of the company at par, and all of defendant's stockholders might have been benefited thereby. In such an event, considering the conditions existing at the time the contract was made, the defendant could have well afforded to pay the bonus, and, there being no usury laws in this state, it may be that the syndicate would be entitled to recover it, although it would have been, even then, "a windfall, like a prize in a lottery"; but to allow the syndicate to recover the bonus without complying with this part of the contract would be giving something for nothing; it would be giving it outright the sum of $57,008.22, for which it had not paid any adequate consideration, or performed any act to entitle it to recover it, as a matter of equity. The defendant has received no benefit whatever from the contract. It would be contrary to the principles of eternal justice, and in violation of all the rules of equity in the exercise of its extraordinary powers, to allow the syndicate to recover the bonus. The rule is universal that a specific performance will always be refused "when the contract itself is unfair, one-sided, unconscionable, or affected by any other such inequitable feature, and when the specific enforcement would be oppressive upon the defendant, or would prevent the enjoyment of his own rights, or would in any other manner work injustice." 1 Pom. Eq. Jur. § 400, and numerous authorities there cited; Dalzell v. Manufacturing Co., 149 U. S. 315, 325, 13 Sup. Ct. 886, and authorities there cited. As was said in Railroad Co. v. Cromwell, 91 U. S. 643, 645:

"The court is not bound to shut its eyes to the evident character of the transaction. It will never lend its aid to carry out an unconscionable bargain, but will leave the party to his remedy at law. This has been so often held on bills for specific performance, and in other analogous cases, that it is unnecessary to spend argument on the subject."

A specific performance is not a matter of absolute right. It is always within the sound judicial discretion of the court, to be exercised according to the settled principles of equity, with special reference to the facts of each case. See Willard v. Tayloe, 8 Wall. 557, 567; Hennessey v. Woolworth, 128 U. S. 438, 442, 9 Sup. Ct. 109; Manufacturing Co. v. Gormully, 144 U. S. 224, 236, 12 Sup. Ct. 632; Waite v. O'Neil, 72 Fed. 348, 359; 1 Story, Eq. Jur. § 742. In Earl of Chesterfield v. Janssen, 2 Ves. Sr. 125, decided in 1750, the court had under consideration a contract made by John Spencer, whereby he obtained £5,000, for which he obligated himself to pay £10,000 at, or soon after, the death of his grandmother, from whose estate he had an expectancy, if he survived her, but to be totally lost if she survived him. He survived her for a short time. About two months after her death he executed a bond in the penalty of £20,000, conditioned for the absolute payment of £10,000 at or before a specified date, and executed a confession of judgment thereon, which was duly entered. Spencer paid £2,000 thereon, and, after his death, Janssen applied for an execution. The executors of Spencer's estate applied to the court for relief upon payment of the £5,000, with interest from the time of advancing it. The case was disposed of upon the ground that there had been a confirmatory contract after the contingency mentioned in the first contract had happened, wherein Spencer bound himself to execute it, and the court gave relief only against the penalty of the bond. But the opinions therein upon the nature of unconscionable bargains are interesting, and have some bearing upon the principles involved in this case. Burnett, J., after discussing the question of usury and bottomry, said:

"The next point is, supposing it not a contract within the statute, whether it is not such an unconscionable bargain, obtained of an expectant upon his expectancy, as the court is warranted, on precedents, to relieve on paying the sum advanced, with interest from the time of advancing. * * * On one hand, I should apprehend it would be too large to say in no case an heir or expectant could borrow money on his expectancy; and yet to let him borrow without any advantage to the lender seems to put him under difficulties. * * * An heir, if hindered from supporting himself by these means, might starve in the desert, within view of the land of Canaan. On the other hand, I should dread the consequence of giving the sanction of this court to future bargains."

Lee, C. J., said:

"I think it will be well worth the consideration of a court of equity whether they will not interpose in case of these hazardous bargains to pay double, so as to prevent the lender's going away with such an exorbitant gain. * * * By the cases cited and stated in courts of equity, it appears they have used a sagacious attention to discover whether there is any fraud expressed, or, from the nature of the transaction or person concerned, anything carrying on the face of it an appearance of imposition. * * * A court of equity has disabled them from taking advantage thereof, and interposed to prevent unconscionable bargains."

Lord Chancellor Hardwicke said:

"It cannot be said that such contracts deserve to be encouraged, for they generally proceed from excessive prodigality on one hand, and extortion on the other, which are vitia temporis and pernicious in their consequences; and then it is the duty of a court, if it can, to restrain them. This court has an undoubted jurisdiction to relieve against every species of fraud."

He then arranged the cases of frauds that would avoid contracts under four heads. The second he states as follows:

"It may be apparent from the intrinsic nature and subject of the bargain itself, such as no man in his senses and not under delusion would make, on the one hand, and as no honest and fair man would accept on the other, which are unequitable and unconscientious bargains; and of such even the common law has taken notice."

See, also, 1 Story, Eq. Jur. § 188.

There are numerous cases, both of ancient and recent date, which hold that upon certain contracts the jury may give less damages than the debts amount to. James v. Morgan, 1 Lev. 111; Thornborough v. Whitacre, 6 Mod. 305, 2 Ld. Raym. 1164; Cutler v. How, 8 Mass. 257; Same v. Johnson, Id. 266; Leland v. Stone, 10 Mass. 459; Baxter v. Wales, 12 Mass. 365; Greer v. Tweed, 13 Abb. Prac. (N. S.) 427; Russell v. Roberts, 3 E. D. Smith, 318; Scott v. U. S., 12 Wall. 443, 445; Railroad Co. v. Cromwell, 91 U. S. 643, 645; Hume v. U. S., 132 U. S. 406, 412, 10 Sup. Ct. 134.

In Scott v. U. S., the court said:

"In cases like this it is the duty of the court to assume the standpoint occupied by the parties when the contract was made, to let in the light of the surrounding circumstances, to see as the parties saw, and to think as they must have thought in assenting to the stipulations by which they are bound. This process is always effective. When the terms employed are doubtful or obscure, there is no surer guide to their intent and meaning. * * * If a contract be unreasonable and unconscionable, but not void for fraud, a court of law will give, to the party who sues for its breach, damages, not according to its letter, but only such as he is equitably entitled to."

In Hume v. U. S., the court of claims, having under consideration an agreement to pay $1,200 a ton for shucks actually worth not more than $35 a ton, after citing some of the cases above quoted, said:

"These citations are sufficient to show that in suits upon unconscionable agreements the courts of law will take the matter in their own control, and will, without the intervention of courts of equity, protect the parties against their enforcement. * * * There is no finding by the court of actual fraud by any of the persons engaged in making the contract now under consideration. The unconscionable price inserted for shucks was, no doubt, a mere accident. * * * But, however it may have happened, we hold, as was held in the case of Leland v. Stone, from which we have quoted the words of the court, that a contract may be held unconscionable without proof of actual fraud at its inception, if its enforcement would be unconscionable."

Judgment was accordingly rendered in favor of the claimant for the actual value of the shucks. This judgment was affirmed by the supreme court.

Whatever conclusion might have been arrived at as to the bonus if the syndicate had fully completed its contract, and produced the 125 tons of contained nickel in matte, it seems clear to my mind that

upon the facts it is only entitled to a judgment for the amount of money actually advanced, to wit, $28,504, with interest and costs.

Defendant Smith obtained a judgment against the syndicate on April 22, 1897, for the sum of $263 principal, and $13.15 costs, which has never been paid. The interests of the other defendants are subsequent to the rights of the syndicate. Let a decree be entered in accordance with the views herein expressed.

CHANDLER et al. v. POMEROY et al.

(Circuit Court of Appeals, Third Circuit. August 1, 1899.)

No. 8.

1. CONTRACT—CONSTRUCTION—AGREEMENT FOR DIVISION OF ESTATE.
   The will of a testator created three active trusts, the income from which was to be paid respectively to a son and two daughters during their lives, and provided for the distribution of each fund on the death of the life beneficiary. Under such provision the son had no interest in the corpus of either fund in any event, and the interest of each daughter was indeterminate, and wholly contingent on her surviving her brother or sister. After the funds had been paid into the hands of the trustee, and at a time when the son and two daughters were the only surviving children, they entered into an agreement for the purpose of settling litigation between them, by which it was provided that the remainder of the estate should be equally divided between them, and that the proceeds or revenue to be derived from such trust funds "shall be treated as a joint fund, and divided equally between the last three parties, and, so far as it lies in our power, we, the parties hereto, covenant and agree that the said trust fund shall be considered and be the joint fund of the last three parties." *Held*, that the fund therein referred to was the income fund, and that the agreement did not include the corpus of the trust funds, in which the son had no interest, and over which neither of the daughters had at that time any power of disposition.
2. APPEAL—SUFFICIENCY OF ASSIGNMENTS OF ERROR.
   The circuit court of appeals will not consider an assignment of error which fails to set out separately and particularly the error relied on as required by rule 11.

Appeal from the Circuit Court of the United States for the District of New Jersey.

Wm. B. Guild, for appellants.

John G. Johnson and George Baldwin Newell, for appellees.

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

BUFFINGTON, District Judge. This is an appeal by Frank R. Chandler and others from a decree entered by the circuit court for the district of New Jersey dismissing exceptions to and confirming a master's report. The facts of the case are fully stated in the opinion of the supreme court of the United States directing an accounting (Chandler v. Pomeroy, 143 U. S. 318, 12 Sup. Ct. 410), and the subsequent opinion of the circuit court upon such accounting (Chandler v. Pomeroy, 87 Fed. 262). They need not, therefore, be here restated.

The first, second, third, and fourth assignments allege the supreme court in the case mentioned decided the corpus of certain trust funds created by the will of George Pomeroy were included in the agreement of April 13, 1887, upon which the accounting is based, and that the circuit court failed to follow such decision in that regard; and, further, that, if the supreme court did not pass on that question, the circuit court erred in excluding the corpus of said funds from this accounting. To us it is clear the supreme court have not passed on this question. The late Mr. Justice Bradley having dismissed the bill (46 Fed. 533), an appeal was taken to the supreme court, where the case was reversed, and an accounting ordered. The question before that court being the liability to account under the agreement, it declined to pass on the question whether the corpus of the trust funds was covered by the agreement, saying:

"We do not find it necessary upon this appeal to put a construction upon the agreement to determine whether it applies to the principal as well as the income of the trust funds, or whether in this suit the court may proceed to a partition of the real estate. These questions will arise more properly upon the settlement and enforcement of the decree."

Thereafter the circuit court did decree that the corpus of the trust funds was not covered by the agreement. In so doing, we think, there was no error. The agreement in question was made between George P. Pomeroy, Julia Morrison, and Josephine Pomeroy, who were the sole surviving children of George Pomeroy. George Pomeroy, the father, by his will, created, inter alia, three active trusts, the corpus of which had been paid to, and at the date of the agreement was in the hands of, the trustee, the New York Life Insurance & Trust Company. Such trustee was neither a party to the agreement nor to this bill. The first fund was $30,000, for the benefit of George P. Pomeroy during life, and at his death the trustee was "to pay and divide the securities and the proceeds thereof equally between my three younger children, Edward, Julia, and Josephine, and the survivors of them." It was further provided that at the division of the fund, "if either Edward, Julia, or Josephine shall have died, leaving issue, who shall be then surviving, such issue shall take by way of representation." While Edward was dead, without issue, when the agreement in question was made, to wit, April 13, 1887, it is quite clear that at that time Julia and Josephine had no determinate vested interest in the corpus. If both were living at the death of George P. Pomeroy, they took, but, if either or both were dead, leaving issue, then such issue was to take by way of representation. The second trust fund was one of $50,000, the interest on which was to be paid to Julia during life; and another, of like amount, the interest on which was to be paid Josephine during life. At the death of either it was provided that her trust fund was to be paid to her issue, and, in default of issue, to Edward and the surviving sister, or the survivor; the issue of Edward and of the other daughter representing their parents. Such being the case, it is quite clear that when the agreement was made neither Julia nor Josephine had present power to divert the corpus of these three funds from the trusts to which they were subjected by the will of

George Pomeroy, and George P. had no interest in them, either personally or as devisee of Edward, and it was then uncertain who would receive the corpus at the death of the respective life beneficiaries. Edward Pomeroy, the executor, at the time of his death, had not only failed to settle his father's estate, but the amount payable by him to that estate was undetermined, and in litigation. By his will his brother George was made his residuary legatee, but what passed under the will depended on the quantum of his liability to his father's estate. The settlement of these two estates involved expense and family disputes, and a professed object of the agreement was "to settle the estate of George Pomeroy, deceased, without litigation, and to adjust the claims of the parties hereto against the estate of said Edward Pomeroy, and to suppress and terminate all suits pending against said Edward Pomeroy at the time of his death, brought by the parties hereto or either of them." To do this it was agreed that "the remainder of the estate of George Pomeroy, deceased, shall be equally divided" between the three surviving and contracting children, and the estate of Edward shall be divided in the same way. The expressed purpose was fully provided for by thus blending the two estates, and making George, Josephine, and Julia participate equally. As the trust funds were already paid to the trustee, as they formed no part of "the remainder of the estate of George Pomeroy," it is clear they were not embraced in the foregoing provisions, or affected by the terms thereof. It is contended, however, that the corpus of the trust funds was made subject to this agreement by one of the latter clauses, which provided:

"It is further covenanted and agreed that in the division of the estate the proceeds or revenue to be derived from the trust fund for the benefit of George P. Pomeroy, Julia Pomeroy Morrison, and Josephine Pomeroy, created by will of George Pomeroy, deceased, shall be treated as a joint fund, and divided equally between the said last three parties; and, so far as it lies in our power, we, the parties hereto, covenant and agree that the said trust fund shall be considered and be the joint fund of the said last three parties."

The effect of this clause, as construed by the master and the court below, was to form a joint income fund of $130,000, from which George P. drew the interest on $43,333.33 while contributing but the interest on $30,000, while the sisters contributed $50,000 each, and drew interest on but $43,333.33 each. Not content with this construction and result, the appellants claim, when George P. died, and ceased to contribute anything whatever to the joint fund, his sisters should continue to divide their income with his estate; and, in addition thereto, it is contended that the corpus of said trust funds passed by this agreement. It will be noted that no part of said corpus, or any interest therein, belonged to or was released to his sisters or contributed by George P. Pomeroy, for all contingent interest of Edward in the corpus of all the funds ceased on his death without issue, and, of course, no interest of Edward in them passed to George under the former's will. The clause in question provided that in the division of the estate, not the trust fund, but "the proceeds or revenue to be derived from the trust fund, * * * shall be treated as a joint fund, and divided equally between the last-named parties." This

division of proceeds or revenue is the only division made by the entire clause, for the subsequent clause only provides: "And, so far as it lies in our power, we, the parties hereto, covenant and agree that the said trust fund shall be considered and be the joint fund of the said last three parties." Now, it is clear that the parties could not divide, assign, or transfer the ownership of the corpus fund. Indeed, one of them—George P.—had no interest, present or prospective, in that corpus, nothing to transfer; hence, as to him, the covenant, if it be construed as appellants contend for, had no force or application, and yet he was one of the parties covenanting in that particular clause, viz.: "We, the parties hereto, covenant and agree that the said trust fund shall be considered and be the joint fund of the three last parties." But he had an interest in the income of one of the trust funds, and this it was the purpose of the preceding clause to contribute and divide. This latter clause, which it will be observed is not separated from the preceding one, or distinct therefrom, thus constituting a new sentence, and suggesting an additional subject-matter, merely follows the first, is joined to it by a copulative word, and must be deemed a mere addition, a means of accomplishing the main purpose, to wit, the division of the income. To effectuate this purpose, the parties agreed that the trust fund should be considered and be the joint fund of the three parties. Thus read, we have a natural, reasonable, and unstrained construction, and one which gives effect to every part of the instrument. It follows, therefore, that the circuit court did not err in its construction of the trust agreement, and the first, second, third, and fourth assignments of error, relating thereto, are not sustained.

The fifth assignment of error fails to set out separately and particularly the error asserted, as required by rule 11. It is true, reference is made to a schedule of complainants, printed in the record, which covers some 35 pages, and embraces hundreds of items; but any or all of these may constitute the error complained of. This court is an appellate one, and the purpose of its rules is the designation of specified errors. As this assignment specifies no particular error, but practically involves a re-examination of the entire subject-matter involved in the schedule referred to, it is faulty.

The sixth assignment is even more so. It virtually calls for a review and re-examination of the entire subject-matter, without assigning any specific error made by the court, other than the entering of its decree, and failure to enter one for the complainants.

The seventh and eighth assignments are not sustained. The time and manner of sale of the household effects were, under the circumstances, matters to be determined by the court. The record discloses nothing to call in question anything connected with the sale. Indeed, the error was not insisted upon at the bar.

The ninth and tenth assignments specify no particular error.

The eleventh exception assigns for error that the circuit court had not dealt with the real estate embraced in the agreement, but wholly neglected to carry into effect the terms of the agreement in reference thereto. This question was raised in the court below by appellants' eighth exception to the master's report. The opinion of the court

shows this exception was withdrawn, and that partition was made by the courts of the several states in which the lands were situate. The court below having abstained from considering the question at the instance of the appellants, the appellants cannot, either in good faith or correct practice, make error of that to which they assented in the court below.

The remaining assignments are of such general, indefinite character as to require no discussion. Finding no error in any of the matters complained of, the appeal must be dismissed, at the appellants' costs, and the decree of the circuit court affirmed.

DUNN et al. v. HOWE.

(Circuit Court, D. Massachusetts. June 30, 1899.)

No. 766.

1. CORPORATIONS—STOCKHOLDERS—ACTION BY ASSIGNEE IN INSOLVENCY TO RECOVER UNPAID SUBSCRIPTIONS.
   No assessment by a court is necessary, under the Maine statutes, to authorize the assignee of an insolvent corporation to maintain an action against stockholders to recover for stock not paid for.

2. PARTIES—STATUTORY OFFICERS—RIGHT TO SUE IN OTHER JURISDICTIONS.
   An assignee in insolvency of a Maine corporation, who is given by the statutes of that state a right of action against its stockholders to recover for stock issued without bona fide payment of full value therefor, which right of action did not exist in the corporation, may maintain such an action in a federal court of another jurisdiction.

3. CORPORATIONS — LIABILITY OF STOCKHOLDERS ON SUBSCRIPTIONS — MAINE STATUTE.
   The statute of Maine gives a right of action to any trustee, receiver, or other person appointed to close up the affairs of any insolvent corporation against "any person or persons who have subscribed for or agreed to take the stock in the corporation, and have not paid for the same," to recover the par value of the stock for the benefit of the creditors of the corporation. The supreme judicial court of the state has construed such statute as imposing liability only on persons who had dealings in relation to the purchase of stock directly with the corporation, and not on transferees, though the stock had not been paid for by the original subscriber. *Held*, that where stock was voted to be issued to a certain person on a contract between him and the corporation, and certificates were by his direction issued in the name of a third person, but were delivered to and receipted for by himself, he was the person liable under the statute in case the stock was not paid for, and a recovery could not be had thereunder against a subsequent holder, though new certificates had been issued to him, and the old ones canceled; it not appearing that the stock had ever been surrendered to or owned by the corporation after it was originally issued.

This was an action by the assignees in insolvency of a corporation against a stockholder, under the statute of Maine, to recover the subscription price of the stock.

Wm. P. Foster, P. H. Gillin, E. C. Ryder, and C. J. Dunn, for plaintiffs.

Southard & Parker, for defendant.

PUTNAM, Circuit Judge. This action was brought by an assignee of the Bangor Pulp & Paper Company, an insolvent Maine corporation, appointed by a Maine court of insolvency, and is based on a statute of that state which provides that the capital stock subscribed for any corporation shall be declared to be and stand for the security for all creditors thereof, and that no payment upon any subscription to, or agreement for, the capital stock of any corporation shall be deemed a payment within the purview of the statute unless bona fide made in cash, or in some other matter or thing at a bona fide and fair valuation thereof. It also enacts that no stockholder shall be liable for the debts of the corporation beyond any amounts not so paid. It also provides that "any person having a judgment against the corporation, or any trustee, receiver or other person appointed to close up the affairs of any corporation which is or may be insolvent, may, within two years," etc., "commence an action, without demand or without previous formalities, against any person or persons who have subscribed for, or agreed to take, the stock in the corporation, and have not paid for the same." Rev. St. Me. c. 46, § 47. The purpose of the statute was threefold: First, to declare the rule of the common law, which requires that a fund shall be gathered to meet the liabilities of a corporation equal to the amount of the capital stock issued to stockholders; second, to wipe out all liability on the part of any stockholder who had fairly paid for his stock, or, so far as he had paid, to relieve him to that extent; third, to obviate the difficulties with which the courts have surrounded this topic, by insisting on the rule that there must be equality among all creditors and among all stockholders, and also the rule in equity that there can be no proceeding unless in a jurisdiction where the corporation can be made a party. Therefore this statute provided that any stockholder might be sued for the amount not paid in by him on his stock, without reference to any other stockholder; and that a suit might be brought by any creditor, or by any other person interested in the manner stated by it.

The first question we have to meet is whether, under this statute, an assessment is required by the order of any court. Under some circumstances the courts may order an assessment, but Potts v. Wallace, 146 U. S. 689, 13 Sup. Ct. 196, which is a case wonderfully like this, holds that, where the deficiency is equal to the amount of the unpaid stock, no assessment is necessary; and such is the unqualified provision of the statute in issue here.

The next question that arises is whether the plaintiff has a standing in a federal court in a district other than that where the corporation has its domicile. There can be no doubt that a statutory assignee of an insolvent corporation comes within the terms of the statute. He is one of the "other" persons named in it, and beyond dispute he is qualified to maintain a suit of this character within the district of Maine. The ordinary rule is that a statutory officer cannot sue outside the jurisdiction in which he is appointed, but that rule does not apply where the right of action first vests in him. The assignee is given by the statute a right of action which, in this case, did not otherwise exist. It is like the ordinary case of a statute

giving damages in a civil suit for a death where there is no survival of any right of action, in which case the administrator may sue anywhere, because the right first vested in him. Therefore we hold that the plaintiff has a standing in this court to maintain this suit. This statute is a wholesome law, and has been administered by the supreme judicial court of Maine in a wholesome spirit. Although it applies only to persons who "subscribe for or agree to take" stock, yet, in accordance with sound rules, the supreme judicial court of Maine has held that a man who has taken stock from a corporation must, in the eyes of the law, be said to have "agreed to take" it. The mere fact that a contract is executed does not relieve it from its character as such. In order that a person taking stock shall be liable, the stock must be taken by him, and the dealings had between him and the corporation. The supreme judicial court of Maine, in dealing with this statute, has gone to the very substance of the transaction and the root of the thing, and it has not looked at all at the mere form. So that court has held that, if A. B. takes out shares of stock in the name of C. D., especially when not authorized by C. D., A. B. is liable, and C. D. is not. What, then, was the substance of the transaction at bar? The first thing we have is a contract between the Orono Pulp & Paper Company and Mr. H. S. Rice and others. Mr. Rice is the only person named in the contract. Who the others were we do not know, except that the case shows beyond doubt that Mr. Horsford was one of them. The contract provided that the Orono Pulp & Paper Company should execute a lease of certain property to Mr. Rice and his associates, or to a corporation to be formed by them. within a few days over a month from the execution of the contract, the corporation whose stockholder is sued here was organized under the laws of Maine by Mr. Rice, Mr. Horsford, and Mr. Whitman, those three persons being all who were named in the certificate of organization. There can be no question that we would be required to find, in view of the expression in this contract with reference to a corporation thereafter to be formed, that this was a continuous transaction, and, whether it was or not, the various steps come so close together that Mr. Rice and Mr. Horsford must be held in law trustees for the new corporation; and any stock issued to them in exchange for the contract would be without consideration. Next we find this proceeding on the records of the new corporation: "August 1, 1892. Voted, that the assignment of contract of H. S. Rice and others with Orono Pulp and Paper Company be accepted, and the clerk be directed to notify the Orono Pulp and Paper Company of said assignment." The assignment is not produced; but, inasmuch as a short time afterwards —on the 1st day of October, 1892—a lease was executed from the Orono Pulp & Paper Company to the Bangor Pulp & Paper Company in pursuance of that contract, there can be no question that an assignment was either executed or waived. Messrs. Rice and Horsford were present at the meeting in August, 1892, and the recital in the vote of an assignment in the presence of these gentlemen was sufficient to constitute an accomplished transaction. What is the next thing we find? Certificates of stock were at the same meeting directed to be issued as follows: a certain number to Rice, and 550 shares

to Horsford, "or order." Mr. Sawyer, the treasurer of the new corporation, testifies that he had an order from Mr. Horsford to issue a large portion of the stock—if not the whole of it—to a Mr. Powers; and certificates numbered 6, 7, and 8, covering the 105 shares now in the name of the defendant, were accordingly made out in the name of Mr. Powers. Those certificates were delivered into the hands of Mr. Horsford, and he gave his receipt for them. There is nothing to show that Mr. Powers had any interest in the matter. In our judgment, the transaction was complete under the statute when the votes cited were passed, but, if anything more was needed, the issue of the stock certificates to Mr. Powers, accepted by Mr. Horsford, fixed on the latter a liability under the statute for the par of the stock so issued; and, as two persons cannot be liable under the statute for the same stock, unless they jointly take it, and as Mr. Horsford thus became liable, it is not possible that any other person can be. Of course, there might have been subsequent transactions which might have entirely changed the conditions, and thus made an exceptional case; and we will look to see whether there were any of that nature. Stock may be issued, and afterwards surrendered to the corporation, and become what is known as "treasury stock,"—that is, no longer outstanding stock; and, if meanwhile no debts have accrued, the original transaction may thus be annulled, and the original stockholder disappear entirely from the matter, and the stock become as though it had never been issued. Thus there may come in a new person, who takes that stock from the corporation. He deals directly with the corporation, and the statute applies. So, also, it is possible that stock, on its face, may be assessable. If such stock is transferred on the books of the corporation to a purchaser, and a like new certificate is issued, and the corporation has meanwhile incurred no debts, the holder of the new certificate may become liable to subsequent creditors, because all the parties have agreed to put him in the place of the original subscriber. The latter condition cannot exist in this case, because the stock here contains no reservation of any right to make any further assessment, and by the very terms of the vote of 1892 it was put out as fully paid. Is there anything here to show that the circumstances covered by our first hypothesis exist; that is to say, that this stock was surrendered to the corporation by Mr. Horsford, so that the corporation had a right to issue it as it would any other stock which had never been issued? It is to be borne in mind that the supreme judicial court of Maine has properly held that a transferee is not liable although the original holder of the stock had not paid for it. The statute deals only with the parties who have dealt with the corporation, and no mere transferee of stock can be liable, even though he may know that the stock was issued without payment as the statute requires. Is there any evidence that this stock was surrendered to the corporation, and was issued anew by it to this defendant? Not a particle that we can see. In form, that did occur; and the forms would be exactly the same in case of the sale of stock from one person to another as in the case of a surrender of stock to the corporation, and its issue by the corporation to a new shareholder on a contract between the cor-

poration and the new shareholder, because, under the rules of corporations, no certificate can be issued to a transferee until the old certificate is surrendered. But all the transactions in this case were simultaneous, and they were the ordinary transactions where stock is transferred, and a new certificate issued therefor. There is not a particle of evidence which would justify the court in holding that the situation was of any other character than that which ordinarily exists when stock is transferred, or in holding that the defendant ever dealt with this corporation as to this stock. Whether the stock was put in his name without his knowledge, or whether by an arrangement between him and Mr. Horsford, is not of importance, because the defendant is not shown to have had any dealings with the corporation beyond the formal acceptance of the certificate of stock. There has been some discussion whether the defendant is estopped from denying that he is a stockholder, but that is not the question. It is whether he got his stock by dealing with the corporation. A man may be a stockholder without having dealings with the corporation for the acquisition of the stock, as he may not be a stockholder of record and yet have had dealings with the corporation which render him liable under the statute. It is plain the plaintiff cannot recover.

PAINE et al. v. LOEB.

(Circuit Court of Appeals, Second Circuit. July 18, 1899.)

No. 79.

CONTRACT—RIGHT TO ENFORCE—FRAUDULENT CLAIM OF AGENCY FOR UNDISCLOSED PRINCIPAL.

Plaintiffs, as brokers, entered into a contract for the purchase from defendant of certain bonds, claiming to act for an undisclosed principal, and stipulating that they should in no manner be held liable on the contract, which, as they had reason to believe, was made by defendant under a misapprehension as to the value of the bonds. In fact, they were acting for themselves, and there was no other principal. *Held*, that they could not maintain an action on the contract,—not as agents for an undisclosed principal, because no such principal existed, nor as principals, because, by their fraudulent misrepresentations, they had secured immunity from liability on the contract as such, and estopped themselves from claiming rights which were correlative with such liability.

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

Theron G. Strong, for plaintiffs in error.
Franklin Bien, for defendant in error.

Before WALLACE and SHIPMAN, Circuit Judges, and THOMAS, District Judge.

THOMAS, District Judge. The plaintiffs are bankers and brokers doing business under the firm name of Franklin Paine & Co., at Duluth, Minn., and the defendant is a broker at the city of New York. The city of Duluth, in 1896, had a population of about 55,000, and

was supplied with water and gas by the Duluth Gas & Water Company, whose works were capable of meeting the necessities of the city, were of the value of upwards of $1,500,000, and produced an annual net income of $115,000. In the year 1896 the company had outstanding two classes of bonds. The first class consisted of $295,000 first mortgage bonds, bearing 6 per cent. interest, and payable in 1908, while the second class comprised $1,513,000 5 per cent. interest-bearing bonds, secured by a second mortgage. It was the intention to retire the bonds of the first class with those of the second class, and the later bonds, by words indorsed upon them, tended to show that they were first mortgage consolidated bonds. The value of the first bonds was somewhat above par, and the interest had been paid duly on all bonds, except that in 1896 the interest upon the 5 per cent. bonds had been delayed from April 1st to May 15th. Franklin Paine, one of the plaintiffs, and the active party in the negotiations about to be stated, had been a broker in the city of Duluth for 10 years prior to the event herein involved. At some time in the forepart of September, 1896, the defendant, by letter, asked the plaintiffs to procure for him a bid on certain of the 6 per cent. bonds, which the plaintiffs were unable, apparently, to do. On September 17th the plaintiffs wrote the defendant as follows:

"A short time ago you asked us for a bid on $10,000 Duluth Gas and Water 6 per cent. bonds, which we could not make. If you can arrange to do so, please offer them to us at a fixed price, open for, say, three days. We have had some conversation regarding them with a party who says he might consider the purchase if the price suited him, though he does not wish to make a bid."

To this letter the defendant replied by telegraph on September 21st, as follows, "Will sell ten Duluth Gas sixes 85," and a letter of the same date contained a similar statement. To this offer the plaintiffs answered on September 21st that the person to whom they wished to offer them was absent, and that they would wire the defendant should such person, on his return, accept the bonds, or make an offer. On September 24th the plaintiffs wrote the defendant as follows:

"We wired you this a. m. as follows: 'Keep touch of bonds few days, if possible. Negotiations progressing.' We have offered them to two men, each of whom seems to think that he can at least get a bid for the lot in a short time, even if they cannot be sold at your price. Both of them expect to know this week what they can do. As, in the event of a sale to them, we do not wish to become responsible for the payment, we may ask you to place the bonds in some New York bank, say for one business day, to be delivered to order of American Exchange Bank, Duluth, upon payment of price agreed upon. In that case, if the buyers fail to close the deal, we would incur no loss."

The defendant answered this letter on September 28th as follows:

"Yours of the 24th came duly to hand. In reply beg to say that the simplest manner to handle the sale of the Duluth G. & W. bonds, in case you prefer it, is to let your bank authorize the payment for the same through their New York correspondent, and your purchaser can deposit the money with your bank in Duluth. This excludes all risk on your part."

On September 30th the plaintiffs telegraphed the defendant:

"Can get eighty-five for the bonds for November delivery. Answer."

The defendant expressed qualified consent to this on October 1st, and on the same date received from the plaintiffs the following:

"Only difference seems to be the question of accrued interest. If you prefer cash lump sum eighty-two hundred and fifty covering everything, think could make that deal. If you reply satisfactorily on either proposition, can close quickly."

To this the defendant telegraphed on October 2d:

"I sell you ten Duluth Gas & Water sixes for eighty-two hundred and fifty dollars, payable and deliverable prompt New York."

The bonds were delivered, and payment made, as suggested in the plaintiffs' letter of September 24th and the defendant's letter of September 28th. In fact, the defendant delivered 5 per cent. bonds under the misapprehension that they were 6 per cent. bonds, and on October 6th the plaintiffs advised the defendant of the mistake, and in their letter of that date the plaintiffs maintain the pretense that they had sold the bonds to third parties, and to this end the following language is used:

"In reply to your message this a. m., asking terms of settlement, we replied as follows: 'Five per cent. bonds unsalable. We sold sixes as offered. You receive back bonds, reimburse bank, and pay us difference to fill our sale.' This was before we had seen the buyers. Have seen them since, and they are disposed to insist upon delivery, though, of course, if you cannot deliver, we shall have to make some settlement with them. We depend upon your taking care of us to the extent necessary for settlement."

Again, on October 7th, the plaintiffs wrote the defendant:

"We sold them [referring to alleged purchasers] the bonds at 96, for which we will, if it will be of service to you, furnish certified statement from American Exchange Bank. * * * If we are forced to settle with the purchaser, we shall have to pay to market; while, if we were able to offer them a voluntary settlement, we think they would make us some concessions."

This claim of undiscovered principals was preserved in subsequent letters. In the end the bonds were received back by the defendant, the bank was reimbursed, and in the present action the plaintiffs sue to recover damages for the breach of the defendant's contract to deliver 6 per cent. bonds. To this point it is evident that the plaintiffs, skilled brokers, long resident of Duluth, knew that the defendant was seeking a bid for bonds of the water and gas company of that city, and that he contracted to sell the same at some 25 per cent. below their value, and that the plaintiffs represented that they were acting for third persons, and carefully stipulated that they should not be in any wise responsible for the bonds. But upon the trial the plaintiffs shifted their relation to the transaction, and claimed that they were acting as agents for themselves, and that they represented no principals. Hence, it is certain that the statements in their letters in that regard were utter falsehoods, and that they procured an exemption from personal liability by means of this false and fraudulent representation that they were mere agents. It is obvious that the defendant regarded the plaintiffs as mere agents in the transaction, and the plaintiffs, by careful misrepresentation, not only fostered this belief, but also secured all the immunity that could be conferred upon agents, even to total exemption from liability. The plaintiffs owed

the defendant the duty of practical integrity in the transaction. The plaintiffs undoubtedly knew, after September 21st, when the defendant offered to sell bonds to the amount of $10,000 at 82½ per cent. of their face value, which was 20 or 25 per cent. less than their actual value, that the defendant was acting upon some misapprehension, and the plaintiffs nicely adjusted their conduct to perpetuate such misapprehension. Although they claim to have been the real principals, they gave the defendant for some 10 days assurances that they were seeking diligently the conclusion of a contract of sale with third persons, and finally put such illusionary third persons in the position of the purchasers, and so attempted to shield themselves that they "would incur no loss."

Two general propositions of law sufficiently favorable to the plaintiffs may be stated. When a contract not under seal is made with an agent in his own name for an undiscovered principal, whether he describes himself to be an agent or not, either the agent or principal may sue upon it. Ludwig v. Gillespie, 105 N. Y. 653, 11 N. E. 835. In the case of written contracts the right of action follows the legal title, and the party entitled to maintain an action upon a written contract is the one to whom, by its terms, it is to be performed. Weed v. Insurance Co., 133 N. Y. 394, 407, 31 N. E. 231; Considerant v. Brisbane, 22 N. Y. 389. May the plaintiffs claim a right to maintain this action (1) as the agents of undiscovered principals or as the undiscovered principals, or (2) as the persons with whom the contract was made, and to whom performance was promised? If they may sue as agents, it is upon the theory that they have principals behind them, for whom they act in a representative capacity. Id. 395, 396, 398; Pitney v. Insurance Co., 65 N. Y. 18. If the plaintiffs sue as the undiscovered principals, the contract must be such that the principals, when discovered, are bound to the defendant for its fulfillment, for an unnamed principal, when revealed, is liable for the performance of the contract, unless the liability was limited expressly to the agent alone (Knapp v. Simon, 96 N. Y. 288, 289; Cobb v. Knapp, 71 N. Y. 348; Tuthill v. Wilson, 90 N. Y. 423; Kayton v. Barnett, 116 N. Y. 627, 23 N. E. 24); and it is equally true that the agent of an undiscovered principal is liable at the option of the opposite party (Argersinger v. MacNaughton, 114 N. Y. 535, 21 N. E. 1022; Tuthill v. Wilson, 90 N. Y. 423; Cobb v. Knapp, 71 N. Y. 348; Knapp v. Simon, 96 N. Y. 288), although it seems that the right of an agent, with whom the contract is made, to sue, may not be dependent upon his personal obligation to respond for the fulfillment of the contract (Considerant v. Brisbane, 22 N. Y. 391; but see dissenting opinion of Denio, J., at pages 398, 399). In the present case the plaintiffs expressly contracted that they should not be personally liable, and fraudulently represented that there were third parties upon whom all the responsibility should fall. This, in terms, relieved the plaintiffs of all contractual liability, and led the defendant to believe that there were responsible parties, who were bound personally for the fulfillment of the contract to the defendant. In fact, there were no such parties. Hence the plaintiffs should not be allowed to maintain this action as agents, because, to the extent above stated, such an action involves

necessarily a responsible principal, and, confessedly, no such principal exists. But, nevertheless, the plaintiffs could maintain the action as principals, notwithstanding the myth concerning the third parties (Patrick v. Bowman, 149 U. S. 411, 421, 422, 13 Sup. Ct. 811, 866), had they not contracted that they should not stand in the place of principals by exacting an agreement that they should bear none of the responsibilities of principals. In such case they would not be liable ex contractu, even if their fraud were discovered, although they might be liable for fraudulent representation. But the plaintiffs' possible answer may be that, notwithstanding the exemption obtained by them, they would have been liable as principal parties to the contract, if the facts had appeared. This is tantamount to saying that the discovery of their fraud would have resulted in their liability, and this position is equivalent to affirming their own fraud to obtain the necessary relation to the contract. The fact is that the plaintiffs intended (1) to take advantage of the obvious ignorance of the defendant as to the value of the bonds; (2) to shield themselves from all claim to respond to the defendant for any possible miscarriage of the contract; (3) to contract that certain unnamed third persons, nonexistent in fact, should be the real responsible parties of the second part. They now seek to assert that they are and were the real parties of the second part, and entitled to all the powers that were intended to be conferred upon them. To admit such contention would be to remove the estoppel which the plaintiffs by systematic untruthfulness have set up against themselves. If they are denied the right to sue, it is because they, by their own stipulations and representations, devested themselves of the capacity of proper suitors. These views must result in an affirmance of the judgment, with costs.

McNAUGHT v. FISHER.

(Circuit Court of Appeals, Second Circuit. July 18, 1899.)

No. 102.

1. CORPORATION—SUBSCRIPTIONS TO STOCK—PARTIES TO CONTRACT.
   When a corporation is organized, and a subscription to its stock previously made is accepted, such subscription becomes a contract binding according to its terms, the parties to which are the corporation on one side and the subscriber on the other.

2. GUARANTY—CONSIDERATION.
   Defendant was instrumental in procuring subscriptions to the stock of a corporation, and afterwards in its organization. The subscriptions were accepted, and the stock paid for and issued. Subsequently a subscriber, on behalf of himself and other stockholders, including plaintiff, wrote defendant in regard to certain matters relating to the corporation, and in his reply defendant stated, "I promise you that everything shall be done which is necessary to carry out the terms provided in your subscription list, and in a manner that shall be satisfactory to you." *Held*, that such promise, even if construed to apply to all matters contained in the subscription, and not merely to those inquired about, was without consideration as a guaranty to plaintiff, who had already paid for and received his stock, and who took no action in reliance on such promise.

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

Archibald F. Clark and James McNaught (Joseph D. Redding, on the brief), for plaintiff in error.

Arthur H. Masten and J. Snowden Marshall, for defendant in error.

Before WALLACE and SHIPMAN, Circuit Judges, and THOMAS, District Judge.

THOMAS, District Judge. The true question involved in this action is whether the defendant below (the plaintiff in error), as a guarantor, is personally liable for the nonfulfillment of the terms of an agreement which the plaintiff subscribed, and pursuant to which he paid for and received the stock of a corporation afterwards formed. The plaintiff alleges a contract by the plaintiff with the defendant for the purchase of 100 full-paid, nonassessable shares of the company's stock, and an agreement in the nature of a warranty, made by the defendant with the plaintiff, that the company, when organized, should have assets in lands and money as hereafter stated. The subscription agreement signed by the plaintiff and others provided as follows:

"We, the undersigned, in consideration of the sum of one dollar by each to the other in hand paid, the receipt of which is hereby acknowledged, and the further consideration of the mutual benefits and profits expected to be realized from the investments hereinafter set forth, do agree as follows: First. We subscribe to and agree to pay for at the rate of $50 per share (par $100) the number of shares set opposite our names of the Fidalgo Island Land Company. Second. It is stipulated and agreed that the assets of the Fidalgo Island Land Co. are to consist of five hundred acres of land situated in sections 23, 26, 25, 1, 2, and 6, upon Fidalgo Island, in Skagit county, in the state of Washington, and that said island is the northern terminus of the Northern Pacific Railroad upon Puget Sound, and that at least 40% of the above five hundred acres is located in said section 23. Third. It is further stipulated and agreed that capital stock of said company shall be twelve hundred thousand dollars, of which $200,000 shall remain in the treasury of the company for a working capital, and the remainder sold to subscribers at fifty cents on the dollar, or an equivalent of a thousand dollars an acre average price for the territory owned by the company; this being the price, with ten per cent. added, at which a large portion of the above property was purchased about a year ago by a pool formed in Seattle and Tacoma. Fourth. It is further stipulated that the property in section 23 has been platted and was first placed upon the market at private sale February 3, 1891, and that the sale by lots up to date has aggregated between forty and fifty thousand dollars, and that the prices obtained have ranged from six to eight thousand dollars per acre; that the sale is steadily and regularly progressing, and that the proceeds of sales already made shall remain in the treasury of the company for the benefit of the stockholders."

This contract, until accepted by the corporation, existed only as to the subscribers thereto, but upon such acceptance the corporation became a party to it, and it became binding according to its terms. The plaintiff alleges that the company never had the stipulated assets, and the finding of the jury establishes that the terms of the subscription agreement respecting such assets were not fulfilled. An accurate statement of the dates of relevant events is of first importance. The agreement was subscribed by the plaintiff at a date not precisely obtainable, but it was after the meeting held at the Rennert House

on April 13, 1891, and before the first certificate of stock was issued to the plaintiff, on May 11, 1891. The plaintiff fixes the time in March or April, and the latter month is the probable time. The company was incorporated on the 28th day of April, 1891, in the state of Washington, for the business of buying and selling land. One McMurran, who claimed to have obtained the subscriptions at Baltimore, designated one Howard at such city to receive payment of the subscriptions, and for this purpose plaintiff delivered to Howard a check, dated May 13, 1891, payable to the order of McMurran. On May 16th, Howard sent $19,820, obtained from subscriptions, to McMurran, and the latter kept plaintiff's check for pretended commissions, and delivered the balance to the defendant, and the same was deposited to defendant's personal bank account. The defendant claims that this money, with other moneys received from subscriptions, was applied to the purchase of land, in the interest of and at the direction of the company. Under the date of May 11, 1891, the company issued in the plaintiff's name its temporary certificate No. 13 for 100 shares of its capital stock, and on May 12th intrusted the same to McMurran for delivery to the plaintiff, and McMurran caused its actual delivery to the plaintiff. After the permanent certificates had been lithographed, a second certificate, numbered 11, and dated August 22, 1891, was issued to the plaintiff, and transmitted to him through Howard, about February, 1892, and the first certificate was returned to the company.

The foregoing statement presents the salient features of the plaintiff's contract with the Fidalgo Company. It remains to consider what relation the defendant bore to the transaction that should involve personal liability on his part. This question presents three subinquiries: (1) The communications between the defendant and the plaintiff; (2) the interest of the defendant in the stock delivered to the plaintiff; (3) the defendant's connection with the money received from the subscriptions. The attention of the subscribers to the undertaking was attracted by McMurran, who, in the spring of 1891, visited Baltimore. After April 13th, and previous to the incorporation of the company on April 28th, the defendant visited Baltimore, and met several persons, who afterwards signed the subscription agreement, and explained the project, at a meeting at the Rennert House, in that city, and the defendant there made certain statements upon which some reliance is placed to prove the defendant's liability. The nature of these statements is shown by the evidence of Marshall, who at all times is prominent among the subscribers. The plaintiff was not present at the meeting. He did not at that time or on any subsequent occasion meet the defendant. Nor is there any evidence that the defendant's statement was communicated to him, or to any one acting in his behalf. There is nothing whatever in the statement made by the defendant at the Rennert House that tends to show an agreement on the part of the defendant to assure the performance of the promises contained in the agreement as to the assets of the proposed corporation. Approximating the time of the subscription, a doubt arose in the mind of Marshall as to the legal right of the corporation to issue stock according to the terms of the paper, which pro-

vided that only 50 per cent. of its nominal value should be paid therefor. Hence, Marshall wrote to and received letters from the defendant on the subject, which constituted the second item of evidence upon which the plaintiff relies. On April 9, 1891, Marshall wrote to McMurran as follows:

"In connection with the proposed subscription to the stock of the Fidalgo Island Land Company, there is a matter as to which I and a number of others would like to be fully informed. The stock is to be subscribed for and paid for at the rate of $50 per share, the par being $100. Now, while such an agreement can no doubt be made as between the company and its stockholders, it is equally certain that it is void as to creditors, who can require the full payment for the stock. If, however, the laws of Washington authorize stock subscriptions to be made in property other than money, such payment may be validly made, if the mode prescribed by law for making it be complied with. I would like to have the views of some one better informed than I am on the subject, and to know whether the stock received by the subscribers is to be so issued to them as to preclude the possibility of a claim by creditors for a further payment beyond the $50 per share. Please obtain this information for me as soon as you can."

To this letter the defendant replied under date of April 13, 1891, and the reply is addressed specifically to the inquiry of Mr. Marshall, and in it he gives attention to the legality of issuing the stock for property, and then adds:

"The price at which the lots are being sold, as Mr. McMurran has probably explained to you, is greater than the par value of the company's stock. The stock, when issued, will be issued directly to the company's grantors in payment for the lands conveyed. The stock will therefore be fully paid up and nonassessable."

If, as claimed by the plaintiff, these letters antedate the subscription by the plaintiff, they indicate no agreement on the part of the defendant with anybody. Marshall wrote for the defendant's views, and such he received. On May 13, 1891, Marshall addressed another letter to McMurran, seeking information. In it he says:

"I have just received your letter of the 12th inst., and have seen the letter of Mr. McNaught to Mr. Howard. * * * Mr. McNaught's letter says that 'arrangements' have been made 'for the balance of the subscription of $200,000.' I suppose, if the subscription had been actually made, this language would not have been used, and, as the success of the enterprise depends, according to my understanding, upon raising the entire amount, I do not care to put $10,000 in upon any contingency as to actually getting the requisite amount. I think, if I am to put up cash, I ought to know under what 'arrangements' others are to share in the venture. I will be obliged, therefore, for full information on this point. I also understood that I was to get stock that had been issued full paid to Mr. McNaught, or to some one else, and transferred to me by him. The certificate shown me is from the company directly. Please let me know fully about both these matters at your earliest convenience, and oblige."

To this letter of Marshall the defendant replied under date of May 14, 1891. In it the defendant addresses himself first to the question as to whether the entire treasury stock would be taken, and the letter continues:

"I guaranty that the subscriptions will be completed within thirty days. I, in company with T. F. Oakes, president of the Nor. Pac. R. R. Co., leave for the coast on Tuesday next, and I am anxious to close up Mr. McMurran's subscriptions before leaving. I do not know whether the record which is kept at Seattle, Washington, shows that stock to the extent of a million dollars has been issued to the persons conveying the land to the corporation, and canceled

to the extent of the subscription of yourself and your friends. I presume, however, that everything is regular upon the record, but, if it is not, when I reach Seattle I will have the records perfected in detail. You need not have the slightest apprehension regarding a failure to secure subscriptions for the remainder of the $200,000, or the regularity of the proceedings. I promise you that everything shall be done which is necessary to carry out the terms provided in your subscription list, and in a manner that will be satisfactory to you. If you prefer to have the stock issued to some person conveying the property to the company, or a person represented by the person making such conveyance, so as to leave no doubt as to the stock being full-paid and unassessable, kindly instruct John D. Howard to return your stock to me, and I will have it issued to such a person, and by that person transferred to you."

It appears that at this point the subject of inquiry by Marshall was the nonassessable nature of the stock, and the obtainment of subscriptions for the $200,000 of stock. But, before this letter was written, the plaintiff had signed the subscription, his subscription had been accepted by the corporation, the stock had been issued, the plaintiff had drawn and delivered his check to Howard in payment thereof, and, so far as appears, plaintiff was in possession of the stock. But from the letter of Marshall to McNaught dated May 16, 1891, it appears that the money had not been forwarded by Howard at the time McNaught's letter of May 14th was received, for Marshall writes:

"Your letter of the 14th inst. is just received, and the statements it contains are satisfactory to me. I have so stated to Mr. Howard this morning, and he will forward the money in his hands."

Subsequent letters interchanged by Marshall and the defendant show: (1) That Marshall was urged by his own solicitude, and that of other subscribers at Baltimore, to make inquiries concerning the condition of the company; (2) that Marshall and the defendant understood that the stock already issued to the subscribers should be retired, and that stock made full-paid by issuing the same for property conveyed to the company should be delivered by the party receiving such stock to the subscribers to the extent of their holdings, and that this had not been done at the date of Marshall's letter of October 10, 1891; (3) that Marshall applied to the defendant for information concerning the promised assets of the company by letters dated August 14 and October 10, 1891, and that the defendant replied thereto, but that Marshall made no claim that the defendant guarantied the fulfillment of the subscription paper in that regard. The understanding of the matter, as regards Marshall and the defendant, is summarized in the letter written by Marshall under date of October 10, 1891, and the answer of the defendant thereto by letter under date of October 13, 1891. There is one fact that admits of no doubt, namely, no letter subsequent to that of May 14, 1891, tends to show a promise on the part of the defendant to assume the fulfillment of the subscription paper as regards the stipulated assets of the corporation. It is considered that, if the warranty was made at all, it was made by the letter written by the defendant to Marshall on May 14th. That guaranty related to the fulfillment of a contract of subscription prior to that date to which the Fidalgo Company, afterwards organized, became a party, and had no prospective reference to the agreement alleged to have been made over two months thereafter between the defendant and the plaintiff for the sale of stock. It is not nec-

essary to determine the scope of the alleged warranty. Marshall wrote, making inquiries respecting the manner in which the stock should be made nonassessable, and as to the subscription for the remaining $200,000 of stock, and it was to these inquiries that the defendant's mind was directed, and to these, presumably, his letter was addressed. He uses the following language:

"I guaranty that the subscriptions will be completed within thirty days. * * * I promise you that everything shall be done which is necessary to carry out the terms provided in your subscription list, and in a manner that will be satisfactory to you."

This language, standing by itself, is sufficiently general to cover the matter of the assets of the company; but whether it does so is open to discussion, and the determination of the question is not required, inasmuch as such contract, whatever its scope, was without consideration. It did not accompany the making of the primary contract. No consideration moved the defendant for the making of such promise; nor is there any evidence that any liability was contracted on the part of the plaintiff by reason thereof. His agreement with the company had been executed on his part. He had paid the money for his subscription to Howard. The company had issued the stock. The plaintiff presumptively had the stock in his possession. In short, no liability was assumed by the plaintiff under the influence of the alleged warranty, nor was there any independent consideration for the making thereof. If the warranty was inoperative, the question whether the transfer to the company of stock by the defendant, and the issuing of the stock to the subscribers, created a sale thereof to the subscribers by the defendant, need not be determined. The warranty was not and could not be collateral to such agreement, and derived no support therefrom. There was, undoubtedly, a promise from the defendant to Marshall, at the latter's solicitation, that stock should be issued by the company for the property to be purchased by it, and that the recipient of the stock should transfer the same to the subscribers to the extent of their subscriptions. This was for the purpose of making the stock full-paid. There is evidence tending to show that the defendant received from the company stock in payment of interests claimed to have been transferred to the company, and that he surrendered some such stock to the company, and an incidental amount was afterwards issued to the subscribers. There is not the slightest evidence that he ever, upon the books of the company or otherwise, transferred stock to the subscribers. As late as October 10, 1891, Marshall complains to defendant that the arrangement has not been carried out. Therefore a sale of the stock could not have been made in August of that year, as seems to have been found by the jury, although the speculation may be indulged that the stock issued in the following year was pursuant to that arrangement. However, the question has no definite bearing upon the real fact in issue.

It is not necessary to consider whether the defendant properly and providently expended the money paid to McMurran pursuant to the terms of the subscription agreement. The money belonged to the company, and the defendant was accountable to it for the same.

There is no evidence whatever that the defendant personally appropriated it under an arrangement that it should furnish a consideration for the sale of the stock by him to the Baltimore parties, nor does it appear that the plaintiff ever had such a conception. The conclusion that the guaranty contained in the defendant's letter of May 14th was without consideration requires the reversal of the judgment, with costs.

PRICE v. BOARD OF CHOSEN FREEHOLDERS OF PASSAIC COUNTY.

(Circuit Court of Appeals, Third Circuit. August 1, 1899.)

No. 7, March Term, 1899.

1. MUNICIPAL CORPORATIONS—LETTERS SOLICITING PLANS FROM ARCHITECTS—CONSTRUCTION.
   A county board, having statutory authority to build a court house, issued a letter to architects, inviting the submission of plans in competition, stating that the board had full power to select an architect, and to erect the building, and offering certain premiums to be given to the authors of the six designs "which shall be selected by the commissioners." It further stated that the board had invited a third person to act as its professional adviser "in the conduct of the competition and in the examination of the designs submitted," to whom such designs should be sent, and that a number would be selected by him, and handed over to the board, with his comments and recommendations. *Held*, that such letter did not constitute an agreement with a competitor that the right of selection should be confined to the designs recommended by such person.
2. SAME—SELECTING PLANS FOR PUBLIC BUILDING—POWERS OF BOARD.
   A board having statutory authority to select plans for a public building may voluntarily, in the exercise of its discretion, confine its choice to one of a number selected by others, but it has no power to bind itself in advance to do so.

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

Julius J. Frank, for plaintiff in error.
Dewitt C. Bolton, for defendant in error.

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

BUFFINGTON, District Judge. This is a writ of error brought to review the action of the circuit court in sustaining a demurrer and entering judgment in favor of the defendant in a suit brought by Bruce Price, the plaintiff in error, against the board of chosen freeholders of the county of Passaic. In pursuance of chapter 285 of the Laws of 1895 of New Jersey, whereby the board of chosen freeholders of counties were, inter alia, authorized to appoint three commissioners, "who shall have power to erect on the property now owned by said county such buildings as they may deem suitable for the purposes of this act," the board of chosen freeholders of Passaic county named certain commissioners to erect a court house at Paterson, N. J. These commissioners invited Prof. William R. Ware, of Columbia College, to act as "their professional adviser, both in the conduct of the competition and in the examination of the designs submit-

ted," and issued a circular to architects, dated June 1, 1896, requesting them to submit plans. In pursuance thereof, the plaintiff, with some fifty others, prepared and submitted designs for a court house. His plans, with those of eleven others, were selected by Prof. Ware, and recommended to the commissioners. The latter, from the thirty-eight additional plans, selected one for the building, and its designer as the architect, and awarded premiums of $300 each to five other of said thirty-eight. The plaintiff alleges that this was in violation of the agreement embodied in said circular; that by its terms the commissioners were confined in their choice to the twelve selected by Prof. Ware; that by the commissioners going outside said number the plaintiff was damnified, and a right of action accrued to him to recover the expense incurred in the preparation of his plans. Assuming, for present purposes, that any special damage was done the plaintiff, who, it will be observed, was not necessarily one of the six to be selected, two questions yet remain: First, whether there was a contract to select from the twelve chosen by Prof. Ware; and, secondly, if so, could the commissioners thus delegate their delegated authority? On the first question we think the letter cannot be read to bind the commissioners to confine themselves to the choice made by Prof. Ware. The first clause asserts in the commissioners themselves "full power to select an architect, and to proceed with the construction of the building." In the same clause they define Prof. Ware's relation, namely, they have invited him to act with them as "their professional adviser" in "the conduct of the competition and in the examination of the designs submitted." He is to act with them, not for them; and he is an adviser, not an arbiter. The next clause, far from conferring on their adviser the right and duty of deciding, expressly confines the power of choice to the commissioners, viz. "and they offer to give to the authors of the six designs which shall be selected by the commissioners the following prizes,"—a thing which, it is to be noted in passing, they have done, and the doing of which forms the gravamen of the plaintiff's complaint. The only possible ground for contending that the commissioners contracted to select the architect and prize winners from Prof. Ware's preliminary selection is found, if at all, in the clauses following:

"The designs will be sent to Prof. Ware, who will proceed to examine them. All drawings or sets of drawings not conforming to the requirements will be thrown out. From the remainder he will select those which he finds the best among them, not less than twelve in number, which he will hand over to the commission, with his comments, and any recommendations he may have to make. If the commission finds itself unable to choose upon the evidence before it between two or more of the competitors, it will invite the competitors among whom its choice lies to present, under the instructions of the commission, such further explanations or drawings as the nature of the questions at issue may require."

We search in vain therein for any provision which restricts the commission, or limits or abridges its field of selection. It is true, Prof. Ware was to make a preliminary choice of at least twelve, and "hand them over to the commission, with his comments and any recommendations he may have to make," but these were duties in line with his relation as professional adviser, and such comments or

recommendations could not, unless expressly stipulated, be held to abridge or limit the general powers vested in the commissioners. Moreover, the paper as a whole shows the commissioners were to have all the plans before them. For example, all plans were to be sent originally to Prof. Ware alone, but when they were returned they were to "be returned by the commissioners to their authors, after the award has been made." That the commissioners were to have all the plans before them is also shown by their agreement not to adopt any original suggestion of an unsuccessful competitor without compensation. Indeed, we think the whole scope of the paper shows clearly that Prof. Ware was the professional adviser of the board, and that neither expressly nor impliedly did the commissioners restrict themselves or limit the field of choice to those whom he should recommend. Then, too, if the paper were read or construed as a surrender on the commissioners' part to Prof. Ware of the right and duty of selection which the law intrusted to them, it was ultra vires. As was well said in Cope v. Hastings, 183 Pa. St. 322, 38 Atl. 720:

"They might voluntarily or in the exercise of their discretion limit their choice to one of eight, chosen by others as more competent, but they could not bind themselves to do so. The discretion which was free at first must remain so, or up to the time of final judgment and action."

Being, therefore, of the opinion that on both grounds the demurrer was rightly sustained, the judgment of the court is affirmed.

EVANS v. FELTON.

BIRCH v. SAME.

(Circuit Court, N. D. Illinois, N. D. July 27, 1899.)

No. 24,799.

REMOVAL OF CAUSES—SEPARABLE CONTROVERSY—ACTION FOR JOINT TORT.

Where a declaration in a state court in form charges a joint tort against two or more defendants the cause is not removable by one defendant as involving a separable controversy on the ground that the facts stated do not constitute a cause of action against him, that being a matter for the determination of the state court.[1]

On Motion to Remand.

F. J. Woolley, for plaintiff.

Rufus S. Simmons, for defendant.

KOHLSAAT, District Judge. Defendant's contention in support of the proposition that the controversy herein is severable as to him is that the declaration fails to state a cause of action as against him, while it does state a good cause of action as against the other defendant. The declaration charges that the two defendants jointly committed the tort. It is admitted that, if the averments of fact were

[1] Separable controversy as ground for removal, see note to Robbins v. Ellenbogen, 18 C. C. A. 86, and, supplementary thereto, note to Mecke v. Mineral Co., 35 C. C. A. 155.

sufficient to support this charge, the cause would not be severable. Railroad Co. v. Wangelin, 132 U. S. 599, 10 Sup. Ct. 203. I hold that, under the facts in this case, where the declaration in form charges a joint tort against two or more defendants, the question of whether or not the declaration states facts sufficient to establish a good cause of action against either of the defendants is one for the determination of the state court. The cause is remanded.

KETTENRING v. NORTHWESTERN MASONIC AID ASS'N.

(Circuit Court, N. D. Illinois, N. D. July 19, 1899.)

No. 23,824.

INSURANCE—CONSTRUCTION OF POLICY—TIME WITHIN WHICH ACTION MUST BE BROUGHT.

A provision of a life insurance policy that no suit shall be maintainable thereon "unless the same shall be commenced within twelve months after the death of said insured," is unambiguous, and the limitation will be enforced in accordance with the plain meaning of its terms where the declaration counts on the contract alone, and alleges no extrinsic facts excusing delay in bringing suit.[1]

This is an action on a policy of life insurance. Heard on demurrer to a plea of limitation contained in the policy.

Bulkley, Gray & More, for plaintiff.
Walker & Payne, for defendant.

KOHLSAAT, District Judge. This is a suit at law upon a policy of insurance which contains the following clause: "No suit at law or in equity shall be maintainable against said association upon or growing out of this contract, unless the same shall be commenced within twelve months after the death of said insured." This suit was commenced 12 months and 15 days after the death of the insured. Defendant pleads the limitation of 12 months, and plaintiff demurs to the plea. This decision is upon said demurrer. Under another clause of the policy the amount to be paid to the beneficiary is payable within 90 days after the receipt by the company of satisfactory proofs of the death of insured. Plaintiff contends that the two clauses are conflicting; that the limiting of the right of action to 12 months must be construed as meaning a full period of 12 months during any portion of which plaintiff could sue, and that such limitation period should only commence to run at the expiration of the said 90-day period. The case of Riddlesbarger v. Insurance Co., 7 Wall. 386, is the leading case in the federal courts sustaining the validity of a clause in an insurance policy limiting a right of action thereon to a period less than that provided by the general statute of limitation. Without discussing the question of whether or not such decision was faulty as against public policy, I hold that, in view of it,

[1] For conditions as to time of bringing action, see note to Steel v. Insurance Co., 2 C. C. A. 473, and, supplementary thereto, note to Rogers v. Insurance Co., 35 C. C. A. 404.

the plain meaning of the clause in question should be given effect by the court, and that unless some equitable circumstances are disclosed which would take the particular case out of the rule, or unless the insurance company is estopped by its own actions from relying upon such limitation clause, the clause must be enforced literally and strictly. The decisions are hopelessly antagonistic on this point. The courts of a large majority of the states—including Illinois—have given a literal construction to the limitation clause, and enforced it as it reads. A few of the state courts have attempted to distinguish between the meaning of "after the loss," and "after time of death," or "after date of fire," but I am not able to recognize that the terms are not practically synonymous. The matter has not been passed upon by the United States supreme court. In the case of Steel v. Insurance Co., 51 Fed. 715, 2 C. C. A. 463, the circuit court of appeals of the Ninth circuit, by a divided court, held in accordance with plaintiff's contention herein; but Justice McKenna dissented to such holding in a strong opinion, with the reasoning of which I concur. The decision in that case was affirmed by the supreme court in 154 U. S. 518, 14 Sup. Ct. 1153, but no opinion was handed down; and in view of the fact that on a previous appeal of the same case, reported as Thompson v. Insurance Co., 136 U. S. 287, 10 Sup. Ct. 1019, the supreme court had held that the company was estopped, by its actions in the premises, to rely upon this limitation, and refused to pass upon the construction to be given to the limitation clause, the affirmance could be accounted for on the ground of estoppel alone. The federal circuit courts have decided both ways, but generally upon the specific facts of the particular case. No doubt, upon the facts of a particular case, the court might properly hold that the limitation provided is unreasonable, or that the company is estopped to rely thereon; but where the declaration is upon the contract, without averments explaining or accounting for the delay in the institution of the suit, I hold that the clause in question must be construed as it reads, in accordance with the plain meaning of its language. I also hold that the provisions of the by-laws and certificates originally covering the insurance on the life of deceased were merged in and abrogated by the existing contract. If the language of the present contract were ambiguous, the wording of the old by-laws and certificates might be looked to for the purpose of interpretation, but I hold the language of the present contract not to be ambiguous. The demurrer to the plea is overruled.

McCULLOCH v. AYER.

(Circuit Court, N. D. Illinois, N. D. June 30, 1899.)

No. 24,946.

NEGLIGENCE—FAILURE TO PROVIDE FIRE ESCAPES—ILLINOIS STATUTE.

The Illinois statute relating to fire escapes, in force July 1, 1897, in section 1 provides that within three months after its passage certain classes of buildings shall be provided with fire escapes under the general direction and approval of the inspector of factories. Section 3 makes it the duty of the inspector, where such buildings have not been so equipped as re-

quired, to serve a notice upon either or any of certain parties having an interest therein, including owners, lessees, and occupants, commanding such person or persons to cause fire escapes to be erected; and section 4 provides a penalty for failure to comply with such notice. The act itself nowhere imposes on either of such classes of persons the duty of erecting fire escapes. *Held*, that the power of determining upon whom such duty rests in any particular case is vested in the inspector, and, until he has designated such person by the required notice, a court cannot determine that either an owner, lessee, or occupant is liable by reason of a failure to comply with the statute.

Follansbee & Follansbee, for plaintiff.
Smoot & Eyer, for defendant.

KOHLSAAT, District Judge. The decision of this case depends upon the construction to be given to the provisions of the statute of this state relating to fire escapes, in force July 1, 1897. The fee to the real estate, upon which was situated the building where the fire in question occurred, was in some person not named in this record. A 99-year lease of the real estate was given in 1886. A seven-story building was erected thereon by the lessee. A sublease for 10 years was made of the entire premises in 1890, and in 1895 defendant, Ayer, acquired the 99-year lease subject to this 10-year lease, at the same time taking an assignment of the lessor's interest in the latter. At the time of the fire the holder of the 10-year lease was in sole possession and control of the entire premises by itself or its subtenants. It is admitted that there is no common-law liability for failure to provide fire escapes. It must follow that the wording of a statute imposing this liability must be clear and explicit. Such a statute must be strictly construed. Section 1 of the statute in question provides that within three months next after the passage thereof certain designated buildings shall be provided with fire escapes, and that the number, location, material, and construction of such fire escapes shall be subject to the approval of the inspector of factories. This section contains a proviso that certain classes of buildings (including those used for manufacturing purposes) shall have a certain number of fire escapes, proportioned to the number of persons employed in such buildings. Section 2 has reference to buildings erected after the passage of the act. Section 3 makes it the duty of the inspector of factories to serve written notice upon either or any of certain parties having an interest in the respective buildings (including owners, occupants, and lessees), wherever the building shall not be provided with fire escapes according to law, commanding such person or persons served to cause to be erected fire escapes as provided in section 1, within 30 days after service of such notice. Section 4 provides a penalty for failure to comply with such notice. Section 5 provides that the erection of all fire escapes shall be under the direct supervision and control of the inspector of factories, and makes it unlawful for any person to erect fire escapes except in accordance with a written permit first obtained from such inspector, prescribing the number, location, material, kind, and manner of construction. Section 6 provides that any person who shall be required to erect fire escapes under the provisions of the act shall make a

written application to the inspector of factories for a permit, which application shall contain certain information prescribed in said section. Section 7 repeals the former act. Plaintiff is practically suing under section 1 of the act. This section declares what buildings shall be provided with fire escapes, and the method of determining the minimum number in proportion to the number of persons employed therein (with the exception of public halls, where the number shall be determined by the inspector of factories). No person is named in this section upon whom the duty to erect is placed. In this respect it differs from the section of the New York statute quoted in plaintiff's brief. In the latter the owner or owners are named in the same paragraph that imposes the duty, and no other persons are named anywhere in the statute; whereas, in the Illinois statute, owners, trustees, lessees, and occupants are mentioned in the third section as the persons upon whom notice may be served, and who are made liable to a penalty for failure to obey the notice. The logical result of plaintiff's contention is that all the persons named in section 3 are jointly and severally liable for neglect to provide the fire escapes as set forth in section 1, irrespective of notice. The act does not say so. If the analogy of the common law were to be followed, the person who has the sole and exclusive possession and control of the premises would be liable, but none of the counts of the declaration charge defendant with such control and possession, and several of the counts charge that the owner of the 10-year lease and its subtenants have the sole and exclusive control and possession. The Pennsylvania statute first quoted in plaintiff's brief provides that "it shall be the duty of" the owners or keepers of hotels or landlords of tenement houses "to provide and cause to be fixed to every such building such permanent fire escape," etc. The amended act of 1885 provides that "it shall be the duty of the owner or owners, in fee or for life, of every such building, to provide fire escapes." The decisions cited simply turn on the person meant as owner. The Ohio statute provides that "it shall be the duty of any owner or agent of any owner of any factory * * * to provide convenient exit," etc., in case of fire. There is a wide difference between a provision that "all buildings shall be provided" and "it shall be the duty of the owner to provide." The Rhode Island decisions cited turn upon this point. I cannot hold that the fact that the statute of Rhode Island was avowedly penal in its nature will make the reasoning of the courts of that state in Grant v. Powder Co., 14 R. I. 380, and Maker v. Same, 23 Atl. 63, inapplicable to the statute of this state because the latter is not so designated. Both statutes impose a liability not before existing, and the person upon whom this new liability is placed should be designated with certainty, and not be left to conjecture.

Construing the act as a whole, I find that section 1 prescribed a requirement with reference to certain classes of buildings; that the duty of determining when these requirements apply, and of enforcing the same, is placed upon the inspector of factories; that the inspector of factories is given the power of determining upon whom the duty of constructing the fire escapes shall be placed, as between one or

more of the persons named in the act; that until such designation by the inspector by means of the notice provided in the statute (at least so far as buildings constructed prior to the passage of the act are concerned), no liability arises; and that, even if it was the intention of the legislature to impose a duty to construct, irrespective of notice by the inspector, the person upon whom it was intended to impose such duty and the resulting liabilities was not designated in the statute with certainty, and this court should not inflict such liabilities upon any one where it may only be determined by inference that such person was the one intended by the legislature to be charged with the duty. The demurrers to the declaration and the various counts thereof are therefore sustained.

In re DEWS.

(District Court, D. Rhode Island. June 24, 1899.)

1. BANKRUPTCY—OPPOSITION TO DISCHARGE—CONCEALMENT OF PROPERTY.
   Where policies of insurance on the life of the bankrupt are payable to his wife as beneficiary, and there is no proof that the premiums paid by the bankrupt were so excessive in amount as to justify the inference of an intended fraud on his creditors, money realized by the surrender of such policies is the property of the wife; and the bankrupt's omission to disclose such fund to his trustee is not a fraudulent concealment of property of his estate, such as to forfeit his right to a discharge.
2. SAME—FAILURE TO KEEP BOOKS.
   Bankruptcy Act 1898, § 14, b (2), providing that a discharge shall not be granted if the bankrupt has, "with fraudulent intent to conceal his true financial condition and in contemplation of bankruptcy, failed to keep books of account," does not apply to cases where the failure to keep books was antecedent to the passage of the act.

In Bankruptcy. On application of the bankrupt for discharge.

Loren M. Cook and Sam'l W. K. Allen, for petitioner.
Charles H. Tyler and H. C. Bolles, for creditor.

BROWN, District Judge. The Washington National Bank, opposing the discharge of the bankrupt, sets forth its first ground of opposition as follows:

(1) Because the bankrupt has knowingly and fraudulently concealed, while a bankrupt, from his trustee property belonging to his estate in bankruptcy, to wit: (a) A property interest in the property and business of the Livingstone Woolen Mills. (b) A property interest in the property and business of the Livingstone Mills, acquired by money realized upon policies of life insurance upon the life of said bankrupt, and invested in the property and business of said woolen mills, through the medium of his son, J. Howard Dews.

The only property to which, under the evidence as submitted, these specifications can relate, is the sums arising from the surrender of certain life insurance policies upon the life of the bankrupt. The wife of the bankrupt was the beneficiary, and upon the surrender of the policies the proceeds were her property.

In Bank v. Hume, 128 U. S. 195, 206, 209, 9 Sup. Ct. 44, it was said:

"It is, indeed, the general rule that a policy, and the money to become due under it, belongs to the person or persons named in it, and that there is no

power in the person procuring the insurance, by any act of his, by deed or will, to transfer to any other person the interest of the person named."

While it is true that the payment of large premiums, out of all reasonable proportion to the known or reputed financial condition of the person paying, and under circumstances of grave suspicion, may justify the inference of fraud on creditors in the withdrawal of such an amount from the debtor's resources, the present proofs are too meager to show that this was the fact in the present case, or to support a finding that Mrs. Dews, through the payment by her husband of an excessive amount for premiums, has received money which, ex æquo et bono, is the property of her husband's creditors. Nor is the true question now before us an inquiry whether the creditors of the bankrupt have an equitable right to any portion of these funds. It is whether the bankrupt has been guilty of knowingly and fraudulently concealing this property from his trustee. I am of the opinion that the failure of the bankrupt to disclose this property to his trustee was consistent with an honest intention, and was not a fraudulent concealment. The first specification must be overruled. The second specification falls with the first.

The third specification charges the failure, with fraudulent intent and in contemplation of bankruptcy, to keep books of account or records, from which the bankrupt's true condition might be ascertained, "from the date of his failure, in 1889, to the date of filing this petition in bankruptcy." The finding as to the first specification disposes also of so much of the third specification as relates to the failure of the bankrupt to keep accounts relative to property in the Livingstone Woolen Mills. In support of the remainder of its third specification, the objector relies upon acts committed long before the passage of the bankruptcy act of 1898, namely, during the period from August, 1889, to the early part of January, 1897. There is strong authority, however, for the bankrupt's contention that section 14, b (2), is limited to acts committed after the passage of the bankruptcy act. In re Shorer, 1 Nat. Bankr. News, 331, 96 Fed. 90; In re Stark, 1 Nat. Bankr. News, 232, 96 Fed. 88; In re Holtz, 1 Nat. Bankr. News, 204; Buckingham v. McLean, 13 How. 150; Black, Bankr. p. 86; Coll. Bankr. 135, 137; In re Holman, 92 Fed. 512. While the question is not free from doubt, I am inclined to think that the narrower interpretation of the statute should be adopted. The third specification is overruled.

The specifications relating to matters occurring prior to the date of the application for a discharge I find not to be sustained. They are therefore dismissed.

The additional specifications, filed after the oral hearing, and based upon the acts of the bankrupt in the hearing before me, give rise to a serious question. Though the matter was argued by counsel for the objector, and called to the attention of counsel for the bankrupt, no argument of this question was submitted on behalf of the bankrupt, nor was the attention of the court called to such parts of the testimony as may be favorable to the bankrupt on this issue. I am unwilling to determine this question merely upon the argument of the objector and my own unaided recollection of the testimony. I therefore deem it

proper to direct the attention of counsel for the bankrupt to the importance of the additional specifications, and to grant them permission to file within 30 days a brief setting forth such parts of the evidence and such arguments as they may deem favorable to the bankrupt on the issue presented by the additional specifications; the objector, the Washington National Bank, to have leave to file a brief in reply, if it shall so desire.

In re GRUBBS-WILEY GROCERY CO.

Ex parte GRUBBS.

(District Court, W. D. Missouri, S. D. June 17, 1899.)

No. 40.

1. BANKRUPTCY—PRIORITY OF CLAIMS—WORKMEN AND SERVANTS.
   The general manager of a mercantile corporation, who has supreme authority in managing and directing its daily business affairs, and who is also a stockholder and director, and is allowed a salary of $100 per month by the board of directors for his services as manager, is not a "workman" nor a "servant" of the corporation, within the meaning of Bankruptcy Act 1898, § 64b, according priority of payment out of bankrupt estates to "wages due to workmen, clerks or servants."

2. SAME—PROVABLE DEBTS—SALARY OF MANAGER.
   Where the general manager of a trading corporation, who is also a stockholder and director, has been allowed a salary for his services as manager, at a fixed monthly rate, by mere agreement of the board of directors, without any by-law or formal resolution or entry of record, he will not be entitled, as against the estate of the corporation in bankruptcy, to prove a claim for the unpaid balance of such salary (the same being several months in arrear), but only for the reasonable value of his services as determined by the court.

In Bankruptcy. On review of decision of referee in bankruptcy in the matter of the claim of F. H. Grubbs as a creditor of the bankrupt corporation.

Massey & Tatlow, for claimant.
Sebree & Farrington, for the estate.

PHILIPS, District Judge. The Grubbs-Wiley Grocery Company was engaged in the mercantile business at Springfield, Mo., and has been adjudged a bankrupt. The claimant, F. H. Grubbs, at the time of the adjudication, and for several months prior thereto, was a stockholder and director in said company, and its general manager, and presents a claim against the estate for $400 for his services as such manager, and asks that the same be allowed as a preferred claim. The referee refused to allow said claim as one entitled to priority over general creditors, but did allow the same on a basis of $75 per month as the reasonable value of the claim for services, amounting in the aggregate to $225. The claimant has appealed to this court, and asks for a review of this action of the referee.

The section of the bankrupt act relied upon by claimant is 64b, subsec. 4, which gives priority to "wages due to workmen, clerks or servants which have been earned within three months before the date of the commencement of the proceedings, not to exceed three hun-

dred dollars." The first question to be decided is, does this claimant come within either of the designated preferred persons? He does not claim that he was a clerk. The term "workmen or servants" is to be presumed to have been employed in its ordinary acceptation. Ordinarily a workman is understood to be "one who labors; one who is employed to do business for another; a worker; one who is employed in labor." Doubtless the statute has reference to a workman employed on some character of work,—laboring for some person who sustains to him the relation of an employer or master, for whom he works. So, also, the term "servant" ordinarily means a person employed by another to render personal services to the employer, between whom the relation of master and servant exists, as understood in law. This claimant was himself a stockholder in this corporation, and was one of the board of directors, and was its general manager. As such general manager he stood in the relation of vice principal of the corporation. In its management and operation he represented and stood for the corporation. Because of his service as manager commanding more of his time and attention than other directors, he was accorded by the board, of which he was a member, a salary of $100 per month. He was not a servant, as he had no master over him; being supreme in authority in managing and directing the daily business affairs of the concern; obeying the direction of no superior in his work. It is true, he was, in a certain sense, working for the corporation, the legal entity; but, in his office as director and general manager, he was the representative of the corporate body. His attitude in this respect was in no wise different from that of the president, or any other director of the corporation. The board of directors, as is frequently the case, might have voted a salary to the president for his services. Could it be maintained that he was a workman or servant of the company on a salary, entitling him, on the declaration of bankruptcy of the concern, to have his salary paid as a preferred claim? Indeed, it would present a remarkable feature of the bankrupt act, if the managing officers of a business corporation could vote themselves salaries ad libitum, and after, by their mismanagement, wrecking the company, and inviting an adjudication of bankruptcy, they could, to the exclusion of other creditors of the concern, whose money and property they had obtained on credit, come in as preferred creditors, to the exclusion of such general creditors. The act, in my judgment, admits of no such construction. Such an officer of a corporation, being one of its board of managing directors and its general manager, certainly was not in the mind of the lawmakers, and is certainly not within the spirit of the act, as a preferred creditor.

The second matter for determination is whether or not the claimant is entitled to the fixed salary which he claims the board of directors accorded him. The finding of the referee in this respect is that:

"F. H. Grubbs was a stockholder and director in said grocery company on the 20th of August, 1898; he and Wiley (another director) holding a controlling interest in said company, there being three other directors. And on said day, at a meeting of the board, said Grubbs was employed as manager of said company, at a salary of one hundred dollars per month. That there was no resolution or by-law of the corporation authorizing said salary, and no entry of record allowing said one hundred dollars per month, but the directors then and

there agreed that he should be paid this salary; being the same salary formerly paid to the director and stockholder whom he succeeded in office."

It does not appear from this statement whether or not the claimant voted or acted upon the matter of fixing his salary, nor, indeed, whether there were a sufficient number of directors present to have acted upon this matter independently of his co-operation. The facts found by the referee are that at a meeting of the board said Grubbs was employed as manager. The settled law in respect of such corporations, in the matter of fixing the compensation for such employés, is that "the compensation should be fixed by by-law or resolution before the services are actually rendered, so as to contain the necessary elements of a contract supported by sufficient consideration." Bennett v. Roofing Co., 19 Mo. App. 349–351. So it is held in Besch v. Manufacturing Co., 36 Mo. App. 333, that "the compensation of the superintendent of the corporation, who is also a director, must be fixed by corporate action, a record of which should be made upon the books of the corporation." The evidence in this case, as found by the referee, is that there was no resolution or by-law of the corporation, and no entry of record, authorizing said salary. The ruling of the court of appeals, following that of courts of other jurisdictions, is based upon grounds of public policy. As such officers are stockholders, and directly pecuniarily interested in producing the best results of wise and energetic administration, and especially as the directors sustain the relation of trustees towards the stockholders and creditors, to a certain extent, they are presumed, in the first place, to give their services freely to the administration of the affairs of the corporation; and, in the second place, while the law admits of a contract for compensating the officers in consideration of their extra services, yet, where the rights of general creditors are concerned, such creditors not being admitted into the deliberations of the governing body, the law wisely exacts that such contracts for extra compensation shall receive the formal sanction of the board of directors, as such, evidenced by the records of the corporation. The allowance, therefore, made by the referee, of $225 to this claimant, under the bankrupt act, is even more liberal than the letter of the law would sustain. The court, however, in a spirit of liberality, will allow the finding of the referee to stand.

In re HILL et al.

(District Court, N. D. Georgia. June 17, 1899.)

BANKRUPTCY—JURISDICTION OF EXEMPT PROPERTY—WAIVER.

As property which is exempt by the law of the bankrupt's state never comes within the jurisdiction of the court of bankruptcy as assets of the estate, nor does the title thereto vest in the trustee, it being the duty of the latter merely to set apart to the bankrupt the exemption to which he is entitled, the court of bankruptcy will not retain any control over such property for the purpose of enforcing the rights of a creditor holding a note in which the bankrupt has waived his rights of homestead and exemption; but such creditor will be left to assert his rights in a court of competent jurisdiction.

In Bankruptcy. On exceptions to allowance of exemption.

Spencer R. Atkinson and O. E. & M. C Horton, for creditors.
T. C. Battle, for bankrupt.

NEWMAN, District Judge. In this case I have been asked to review and reconsider a ruling made in the case of In re Camp, 91 Fed. 745, to the effect that the exemption allowed a bankrupt by the laws of the state would not be administered in the bankrupt court in favor of creditors holding notes containing waivers of homestead exemptions. The argument made by counsel at this hearing is based mainly on the language of the waiver contained in the notes held by creditors of Hill & Wait. The waiver attached to these notes, which is the same as that in general use in Georgia, is a waiver of all right of homestead and exemptions against the note, or any renewal thereof. Particular emphasis is given by counsel to the word "right." The contention is that the debtor not only concedes the right of the creditor to have his debt out of any property as to which he may be entitled to homestead or exemption, but that he waives and renounces the right to have the homestead or exemption set apart. Then, the further argument is that, the debtor, by the agreement contained in his note, having waived the right itself to have the homestead or exemption set apart, the bankrupt court will not allow an exemption as to which the right has been waived, so long as the creditor having such a waiver note objects, or until his note is paid. The argument in this respect is based very largely on certain decisions of the supreme court of the state in which it is held that the homestead is a right in property, and to waive it is substantially to convey it away, and, having so conveyed it to the creditor, he cannot set up title to it as an exemption until the debt is paid. The cases cited are Flanders v. Wells, 61 Ga. 195; Tribble v. Anderson, 63 Ga. 31; Cleghorn v. Greeson, 77 Ga. 343; and Broach v. Powell, 79 Ga. 79, 3 S. E. 763. The decisions relied upon were mainly in cases where it was sought to avoid the effect of the waiver on the ground that the debt was infected with usury, and the effect of all the decisions is that, relatively to the determination of this question, the waiver of homestead and exemption in the note would be regarded as a conveyance of the homestead right.

All this is no answer to the fact that exempt property is never in the court of bankruptcy. The act provides that the title to all property, except such as is exempt, vests in the trustee in bankruptcy. Exempt property never becomes assets in the bankrupt court for administration. The title never passes. Only a qualified right of possession is in the trustee. As to property which is exempt, relating back to the adjudication, title remains in the bankrupt, and it is only to be set apart, and otherwise the trustee can exercise no right, and owes no duty. It never gets into the court of bankruptcy. Consequently, as to these questions,—the effect of waiver notes and the right of creditors holding such obligations,—there is no jurisdiction whatever in the bankrupt court. If it should undertake to deal with the questions suggested by counsel, it would be dealing with property over which the act provides that the bankrupt court could have no

jurisdiction and control. In addition to this, it may be stated that under the language of the waiver notes in this case, which, as has been stated, are those in general use in Georgia, it has never, I think, been insisted that there was a renunciation of the right to have the homestead and exemption set apart, but simply an agreement that as to such debt the exemption would not be good. In the case of Flanders v. Wells, supra, the court appears to hold that in that case the right to have the property exempted was waived. It would seem from the report of that case that there was an express covenant by the mortgagor not to have the property in question exempted; and, further, it is not altogether clear that the opinion of the court has the meaning that is contended for here. No case has been presented in which it was expressly held that on objection by persons holding waiver notes the ordinary of the state would decline to set apart the homestead until the waiver notes were paid, and I do not understand that such is the rule. My understanding of the rule is that the ordinary of the state, where an exemption is applied for, will set it apart as a matter of right, leaving parties who have debts which are good against the homestead to assert their rights against it in courts of competent jurisdiction. If that be true, there is no reason why the right to have the homestead and exemption set apart should not exist in bankruptcy. I shall adhere to the ruling made in the former case, In re Camp, supra. It is the duty of the trustee in bankruptcy to set apart to the bankrupt, if he is otherwise entitled to it, the homestead and exemption allowed by the laws of the state, and to leave parties holding obligations containing a waiver of homestead and exemption to assert their rights in courts of competent jurisdiction. An order will be made accordingly.

In re WRIGHT.

(District Court, N. D. Georgia. May 18, 1899.)

BANKRUPTCY—LIENS—UNRECORDED MORTGAGE.

Where, by the law of the state, an unrecorded mortgage is good against the mortgagor and against all others except intervening incumbrancers or purchasers, a mortgage given by a debtor to one of his creditors, more than four months before the filing of the debtor's voluntary petition in bankruptcy, is a valid lien, as against the trustee in bankruptcy and the general creditors whom he represents, though it was not recorded until the day on which such petition was filed, and though in the meantime the mortgagor remained in possession, with power to sell.

In Bankruptcy. On review of decision of referee in bankruptcy.

O. E. & M. C. Horton, for creditors.
Simmons & Corrigan, for bankrupt.

NEWMAN, District Judge. This is a question brought up from the referee, as to the lien and priority of a mortgage given by the bankrupt to J. J. & J. E. Maddox. The mortgage was executed on the 15th day of September, 1898, and filed for record January 19,

1899, at 4 o'clock p. m., which was four months and four days after its execution. The petition in voluntary bankruptcy was filed on January 19, 1899, at 5:45 p. m.,—one hour and forty-five minutes after the filing of the mortgage for record. The trustee claimed before the referee, on behalf of the general creditors, that the lien of the mortgage should not be recognized as against the general creditors. He contends that its execution should be considered as of the date of the filing of the mortgage for record, and that consequently it is obnoxious to the bankrupt act, as a preference given within four months.

The facts, as reported by the referee, appear as follows: L. B. Jackson, as the representative of the mortgagees, went to the store of the bankrupt on the day the mortgage was executed, and found such a condition of things as to cause him to request and to receive the mortgage, which was given with the understanding that the mortgagees would withhold it from record at that time, but reserving the right, should they deem it necessary, to place it on record. This agreement to withhold from the record, they admit, was to prevent the other creditors from closing down on him. The mortgage secured an antecedent debt of $280.97, and also, by its terms, secured any subsequent indebtedness between the parties. The only subsequent indebtedness shown before the referee was $26.

There are three provisions of the bankrupt act which may be considered in determining this question. Clause b of section 3 is as follows:

"A petition may be filed against a person who is insolvent and who has committed an act of bankruptcy within four months after the commission of such act. Such time shall not expire until four months after the date of the recording or registering of the transfer or assignment when the act consists in having made a transfer of any of his property with intent to hinder, delay, or defraud his creditors or for the purpose of giving a preference as hereinbefore provided, or a general assignment for the benefit of his creditors, if by law such recording or registering is required or permitted, or, if it is not, from the date when the beneficiary takes notorious, exclusive, or continuous possession of the property unless the petitioning creditors have received actual notice of such transfer or assignment."

This provision, as will be seen, relates to the time within which a petition in involuntary bankruptcy may be filed, but it is contended that it should apply to cases of voluntary bankruptcy also, and that, as a consequence of the foregoing provision of the act, the mortgage would only become effective as a lien from the date of its record; possession being all the time, until the bankruptcy proceedings, in the mortgagor. It seems, however, that this provision was only intended to fix the time within which creditors might institute proceedings in involuntary bankruptcy, and by it the record or nonrecord of the mortgage is only material as affecting that period. This is a different question entirely. It is a question of priority as between creditors against the estate of a voluntary bankrupt, and the fact that proceedings in involuntary bankruptcy might be instituted within four months from the record of an instrument, unless there be possession to put them on notice, does not seem to affect this question.

Another provision of the act in which there is reference to the record of instruments is clause d of section 67, in these words:

"Liens given or accepted in good faith and not in contemplation of or in fraud upon this act, and for a present consideration, which have been recorded according to law, if record thereof was necessary in order to impart notice, shall not be affected by this act."

This provision would seem to be applicable here, were it not for the expression, "and for a present consideration." This shows that this paragraph refers to liens given or accepted within four months preceding the bankruptcy proceedings. Otherwise, if a lien had been given or accepted, even though not for a present consideration, but for an antecedent debt, the lien would be good, under all the provisions of the act. It is clear that a mortgage given more than four months before proceedings in bankruptcy were instituted, in good faith, even for a previously existing debt, is not affected by the bankrupt act.

The remaining provision of the act which refers to the record of instruments is clause a of section 67, and it is this which it seems should control here. It is as follows:

"Claims which, for want of record or for other reasons, would not have been valid liens as against the claims of the creditors of the bankrupt, shall not be liens against his estate."

In Georgia, the only necessity for recording a mortgage is to make it good as against intervening liens or conveyances. It is always good as against the mortgagor, and is also good as against the general creditors of the mortgagor without a lien. A claim based on a mortgage, therefore, will always be a valid lien against the general creditors of the estate who have not obtained a lien, notwithstanding the failure to record the mortgage; and consequently, under this last-named paragraph of the act, it will be a perfect, valid lien in this case. The trustee, in objecting to this mortgage, only represents general creditors. There were no intervening liens or conveyances of any kind.

The decisions generally of the bankrupt courts under the act of 1867 seem to be in line with the views herein stated. Bump, Bankr. (11th Ed.) p. 792, and authorities there cited. A quotation from a single decision, however, will be sufficient in this case. In 2 Woods, 443, Fed. Cas. No. 7,403, the case of Johnson v. Patterson is reported, decided by Circuit Judge Woods on appeal in bankruptcy. That case was decided on the mortgage laws of Georgia, and is therefore the more pertinent and better authority here. The last paragraph of Judge Woods' decision will show sufficiently what was decided:

"In my judgment, therefore, as the mortgage in question in this case is good, by the law of Georgia, as against the mortgagor and against all others who had not acquired liens or become purchasers before the actual record, in spite of the fact that the mortgage was not recorded, and that the mortgagor remained in possession, with power of sale, I must hold it to be good as against the assignee of the mortgagor and the general creditors whom he represents."

The decision of the referee in this matter was correct, and will be sustained.

In re BEDINGFIELD.

(District Court, N. D. Georgia. May 17, 1899.)

1. BANKRUPTCY—PETITIONING CREDITORS—WITHDRAWAL.
A creditor who joins with others in filing a petition in involuntary bankruptcy against their debtor, the act of bankruptcy alleged being a preferential transfer of the debtor's whole property, but afterwards obtains a settlement of his debt, and transfers his claim, will not be allowed to withdraw from the proceeding when his withdrawal would reduce the amount of debts represented on the petition below the jurisdictional minimum, and so require the dismissal of the proceeding.

2. SAME—INTERVENING CREDITORS.
Where a petition in involuntary bankruptcy, brought in good faith, appears on its face to represent creditors sufficient in number and amount to sustain the jurisdiction, but before adjudication it appears that there is a deficiency in the amount of debts represented, then creditors other than the original petitioners, who have entered their appearance and joined in the petition subsequent to its filing, under Bankruptcy Act, § 59, cl. f, may be reckoned in making up the amount of claims required by the act to support the petition.

In Bankruptcy. On motion to dismiss petition in involuntary bankruptcy.

Maddox & Terrell, for petitioning creditors.
Jas. L. Key, for bankrupt.

NEWMAN, District Judge. A petition in involuntary bankruptcy was filed against W. H. Bedingfield. The petitioning creditors amount to $505.70. Very soon after the petition was filed, Carlton & Smith, a mercantile firm, having a debt of $77.08, which firm had joined in the petition in bankruptcy against Bedingfield, gave notice to counsel employed in the case that they desired to withdraw from the bankruptcy proceeding. There is no doubt but that they joined originally in the petition in involuntary bankruptcy, joined in the employment of counsel, and one of the firm—Mr. Smith—made oath to the correctness of the petition. It seems that a very short time—an hour or so—before the petition was filed, probably, the claim of Carlton & Smith was transferred to Fain & Stamps, presumably in the interest of Kelly Bros., who obtained the preference which is the act of bankruptcy alleged. They also notified counsel for the petitioning creditors within a short time after the petition was filed that they did not desire to participate in the same. The question is whether or not this withdrawal should be allowed. It seems to me that it would be very bad practice to countenance such a transaction. If creditors having, as in this case, a number of small claims, amounting to something over $500, join in a petition for involuntary bankruptcy, where there has been a transfer of property and a preference in violation of the bankrupt act, and one of the petitioning creditors can withdraw in order to reduce the amount of the petitioning creditors' debts below $500, it would open the way for debtors giving such a preference, and the person preferred to settle with a portion of the creditors, and thereby defeat the proceeding, however palpable the preference might be. The bankrupt act

has an express provision against any such proceeding. Section 59, cl. g, is as follows: "A voluntary or involuntary petition shall not be dismissed by the petitioner or petitioners or for want of prosecution or by consent of parties until after notice to the creditors." Where a creditor joins in a proceeding in involuntary bankruptcy, and allows the petition to be filed, and afterwards obtains a settlement in some way, it is too late to withdraw from the proceeding in the way attempted here. On the face of the papers, this is a clear preference of one creditor. It appears that the entire property of Bedingfield was transferred to one creditor for an antecedent debt, leaving nothing whatever to the other creditors. If, by the aid of third parties, the debt of one of the creditors can be bought up, so as to reduce the amount below $500, it will enable the debtor to protect his preference, and defeat the whole purpose of the bankrupt act.

Another question involved here is this: The petitioning creditors took to themselves a transfer of the taxes due by Bedingfield, and used that to make up the $500 necessary to file the petition in involuntary bankruptcy. There is grave doubt, under the facts shown, as to their right to do this, and a serious question would be made as to whether there was the necessary amount of indebtedness in the petition in this case if only the original petitioners' debt were to be considered. Before the time for the adjudication in the case arrived, however, Mrs. C. V. Powers, having a debt against Bedingfield of $33.70, filed a petition adopting the allegations of the original petition, and asked to be made a party to the proceeding, which amendment was allowed. Now, can this Powers debt be considered in order to make up the jurisdictional amount? Section 59, cl. f, is as follows: "Creditors other than the original petitioners may, at any time, enter their appearance and join in the petition." Can a creditor, prior to the adjudication, join in the petition so as to make up the amount of $500, necessary to commence proceedings in involuntary bankruptcy, when it appears that for some reason the necessary amount of creditors did not join in the original petition? I am inclined to agree with Judge Lowell, of the district of Massachusetts, who has recently determined this question in the case In re Romanow, 92 Fed. 510. This is what he says on the subject:

"The petition was filed January 28, 1899. On February 14th, Breitstein, a creditor of the respondents, appeared, and sought to join in the petition. The respondents object that he cannot be counted in making up the necessary number of creditors required by section 59 of the bankrupt act. Clause f of that section reads as follows: 'Creditors other than original petitioners may, at any time, enter their appearance, and join in the petition, or file an answer, and be heard in opposition to the prayer of petitioners.' Those who are permitted to 'join in' a petition by so doing commonly become parties to it; and the words 'join in the petition,' as used in clause e and clause b of the same section, plainly carry that implication. It is urged by the respondents that, if this construction be given to clause f, an insufficient number of creditors, or creditors having an insufficient amount of claims, may file a petition against a debtor, and obtain an adjudication, by subsequently procuring other creditors to join with them, such joinder being possible at any time before the petition is dismissed. This practice, it is said, would permit a petition, at the time of its filing insufficient in substance as well as in form, to be made good by subsequent acts. It must be admitted that there is weight in this argument, but the

language of the act is clear; and the inconvenience, if inconvenience there be, was not deemed by congress a controlling consideration in the act of 1867 (see Rev. St. §§ 5021, 5025), nor, in some cases, at least, under the act of 1898 (see section 59, cl. b). I think, therefore, that creditors otherwise competent to appear and join in a petition subsequent to its filing may be reckoned in making up the number of creditors and amount of claims required by section 59."

I think the objection to such practice, which Judge Lowell says was urged before him, that this would allow an insufficient number of creditors to bring a proceeding, and afterwards build it up to the necessary amount by amendment, is not very serious. It would be necessary in every case, of course, that a petition in involuntary bankruptcy should, on the face of it, show that creditors participated to the amount of $500, before a petition could be filed, or a rule obtained; and these, of course, would have to be participating in good faith. Then, if afterwards, and before adjudication, it should appear that for some reason one or more of the petitioning creditors did not have debts, or their debts were not provable, and other creditors came in, sufficient to make the amount necessary, they could be allowed, and the proceeding stand. The court would never entertain a mere sham petition prepared originally with a view to doing this, but it would be only where a petition was brought in good faith, and some such contingency as has been referred to occurred. I think it clear that Mrs. Powers' debt should be counted in making up the necessary $500, and then, even without the allowance of the debt for taxes,—as to which no opinion is expressed,—there would be petitioning creditors to the necessary amount. The motion to dismiss the proceeding will be denied.

In re PURVINE.

(Circuit Court of Appeals, Fifth Circuit. June 28, 1899.)

No. 850.

1. BANKRUPTCY—APPEAL AND REVIEW.
   On a petition to the circuit court of appeals to review and revise an order of the district court in bankruptcy, under Bankruptcy Act 1898, §§ 24, 24b, only questions of law will be considered.
2. SAME—JURISDICTION—REQUIRING BANKRUPT TO SURRENDER PROPERTY.
   A court of bankruptcy has jurisdiction and power to order a bankrupt to pay over to his trustee money found to be in his possession and control, and properly belonging to his estate in bankruptcy; and, if the bankrupt fails to obey such order, the court may commit him, as for a contempt of court, until he complies.

Shelby, Circuit Judge, dissenting.

Petition for Review of an Order of the District Court of the United States for the Northern District of Texas, in Bankruptcy.

The creditors of A. S. Purvine, on November 23, 1898, filed a petition against him in the United States district court for the Northern district of Texas, praying that he be declared a bankrupt. It was alleged that he was insolvent, and that he had sold his property, and was concealing the proceeds to defraud his creditors. The schedule filed by Purvine showed an indebtedness of $4,600, and no assets but a homestead. Purvine was duly adjudged a bankrupt, and O. B. Colquitt was appointed trustee. On the 16th of January, 1899, upon the

application of the petitioning creditors, Purvine was examined. On the 25th of January, 1899, the said creditors filed a petition addressed to the referee, alleging that it appeared from the bankrupt's examination that he had in his possession $8,300, and that Purvine denied that he had possession of this fund, and refused to deliver the same to the trustee. The petition charged that his schedule of assets was false in failing to include this fund, and that he was concealing the same. The prayer was for an order to require Purvine to pay this money to the trustee. Purvine filed an answer, under oath, denying that he had such funds, or any other property except that stated in his schedule. The referee, however, made an order requiring Purvine to pay to Colquitt, the trustee, $7,400 by April 1, 1899. On the 11th of April, 1899, Purvine having failed to pay the money, the creditors prayed for a certificate of contempt from the referee to the district judge. On the 8th of May, 1899, on the motion of the creditors, an order was made by the district court requiring Purvine to show cause why he should not be punished for contempt for failing to pay the money to the trustee. On May 15, 1899, Purvine answered that on the 27th day of February, 1899, he had filed his sworn answer that he did not have the money, and could not pay it over, as ordered by the referee. He also said that he had at all times obeyed the orders of the court except to turn over the money which he did not have to turn over; that he had fully answered all questions propounded to him touching the money alleged to be in his possession, and had shown that the money had been stolen from him, or lost, while he was in a state of intoxication. On May 19, 1899, the district court entered an order approving the order of the referee, and requiring Purvine to turn over to the trustee the $7,400 by 12 m. on the next day, the 20th of May, and in the interim to be under the surveillance of the United States marshal, and requiring the cost of the attendance of the marshal to be paid by Purvine; and the order further gave Purvine and his counsel until 10 o'clock on May 20, 1899, to file his motion to vacate the order. On May 20, 1899, a motion to vacate the order was filed, based upon the ground that the order was unlawful, for reasons therein stated. On the 20th of May, 1899, the court overruled the motion to vacate or modify its order, and entered the following order: That, "it appearing to the court that the order of the referee requiring the payment of $7,400 to O. B. Colquitt, trustee, was lawfully made, and that said bankrupt is now in possession and control of the sum of $7,400, and the same lawfully belongs in the custody of the said trustee, and is applicable to the payment of the debts of the said bankrupt duly proved against him, and it appearing that he has disobeyed the order of the referee, and is in contempt of the order of said referee, it is therefore ordered and adjudged that the order of the referee is a lawful order; and, it further appearing that the time for paying the sum of $7,400 to the trustee has expired, and Purvine has failed, and still fails, to comply, it is further ordered and adjudged that Purvine is guilty of contempt of the authority of the district court of the United States, and he is committed to the custody of the United States marshal, to be by him held and confined in the jail of Dallas county until the said A. S. Purvine shall pay to O. B. Colquitt, trustee, as aforesaid, the sum of $7,400." Upon the issuance of this order the United States marshal incarcerated the bankrupt, Purvine, and still holds him in the county jail of Dallas county by virtue of this order. This order of commitment is brought to this court by Purvine for revision.

W. S. Simkins, for bankrupt.

R. W. Flournoy and T. A. Altman, for creditors.

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

NEWMAN, District Judge (after stating the facts as above). The question in the case before us is, had the district court power to pass the order excepted to, and brought before the court of appeals in vacation, in chambers, for revision?

This court only revises the action of the district court in matters of law. Bankruptcy Act 1898, §§ 24, 24b.

The facts are for the district court. The judge presiding in that court found that Purvine had the money in his possession and control, and there was ample evidence to support such finding; so the sole question here is one of the power of the district court to order a bankrupt having money in his possession, belonging to the bankrupt estate, to turn the same over to the trustee, and to punish as for contempt the failure to do so.

We are satisfied that the district court has such power. It is the duty of the bankrupt to deliver to the trustee all property subject to his debts. Upon his failure to make such delivery he may be ordered by the court to do so. Unquestionably, the court has this power. Having it, it is strange, indeed, if, when exercising it, it cannot enforce its orders. To deny this authority is to admit that a bankrupt may sit in the very presence of the court with cash to any amount in his pocket, which is a part of his estate, and the title and right to the possession of which is legally in the trustee, and smile at the order of the court directing him to turn it over to the trustee. To deny this authority makes this anomaly: that it is the duty of the court to make an order which it is powerless to enforce. By section 41, Bankruptcy Act 1898, it is provided:

"A person shall not in proceedings before a referee, (1) disobey or resist any lawful order, process, or writ. * * * b. The referee shall certify the facts to the judge, if any person shall do any of the things forbidden in this section. The judge shall thereupon, in a summary manner, hear the evidence as to the acts complained of, and if it is such to warrant him in so doing, punish such persons in the same manner and to the same extent as for contempt committed before a court of bankruptcy, or commit such person upon the same condition as if the doing of the forbidden act had occurred with reference to the process of, or in the presence of the court."

If the court of bankruptcy is powerless in this respect, persons, by becoming bankrupts, obtain an immunity not allowable in any other court of equal dignity, either federal or state, in this country. Orders similar to that made by the district judge in this case were made under the bankrupt act of 1867, and enforced in the same way. In re Dresser, 3 N. B. R. 557, Fed. Cas. No. 4,077; In re Salkey, 11 N. B. R. 423, Fed. Cas. No. 12,253; In re Peltasohn, Fed. Cas. No. 10,912; In re Kempner, Id. 7,689, 6 N. B. R. 521; In re Speyer, Fed. Cas. No. 13,239, 6 N. B. R. 255.

While we are clear, therefore, as to the existence of the authority to punish for contempt in cases like this, we think it proper to say that in the bankrupt court, as in all other courts, the power to punish for contempt should be carefully exercised. By the bankrupt law, various acts of the bankrupt are made criminal offenses, and various rights vesting in the trustee are to be enforced by proper civil proceedings in courts of competent jurisdiction. We simply pass on the question before us, and hold that, when a bankrupt has in his possession and control cash belonging to the bankrupt estate, the court may, within the meaning of the bankrupt act, make a "lawful order" directing him to turn the same over to the trustee, and on his failure to do so may commit him until he complies with the order.

We decline to interfere with the order of the district court, and consequently it is ordered that the application for a revision of the

action of the district judge in this case be, and the same is hereby, denied.

SHELBY, Circuit Judge (dissenting). By the constitution of the state of Texas (article 1, § 18) it is declared "that no person shall ever be imprisoned for debt." When the laws of the state prohibit imprisonment for debt, such laws are by statute made effective against all processes and orders of the courts of the United States. Rev. St. U. S. § 990. Construing the statute just cited, Wallace, J., in Manufacturing Co. v. Fox, 20 Fed. 409, said:

"The power of the courts of the United States to punish for contempt and imprison for nonpayment of money judgments is circumscribed and controlled by the laws of the state, and where an order made in the progress of the cause is of the character of a judgment or decree for the payment of money it cannot be enforced upon the theory that disobedience is a contempt."

See, also, Low v. Durfee, 5 Fed. 256.

It is well settled that constitutional provisions against imprisonment for debt do not apply in cases of judgments for torts, or against fines for criminal offenses, nor would such provision prevent imprisonment for failure to pay a fine imposed by the court in contempt proceedings. But this case does not present a judgment ex delicto, nor a fine. It is a proceeding by the creditors to obtain the satisfaction of claims against their debtor. An order is obtained that a sum of money be paid which is to be used in satisfaction of the debts, and imprisonment is imposed because the petitioner disobeys the order to pay the money. The Alabama constitution prohibits imprisonment for debt. The legislature passed a law authorizing a plaintiff who had failed to collect his judgment by execution to file a bill in equity against the defendant, requiring the defendant to answer under oath what property he has, the nature thereof, and in whose hands it is. The court was authorized to render a decree requiring the defendant to deliver the property or effects found in his hands to the register of the court. The statute also provided for the failure to comply with such decree,—the defendant would be guilty of contempt, and that he might be imprisoned in the county jail until he should have obeyed the decree. The supreme court of Alabama held this law unconstitutional. The court said:

"Its manifest purpose is to coerce the payment of the ordinary judgment debt by imprisonment in the county jail under the guise of making a refusal to pay a contempt of court. * * * The purpose of the law is to force the payment of the debt which is the basis of the suit. The defendant is attached and imprisoned because he does not deliver the money or property in order to pay the debt. If the debt is paid, the prisoner is released. If he does not deliver the property or money to the officer of the court for the ultimate satisfaction of the complainant's debt, his imprisonment is continued. The indirection employed cannot aid the matter, for the express prohibition of an act is also an implied prohibition of all and every means designed and used solely to reach that end. What cannot be done directly is also prohibited to be done indirectly. The payment or delivery to the register is only for the benefit of the complainant. Characterizing the refusal to pay or deliver as a contempt does not make it such if it appears in its essence and nature to be otherwise, and is merely a new legislative creation to accomplish by evasion an unlawful or unconstitutional end. * * * An order committing a defendant for contempt for such refusal is an imprisonment for debt, and as such is prohibited by

said section of the Declaration of Rights." Ex parte Hardy, 68 Ala. 303; Cotton v. Sharpstein, 14 Wis. 236; In re Blair, 4 Wis. 531; Wightman v. Wightman, 45 Ill. 167; Coughlin v. Ehlert, 39 Mo. 285; Roberts v. Stoner, 18 Mo. 481; In re Atlantic Mut. Life Ins. Co., Fed. Cas. No. 629.

There is nothing in the bankruptcy act to authorize imprisonment for debt. In its essence this proceeding is an imprisonment for debt, which violates the constitution of Texas and the United States statute. Const. Tex. art. 1; Rev. St. U. S. § 990; The Blanche Page, 16 Blatchf. 1, Fed. Cas. No. 1,524; Hendryx v. Fitzpatrick, 19 Fed. 810.

Section 41 of the bankruptcy act forbids one to "disobey or resist any lawful order, process, or writ" in proceedings before a referee. This, of course, implies that the party has the ability to obey the order, and that he willfully disobeys it. This language merely recites a power in reference to decrees or orders that all courts possess. It confers no new or peculiar power. Rev. St. U. S. § 725. The bankruptcy act in terms provides for the punishment of a person who "concealed while a bankrupt * * * from his trustee any of the property belonging to his estate in bankruptcy." It also provides for the punishment of one who has "made a false oath or account in, or in relation to, any proceeding in bankruptcy." On conviction, the person violating either of these provisions is to be imprisoned for a period not exceeding two years. The prosecutions for these offenses are to be conducted as other criminal cases. Bankr. Act, § 29.

In proceedings to punish for contempt it is a general rule not to permit the respondent's answer to be traversed. It is taken as true, and, if false, a prosecution may be had for perjury. Blackstone so states the rule. 4 Bl. Comm. 287. This rule is followed by the federal courts. In re May, 1 Fed. 737; U. S. v. Dodge, 2 Gall. 313, Fed. Cas. No. 14,975. In Re Pitman, 1 Curt. 186, Fed. Cas. No. 11,184, it was held by Judge Curtis that, although there were precedents for the introduction of other evidence, the respondent's answer was to be treated as evidence. The court said: "Now, one of the most important privileges accorded by law to one proceeded against for contempt is the right to purge himself, if he can, by his own oath. So rigid is the common law as to this that it does not allow the sworn answers of the respondent to be controverted as to matter of fact by other evidence." This general rule of the common law has exceptions, not material to be discussed here. The rule is here cited to show that the respondent's answer is a material, and often a controlling, part of the record in the proceedings for contempt of court.

In the administration of the bankruptcy law the question most often occurring is, has the bankrupt surrendered all of his assets? By the evidence of creditors, and even from his own books, it may often appear to the satisfaction of the referee that he has not. In every such case an order might be made requiring him to deliver to the trustee the amount which the referee determines he has retained. His failure to obey such order might as well, in such cases as this, be punished as a contempt of court. The administration of the law with that construction would render useless those provisions of

the statute providing for criminal prosecutions. The statute, viewed as a whole, does not, in my opinion, authorize such construction.

If the record does not show that it is or was possible for the petitioner to perform the decree, the court has no authority to punish for the failure to perform it. Rap. Contempt, § 17; Adams v. Haskell, 6 Cal. 316; Kane v. Haywood, 66 N. C. 1; Walton v. Walton, 54 N. J. Eq. 607, 35 Atl. 289. It does not appear from the record in this case that the petitioner can pay to the trustee the sum involved. If his answer be disregarded, contrary to the common-law rule, and the order of commitment only be looked to, it is not shown that he could certainly make the payment. The order of commitment recites that he has the money "in possession and control." This language may be construed as all decrees are construed,—in the light of the pleadings and record. It was not claimed, nor intended to be claimed, that he has the funds in his pocket in jail. Prisoners are not permitted to keep such sums about them while in jail. All the order shows is that the money, at its date, was under the control of the petitioner. It is not shown where it is, nor how it is under his control. If the place of its deposit was known, it would be reached by the civil process of the court. The order of commitment, construed in the light of the record, does not show that the prisoner can make the payment.

When examined, the bankrupt must answer, otherwise he can properly be punished for contempt in refusing to answer legal questions. When he answers, as in this case, that he has not the money called for, and therefore cannot comply with the order of the court, if his answer is true, he has done all he can do, and is not in contempt of court. If his answer is willfully false, he is guilty of perjury, under section 29 of the bankruptcy act. The criminal law would then afford the regular and legal mode for his punishment. If the court can, in a proper case, legally hold that such answer is also a contempt of court, it would not authorize a sentence of perpetual imprisonment, or a sentence of imprisonment till the bankrupt confessed the perjury of his answer by producing the money he had sworn was lost. The general rule that a court can punish a party for failure to perform its decrees is unquestioned. It is equally well settled that it must be a decree that he can perform. Incapacity to do the act required by the decree is necessarily an answer to a proceeding for contempt for nonperformance. A commitment for contempt for failure to perform an act not possible of performance is unjust and illegal. If it be true that a court may condemn a party to perpetual confinement until he performs a decree, such commitment, in the very nature of things, is unjust and illegal, unless it indisputably appears that he can, if he choose, perform the act commanded. While the dignity and power of the court must and should be protected and preserved, the fundamental constitutional rights of the citizen are of paramount importance, and are equally under the protection of the courts. The order of commitment in this case seems to me illegal, because in conflict with constitutional principles. This view, I think, is sustained by the supreme court in the case of Hovey v. Elliott, 167 U. S. 409, 17 Sup. Ct. 841. That was a case begun in chancery in the District of Columbia. The defendant was held to be guilty of contempt in

neglecting to pay into court certain money held by him which was the subject of the controversy in the suit. He also declined to appear when summoned so to do. The court thereupon ordered his answer stricken from the files, and a decree to be entered that the bill be taken pro confesso against him. Mr. Justice White, who delivered the opinion of the court, gives the judicial history of the law concerning contempt of court in England and in this country, and holds that one could not be deprived of property without due course of law in the guise of punishing him for contempt. In the course of the opinion the court said:

"The necessary effect of the judgment of the supreme court of the District of Columbia was to decree that a portion of the award made in favor of the defendant; in other words, his property belonged to the complainants in the cause. The decree therefore awarded the property of the defendant to the complainants upon the hypothesis of fact that by contract the defendant had transferred the right in or to this property to the complainant. If the court had power to do this by denying the right to be heard to the defendant, what plainer illustration could there be of taking property of one, and giving it to another, without hearing, or without process of law? If the power to violate the fundamental constitutional safeguards securing property exists, and if they may be with impunity set aside by courts on the theory that they do not apply to proceedings in contempt, why will they not also apply to proceedings against the liberty of the subject? Why should not a court in a criminal proceeding deny to the accused all right to be heard, on the theory that he is in contempt, and sentence him to the full penalty of the law? No distinction between the two cases can be pointed out. The one would be as flagrant a violation of the rights of the citizen as the other; the one as pointedly as the other would convert the judicial department of the government into an engine of oppression, and would make it destroy great constitutional safeguards."

Stripped of all technical forms, what is the substance of this proceeding so far as it is civil procedure and so far as it relates to property? It is a proceeding by creditors to collect their claims. On a motion made by them their debtor is placed in jail, to be kept there until he produces a sum sufficient to pay their claims. If his friends, out of sympathy for his condition, were to pay the amount of money demanded,—as was often done when imprisonment for debt was the rule,—his release would follow, for there is no fine, and no sentence for a definite period by way of punishment. The constitution of Texas protects the debtor against such judgment, even in the most formal suit, and the procedure cannot be legalized upon the theory that constitutional provisions may be disregarded in proceedings for contempt. What is the case, viewed as a criminal case,—as an offence against law? The petitioner has not offended the dignity of the court in its presence. He has not refused to obey any decree of the court, admitting or averring his ability to obey it. He has answered under oath, showing an inability to obey the order. If that answer is false, he subjects himself to a criminal prosecution for perjury. The district court concludes that it is false. While it is true that for making a false answer under oath punishment should be inflicted, it must be inflicted, if at all, according to law. If Purvine's answer is true, he has not the money to pay the $7,400 ordered to be paid. If he has it, he has committed perjury. Practically, looking at the substance of the proceeding, the district court, in effect, convicts Purvine of perjury,—of making a false answer,—and, dis-

pensing with the formalities of grand and petty juries, a sentence is pronounced against him severer in its terms than if he had been convicted of perjury after indictment and trial. When indicted he would have bail, a trial in due form of law; if convicted, the right of appeal, and to apply for pardon; but by convicting him under the form of a contempt proceeding he is deprived of all these constitutional safeguards. The petitioner, it is true, has been in jail under this order for only a few months. It is in form fixing no period for his release. If valid to hold him now, it will be valid to hold him 10 years from now.

I think that the record shows that the order of commitment is erroneous, and is in excess of the jurisdiction of the district court, and that an order should be made directing the discharge of the petitioner from imprisonment.

In re HAYDEN.

(District Court, S. D. Florida. April 1, 1899.)

BANKRUPTCY—EXAMINATIONS—SCOPE OF INQUIRY—PREVIOUS ASSIGNMENT.

Where the bankrupt, more than a year before the enactment of the bankruptcy law, had made an assignment for the benefit of his creditors under a state law, it is not material or proper, in his examination in the bankruptcy proceedings, to inquire into the circumstances under which the assignment was made, nor to require the assignee to produce the books and papers turned over to him at the time, unless a foundation is first laid for the belief that property of the bankrupt was withheld by him at the time of such assignment, and was still held as his at the time of the enactment of the bankruptcy law.

In Bankruptcy. On questions certified by the referee in bankruptcy.

LOCKE, District Judge. This matter has come on to be heard upon certain questions certified to the court by N. B. K. Pettingill, Esq., referee in bankruptcy, to wit: "(1) Whether inquiry, in the course of the examination of the bankrupt by the creditors, into the circumstances under which a deed of assignment for the benefit of the creditors under a state law, made by the bankrupt on the 18th day of May, A. D. 1897, is material and proper in a bankruptcy proceeding under a petition filed on the 23d of August, A. D. 1898. (2) Whether it is material and proper for the referee herein to compel the production before him, in obedience to a subpœna duces tecum directed to the assignee of said bankrupt under the deed of assignment aforesaid, of the books of accounts and other papers turned over by said bankrupt to his said assignee at the time of said assignment, and now in the possession of said assignee."

These questions having been fully examined, it is considered that, unless some foundation for the belief that certain property of the bankrupt was withheld by him at the time of such assignment, and

was still held as his at the time that the bankrupt act became a law, is laid by the introduction of other evidence, such inquiry and examination is not material and proper; nor is it material and proper for the referee to command the production of such books and papers, turned over by such bankrupt to said assignee. And, no such other testimony having been introduced in the case, it is considered that the objections to the introduction of said testimony should be sustained.

Ex parte JONES.

(Circuit Court, N. D. Alabama, S. D. August 16, 1899.)

1. UNITED STATES COMMISSIONER—POWERS AS EXAMINING MAGISTRATE—PROBABLE CAUSE.

   The powers exercised by a United States commissioner in the examination of a person charged with an offense are those common to all examining magistrates. To authorize him to commit, he need not be convinced of the guilt of the accused, but the proof should be such as to afford good reason to believe that the offense was committed, and by the accused; otherwise, it is his duty to discharge.

2. HABEAS CORPUS—PRISONER COMMITTED BY MAGISTRATE.

   The sufficiency of the evidence on which an accused was committed by a magistrate is not open to review in a proceeding by habeas corpus, but where, although there was evidence of the commission of the offense, there was no competent evidence even tending to incriminate the person charged, he should be discharged on habeas corpus.

Petition for Writ of Habeas Corpus.

The petitioner is charged with unlawfully using the United States mails. Being arraigned before the commissioner, she pleaded, "Not guilty." Della Williams testified to visiting the defendant's house, and finding her husband there. "I then broke some panes of glass in one of the defendant's windows to her house. I done this in order to get full view of my husband, who was standing at the back door, trying to get it open." She then testified to the receipt through the United States mails of four letters, the sending of which would be a violation of the postal laws and regulations of 1893. Witness said she was positive in her mind that the defendant mailed the letters, but she testified to no fact tending to show that the defendant wrote or posted them. "One of the letters called me 'a four-day snow cow,' and the damage done they would pay for." James W. Bass testified that he was not acquainted with defendant, but that she acknowledged to him "that a large, yellow, fat woman broke several panes of glass in one of her windows on a cold, snowy morning in February," and that he (witness) held the letters mentioned in the evidence for further reference. Bessie Williams testified that she received from a mail carrier the four letters referred to, "and I opened one of said letters, and I remarked to my mother, who was present, that they were from Cherry Jones, and that I wouldn't read any more of them, because they were too bad. I am fully satisfied that they were from Cherry Jones, as her name was signed to some of them." The commissioner committed the defendant for trial, fixing her bond at $500, and she is now confined in jail. She files a sworn petition for writ of habeas corpus, and an agreement is presented with the papers, signed by the district attorney and by the attorney for the petitioner, to the effect that the case may be tried and decided on the evidence as taken down by the commissioner; and the agreement is also to the effect that the letters referred to are such as are prohibited by the statute.

J. Finley White, for petitioner.

Wm. Vaughan, U. S. Atty., and Shelby S. Pleasants, Asst. U. S. Atty.

SHELBY, Circuit Judge (after stating the facts as above). In committing a prisoner to await the action of the grand jury, a United States commissioner exercises the powers common to all committing magistrates. If there is probable cause for holding the defendant for trial, he commits him; if not, he discharges him. To commit, he should not require that proof which would be necessary to convict on a trial in chief, nor should he require proof that convinces his mind of the defendant's guilt. He should, however, require that probable cause be shown. That means that the case is made out by proof furnishing good reason to believe that the crime alleged has been committed by the person charged with having committed it. Marshall, C. J.; Trial of Burr (Coombs) p. 4, Fed. Cas. No. 14,692a. When the proof does not furnish such "good reason," it is the duty of the commissioner to discharge the defendant, and this duty is just as imperative as the duty to commit him on proper proof. An examination of the evidence in this case will show that there is no evidence—direct or circumstantial—that the petitioner ever saw the obscene letters. They are not shown to have been written by her or for her. It is not shown that the writing resembles hers, nor even that she can write. There is nothing in the evidence to make the letters admissible against her. It is clear that, on the evidence, she was entitled to be immediately discharged by the commissioner.

That conclusion, however, does not necessarily dispose of the case on this proceeding. The writ of habeas corpus is not ordinarily permitted to be used to review the decision of a United States commissioner on the facts. Although it may be clear that the evidence was not sufficient to hold the accused, it seems that, if there was any evidence tending to show her guilt, the action of the commissioner will not be disturbed on habeas corpus. The court will not inquire into the merits of the decision of the committing magistrate, if he has before him any competent legal evidence, tending to incriminate the defendant, on which to exercise his judgment. In re Cortes, 136 U. S. 330, 10 Sup. Ct. 1031. The present practice in the federal courts is that, where there is some evidence tending to show that the party who has been committed by a United States commissioner is guilty of the offense charged, the sufficiency of such evidence is not open to review on a proceeding by habeas corpus. The commissioner is to judge of the sufficiency of the evidence. But the court may inquire whether the commissioner had any competent or legal evidence before him on which to exercise his judgment as to the criminality of the accused. Church, Hab. Corp. (2d Ed.) § 231. If it appears from the evidence before the committing magistrate, not only that no probable cause was shown, but that there was no legal evidence before him tending to incriminate the petitioner, she should be discharged on habeas corpus. Id. § 230, note 4. It is true that there was evidence before the commissioner tending to show that the offense charged had been committed by some one, but a careful examination discloses no legal evidence on which the commissioner could exercise his judgment in holding the petitioner for trial. An order will be made discharging the petitioner.

In re CHUNG FAT et al.

(District Court, D. Washington, N. D. August 18, 1899.)

1. THIRTEENTH CONSTITUTIONAL AMENDMENT—INVOLUNTARY SERVITUDE—SEAMEN—HABEAS CORPUS.
   Alien seamen, who are being coerced to labor on board an American vessel against their will, and without having voluntarily entered into any contract binding them to such service, are being subjected to involuntary servitude within the United States, in violation of the thirteenth constitutional amendment, and are entitled to a writ of habeas corpus to deliver them from such servitude.
2. SEAMEN—SHIPPING ARTICLES—DEVIATION OF SHIP FROM ORDINARY VOYAGE—RELEASE.
   An American registered vessel had been engaged for a number of years in the carrying of passengers and freight between the ports of Hong Kong, China, and Tacoma, in the United States, touching at other ports in China, Japan, and British Columbia. For such voyages it employed Chinese seamen in Hong Kong, the custom being to consider their term of service as ended on the completion of the round trip and return of the vessel to Hong Kong, which was the port of discharge, although the shipping articles fixed the term of service at six months, and authorized the vessel to go "to any other ports or places in any part of the world, as the master may direct." On the arrival of the vessel at Tacoma on one of its usual voyages, it was chartered by the United States government as a transport to be used in conveying troops and supplies to Manilla. *Held*, that such service on the part of the seamen was within the terms of their shipping articles, and, as the voyage to Manilla was in the direction of Hong Kong, and after its completion the master could either proceed to that port, or secure transportation there for the seamen within the term of six months, they were not entitled to be released from their contract by reason of the deviation of the ship from its usual business or route, but that the owners would be required to give bond for the release of the seamen, and their return to Hong Kong, in accordance with the contract, after completion of the voyage to Manilla.

This was a hearing on a writ of habeas corpus issued on petition of Chung Fat and others, Chinese seamen on the steamship Victoria, by which the petitioners seek to obtain their release from service, and their return to China. Dismissed.

Frank Allyn and Frederick Bausman, for petitioners.
J. M. Ashton, for respondent.
Wilson R. Gay, U. S. Atty.

HANFORD, District Judge. The petitioners are Chinese seamen, who were hired on the 26th day of June, 1899, at Hong Kong, to serve as part of the crew of the steamship Victoria, the vessel then being engaged in general commerce as a carrier of passengers and freight between Hong Kong and other ports in China and Japan, and Tacoma and other Pacific coast ports of the United States and British Columbia. The shipping articles which they signed describe the voyage and term of service for which they were engaged as follows: "From said port of Hong Kong to Tacoma, Wash., U. S. A., via China and Japan ports, or to any other ports or places in any part of the world, as the master may direct. Final port of discharge to be Hong Kong, and term of agreement not supposed to exceed six

months." The Victoria is a foreign-built steamship, which, by an act of congress approved June 16, 1898, was granted the privilege of being registered as a vessel of the United States. The privilege of being so registered was presumably granted in contemplation of the use which our government expected to make of her as a transport ship or auxiliary cruiser during the war between the United States and Spain. On her arrival at Tacoma with the petitioners on board, the government did engage said vessel as a transport to carry troops, horses, munitions of war, and provisions for the army, from Puget Sound to Manilla, and she is now being fitted for that service. The petitioners consider that the service for which the ship has been engaged since her last arrival at Tacoma is entirely different from the service contemplated at the time they signed the shipping articles, and that, if they are required to go to Manilla as seamen on a vessel in the service of the United States, while that country is under military government, there is probability of their being exposed to dangers of an unusual character, and detained in the service of the ship beyond the term of their engagement, and for these reasons the new employment of the ship is a departure from the terms of their contract specified in the shipping articles, which entitles them to be discharged, and they allege that they are unwilling to continue in the service of the ship under present conditions, and yet the captain will not discharge them, but requires them to continue to perform duty against their will, and this they allege amounts to subjecting them to involuntary servitude, in violation of the thirteenth amendment to the constitution of the United States, and upon these grounds they have applied to this court for a writ of habeas corpus that they may be released from unlawful detention on board of the vessel, and returned to Hong Kong, where they belong. The writ having been issued as prayed for, the captain has made a return setting forth the shipping articles, and denying that the petitioners are unlawfully imprisoned or detained on board said vessel, and alleging that by their contract the petitioners are bound to serve as seamen on said vessel on the contemplated voyage to Manilla; and further alleging that it is his purpose, if the vessel shall be kept in the service of the government after her arrival at Manilla, to provide for the return of the Chinese seamen now in the ship to Hong Kong, and to pay their wages until the time of their arrival there. The United States attorney for this district has intervened in behalf of the United States, alleging that the discharge of the petitioners from their engagement to serve as seamen at this time may interfere with the plans of the government for speedy dispatch of the vessel on the voyage contemplated, and on the further ground that the petitioners, being Chinese laborers, cannot lawfully be permitted to be landed in this country.

The case presents a number of novel and serious questions. In the first place, the respondent claims that, whatever may be the rights of the petitioners, the writ of habeas corpus is not available as a practicable remedy for their relief. I consider, however, that if, in fact, the petitioners are being coerced to labor on board an American vessel against their will, without having previously vol-

untarily entered into a contract binding them to such service, they are being subjected to involuntary servitude within the United States, in violation of the thirteenth amendment to the constitution of the United States, and to be delivered from such involuntary servitude by means of the writ of habeas corpus is a right which cannot be denied; therefore this objection to the form of the proceeding cannot stand in the way of a full inquiry into the merits of the controversy.

The evidence introduced upon the hearing shows that this vessel has been employed carrying passengers and freight between Tacoma and Hong Kong via other Oriental ports during the past six years, during all of which time part of her crew has been composed of Chinese seamen, shipped at Hong Kong under contracts similar, with respect to the nature and term of service, to the contract under consideration in this case, and that in practice the Chinese seamen have always been paid off on each return of the vessel to Hong Kong, and, although each round trip requires but little more than two months' time, and the contract of the seamen fixes the limit of the term of service at six months, each contract has been deemed to have been terminated with the performance of each voyage ending at Hong Kong. The petitioners have shown by their evidence that at the time of signing the shipping articles they had no knowledge of the contents thereof, except as they were informed through an interpreter, and that the agreement which they entered into, as it was explained to them, required them to make the voyage from Hong Kong to Tacoma and return to Hong Kong, touching only at convenient ports on the coast of China and Japan and at Victoria in British Columbia. This evidence shows that the contracts between the captain, representing the owners, and the Chinese seamen, have been heretofore construed in practice consistently with what I deem to be a fair interpretation of the words in the contract itself, and that a fair interpretation of the contract does not bind the seamen necessarily to a term of six months; nor, on the other hand, does it bind the ship to return from Tacoma to Hong Kong direct. The contract fixes alternative limitations upon the obligation of the Chinese seamen to remain in the ship. One is the return of the vessel to Hong Kong, the port of final discharge; the other is the expiration of the six months from the date of their engagement within which time it is the duty of the captain to return them to the port of final discharge. The captain is given an option to make a voyage from Tacoma to any other port for which the ship may be employed, provided he returns to Hong Kong within six months, and, in case of the vessel being employed for such additional voyage, the seamen are bound by the letter of their contract to continue in the service of the ship until the expiration of the term of six months, unless the vessel should return to Hong Kong within that time. It is practicable for this ship to make the contemplated trip to Manilla, and proceed thence to Hong Kong within the time stipulated, and, in case the exigencies of the service should require the detention of the vessel for a longer time, it is practicable to send the Chinese seamen from Manilla, or any place in the Philippine Islands to Hong

Kong, without violating the letter of the contract. It may be conceded that there are reasonable grounds for the apprehension which the petitioners seem to have that, if they are carried in this ship to the Philippine Islands, they may suffer deprivation of some of their rights, because there are no courts at present so constituted as to be able to afford them protection against the arbitrary exercise of authority by the military officers of the United States. This, however, is not a good reason for abrogating the contract at this time. It is not unusual for vessels in the merchant service to be employed to go to distant countries beyond the jurisdiction of civil governments, and it is part of the life of a sailor to trust his person to the vicissitudes of maritime ventures in places far beyond the power of courts and civil magistrates to enforce rights or redress wrongs. If the court might properly anticipate evils which may or may not happen to the petitioners at Manilla, still such considerations do not outweigh the practical difficulty of terminating the contract at this time. The laws of the country do not permit these petitioners to be landed in the United States from the ship which brought them in, and they cannot be returned direct to Hong Kong without depriving the government of the United States of the use of this vessel, or subjecting the owners to inconvenience and heavy expense in providing for their carriage from here to Hong Kong. If, by the terms of their contract, they were entitled to be discharged before the vessel proceeds on the voyage to Manilla, I would not be disposed to permit considerations of expediency or expense to outweigh the legal rights of the petitioners, but at present the conditions are reversed; the letter of the contract entitles the ship to the service of these seamen while she is proceeding to Manilla, which is so near to Hong Kong that I must regard the trip to Manilla as being in the direction of the fulfillment of the terms of the contract itself, and I consider that it would be unreasonable to attempt to coerce the captain and owners of the ship to send these petitioners to Hong Kong by another vessel, when so much unnecessary expense can be saved by requiring them to abide by the terms of their contract until they reach Manilla. The ship will have no right to detain these petitioners after arrival at Manilla, unless she is to proceed from there to Hong Kong; and I am satisfied that it is not now the purpose of the captain to detain them against their will; still the agent of the owner, in giving his testimony upon this hearing, very frankly stated that, in case of difficulty in supplying their places at Manilla, these men will be detained, rather than suffer the vessel to be detained for want of a crew. If they shall be coerced into continued service after the termination of their term of service, they will be entitled to damages, and, in view of all the circumstances, I think that they should have such protection as the court can give, without doing injustice to any one. The respondent has offered to give a bond obligating himself to fulfill his contract with the Chinese members of his crew with respect to returning them to Hong Kong in due time, and I will accept his offer, provided that the bond shall be executed by Mr. Doawell, the ship's agent, also, as a joint obligor or surety. I

will fix the sum of $5,000 as the penalty, and upon filing such a bond in favor of the clerk of this court for the benefit of each and all of the Chinese seamen now on board the ship this proceeding will be dismissed.

BASS, RATCLIFF & GRETTON, Limited, v. CHRISTIAN FEIGENSPAN.

(Circuit Court, D. New Jersey. August 5, 1899.)

1. TRADE-MARK—INFRINGEMENT.
The complainant's trade-mark for pale ale, consisting of an equilateral triangular figure, which as applied to bottled pale ale is colored red, is infringed by the defendant's mark as applied to pale ale and half-and-half, consisting of a combination of a red triangle nearly equilateral, a narrow gold border surrounding and binding it, a monogram composed of the letters C and F in the middle, and some fine scroll ornamentation in each corner.

2. SAME—EVIDENCE.
Courts should not be astute to recognize in favor of a trade-mark infringer fine distinctions between different articles of merchandise of the same general nature, and should resolve against the wrongdoer any fair doubt whether the public may or may not be deceived through the application of the spurious symbol; and hence pale ale and half-and-half must, as against an infringer of a trade-mark for the former, be treated as malt liquors substantially similar to each other and belonging to the same class.

3. SAME—LIABILITY TO DECEIVE.
No one who has counterfeited a legitimate trade-mark and applied the spurious symbol in competition with the genuine can avoid the charge of infringement by showing that the false mark has in practice been so accompanied, on labels, capsules or otherwise, by trade-names, designations, descriptions or other accessories, not forming part of it, as to render it unlikely that the public has been deceived. Such a showing, while it may affect the nature or measure of the relief to be granted, cannot defeat a suit for infringement.

4. SAME—INJUNCTION.
He who applies the false mark has no just cause of complaint if he be prevented from further violating the exclusive right of the lawful employer of the genuine symbol, and he should not be allowed, at the peril of the latter, fraudulently to experiment in the use of such false mark with accessories of varying character with the double purpose of filching the custom of a business rival, and at the same time shielding himself from the consequences of infringement.

(Syllabus by the Court.)

In Equity.

Arthur Steuart, Rowland Cox, and Samuel D. Oliphant, Jr., for complainant.

Samuel Kalisch and Chauncy H. Beasley, for defendant.

BRADFORD, District Judge. The bill in this case charges infringement of a trade-mark and prays for an injunction and an account. The complainant is a corporation of Great Britain and is and has for a number of years been engaged in the business of brewing malt liquors at Burton-on-Trent, England. The business was founded by William Bass at that place in 1777, and has from that time

uninterruptedly been there carried on by him and his successors, including, among others, the firm of Bass & Company. During all this period the ale brewed by him and them has continuously been known as "Bass ale" or "Bass." The business has long been very extensive, its product reaching all parts of the civilized world. For nearly fifty years Bass ale has been shipped for consumption in the United States in steadily increasing and in recent years in very large quantities. Bass & Company and its successors have not bottled their ale, but have sold it only by the cask or otherwise in bulk. Liquor dealers to whom it is furnished either bottle and sell it, or sell it on draft or in bulk. Many years before 1855 Bass & Company adopted and applied to casks of pale ale brewed by that firm an equilateral triangle as a trade-mark in connection with the sale of that product, and prior to such adoption and application no such figure or symbol had been appropriated to malt liquor. Before 1855 the triangle as so applied to pale ale was red. Afterwards it varied in color; being red, white or blue, as the case might be, to indicate the particular brew-house,—the complainant having three,—where the pale ale contained in the cask bearing it was made. The triangle thus selected as a trade-mark has continuously from the time of its adoption been applied by the complainant and its predecessors, by means of labels, stencilling or otherwise, to casks containing their pale ale. In 1855 Bass & Company adopted a form of label bearing the triangular symbol in red to be applied to bottles containing Bass pale ale. This label has with slight variation continued unaltered from the time of its adoption until now, and in its application to bottles of pale ale has uniformly borne a solid red equilateral triangle, the words "Trade Mark" being printed thereon parallel to its base. The complainant has succeeded to the property and good-will of its predecessors, including Bass & Company, and to whatever exclusive right that firm had in the triangle as a trade-mark in connection with the sale of its pale ale. It appears that the complainant has had an understanding or agreement with all bottlers, with the exception of only one bottling house, to whom it has sold its pale ale, that its labels bearing the red triangle should be affixed to all bottles containing such ale, and that they have been so affixed, unless, as has sometimes occurred, the complainant has permitted a bottling customer to affix to the bottles what is termed a caution label displaying a fac-simile of the capsule used by the bottler and containing a red triangle as its principal feature. The complainant annually furnishes to the various bottling concerns with which it deals in the United States and elsewhere upwards of 200,000,000 of its red triangle labels for application to the bottled product. The triangle, adopted in the first instance by Bass & Company, thus appears not only on casks of pale ale as sold by the complainant, but, with the exception above mentioned, on all bottled Bass pale ale. The complainant and its predecessors have also caused the red triangle to be applied to the bottled product by means of capsules and otherwise. By signs, labels, cards and divers other advertising expedients, that symbol has for many years been constantly and con-

spicuously associated with their product, whether bottled or not, and with its origin. The complainant has produced evidence to the effect that its pale ale has for many years been to some extent called for or spoken of as "triangle ale." This evidence comes from persons connected with the complainant and living in England, and probably has reference solely to what may have transpired there. On the other hand there is evidence on the part of the defendant that Bass pale ale has not in this country been so called for or spoken of. But there can be little or no doubt, on the evidence as a whole, that a triangular figure, and especially a solid red triangle, as applied to pale ale or any substantially similar malt liquor, amounts to a representation to the public, or a large portion of the public, that the liquor to which it has been applied is Bass pale ale, which has acquired such an enviable reputation for its excellence. The complainant procured the registration in the U. S. patent office July 23, 1889, as a trade-mark, being No. 16,851, for "beer of all descriptions," which it seems includes pale ale, of a "triangular figure with the words 'Trade Mark' at the base thereof." In the statement of trade-mark it is alleged that "the color is not essential and other colors may be substituted, and the triangle may be used in outline, if desired, without affecting the character of the trade-mark, the essential feature of which is the triangular figure." It is claimed on the part of the defendant that the registry of the mark must be treated as a nullity for the reason that it does not appear that the declaration of trade-mark was verified before a proper officer. This contention is immaterial, if the complainant was entitled to the exclusive use of the triangular symbol as a common-law trade-mark for pale ale of its production. That the complainant was so entitled I have no doubt. While Bass & Company and its successors have not sold their pale ale bottled, but only in bulk, and therefore, so far as bottled Bass pale ale is concerned, were not the owners of that product at the time they caused the triangle adopted by that firm to be applied thereto, this circumstance by no means negatives the existence of an exclusive right on the part of the complainant in or to the use of that symbol in connection with the sale of pale ale, although bottled. That symbol, having been applied by the complainant and its predecessors to their whole product of pale ale before sale by them, and having become associated in the public mind with it, enured to the benefit of the complainant with respect to all pale ale brewed by it, whether sold to consumers in bottles, casks or otherwise. Precisely the same considerations, which would sustain the complainant's trade-mark in its application to Bass pale ale before sale from the brewery or warehouse, would support it as applied by bottlers to the bottled product by virtue of an understanding or agreement with the complainant. In either case the complainant applies its trade-mark or causes it to be applied to its product for the purpose of protecting and extending its business. The use by others in either case of the complainant's trade-mark, or a mark bearing such close resemblance thereto that it may readily or reasonably be mistaken for it, in connection with the sale of pale ale or other malt liquor substantially similar to it, not brewed by the complainant, is

calculated to deceive and defraud the purchasing public, fraudulently to divert custom from the complainant and, perchance, by the palming off of an inferior ale, to injure the reputation enjoyed by the complainant on account of the excellence of its product. The complainant's trade-mark did not, and could not, include the totality of the contents of the labels or capsules used in connection with the sale of Bass pale ale. Such trade-names, designations or advertisements do not constitute a trade-mark. The trade-mark consisted solely of the triangular symbol; and there could be no reason for doubt by any intelligent person in this country, able to read the English language, as to what in fact was intended as the trade-mark, for upon or within the triangle, and not outside of it, were printed the words "Trade Mark."

Has or has not the defendant infringed that trade-mark? The defendant is a corporation of New Jersey and is and has for a number of years been engaged in carrying on in the city of Newark in that state the business of brewing, bottling and selling malt liquors, including pale ale and half-and-half; the latter being a mixture of pale ale and brown stout. It did not adopt the alleged infringing symbol and apply it to malt liquor until long after the complainant's trade-mark had been adopted and applied to pale ale, and had become well known to the public. The defendant procured the registration of its symbol in the U. S. patent office February 21, 1893, as a trade-mark for ale, being No. 22,498, specified as follows:

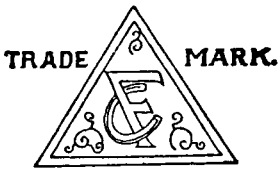
"The trade-mark consists of the following letters and arbitrary symbol, viz.: The letters 'C' and 'F' arranged in a monogram, in the center or field of a triangle. These have generally been arranged as shown in the accompanying drawing, which represents the fac-simile of the trade-mark of said corporation, said arrangement consisting of a triangle provided with an outer border and in the field of the triangle is arranged the monogram, consisting of the interwoven and fancy letters 'C' and 'F.' In use said letters are printed in gold on a red field in the triangle and the border of the triangle is also printed in gold, but said letters may be printed in black or in any other color, on a triangular field of any suitable color, and the outer band may be of any other color or may be entirely omitted, without materially affecting the character of the said trade-mark, the essential feature of which is the monogram of the letters 'C' and 'F' on a triangular field."

In point of fact the mark which the defendant has applied to its pale ale and half-and-half, and of which the bill complains, is the combination of a red triangle, a narrow gold border surrounding and binding it, a monogram consisting of the letters "C" and "F" in the middle, and some fine scroll ornamentation in each corner. The triangle used by the defendant is not equilateral like that of the complainant, but isosceles, its base being longer than either of its sides, but closely approximating to equality with them. In practice, while the words "Trade Mark" are printed on the triangle used by the complainant, those words respectively are on different sides of and do not touch the triangle used by the defendant for pale ale, but are printed on and are parallel to the base of the triangle used by the defendant for half-and-half. The two symbols and the words "Trade Mark" appearing in connection with them, subject to an alteration

in the position of those words in the case of half-and-half as above stated, are as follows:

Complainant's Symbol.

Defendant's Symbol.



These two symbols, disassociated from all accessories on labels or capsules bearing them, resemble each other closely enough to be confusing, deceptive and misleading to the public, if both be applied to substantially similar malt liquors. The essential feature of the defendant's symbol is not the monogram, or gold border or scroll ornamentation. That feature is the triangle, or, as it has been applied, the red triangle, which also constitutes the complainant's symbol as employed in connection with the sale of bottled pale ale. There is nothing particularly unique or striking in the monogram, and, if there were, it might readily be supposed to represent, not that the malt liquor to which it is applied was the product of some person, firm or corporation other than the complainant, but merely the initials of the name of some bottler of or agent for Bass pale ale. Neither the gold border nor the scroll tracing is calculated to stamp itself upon the memory comparably with the triangle. Indeed, the defendant in its statement of trade-mark claims that the border "may be of any other color or may be entirely omitted, without materially affecting the character of the said trade-mark." When the symbols of the complainant and defendant are viewed side by side differences between them can, of course, be perceived, which may or may not be sufficient in their character to prevent confusion on the part of purchasers who have both symbols before them at the same time. But purchasers of pale ale do not as a rule have both symbols simultaneously before them for comparison. If they have come to associate a red triangle as applied to pale ale with Bass pale ale,—not necessarily with the name "Bass" in connection with pale ale, but with the superior malt liquor which Bass pale ale is,—and thereafter see the red triangle of the defendant's symbol applied to pale ale or substantially similar malt liquor, the complainant's symbol not being at the time before their eyes, may they not, in the exercise of only such degree of care as is usually observed by and reasonably to be expected from such purchasers, under varying conditions of knowledge, intelligence and nationality, be misled or deceived into the belief that in buying the malt liquor bearing the defendant's symbol they are getting Bass pale ale? Clearly they may; and, therefore, if the question of infringement is to be decided on consideration of the triangular symbols, disassociated from their accessories as contained on the labels and capsules displaying those symbols, there can be no doubt that the complainant's trade-mark has been infringed by the defendant. I am by no means satis-

fied that the defendant acted in good faith toward the complainant in adopting, using and procuring registration for its triangular symbol. On the contrary, the only inferences to be drawn from the testimony of Feigenspan, the president and principal stockholder of the defendant, strongly point to a deliberate intention on its part to filch the complainant's business by palming off on the public its own product as that of the complainant. The defendant, before the adoption of its triangle, knew of and was familiar with the complainant's trade-mark in red as applied to pale ale. It was at liberty to adopt and apply to its product any purely arbitrary symbol which had not theretofore been appropriated as a trade-mark for a similar product. Why should it under these circumstances, unless with wrongful intent toward the complainant, have adopted a red triangle? An explanation consistent with fair dealing on the part of the defendant is difficult, if not impossible. Certainly the president and secretary of the defendant, although pressed on this point in their examination, have utterly failed satisfactorily to account for the adoption by the defendant of the triangle as a trade-mark. To employ the language of Acheson, J., in Godillot v. Grocery Co., 71 Fed. 873, "there is no good reason for such a close imitation of the plaintiff's trade-mark, and no justification therefor." I cannot resist the conclusion that the defendant had an intent to infringe the complainant's trade-mark. If the defendant infringed that trade-mark by the sale of pale ale to which it had applied the triangle, it equally infringed that mark by the sale of half-and-half bearing the same symbol. The addition of brown stout to pale ale, resulting in half-and-half, does not, in my opinion, so differentiate that mixture from pale ale as to avoid the charge of infringement, if otherwise it would be sustained. Pale ale and half-and-half must, as against an infringer of a trade-mark for the former, be treated as malt liquors substantially similar to each other and belonging to the same class. Courts should not be astute to recognize in favor of an infringer fine distinctions between different articles of merchandise of the same general nature, and should resolve against the wrongdoer any fair doubt whether the public may or may not be deceived through the application of the spurious symbol. The defendant must be declared an infringer unless such effect is to be given to the form and contents of the labels and capsules respectively displaying the triangles of the parties as to produce a contrary result. It is unnecessary here particularly to refer to the capsules. The label customarily affixed to the complainant's pale ale sets forth in addition to the trade-mark the words: "This label is issued only by Bass, Ratcliff & Gretton, Limited. Bass & Co.'s Pale Ale. Bass & Co., Brewers, Burton-on-Trent." The label used by the defendant in connection with the sale of pale ale contains in addition to the triangular symbol the following: "Feigenspan's Finest India Pale Ale. Newark, N. J. Keep in cool place and standing upright at least 24 hours before opening." The defendant's label applied to half-and-half bears in addition to its symbol the following: "Feigenspan's Combination Half-and-Half. Brewery, Newark, New Jersey, U. S. A. The Combination Half & Half is a Choice Blending of

our Finest India Pale Ale & Brown Stout, made from Selected Malt & Hops." On each of the above labels the words "Trade Mark" appear on or in connection with the triangular symbol as heretofore stated. These three labels widely differ from each other in form, style of lettering, color, ornamentation and contents. Viewed side by side no one of them could be mistaken for either of the others. But it does not follow from what has been said that the defendant's labels might not be understood by illiterate or alien purchasers, seeing thereon the red triangle, to refer to Bass pale ale, and not to either the pale ale or the half-and-half of the defendant. With respect to the defendant's label for pale ale it may further be observed that, bearing the red triangle, there is nothing on it inconsistent with the idea that Feigenspan or the defendant might be a bottler of Bass pale ale, using that symbol by arrangement with the complainant. But aside from these considerations is the important fact that this is strictly a trade-mark case. The infringement of a trade-mark involves the violation by one person of an exclusive right of another to the use and benefit of a word, mark, symbol, &c., as the case may be, in connection with the sale of goods similar to those to which the same has been applied. This exclusive right is a vested right of property and cannot be invaded with impunity. No one who has counterfeited a legitimate trade-mark and applied the spurious symbol in competition with the genuine can avoid the charge of infringement by showing that the false mark has in practice been so accompanied, on labels, capsules or otherwise, by trade-names, designations, descriptions or other accessories, not forming part of it, as to render it unlikely that the public has been deceived. Such a showing, while it may affect the nature or measure of the relief to be granted, cannot defeat a suit for infringement. The lawful appropriator and employer of a trade-mark has an exclusive right of use and is entitled to be effectually secured in the full enjoyment of that right. If other persons are to be permitted to violate that exclusive right on the plea that the counterfeit symbol as applied in a given case has such accessories as to render deception of purchasers improbable or even impossible, an element of uncertainty and confusion will be introduced which cannot fail to encourage fraud and promote litigation. A sound public policy requires that the spurious trade-mark be suppressed, whether it is or is not for the time being accompanied by such accessories, not constituting part of it, as to avoid deception or render it unlikely. He who applies the false mark has no just cause of complaint if he be prevented from further violating the exclusive right of the lawful employer of the genuine symbol, and he certainly should not be allowed, at the peril of the latter, fraudulently to experiment in the use of such false mark with accessories of varying character with the double purpose of filching the custom of a business rival, and at the same time shielding himself from the consequences of infringement. Different considerations apply to cases involving those forms of unfair competition in trade where one person palms off his goods as those of another, not by means of violating any exclusive right of the latter possessed by virtue of a valid trade-mark, but by mere imitative devices

with respect to trade-dress, trade-names, &c., calculated to deceive the public. After careful examination of the evidence I am satisfied that the defendant has with wrongful and fraudulent intent to derive benefit from the reputation enjoyed by the complainant infringed the complainant's trade-mark by using the red triangle in connection with the sale of pale ale and half-and-half. Even were the words "Bass & Co.," contained on the complainant's label, to be treated as part of its trade-mark, as claimed by the defendant, the result would be the same; for the distinctive and dominating feature of the trade-mark would be the triangle. There has been no acquiescence by the complainant in the infringement of its trade-mark by the defendant and no such laches on the part of the former as to deprive it of the right to relief. The complainant is entitled to an injunction and an account. Let a decree be prepared accordingly.

BENNETT v. CARR.

(Circuit Court of Appeals, Second Circuit. July 18, 1899.)

No. 131.

1. COPYRIGHT—ACTION TO RECOVER PENALTIES FOR INFRINGEMENT—CONSTRUCTION OF STATUTE.
   A compliance by the plaintiff with all the requirements of the statute to secure a valid copyright is a condition precedent to the recovery of the penalties imposed by such statute for infringement; and in an action for the recovery of penalties, which may be incurred unintentionally, and are often greatly in excess of the injury done, such requirements will be strictly construed.

2. SAME—REQUISITE OF COPYRIGHT—DESCRIPTION OF PAINTING.
   Under Rev. St. § 4956, which provides that no person shall be entitled to a copyright unless, in case of a painting, he shall file with the librarian of congress, or deposit in the mail, addressed to the librarian, a description of the painting, "nor unless he shall also" file or deposit a photograph of the same, such photograph cannot constitute the description of a painting, which is required in addition thereto, and is required to be recorded; nor will "Four-in-Hand," given as the name of a painting, constitute a sufficient description to entitle the painter to recover the statutory penalties for infringement by printing a copy of the painting, made from a similar photograph, in a newspaper.

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

A. L. Gurlitz, for plaintiff in error.

John S. Wise, for defendant in error.

Before WALLACE and SHIPMAN, Circuit Judges, and THOMAS, District Judge.

THOMAS, District Judge. The defendant in error recovered a judgment against the plaintiff in error for infringement of the statutes relating to copyrights. Carr, the plaintiff below, in 1895 painted in water colors a picture of a coach and four horses, with a background of scenery, which he named "Four-in-Hand." Within the time required by the statute the plaintiff mailed to the librarian of

congress the title of the painting, with two photographs thereof, upon which was inscribed, "Copyright, 1895, by Lyell Carr." The librarian received and filed the same in his office on the 23d day of September, 1895. The maintenance of this action is dependent upon such mailing and such record. A photograph printed from the same negative as those mailed to the librarian was given by Carr to a friend, who loaned the same to an agent of the defendant, in September, 1897, and by its use the defendant printed, in black and white, in his paper, the New York Herald, a picture which is alleged to be an infringement of the copyright. The photograph was diminutive relatively to the size of the painting, and was so framed as to conceal the statement of the copyright. For this infringement the jury awarded a verdict of $10,000. The statute (Rev. St. § 4956) provides:

"No person shall be entitled to a copyright unless he shall, on or before the day of publication, in this or any foreign country, deliver at the office of the librarian of congress, or deposit within the mail within the United States, addressed to the librarian of congress, at Washington, District of Columbia, a printed copy of the title of the book, map, chart, dramatic or musical composition, engraving, cut, print, photograph, or chromo, or a description of the painting, drawing, statue, statuary, or a model or design, for a work of the fine arts, for which he desires a copyright; nor unless he shall also, not later than the day of the publication thereof, * * * deliver at the office of the librarian of congress, * * * or deposit in the mail, * * * addressed to the librarian, * * * two copies of such copyright book, map, chart, dramatic or musical composition, engraving, chromo, cut, print, or photograph, or in case of a painting, drawing, statue, statuary, model, or design for a work of the fine arts, a photograph of the same."

Section 4965 provides for a recovery of a penalty for the infringement of a copyright obtained pursuant to the provisions of section 4956. Hence the plaintiff may not maintain this action unless he has complied with the conditions precedent stated in section 4956, which should be strictly construed, because it contains the condition precedent to the recovery of severe penalties. The rigor of the penalty is illustrated in the present case, where a recovery of $10,000 has been had for the unintentional infringement of the copyright of a painting of the apparent value of $100. There is no contention that any description of the painting was sent or delivered to the librarian, other than that contained in the title, "Four-in-Hand," or in the photograph mailed to and received by the librarian. It cannot be contended seriously that the title constitutes a description. In any case, a reading of the statute should instantly dispel such contention. The inquiry follows, is the photograph a sufficient description, within the meaning of the statute? As stated by the court at the trial, "A photograph is itself a description of the painting which it represents, and a far more correct description of the painting than any mere words could usually give." Such photograph might well be regarded as a sufficient description, unless the statute requires a description of the painting in addition to, and other than, the photograph, for the scheme of the statute controls, even though it be inferior in the efficacy of its requirements to the plan adopted by the plaintiff. Abridging the words of section 4956, it provides:

"No person shall be entitled to a copyright unless he shall * * * deliver * * * or deposit * * * a printed copy of the title of the book * * *

or a description of the painting; * * * nor unless he shall also * * * deliver or deposit * * * two copies of such copyright book, * * * or in case of a painting, * * * a photograph of the same."

It is observable that the statute requires the delivery or deposit of the title of a book, or, in the case of a painting, a description thereof, and, in addition to this, the delivery of two copies of a book, or, in the case of a painting, a photograph thereof. Hence, in the case of a book, the delivery of its title and a copy thereof is necessary, and in the case of a painting the delivery of its description and a photograph thereof is requisite. The statute specifically states that in the case of a painting there must be a description thereof, and also a photograph of the same. May the statute be read to mean that the deposit of a photograph shall fulfill both requirements? The very words negative such construction, because the requirement is that the description shall be deposited, and, in addition thereto, something else shall be done, viz. the delivery of a photograph. How, then, can it be said that the deposit of the photograph may include the performance of the additional condition? When congress pointed out the elements that should lead to a valid copyright, it designated a photograph as one essential, and superadded to this a description. Section 4957 illustrates that a photograph could not fulfill the term "description," for it provides that the librarian shall keep a record of the article copyrighted, as follows:

"Library of Congress, to wit: Be it remembered, that on the —— day of ——, A. B., of ——, hath deposited in this office the title of a book (map, chart, or otherwise, as the case may be, or a description of the article), the title or description of which is in the following words, to wit: (Here insert the title or description.) * * * And he shall give a copy of the title or description under the seal of the librarian of congress, to the proprietor, whenever he shall require it."

The clause "the title or description of which is in the following words, to wit: (Here insert the title or description,)" shows that congress intended that the description should be in words, and thereby be capable of insertion in the record. This evidence of intention is manifested by the command that a copy of the description should be furnished to the proprietor. The librarian could not insert a photograph in the record, nor could he, from his own resources, furnish a copy thereof to the proprietor. The manner in which the librarian met this difficulty appears in the copy of the record furnished to the proprietor in this case. It states that Lyell Carr "has deposited in this office the title of a painting, the title or description of which is in the following words, to wit: 'Four-in-Hand.' Photo. on file." It is evident that no copy of the description is hereby furnished, nor is any description contained in the record. The record, from the very nature of the case, refers for its completion to an article on file which could not be entered of record. Such a necessary deficiency in the record of itself shows that the requirements of the statute had not been met. Section 4965 makes the recording of the description of a painting a precedent condition to the recovery of the penalty. Therefore, if the description be not recorded, as it plainly has not been in this case, there can be no recovery, at least where the omission to record arises from the fail-

ure of the proprietor to furnish a description capable of record. While a provision for using a photograph for the purposes of description would have been useful, it is considered that the statute was not framed in expectation that this could be done; and, however improvident the omission, it is for this court to determine only whether it exists. The conclusion that the statute does not permit the use of a photograph for that purpose must lead to the reversal of the judgment, with costs.

NEW JERSEY WIRE-CLOTH CO. v. MERRITT et al.

(Circuit Court, E. D. Pennsylvania. August 7, 1899.)

PATENTS—VALIDITY—FIREPROOF BUILDINGS.

The Orr patent, No. 456,202, for improvements in fireproof buildings, and relating to the use of metallic lathing in connection with cement, concrete, plaster, or other suitable plastic materials, in ceiling and arch construction, is void for want of invention in view of the prior state of the art.

This was a suit in equity by the New Jersey Wire-Cloth Company against Merritt & Co. and others for alleged infringement of a patent for improvements in fireproof buildings.

Philipp, Phelps & Sawyer, for complainant.

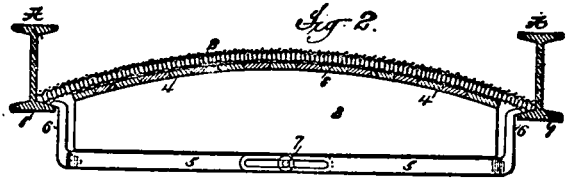
Ernest H. Hunter and George Q. Horwitz, for respondents.

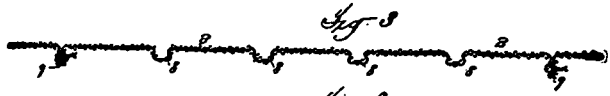
McPHERSON, District Judge. This suit is brought to restrain an alleged infringement of letters patent No. 456,202, originally issued to William Orr upon an application filed April 30, 1890, and now owned by the complainant as assignee. The specification declares that the applicant has invented "certain new and useful improvements in fireproof buildings," and proceeds to describe the improvements in general terms as follows:

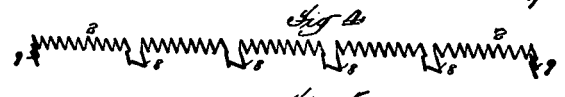
"This invention relates to the construction of ceilings or walls formed of metallic lathing, to which is applied cement, concrete, plaster, or other suitable plastic material, and especially to arches thus constructed, it being the object of the invention to provide an improved construction by which the cost is reduced, and the strength and fireproof qualities of the ceiling or wall increased. To this end my invention consists in an improved means for forming fireproof structures with metallic lathing, and in an improved ceiling and arch construction, all of which will be more particularly described in the specification, and pointed out in the claims."

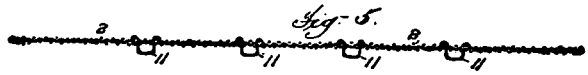
A detailed description is then given, referring to the drawings that accompany the application:

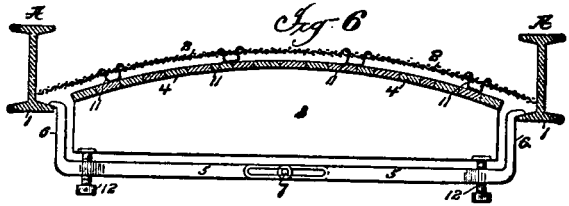
"Fig. 1 shows an arch constructed in accordance with my invention, part of the plastic material being removed. Fig. 2 shows the method of supporting the lathing during the process of constructing the arch. Fig. 3 is a section of the metallic frame of the arch of Figs. 1 and 2, taken across the curve, and showing the preferred form of construction. Fig. 4 is a similar section of the same construction with metallic lathing formed of perforated sheet metal. Fig. 5 is a similar section of a modified construction, in which the lathing is provided with offsetting clips. Fig. 6 shows an adjustable frame, preferably used to support the lathing. Fig. 7 is a side view of the frame shown in Fig. 6. Fig. 8 shows a section of straight ceiling construction in accordance with my

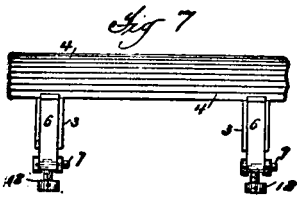


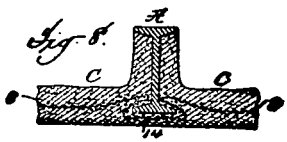












invention. Referring now particularly to Figs. 1 and 2, A are the ordinary I-beams of a ceiling, and B an arch supported thereby, the arch being formed by a section of metallic lathing, 2, sprung into position above the lower flanges, 1, and embedded in a body of plastic material. For the purpose of supporting this metallic lathing during the process of applying the plastic material, I employ a frame formed preferably of side pieces, 3, and slats, 4, supported thereon, and forming the top of the frame. This frame may be supported in any suitable manner by blocking or otherwise; but I prefer to use the means shown, consisting of a light metallic hanger, 5, supported from the flanges of the beams by arms, 6, and carrying the frame. This hanger is formed preferably in two parts, having a slot and set-screw connection, 7, as shown in Fig. 2, by which the two parts of the hanger may be drawn together, and the supporting ends released from the flanges of the beams, thus allowing the frame to be removed from beneath the arch. The supporting frame may rest

directly upon the hanger, as shown in Fig. 2, but I prefer to employ the construction shown in Fig. 6, in which the hanger is provided with set screws, 12, at each end, on which the frame is supported, and by which it may be adjusted vertically, as desired. With this construction, the metallic lathing having been sprung into position between the beams, the frame will be placed in position beneath it, and raised by set screws, 12, until it is in position to support the lathing. The plastic material is then applied, and allowed to set as desired, when the frame will be lowered by the set screws, and withdrawn from the plastic material, and the frame and hanger will then be moved forward for the construction of another section, as above described.

"The metallic lathing used may be of any suitable construction, either of woven wire, or of metal perforated or cut in any of the common forms. For the purpose of offsetting this lathing from the frame, I preferably provide the lathing, whether of the woven-wire form shown in Figs 1, 2, and 3, or of the perforated sheet-metal form shown in Fig. 4, with ribs, 8, and flanges, 9, extending in the direction of the curve, these ribs and flanges being made to project from the body of the lathing a distance equal to the desired thickness of the plastic material, or the under side of the lathing. The lathing thus being offset from the frame, the cement, concrete, or other material of which the arch is to be formed will be poured on from above, having been allowed to thicken sufficiently for this purpose. The depth of the coating formed will preferably be greater on the upper side of the lathing than on the lower, thus increasing the pressure on the arch, and adding to the tensile strength of the metal a compressive strength produced by the weight of the body of the plastic material upon it; but this is not absolutely necessary. The cement having been allowed to set sufficiently, the two parts of the hanger, 5, are drawn together, releasing the arms, 6, from the flanges of the beams, A, and the frame is withdrawn from beneath the arch, and moved forward for the construction of another section. A coating of plaster, or finish of any suitable material, is then applied on the under side of the arch. A section of lathing, 10, will preferably be bent around the lower flanges, 1, of the beams, as shown in Fig. 1, after the supporting frame is removed, and covered with plastic material, thus protecting the flanges of the beams also, and increasing the fireproof qualities of the construction. The plastic material will also preferably be applied to the sides of the beams and the base of the upper flanges, as shown.

"It is evident that by the use of my supporting frame all danger of the arch being thrown out of form by the greater pressure upon some parts produced by unequal distribution of the cement during the process of construction is avoided. By offsetting the lathing from the frame, and applying the cement from above, I provide a simple and convenient means of constructing a ceiling or arch in which the metallic frame formed by the lathing is entirely embedded in a body of plastic material, the lathing forming a series of angles preventing any slipping between it and the plastic material, and the union of the two making an exceedingly strong ceiling, and an arch that will stand any required test. The down-turned ribs and flanges of the lathing are an important feature of my invention as applied to arch construction, independent of their use as a means for offsetting the lathing from the supporting frame. By the use of these ribs and flanges running in the direction of the curve, the compressive strength of the metallic frame is greatly increased. So great is the advantage obtained by this, that it will frequently be found not necessary to use the supporting frame with lathing so constructed, the ribs and flanges adding sufficient strength to the lathing to support it during the process of applying the cement, so as to prevent the arch being thrown out of form. In case the frame be not employed, the ribs and flanges may be upon the upper or under side of the lathing, and the cement applied from above or below, as preferred. For increasing the strength of the lathing, the flanges may be secured together in any suitable manner, as by clips or lacing, as shown in Fig. 3. While I prefer to use the ribs and flanges, as shown in Figs. 1 to 4, on account of the greater strength of the arch secured thereby, as above described, it is evident that the lathing may be offset from the frame by other means, and that this offsetting is independent of any strengthening feature added to the lathing itself. Thus I have shown in Fig. 5 a section of woven-wire lathing in which clips, 11, are used to offset the lathing from the supporting frame. The same result may

be secured in many different ways, as by down-turned edges of perforated sheet metal, or depressions in the metal. This method of supporting the lathing while the concrete is being applied may be applied not only to an arch, for which it is especially desirable, but also to a straight ceiling, in which case the arms, 6, of the hangers will be extended, and the upper surface of the supporting frame be a plane. A section of a ceiling, C, thus formed is shown in Fig. 8, in which the sheet of lathing is shown also as bent around the lower flanges of the beams at 14, so as to cover and protect them, and avoid the use of the independent sheet of lathing for this purpose. This method of covering the flanges of the beams may be applied also to the arch construction of Fig. 1."

The patent has several claims, but only the first two are now in controversy. These claims are:

"(1) A fireproof ceiling, consisting of metallic lathing extending from beam to beam, and having upon its under side offsetting portions projecting from its body, and a body of plastic material applied from above, and in which the body of the lathing and projections are embedded, substantially as described. (2) An arch formed of metallic lathing bent to the required form, and having upon its under side offsetting portions projecting from its body, and a body of plastic material applied from above, and in which the body of the lathing and projections are embedded, substantially as described."

How far the many advantages that were expected by the patentee, and are declared in the plaintiff's argument to accompany the invention, have been realized, I do not know. There is no evidence that the construction has been used by the plaintiff or by other persons, and the only testimony concerning its value is the opinion of some of the witnesses. The defendants are charged with infringing the patent by building arches of concrete, in combination with a framework made of expanded metal that had been manufactured under the Golding patents of 1884 and 1885. These arches were constructed in a building erected in 1897 in the city of Philadelphia, and the method of construction was essentially the method described in the plaintiff's patent. The defenses are noninfringement, want of invention, and anticipation.

In order to understand the dispute, it is necessary to know with exactness what may be new in the plaintiff's claims, and this may perhaps be arrived at most easily by laying aside what is agreed to be old: (1) A ceiling, either flat or curved concavely, formed of plastic material in combination with a metallic framework embedded in the material, was old before the date of the patent in suit. (2) The use of a centering or molding board to support the plastic material from below, and give shape to it, during the process of hardening, was also well known at that time. (3) The application of the material from above was in like manner a familiar method. (4) Various designs of metallic lathing, some of them capable of being used to produce the finished construction contemplated by the patent, and some of them being unsuited for such use, were also well known, and in more or less general use. These facts are undisputed, and they show that the novelty of the plaintiff's patent must consist in the use that is made of the offsetting portions of the metallic lathing. These projections support the body of the lathing at a uniform distance above the centering, and permit complete embedment, except at the supporting points. Now, the expanded metal used by

the defendants is always so made as to present an irregular surface, having offsetting or projecting portions wherever the still united parts of the strips of metal pass over or under each other. These offsetting portions will differ in height, as the width of the metal strips may differ; and it is therefore possible, by using a framework having strips sufficiently wide, to secure a nearly complete embedment, and thus to obtain whatever advantages the plaintiff's construction may offer to the builder. The first question, therefore, arises, does such use infringe the claims in controversy? If the patent is valid, I think the question must be answered in the affirmative. The specification evidently had in mind the possible use of such a framework as the defendants employed, for it expressly declares: "The same result may be secured in many different ways, as by down-turned edges of perforated sheet metal, or depressions in the metal." And the claims describe the metallic lathing necessary to be used as having "upon its under side offsetting portions projecting from its body," thus including, as it seems to me, not only such lathing as might be specially prepared for the purpose of the patent, but also such lathing as might be adapted for that purpose, although not specially prepared therefor. The claims under consideration are not for a kind of lathing, nor for the process of putting the lathing and the material together, but for a finished result,—for a construction, a thing built of two substances, and intended to accomplish a defined result; and therefore, if the defendants, by the use of nearly identical framework and material, produce essentially the same construction, adapted and designed to accomplish substantially the same result, I cannot avoid the conclusion that the patent has been infringed.

But a conclusion of infringement assumes the validity of the patent, and this point is next to be examined. In spite of the very able argument of counsel for the plaintiff upon this point, I am constrained to hold that, in view of the prior state of the art in April, 1890, there is nothing new in the claims now in question. I do not think it necessary to discuss the numerous patents offered in evidence by the defendants. The state of the art at the date of plaintiff's patent is clearly described in the following quotation from the testimony of Prof. Main, one of the plaintiff's experts:

"The use of a combination of concrete or equivalent plastic material with iron lathing, iron rods, etc., for the general purposes referred to in the patent, was old and well known at the date of application. Iron lathing or webbing had been used at or near the under side of concrete flooring, and had been regularly disposed within the body of plastic material by means of suitable supports so disposed as to maintain a constant distance between the lathing and the centering or board frame adapted to give shape to the under side of an arch. These supports had, however, so far as I am at present aware, been made separate from the structure of the lathing, and, therefore, separately adjustable, requiring extra labor in their adjustment and probably entailing other disadvantages. The patentee proposes to make these offsets integral portions of the lathing, so that when it is bent or sprung into place upon the centering or board support, or in any convenient manner brought closely in contact with it, the lathing will be supported in such a manner as to bring about the results which I have previously explained, when the plastic material is applied. The construction of these supports or offsets as an integral portion of the lathing obviates the necessity of special adjustment, and promotes rapidity of con-

struction, and consequently economy. As such supports are not subsequently withdrawn, no cavities are left in the ceiling, requiring afterwards to be filled up. I understand that this construction is that which is claimed in claims 1 and 2 of the patent."

This quotation seems to me to bring out the decisive facts of the controversy, namely, that offsetting means carried by the centering were well known at the date of the patent in suit, and that the alleged novelty in the claims now being considered consists merely in transferring such means from the centering to the metallic lathing. I think this is an obvious substitution, and as such was not patentable.

It may, perhaps, be also true that, even if this transference might have involved invention, in case metallic lathing that carried offsetting means had not been theretofore known and used for the purpose of effecting the embedment of plastic material, nevertheless the claim of novelty must fail, because such lathing was already so known and used at the date of the plaintiff's patent. But I do not consider this point. I think it is sufficient to rest the decision upon the ground already stated,—that the patent merely takes the obvious step of transferring the offsetting means from the centering to the lathing, and that this is not patentable invention. A decree will be entered dismissing the bill, with costs.

HAWLEY FURNACE CO. OF NEW ENGLAND v. BRAINTREE & W. ST. RY. CO.

(Circuit Court, D. Massachusetts. August 7, 1899.)

No. 777.

PATENTS—VALIDITY AND INFRINGEMENT—FURNACES.

The Hawley patent, No. 447,179, for an improvement in downward-draft furnaces, and relating more especially to boiler furnaces, if valid at all, is limited, as to its first claim, to the specific form of devices enumerated and described, and is therefore not infringed by defendant.

This was a suit in equity by the Hawley Furnace Company of New England against the Braintree & Weymouth Street-Railway Company for alleged infringement of a patent for an improvement in downward-draft furnaces.

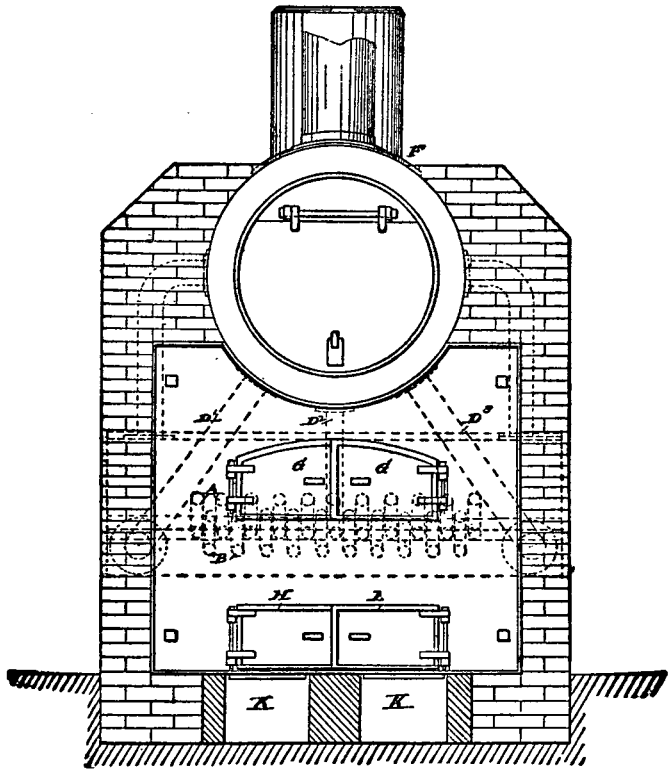
Benjamin F. Rex and Ephraim Banning, for complainant.
Wm. A. Macleod, for defendant.

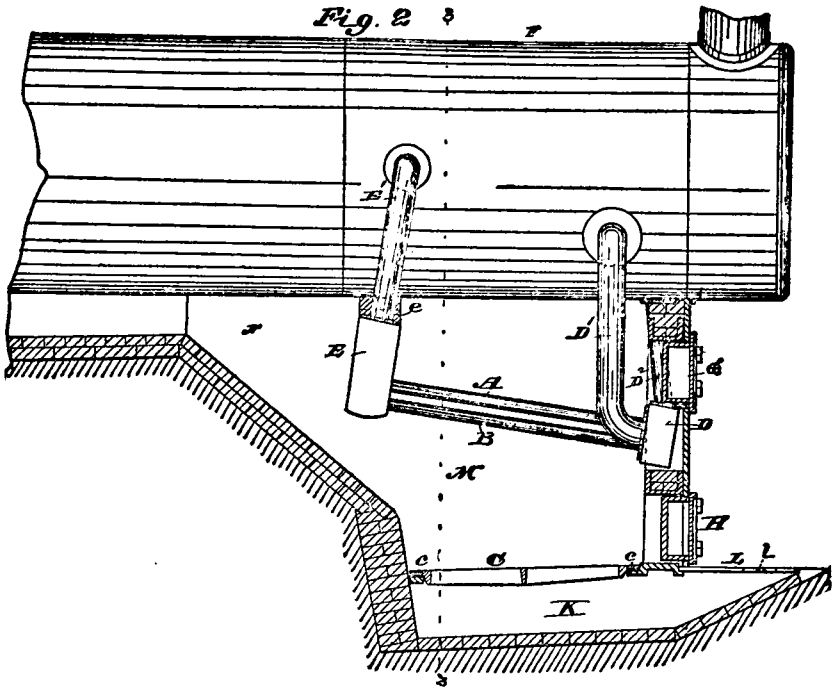
COLT, Circuit Judge. This suit relates to letters patent No. 447,179, dated February 24, 1891, granted to Melville C. Hawley, for "a new and useful improvement in furnaces." The specification says:

"This improvement relates to downward-draft furnaces, and more especially, but not exclusively, for boiler furnaces. Its object is to insure a sufficient downward draft through the upper grate, and at the same time a thorough and economical consumption of the fuel. The leading feature of the

improvement is the combination of a lower upward-burning grate with an upper downward-burning grate, the bars of said upper grate being spaced an unusual distance apart, or so constructed as to provide unusually wide spaces between the bars, whereby ample provision for a downward draft through the upper fire is provided, as well as for the consumption of such partially-consumed fuel as may drop from the upper grate, all substantially as is hereinafter set forth and claimed, aided by the annexed drawings, making part of this specification, and exhibiting a desirable means for carrying out the improvement. * * * The two rows of tubes, A and B, constitute an upper fire-grate having a series of zigzag spaces, which, while being sufficiently contracted for effectively supporting the fuel during the first stages of its combustion, are yet sufficiently wide to provide for a downward draft, and to allow the fuel, after the earlier part of its combustion is effected, to fall down through the bars of the upper grate, and be caught upon the second fire-grate, C, below. This last-named grate, C, is constructed of ordinary bars arranged in the ordinary manner, and it is preferably a dumping-grate. * * * The herein-described improved grate construction is adaptable to almost any ordinary boiler. The upper grate, including the water-chambers, D and E, can be applied as an attachment to existing boilers substantially in the same manner and as readily as to new boilers, and in either case the lower grate can be arranged, as described, to co-act with the upper grate."

Fig. 1





The Hawley furnace is attached to the outside of the boiler. It is an external furnace, as distinguished from an internal furnace, which is located within the boiler shell. It has a lower upward-burning grate, an upper downward-burning grate, an intermediate combustion-chamber, and an escape-flue leading from the combustion-chamber; each end of the upper grate is connected with a water-chamber, which in turn is connected with the boiler. The bars of the upper grate are spaced widely apart, while the bars of the lower grate are spaced in the ordinary manner. The leading feature of improvement in the Hawley structure consists in spacing widely apart the bars of the upper grate, whereby ample provision is made for a downward draft, and the consumption effected of such partially consumed fuel as may drop from the upper grate to the lower grate. The bars or water-tubes of the upper grate are in two rows; the lower row being set at an angle with the upper row, and so forming a series of zigzag spaces. This zigzag arrangement need not receive further consideration, for the reason that the defendant's structure does not contain this feature, and it is not specifically made an element of the first claim of the patent upon which the complainant relies in the present suit. The first claim reads as follows:

"(1) In a combined downward and upward draft furnace, the combination of the lower upward-burning grate, an upper downward-burning grate, an intermediate combustion-chamber, and an escape-flue leading from said combustion-chamber, the bars in said upper grate being spaced widely apart, as de-

scribed, and at each end thereof connecting with a water-chamber in turn connected with the boiler, and the bars in said lower grate being spaced closer together than are the bars of said upper grate, substantially as described."

The elements of this claim are (1) a lower upward-burning grate; (2) an upper downward-burning grate; (3) an intermediate combustion-chamber; (4) an escape-flue leading from the combustion-chamber; (5) the bars in the upper grate spaced widely apart; (6) the upper grate connected at each end thereof with a water-chamber which in turn is connected with the boiler; (7) the bars in the lower grate spaced closer together than the bars in the upper grate. All the features mentioned in this claim were old in the furnace art. Years before the date of the Hawley invention there are found described in patents and publications upward-draft furnaces, downward-draft furnaces, the combined downward and upward draft furnace, with intermediate combustion-chamber and escape-flue leading therefrom, and with the bars of the upper grate spaced more widely apart than the bars of the lower grate, for the purpose of allowing the partially-consumed fuel to pass from the upper to the lower grate; and there is also found, especially in external furnaces of the Hawley type, the intermediate water-chamber connection between the upper grate-bars or water-tubes and the boiler. The prior art is sufficiently illustrated by reference to the Robinson British patent of 1854, the Eastwood British patent of 1862, the two Barlow British patents of 1867 and 1868, the Bosworth patent of 1880, the two Berney patents of 1881, the Post and Sawyer patent of 1886, and the Kearney and Hawley patent of 1888. The Robinson patent shows three downward-burning grates, with different spacings, for the purpose of permitting the fuel to drop from the upper grates to the lower during the process of consumption. In the Eastwood patent there is a combined upward-burning grate, downward-burning grate, intermediate combustion-chamber, and, as shown in Fig. 3 of the drawings, the water-tubes of the upper grate are spaced wider apart than the bars of the lower grate, so that fuel dropping through the upper grate would be caught and consumed on the lower grate. The Barlow patent of 1868 describes a furnace for steam-boilers, comprising an upper downward-burning grate, which is a tubular water-grate; a lower upward-burning grate, which is composed of ordinary grate-bars; an intermediate combustion-chamber; the bars in the upper grate spaced more widely apart than the bars in the lower grate, and the upper tubular bars connected at each end to a water-chamber which in turn is connected with the boiler. The Barlow structure, except as to details of construction, is the same as that described in the first claim of the Hawley patent. The application for the Hawley patent was filed September 6, 1889, and the patent granted February 24, 1891. During this time proposed claims were repeatedly rejected on reference to the Eastwood patent, the Kearney and Hawley patent, and the Robinson patent. One of the rejected claims read as follows:

"(1) In a down-draft furnace, the combination of the lower upward-burning grate and an upper downward-burning grate, the bars in said upper grate being

spaced widely apart as described, and the bars in said lower grate being spaced closer together than are the bars of said upper grate, substantially as described."

In rejecting this claim, the patent office said:

"The claim presented is rejected on the English [Eastwood] patent of record, No. 2,926 of 1862 (Furnaces). No patentable novelty is seen in spacing the bars of the upper grate widely apart for the purpose described, in view of the English [Robinson] patent No. 2,027 of 1854 (Furnaces), which shows a similar construction for an analogous purpose."

After this rejection the patentee inserted in the claim the words, "and at the rear end thereof connecting with a water-chamber in turn connected with the boiler." At the suggestion of the patent office this last amendment was changed so as to read, "and at both ends connected with a water-chamber in turn connected with the boiler." In this form the patent was finally allowed.

The prior art and the proceedings in the patent office clearly seem to limit the novelty of the first claim of the Hawley patent to the specific form of the devices referred to in the claim. The contention of the complainant that the widely-spaced bars of the upper grate was a new feature in the furnace art cannot be maintained. If Hawley had been the first to devise such a structure, his patent should receive a liberal construction, but such is not the fact. It is shown that at the date of the Hawley invention the wide spacing of the upper grate was old, and that such construction was adopted for the very purposes mentioned in the Hawley specification, namely, to secure a downward draft, and to enable the partially consumed fuel to fall from the upper grate to the lower grate. Hawley, in his specification, says that the wide spacing of the upper grate is "for the consumption of such partially consumed fuel as may drop from the upper grate." Robinson, in his patent, says: "The spaces between them [the grates] allowing the partially consumed fuel to pass or fall through to the next tier, where the spaces are smaller than those in the upper tier, thus causing the fuel to be retained for a time, until it becomes further consumed, and then falls to the next tier, and so on." So, too, with respect to the downward draft, Hawley, in his specification, declares that the upper grate is provided with wide spaces, "whereby ample provision [is made] for a downward draft through the upper fire." Robinson, in his specification, says:

"The coal or other fuel is supplied to the top or upper tier, and the bars or tubes are so arranged that the spaces between them are wider than in the next tier, and these are also wider than the spaces in the tier below; so that the fire passing through the top or first set of gratings will fall on and operate for a time on the second set, and then fall through to the third, and so on. The air necessary for combustion is also supplied at the top or upper part of the apparatus above the fire, instead of under it, as heretofore, by which contrivance I obtain a downward draft or current through the whole series of gratings, which causes the smoke from the top or green fuel to pass through its own, and also through the red fires of the succeeding tiers of gratings, whereby it will be consumed."

It is manifest that after the Robinson patent there was no novelty in a wide spacing of the bars in the upper grate of a furnace for the purpose of securing a downward draft, and of enabling the partially consumed fuel to drop through the bars to a lower grate. That this

feature is not specifically mentioned in the Eastwood and Barlow patents, although shown in the drawings, is probably due to the fact that it was recognized as old and well known in the furnace art. The exact degree of spacing the bars of the upper grate is not made a subject-matter of novelty in the Hawley patent, and, even if it were, the defendant does not infringe, because the bars of its upper grate are not so widely spaced as those of the Hawley furnace. The truth is that Hawley claims generally the wide spacing of the bars of the upper grate as the keynote of his invention, whereas this construction was old, and Hawley nowhere states that his spacing accomplishes anything more than what Robinson mentions. If there is any inventive novelty in the first claim of the Hawley patent,—of which I have grave doubt,—it must be limited to the specific form of the devices enumerated and described in the claim and specification. In the recent case of Springfield Furnace Co. v. Miller Down-Draft Furnace Co., 96 Fed. 418, in the circuit court for the Eastern district of Missouri, Judge Adams held, in a carefully considered opinion, that the first claim of the Hawley patent was void for want of invention, in view of the prior art. If, however, the claim is not absolutely void for lack of patentable novelty, it is so clearly limited in scope that the defendant does not infringe, because its furnace does not contain one element of the combination which composes the claim, namely, the water-chamber at the rear end of the upper grate bars or water-tubes. Bill dismissed, with costs.

MIEHLE PRINTING-PRESS & MANUFACTURING CO. v. CAMPBELL PRINTING-PRESS & MANUFACTURING CO.

(Circuit Court, N. D. Illinois, N. D. July 27, 1899.)

1. PATENTS—PRINTING MACHINES.
   The Miehle patent, No. 322,309, for improvements in printing machines, construed, and limited in view of the prior state of the art, and *held* not infringed as to claims 1, 2, and 4.
2. SAME.
   The Miehle patent, No. 317,663, for improvements in printing machines, construed, and *held* not anticipated, and valid, and also *held* infringed as to claim 1.

This was a suit in equity by the Miehle Printing-Press & Manufacturing Company against the Campbell Printing-Press & Manufacturing Company for alleged infringement of certain patents for improvements in printing machines.

Munday, Evarts & Adcock and Alexander & Dowell, for complainant.

Southgate & Southgate and Carter & Graves, for defendant.

KOHLSAAT, District Judge. The bill in this case alleges the infringement by defendant of claim 1 of patent No. 317,663, dated May 12, 1885, and of claims 1, 2, and 4 of patent No. 322,309, dated July 14, 1885, both patents having been issued to Robert Miehle,

the inventor, and by mesne assignments being now the property of complainant.

So far as the said claims of patent No. 322,309 are concerned, I hold them limited by the prior art, and especially by said patent No. 317,663, to such an extent that the requirement of "vertical" end slots named in each claim, and shown in the drawings, must be considered an essential one. The slots shown (which are substantially the only ones complainant uses in its practical machines) are true scotch yokes. The portion of defendant's machine which complainant claims is a slot is not vertical, but circular. I therefore hold that claims 1, 2, and 4 of patent No. 322,309 are not infringed by defendant's machine.

Claim 1 of patent No. 317,663 reads as follows:

"In a mechanical movement, the combination of a rack frame and racks with a pinion provided with a wrist pin, which engages automatically into end slots, to properly guide the pinion with the said racks, substantially as described."

The chief fault I find with this claim is its vagueness. It is necessary to read into it numerous limitations disclosed by the descriptive portions of the specifications to relieve it from being void for uncertainty. However, the fact that the several mechanical contrivances named in the claim, when operated as a combination by extraneous means, accomplish a new and useful result, relieves the claim from the objection that it covers an inoperative contrivance. The action of the slot and wrist pin does serve to "guide the pinion with the racks" at the points where the teeth of the pinion go into and out of mesh with the racks, although I am of the opinion that a more important function of the wrist pin and slot is to control the movement of the rack frame while the pinion is out of mesh with the racks. I hold that the rack frame, racks, pinion, wrist pin, and end slots represent the minimum essentials of the invention, and that to have added any other requirements to the combination—such as means for operating the pinion in its circular or vertical motion—would have furnished others with easy opportunity for avoiding infringement. I hold that the limitation that the racks shall face each other is impliedly a part of the claim, being covered by the clause "substantially as described," and that, even if the latter clause were missing from the claim, the result would be the same, for this limitation is disclosed in the description and drawings, and the claim must be construed thereby. I also hold that the additional function of the slot and wrist pin, of governing the rack frame while the pinion is out of mesh with the racks, need not be stated in the claim, and that the said claim is sufficiently certain to cover the invention actually made by Miehle. The question then arises as to the scope to be given to said claim in view of the prior art. I find that crank motion for the purpose of progressively retarding and accelerating horizontal movement, as an adjunct to reciprocating motion, is not new in the printing art. The Hoe patent, No. 5,200, for converting circular (or crank) motion into horizontal reciprocating motion, discloses this perhaps more satisfactorily than the other exhibits submitted. Miehle was not the first to "divide the crank in two." That was done

by Hoe nearly 50 years ago. The pin or "spur" at either end of the lever in the Hoe machine, when engaged in the notch in the periphery of the pinion, corresponds with the wrist pin in the Miehle machine. Hoe's description states that when the spur engages said notch the movement of the racks in each direction is "finished by what is equivalent to a crank motion to arrest and start gradually the reciprocating parts, and to secure the proper presentation of the cogs of the wheel when they commence to take into the teeth of the rack with which it is to engage." The pin or spur, while engaging the notch, is held firmly therein by a semicircular bearing surface designated in the Hoe patent as a "guard plate." This guard plate corresponds to one of the sides of the slot of complainant's machine, or to one of the bearing shoulders of defendant's machine. The Hoe machine is not the only one in the prior art disclosing the use of a crank reverse, yet it most nearly, in its analogous parts, corresponds to the machines in controversy in this suit. Complainant contends, however, that this Hoe machine was not commercially practicable, and had but little, if any, public use. This contention has foundation, but it is equally true that machines made in accordance with complainant's patent, No. 317,663, if confined strictly to the model introduced in evidence, having the short end slots with stationary sides, would be open to the same criticism. Complainant contends that the Miehle invention is based upon the scotch yoke principle, as distinguished from the pitman and slide-crank movement. No authority has been presented to show that a scotch yoke has other than straight and parallel sides. Patent No. 322,309 covers the true scotch yoke principle, but 317,663 does not. The sides of the slot in the latter have cam outlines, or at most the straight sections are but an inch or two in length, and this straight portion is in such a relative position that the horizontal motion of the rack frame is at its minimum while the wrist pin is engaged by said straight portion. I do find, however, that Miehle was the first to adopt the idea of the pinion, wrist pin, and end slot for the purpose of utilizing the advantages of a crank reverse in reciprocating motion; that this mechanical combination was a distinct advance in the art; and that Miehle is entitled to the benefit of the doctrine of equivalents as to these three devices to the extent of any changes in their relative size, outlines, or proportions. I find in defendant's machine that the fact that the wrist pin (35), called a "stud," has two bearing shoulders (36 and 37), makes it none the less a wrist pin; that the reversing pinion (38) fitted on this wrist pin, and the circular rack (40), are not essential to the working of defendant's machine (although their use possibly aids in the operation thereof); that outer working shoulder (41), and collar (47), of defendant's machine, correspond respectively to the outer and inner sides of the slot of complainant's machine; and that the fact that these two bearing shoulders are not in the same plane makes the space between them through which passes the double-shouldered wrist pin none the less a slot. While defendant's machine may be an improvement on that shown in patent No. 317,663, yet the latter covers a pioneer invention. The principle of the movement was there, and it was to be expected that a more perfect

utilization of the principle would be attained by those skilled in the art who might follow in Miehle's footsteps. I therefore hold that the combination described in claim 1 of patent No. 317,663 is infringed by defendant's machine. I also hold that, in view of the circumstances of the case, the action of the patent office, and the wording of the specifications of patent No. 304,345, granted to Miehle September 2, 1884, the latter patent cannot be held to invalidate patent No. 317,663. Complainant may prepare a decree based on infringement of claim 1 of patent No. 317,663. The bill is dismissed as to patent No. 322,309.

NUTTER et al. v. BROWN et al.

(Circuit Court, D. Massachusetts. July 28, 1899.)

No. 1,038.

PATENTS—CONSTRUCTION AND INFRINGEMENT—BICYCLE BELLS.

Claims 1 and 8 of the Ericson patent, No. 491,012, for a bicycle bell which is sounded by bringing a friction roller into contact with the tire of the wheel, are limited, when construed in connection with the specification, to a device having an oscillatory plate or disk which carries both the striker and the operating mechanism therefor; and these claims are not infringed by the bell of the Barker patent, No. 608,146.

This was a suit in equity by Charles A. Nutter and others against John G. Brown and others for alleged infringement of a patent for a bicycle bell.

James E. Maynadier and William Maynadier, for complainants.
Charles L. Burdett, for defendants.

BROWN, District Judge. This suit is for infringement of letters patent No. 491,012, issued January 31, 1893, to Lewis E. Ericson, for a bicycle bell. The patent describes a bell which is sounded by bringing a friction roller into contact with the tire of the bicycle wheel. This type of bell is not new with the patentee. In the specification the inventor says:

"My invention consists essentially in an oscillatory plate or disk carrying the striker and operating mechanism therefor; said plate or disk, by its movement, being adapted to throw its striker-operating mechanism into and out of engagement with the bicycle wheel, to actuate it or to allow it to remain at rest."

It is also said:

"Carried by the plate is the swinging striker H, adapted to strike the gong."

The drawings clearly show this construction. I am satisfied, therefore, that a device in which the oscillatory plate or disk does not carry both the striker and the operating mechanism therefor does not infringe the complainants' patent.

In the defendants' bell there is no oscillatory plate that carries both the striker and the operating mechanism for the striker. The complainants contend, however, that the defendants' device has what

is an equivalent of the complainants' oscillatory plate, and that because this equivalent carries the operating mechanism of the striker, there is infringement, though the striker itself is mounted upon an independent fixed plate having no oscillatory movement. The defendants' bicycle bell is described in letters patent No. 608,146, to W. H. Barker, dated July 26, 1898; and the differences and resemblances of the two devices are sufficiently illustrated by the drawings of the respective patents.

The complainants rely upon a special construction of claim 1:

"(1) In a bell for bicycles and other velocipedes an oscillatory plate or disk mounted to turn in the rear of the gong, and complementary striking mechanism carried by said plate and adapted by the movement thereof to be thrown into and out of action by contact with and removal from the bicycle or velocipede wheel."

They contend that the words "complementary striking mechanism" are applicable to a mere part of the striking mechanism; and it is urged that otherwise the word "complementary" is of no effect. Upon the complainants' contention the expression "complementary striking mechanism," used in claim 1, may be equivalent to the phrase "operating mechanism for the striker." I do not think this construction tenable. That which is carried by the defendants' oscillatory arm or plate cannot be termed "striking mechanism," since it cannot strike the bell. The mechanism described in claim 1 as carried by the oscillatory plate must be not only complementary mechanism, but complementary striking mechanism. The term "striking mechanism" properly includes the friction-wheel that takes power from the bicycle-tire, the swinging striker, and the parts intermediate. The term "complementary" indicates that the striking mechanism, when added to the bell, and to the oscillatory plate mounted in the rear of the gong, completes the full operative bicycle bell. This is a more natural interpretation of the word "complementary" than that which would hold it to signify a part of the striking mechanism, or that part of the striking mechanism which operates the striker.

The eighth claim is as follows:

"(8) In a bicycle bell, the combination of the oscillating plate or disk with the rear of the gong and provided with a striker having a pivoted handle, the rotating cam operating on the handle to force the striker back, the spring for throwing it forward and the fixed stop for arresting the spring, substantially as and for the purpose herein described."

While it is doubtful whether the language of this claim is sufficiently definite to constitute a valid claim, yet if we concede validity we are obliged to resort to the specification to learn whether it is a bicycle bell that is "provided with a striker having a pivoted handle," or the oscillating plate; and we think that the specification, with its express statement that "my invention consists essentially in an oscillatory plate or disk carrying the striker and operating mechanism therefor," controls the eighth claim as well as the first.

In view of the conclusions, as to the construction of the patent, and the finding that the defendants' device does not infringe the claims when properly construed, I do not deem it necessary to consider the

serious question whether in view of the prior and closely approximating devices the complainants' device is entitled to the protection of letters patent. The bill will be dismissed.

OVERWEIGHT COUNTERBALANCE ELEVATOR CO. v. STANDARD ELEVATOR & MFG. CO. SAME v. EATON & PRINCE CO. et al. SAME v. CRANE ELEVATOR CO. SAME v. J. W. REEDY ELEVATOR MFG. CO.

(Circuit Court, N. D. Illinois, N. D. July 19, 1899.)

PATENTS—EQUITABLE JURISDICTION—PATENT ABOUT TO EXPIRE.

Equity will not take jurisdiction when the patent sued on will expire 10 days after commencement of the suit, though the bill contains a prayer for injunction, preliminary and permanent, and the usual prayer for discovery and accounting, when no motion for a preliminary injunction is made, and the return day of the subpœna is 20 days subsequent to the expiration of the patent, and no special circumstances are shown which would make the accounting so intricate as to render an action at law inadequate. In such case a mere allegation that complainant has no adequate remedy at law will not confer jurisdiction in equity.

These were four suits in equity brought by the Overweight Counterbalance Elevator Company against the Standard Elevator & Manufacturing Company, the Eaton & Prince Company and others, the Crane Elevator Company, and the J. W. Reedy Elevator Manufacturing Company, respectively, for alleged infringement of a patent. The cause was heard on demurrer to the bill for want of equity jurisdiction.

Charles M. Peck and John W. Hill, for complainants.
Brown & Darby, for defendants.

KOHLSAAT, District Judge. The above four equity suits were commenced 10 days prior to the expiration of the patent. The only substantial ground of equity jurisdiction is the prayer for injunction, preliminary and permanent, although the usual prayer for discovery and accounting is contained in each bill. The return day of the subpœna in each case was 20 days subsequent to the expiration of the patent. No motion for a preliminary injunction was made. The authorities are fairly uniform that, under such circumstances, complainants will not be permitted to invoke equity jurisdiction upon the mere pretext that an injunction is desired, when the right is at most a technical one, which would only under most unusual circumstances be enforced by the court. Prior to the modern liberality in proceedings at law, courts of equity were prone to assume jurisdiction upon mere technical pretexts; but nowadays the tendency is to remit the parties to their remedies at law, unless some substantial ground of equity jurisdiction is presented. No special circumstances are shown in this case, over ordinary cases of account, which would make the accounting so intricate as to make a suit at law an inadequate and incomplete remedy, and nothing appears from the bill to show that adequate discovery cannot be had

at law. A mere allegation that complainant has no adequate remedy at law, unaccompanied by allegations of facts supporting the same, will not confer jurisdiction upon a court of equity. Without reviewing the authorities cited, it is sufficient to say that in each of the cases quoted from by either complainant or defendants it was either stated or intimated that the question was one to be left to the sound discretion of the chancellor, such discretion to be exercised in view of the facts of each particular case. The case of Clark v. Wooster, 119 U. S. 322, 7 Sup. Ct. 217, clearly states this doctrine, and the decision in that case has not since been modified. I hold that in the cases at bar no facts are disclosed by the bill which would cause the court to entertain jurisdiction in the first instance other than for the purpose of an injunction; and while there is no rule of this court which would prevent the granting of a preliminary injunction within 10 days after the filing of the bill, provided notice could be given to defendants, yet, under the practice of this court, extraordinary circumstances would have to be shown to cause the court to take such action. No such circumstances are disclosed by the bill. No affidavits were presented showing such circumstances, and no attempt was made to procure an injunction, and under the ordinary proceedings of this court, as a matter of practice, the injunction could not have been obtained. While these considerations are not presented on the face of the bill and demurrer, yet they are circumstances which influence the decision of the court in the exercise of its discretion. Believing that the technical ground of equity jurisdiction invoked was merely a pretext for avoiding an action at law, and there being an adequate remedy at law, the demurrer is sustained and the bill dismissed in each case.

LOUDEN MACHINERY CO. v. MONTGOMERY WARD & CO.

(Circuit Court, N. D. Illinois, N. D. July 19, 1899.)

No. 25,080.

PATENTS—PLEADING—MULTIFARIOUSNESS.

A bill based on a number of patents covering devices which are sold separately, used in various relations, and applicable to numerous uses and combinations, so that no one machine uses them all, and any of the patents might be infringed without infringing any of the others, is practically a bill for relief as to each of the patented articles separately, and is therefore bad for multifariousness.

This was a suit in equity by the Louden Machinery Company against Montgomery Ward & Co. for alleged infringement of certain patents for inventions. The cause was heard on demurrer to the bill on the ground of multifariousness.

A. B. & M. A. McCoid, for complainant.

George P. Merrick and Erwin, Wheeler & Wheeler, for defendants.

KOHLSAAT, District Judge. The bill in this cause is filed to restrain the defendant from making, using, or selling, or causing to

be made, used, or sold, any machine or apparatus or farming implement or hay elevator containing or employing any one or part of any one of the inventions covered by letters patent numbered 271,276, 300,687, 317,109, 345,229, 393,940, 393,941, 397,124, 434,544, 444,546, 481,263, 485,511, 493,276, 539,524, and 610,865. The several patented devices are sold separately, and used in various relations. No one machine uses them all at one time. They consist of that class of articles which are applicable to numerous uses and combinations. Any of the patents might be infringed without infringing any of the others. The bill does not seek to restrain the infringement of any specific combination. Practically the court is asked to grant relief as to each of the patented articles separately. I find that the case as presented does not come within the rule which permits a plurality of patents to be sued upon in one action, where the inventions covered by those patents are embodied in one infringing process, machine, manufacture, or composition of matter. The bill is multifarious, and the demurrer is sustained.

PERRY v. NOYES et al.

(Circuit Court, N. D. Illinois, N. D. July 27, 1899.)

No. 25,175.

PATENTS—EQUITY JURISDICTION—SUIT FOR ROYALTIES.

A court of equity cannot take cognizance of a suit simply for the purpose of construing the meaning or scope of a patent; and if the ultimate object sought is the payment of royalties, and the suit is essentially based on the contract, the bill must be dismissed, though a discovery and an accounting are prayed for in respect to such royalties.

This was a suit in equity by Perry against Noyes and others to recover royalties for the use of a patented invention.

Charles S. Burton, for complainant.

Ludington & Jones, W. Clyde Jones, and Robert H. Parkinson, for defendants.

KOHLSAAT, District Judge. The bill in this suit does not state a case of which a court of equity has cognizance. There is no precedent or authority for a court of equity taking cognizance of a case simply for the purpose of construing the meaning or scope of letters patent. The discovery, accounting, and payment of royalties prayed for would not give a court of equity jurisdiction. Under the facts presented by the bill, complainant's remedy would be at law, even granting his right to bring suit in the federal courts. The ultimate object sought is the payment of royalties. The suit is essentially one on the contract. I do not recognize the distinction sought to be shown by complainant in the wording of the decisions cited. In view of the authorities, I hold that a suit on a contract of license under letters patent is not a suit arising under the patent laws; and, while complainant has ingeniously worded his pleadings so as to fairly disguise the fact, yet I hold that under the facts alleged

in the bill a suit at law must necessarily be based on the contract of license, and the end sought be the collection of royalties under the contract. The bill is dismissed for want of jurisdiction.

BURRELL et al. v. ELGIN CREAMERY CO.

(Circuit Court, N. D. Illinois, N. D. July 27, 1899.)

No. 23,691.

1. PATENTS—ESTOPPEL TO DISPUTE VALIDITY.
   The facts relied on to estop a defendant from denying the validity of a patent must be clearly established, and not rest on mere matters of inference; and, as a general rule, fraud is an essential element of an estoppel in pais.
2. SAME—PROCESS OF TREATING MILK.
   The Lawrence patent, No. 295,180, for a process of treating milk with fatty and other matters, by passing it and them, mingled with gases, through one or more steam ejectors, for separating and mingling the particles, is void because of anticipation and lack of patentable invention.

This was a suit in equity by Burrell and others against the Elgin Creamery Company for alleged infringement of a patent for a process of treating milk with fatty and other matters.

Banning & Banning, for complainants.
E. H. Bottum and Mark Sands, for defendant.

KOHLSAAT, District Judge. Complainants' patent is for an alleged process of treating milk, patent No. 295,180, known as the "Lawrence Process." The claim reads:

"The process of treating milk with fatty and other matters by passing it and them, mingled with gases, through one or more steam ejectors, for separating and mixing the particles, substantially as described, and for the purposes set forth."

A careful reading of the licenses (together with the other evidence on the point) does not warrant the conclusion that the defendant is estopped, either in law or in pais, from denying the validity of the Lawrence patent. The law does not favor estoppels. The facts relied on to work an estoppel must be clearly established, and not matters of inference. As a general rule, fraud is an essential element of an estoppel in pais. None is shown in the case at bar. Undoubtedly, Sands could not resolve himself into a corporation, and by that subterfuge escape the penalty for a breach of contract. If the facts warranted the application of the rule to him, I would apply it to the defendant. But such is not the case. The drawings of the patent show receptacles for at least two ingredients other than milk, but the specifications modify the drawings and claim in such a manner as to call for one or more ingredients besides the milk. This, in my judgment, avoids the contention of defendant that, even though complainants' patent is valid, yet there is no infringement in defendant's process. From the evidence it is clear that the only chemical change effected by complainants' process is that occasioned

by the subjection of the ingredients to heat. The final result is an emulsion. This result is also arrived at under the Freeman patent, No. 136,051, and the Cooley & Burrell patent, No. 264,516. Unquestionably, complainants' process is an improvement upon those of Freeman and Cooley & Burrell, but only in matter of degree. Whatever advantage lies with complainants' process I find to be simply in the mechanical function of the steam ejector in more minutely subdividing the parties than was accomplished by previous methods, and to be a matter of degree. Mr. Justice Grier, in Corning v. Burden, 15 How. 252, says:

"The term 'mechanical' includes every mechanical device or combination of mechanical powers or devices, to perform some function and produce a certain effect or result; but when the result or effect is produced by chemical action, by the operation or application of some element or power of nature, or of one substance to another, such modes, methods, or operations are called 'processes.'"

Mr. Justice Bradley, in Cochrane v. Deener, 94 U. S. 780, defines a process as "an act or series of acts performed upon the subject-matter to be transformed and reduced to a different state or thing." Complainants' method works no transformation not already obtained, though in a less degree, perhaps, by the other patents shown in the record. Any patentable feature there might be (ignoring the prior art) in the passing of milk, together with fat, oil, and steam, through a steam ejector, would necessarily be based upon the chemical effect of heat, derived from the steam, upon the other ingredients; and the application of the heat of steam to milk and fats in the process of making an emulsion is anticipated by the Freeman and Cooley & Burrell patents aforesaid. While the claim does not call for heated gases, yet the descriptive portion of the specifications might be said to confine the claim to such. I therefore hold that the only possible patentable feature of the process is anticipated, and the patent is void. Bill dismissed for want of equity.

UNITED STATES REPAIR & GUARANTY CO. v. ASSYRIAN ASPHALT CO. et al.

(Circuit Court, N. D. Illinois, N. D. June 7, 1899.)

No. 24,534.

1. PATENTS—CONSTRUCTION—MEANING OF "ASPHALT."
   The term "asphalt," used in a patent in reference to pavements, is not limited in meaning to the Trinidad deposit, or to the so-called "American mixture," but includes as well the bituminous paving material used in France and elsewhere, comprising natural rock asphalt and compositions of bitumen and lime or sand particles.
2. SAME—REPAIRING ASPHALT PAVEMENTS.
   The Perkins patent, No. 501,537, for an improvement in the method of repairing asphalt pavements, consisting in subjecting the spot to be repaired to heat until the material is softened, then adding new material, and smoothing and burnishing, was anticipated by the Crochet French patent of June 10, 1880, which describes substantially the same method.

3. SAME—APPARATUS FOR REPAIRING ASPHALT PAVEMENTS.

The Perkins patent, No. 560,599, for an apparatus for repairing asphalt pavements, being for improvements upon the original Perkins apparatus, and consisting in the use of nozzles instead of burners, the employment of horizontal instead of vertical blasts, and the arrangement of the hood so that it may fit tightly upon the pavement, *held* to cover a new and patentable combination, and also *held* infringed.

This was a suit in equity by the United States Repair & Guaranty Company against the Assyrian Asphalt Company and others for alleged infringement of patents for a method and apparatus for repairing asphalt pavements.

Raymond & Omohundro, for complainant.
Leroy D. Thoman and Peirce & Fisher, for defendants.

KOHLSAAT, District Judge. This is a suit for the alleged infringement of letters patent No. 501,537, for an improvement in the method of repairing asphalt pavements, and of patent No. 560,599, for an improvement in an apparatus for repairing asphalt pavements. Apparatus patent No. 542,349 was also included in the bill, but has been withdrawn. In the suit of United States Repair & Guaranty Co. v. Standard Paving Co., reported in 87 Fed. 339, this method patent was held to have been anticipated by the invention of Paul Crochet, covered by letters patent issued June 10, 1880, by the French government. Complainant strongly insists in this suit that the meaning of the term "asphalt" was not properly presented to the court in the Standard Paving Co. Case, but, while there is considerably more evidence in this suit than in that covering this question, yet the contention was evidently forcibly argued before Judge Coxe, as he discusses it at some length in his well-considered opinion. Since the argument before me, the opinion of the court of appeals of the Second circuit, in the Standard Paving Co. Case, 95 Fed. 137, has been handed me by counsel, and I have considered the same. From the evidence in this suit regarding the prior state of the art, and the argument before me, I find that the term "asphalt" is not limited in its meaning to the Trinidad deposit, or to so-called "American mixture," but includes as well the bituminous paving material used in France and elsewhere, comprising natural rock asphalt and compositions of bitumen and lime or sand particles, and that the claims of the Perkins method patent are so broad with reference to the application of heat to the repair of asphalt pavements that they are anticipated by the Crochet patent, and are invalid.

With reference to apparatus patent No. 560,599, I find it to be a combination embodying improvement upon the original Perkins apparatus. These improvements, while not novel in and of themselves (consisting in the use of nozzles instead of burners, the employment of horizontal instead of vertical blasts, and the arrangement of the hood so that it may fit tightly upon the pavement), taken in combination with the best features of the older machines, accomplish a new and useful result, and I hold the entire combination novel and patentable.

In brief of counsel for complainant it is agreed that the bill may be dismissed as to James P. Mallette, against whom no proof has been introduced.

It clearly appears that the device of defendant company contains the combination of complainant's apparatus patent, and counsel may prepare an order of injunction and reference to take account in usual form.

WILLIAM MANN CO. v. HOFFMAN.

(Circuit Court, N. D. Illinois, N. D. June 6, 1899.)

No. 24,683.

PATENTS—INVENTION—PERPETUAL LEDGERS.

The Leslie patent, No. 581,123, for an improvement in temporary binders, commonly known as "perpetual ledgers," is void as to claims 8 to 13, inclusive, for want of patentable invention.

This was a suit in equity by the William Mann Company against one Hoffman for alleged infringement of a patent.

John Howard McElroy, for complainant.

Jones & Strong, Charles D. Sturtevant, and Taylor E. Brown, for defendant.

KOHLSAAT, District Judge. This is a suit for the alleged infringement of letters patent No. 581,123, granted April 20, 1897, for an improvement in temporary binders, commonly known as "perpetual ledgers." The claims relied on by complainant in its pleadings and proofs are Nos. 8 to 13, inclusive. Claims 9, 10, and 11, when taken alone, lack an important ingredient to make the device operative, i. e. some mechanism for holding the backs tightly compressed against the material inserted between them. By reference to the file wrapper and contents, it seems that the examiner considered the specification that the posts, which were rigidly attached to the respective covers, should be "permanently" connected with each other, as essential to the novelty of the combination, in view of the previous Strauss and Morehouse devices. While more than two posts are covered by the terms of these claims, yet the wording implies that each post used should co-operate with corresponding notched portions of the sheets between the covers. The connecting pieces of the locking mechanism are not "posts" in this sense. Patentee Leslie had, more than two years prior to the filing of the application for the patent in suit, constructed a binder, which he styled a "perpetual ledger," in which he combined a locking mechanism similar to the one in suit with the old idea of hollow metal posts attached to one cover, and perforating the sheets between the covers, into which posts fit metal projections, attached to the opposite cover. In claims 8, 12, and 13 of the patent in suit, he combines the same locking mechanism with the Strauss idea of notching the edges of the sheets, to co-operate with posts at either side of the binder covers, so that any sheet may be removed, without disturbing the other sheets, by simply releasing

the pressure of the covers, and yet will be held firmly in place when the sheets are compressed between the covers. Claim 13 covers this combination alone, but in claims 8 and 12 patentee provides, as an addition thereto, that the connecting pieces or posts should be "permanently," but loosely, connected with their co-operating pieces or posts. Complainant insists that the devices for preventing the separation of the posts need not, of necessity, under the claims of the patent, be attached to, or a part of, the posts, which engage the notches in the sheets, but that the claims cover any device, in whatever part of the binder, as a whole, which prevents these posts from separating from each other. Defendant's device, which accomplishes this purpose, is located in the lock.

In view of the prior state of the art, I am convinced that the combination of the old Leslie locking mechanism, with notched edges and posts co-operating therewith, covers nothing more than intelligent mechanical selection, and is but an aggregation, and that the general claim of all possible means for preventing separation of the posts is invalid. The evidence impresses me as establishing the fact that defendant borrowed from Leslie the distinguishing features of his device, and, if I found the Leslie claims valid, I should hold defendant's device an infringement; but, as I am of the opinion that the claims relied upon by complainant are invalid, as lacking the quality of invention, the bill will be dismissed for want of equity.

THOMPSON et al. v. N. T. BUSHNELL CO.

(Circuit Court of Appeals, Second Circuit. May 25, 1899.)

No. 150.

1. PATENTS—DISCLAIMERS.
   A patent claimed a saw for cutting metal, having its teeth hardened to their base line, or line of juncture with the body of the blade, leaving the latter tough and pliable. The court, in an infringement suit, having intimated that the patent could be sustained if limited to hack saws and band saws, the owners of the patent filed a disclaimer as to circular and back saws. *Held*, that this was a proper disclaimer, and did not add any new element to the claim.

2. SAME—TIME OF FILING DISCLAIMER.
   That a patent owner did not file a disclaimer immediately upon the introduction, in an infringement suit, of evidence of anticipation as to certain features of the claims, *held* not unreasonable delay, when the trial court itself did not consider a disclaimer necessary, and the necessity therefor was first suggested by the appellate court, and the disclaimer was filed within a month and a half thereafter.

3. SAME—RIGHT TO INJUNCTION—ACCIDENTAL INFRINGEMENT.
   A patent owner is entitled to protection against one who has in fact made and sold some infringing articles, though the infringement is claimed to have been accidental.

4. SAME—IMPROVEMENT IN METAL SAWS.
   The Fowler patent, No. 328,019, for an improvement in saws for cutting metal and other hard substances, consisting of hard-tempering the teeth and adjacent portion of the saw, only, leaving the rest of the blade tough and pliable, *held* valid, as to both the claims, if limited to the teeth and an

adjacent strip not exceeding the depth of the teeth, to wit, 1/32 of an inch, and also *held* infringed.

Wallace, Circuit Judge, dissenting.

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

This cause comes here upon an appeal from an interlocutory decree of the circuit court, district of Connecticut, granting an injunction against infringement of United States patent to Thaddeus Fowler, No. 328,019 (October 13, 1885), for improvement in saws. 88 Fed. 81. The facts will be found in the opinion.

M. B. Phillipp, for appellant.

John K. Beach, for appellees.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

LACOMBE, Circuit Judge. A brief recital of the litigation which has arisen upon this patent, with references to former opinions, will make it unnecessary to enter into any elaborate analysis of the invention covered by it, since the record now before the court does not present any important variances from that considered on the former appeal. The specification sets forth that the—

"Invention relates to certain novel and useful improvements in saws, but more especially to that class of saws used in cutting metal and other hard substances, and has for its object to furnish a saw which, while hard as to its teeth, so as to insure a durable cutting edge, shall be of such temper as to its body as to prevent its breaking when subjected to sudden cross strain or twist; and, with these ends in view, my invention consists in the article of manufacture hereinafter described, and then specifically designated by the claims."

The specification then proceeds to set forth in detail the patentee's method of construction, and concludes with two claims, as follows:

"(1) As a new article of manufacture, a saw as described, made from tough, pliable steel, and having the teeth thereof hardened to a high temper down to their base line, or line of juncture with the body of the blade, substantially as described. (2) A saw, as described, of a single piece of metal, with a soft back, and high-tempered, hard teeth, as specified."

No litigation seems to have arisen upon the patent until a suit was begun by the present plaintiffs, then the owners, against one Jennings and another, for alleged infringement. That suit came on for final hearing in the circuit court, Southern district of New York; and on May 25, 1894, that court filed an opinion, which will be found reported as Thompson v. Jennings, 66 Fed. 57. A somewhat full synopsis of that opinion will be necessary to a proper appreciation of the precise questions presented upon this appeal. After referring to the four classes of saws to which the patent refers (those used for cutting metal), viz. circular, back, hack, and band saws, the opinion proceeds to a discussion of the prior state of the art. It states that both circular saws and back saws had been made prior to the patent with the cutting teeth and the adjacent strip hard, and the body soft, with the distinct purpose of preventing breakages, and thus strengthening the saw. The same evidence as to circular saws and back saws is in the present record, and also some additional evidence, showing that in the prior art hack saws

had occasionally been treated in the same way,—hard temper put in the cutting teeth and adjacent strip, with the body soft. Although this proof as to hack saws was not in the prior record, the court, in the Jennings Case, held that there "would seem to be no invention in the mere application, for the same purpose, to the toothed edge of [hack and band] saws of the fractional tempering already in use with circular and back saws." The circuit court, in the Jennings Case, however, found that there was invention, novelty, and utility in arranging the relative tempering of the tool so as to confine the hardness to the cutting teeth, with the result of a tool in which bending or twisting produced practically no break at all. "Seemingly," said the circuit court in that case, "this is a desirable result in hack saws, where sideways twists are not measurably prevented by the back clamps, and especially desirable in band saws, where constant sideways twists are inseparable from their operation. And there is no evidence that in either of these varieties of saw was such an arrangement of temper used before the date of the patent." The court might have added, "nor was such an arrangement used even in circular and back saws," for that record did not disclose any prior use of such tempering confined to the teeth. The record in this case at bar contains the testimony taken in the Jennings Case, and also some further testimony as to tempering hack saws. We do not find, however, that such further proof establishes an anticipating use. It was directed to the same end as in the case of circular and back saws, namely, the securing of a tougher saw by having the teeth and the front strip hard, and the back soft. One of the witnesses (Vauthier) testifies to tempering "about the bottom of the teeth," but all the others (and they are all testifying to the same use, in the shops of the American Screw Company) concur in the statement that there was a tempered strip below the teeth. Of the location of the dividing line of temper, Birge says it was "about as near to the teeth as the depth of the teeth"; McIntosh says, "about one-eighth inch below the bottom of the tooth"; Hatten says, "to within a certain depth of the tooth"; Salesses says, "about one-sixteenth of an inch into the saw from the base of the teeth." We do not find in this record, therefore, any more satisfactory evidence than the court found in the Jennings Case that the prior art possessed a metal saw in which the high temper was confined to the teeth. The conclusion expressed in the Jennings Case reads as follows:

"The first claim is for a saw as described, made from tough, pliable steel, and having the teeth thereof hardened to a high temper down to their base line, or line of juncture with the body of the blade, substantially as described. Inasmuch as such a saw appears by the testimony to present features of novelty and utility not found in the prior saws, which were either tempered uniformly, or else so tempered that not only the teeth themselves, but adjacent strips of the blade, were hardened, this first claim is sustained."

The complainants in the Jennings Case contended further that under the second claim they were entitled to cover saws which also have a strip of the metal adjacent to the teeth tempered as they are. The circuit court in that case repudiated any such proposition as broadly stated, finding it to be wholly inconsistent with the pre-

cise language of the specification, and with the necessary restrictions which the prior art imposed. The opinion quoted from the testimony of the complainant's expert:

"The ideal saw of the patent would consist of a tough, soft, pliable body or back, with a series of hard teeth grafted or applied, so to speak, upon one of its edges; each tooth being virtually separated from its neighbors by an infinitesimal joint of soft metal."

Nevertheless, recognizing the practical difficulty of locating the temper line so that it would be mathematically coincident with the bases of the teeth, the court reached the conclusion that the patentee was entitled to include, under the second claim, blades where the temper line extended some unappreciable distance into the blade beyond the bases of some or all of the teeth; such trivial variance being apparently not detrimental to the usefulness of the saw. The distance beyond the bases of the teeth to which such temper might extend without departing from the blade of the patent was not precisely defined; but it was noted that in the prior art the tempered strip below the teeth had been found, in some instances, to be as narrow as the depth of the teeth, from which it was concluded that blades in which the tempered strip was wider than the depth of the teeth were not within the patent. It appearing that the defendants' saws in the Jennings Case had teeth somewhat less than $^{1}/_{32}$ of an inch in depth, and a high temper extending into the blade $^{4}/_{32}$ below the bases of the teeth, the circuit court held that there was no infringement, and dismissed the bill. The Jennings Case was appealed to this court, which on May 28, 1895 (21 C. C. A. 486, 75 Fed. 572), affirmed the decree of the circuit court. No opinion was written, the court stating that it was deemed unnecessary to add anything to the opinion of the circuit judge; but it was intimated that the patent could be sustained only if limited to hack saws and band saws. Acting upon this suggestion, the owners of the patent on July 18, 1895, filed a disclaimer in the patent office "of so much of said claims as covers circular saws and back saws, leaving said claims to include only back saws and hand saws." Thereafter they brought this suit, and upon proof that defendants had sold some saw blades that in the opinion of the court were "either hardened to the base line of the teeth, or so near it that the variance from the distinctive fractional tempering of the patent was trivial," the circuit court entered an interlocutory decree for injunction and accounting, from which decree this appeal is taken.

The appellant contends that the disclaimer is not a proper one, and is therefore void. The theory of this contention is that there is no separate invention, and that, inasmuch as the different kinds of metal saws known to the art are distinguished from each other by their particular kind of mounting, a restriction of the claim to any one kind of saw is practically adding to the claim a new element, to wit, the kind of mounting. Reference is made to Machine Co. v. Searle, 8 C. C. A. 476, 60 Fed. 82, and to Hailes v. Stove Co., 123 U. S. 582, 8 Sup. Ct. 262, where it is held that disclaimer cannot be availed of when "it requires an amended specification or supplemental descrip-

tion to make an altered claim intelligible or relevant." But this cause is not within such ruling. The invention, and the sole invention, of the patent, as was held in the Jennings Case, consisted in locating the temper line practically coincident with the bottoms of the teeth. It is manifest that this location of the temper line might be applied to any one of the four well-known varieties of saw,—circular, back, hack, or band; but, if applied to circular or back saws, it would subserve no useful purpose, and the patent might fairly be held void for want of utility. When applied to hack or band saws, however, it would accomplish "a desirable result," as the circuit court and this court both held. The phraseology of the claims, however, read in connection with the specification, was broad enough to cover all four varieties of the class known as "metal saws," although as to two of them it was useful, and as to the other two useless. Certainly there was an actual, separable invention, and a specification and claim broader than the invention. In view of the fact that the four varieties of this class of saw were well known to the art, and their differences clearly recognized, as the evidence shows, no amended specification or supplemental description is required to make the new claim intelligible, and a disclaimer of circular and back saws leaves the patent in force as to the other varieties of the class.

There is no force in the contention that there has been any unreasonable delay in filing the disclaimer. Defendant insists that the owners of the patent should have realized the necessity of so doing when the evidence as to prior use of a narrow tempered strip in circular saws and back saws was introduced in the Jennings Case (November 28, 1892). But the circuit court in that case, with such evidence before it, did not consider disclaimer necessary. It was only when the decision of this court was filed, May 28, 1895, that the owners of the patent were apprised of the necessity of disclaimer, and they filed it in July, 1895. They certainly acted with reasonable promptness.

As already indicated, the evidence taken in this cause does not differ materially from that which was before this court in the Jennings Case. There was some testimony as to prior use of a tempered strip extending a little below the bases of the teeth in hack saws. The circuit court in Connecticut apparently discredited this proof, but it really makes little difference whether it be accepted or not. There was abundant proof in the Jennings Case that such a strip was a part of the prior art in circular saws and back saws. The circuit court in that case held that such proof made it necessary to restrict the patent to saw blades where the line of temper is practically coincident with the bases of the teeth, or at most does not extend more than their own depth below; and the court of appeals sustained that conclusion. One of the additional witnesses testifies, without much positiveness, that the temper of saw blades was sometimes confined to the teeth; but the other witnesses to the work in the same shops put the line of temper, as did the witnesses in the Jennings Case, who told of circular and back saws, at about, or more than, the depth of the teeth below their bases. To this limit, in our opinion, the

second claim of the patent in suit must be restricted. The first claim covers blades where the temper is mathematically coincident with the base of the teeth. The circuit court of Connecticut, in the decree now appealed from, inserted a proviso that the decree and injunction should not cover band and hack saws where the strip of high temper extended below the base of the teeth more than one-eighth of an inch. In the Jennings Case the circuit court indicated that the proper limit of the width of such strip should be not to exceed the depth of the teeth, to wit, one thirty-second of an inch. We concur in this conclusion, and are of the opinion that the proviso in the decree appealed from should be modified accordingly.

That some few of defendants' blades, out of a package which complainants claimed to infringe, did not disclose any hard temper beyond 1/32 of an inch below the bases of the teeth, is hardly controverted. It is urged that they were accidentally made and unintentionally sold. But the owner of a patent is entitled to protection against the repetition of accidental infringements. Upon this point the judge who heard this cause in the circuit court says, "If, as they now contend, the saw of the patent in suit is impracticable, and the flexibility which results from the invention of the patent in suit is a disadvantage, the defendant will not suffer from the effect of an injunction which will operate to prevent its making such defective saws in the future accidentally or otherwise,"—an expression of opinion in which we fully concur. Except as to a modification of the proviso as indicated above, the decree of the circuit court is affirmed.

WALLACE, Circuit Judge (dissenting). When this cause was previously before this court, it came before us upon an appeal from a decree dismissing the bill because infringement had not been established. It was unnecessary then to pass upon the question of the novelty of the alleged invention, and this court affirmed the decree below without discussing the question. I cannot concur in the opinion of the court now delivered, because I think there was no patentable novelty in Fowler's alleged improvements in saws, as defined by the second claim of the patent. It was well known in the prior art that there were advantages in having the body of a saw soft, and the teeth hardened to a high temper; and circular saws and back saws were made in that way, the object being to prevent breakages of the whole saw from twist or shock, and confine them to the teeth or the hard-tempered adjacent area. The purpose of the present invention was to accomplish the same object so that the teeth can be used until worn away, while the body of the saw will yield to bend or twist, and be sufficiently pliable not to be broken in use. The description of the invention contains two inconsistent statements. The patentee first states that, in constructing the saw, care is to be taken "that the hard temper is confined to the teeth alone, and does not extend at all into the body of the saw." Subsequently he states that, while able to temper the blade so that the temper line may be at any point in the width of the blade, "I preferably fix upon the base line of the teeth as the best and most advantageous point." The first claim is by its

terms confined to a saw of the first description; the second has in its terms no other limitation than that the saw is one "with a soft back, and high-tempered, hard teeth, as specified." In the present case it is sought to make the second claim cover any saw in which the temper line is approximately near the line of juncture between the teeth and blade. There is no evidence to show that in the prior art saws had been made with the temper line located precisely at the juncture between the blade and the teeth. If this peculiar location was beneficial, the patentee was entitled to make it the subject of a patent, and the first claim secures a monopoly of that improvement. A saw having the temper line approximately in that location has no advantages not possessed by the saws having it precisely at that location, except in the imaginations of expert witnesses. It is shown by the proofs in the present record that it was not new to make saws, of the description to which by the disclaimer the patent is now confined, with the temper line near the line of the teeth,—according to the witnesses, "about the bottom of the teeth," or "about 1/16 of an inch from the base of the teeth," or "about as near to the teeth as the depth of the teeth." In my judgment, this evidence negatives any novelty in the second claim. When it becomes necessary to discriminate between a temper line which is within or beyond 1/32 of an inch from the base of the teeth, and make the validity of the patent and the question of infringement depend upon that test, this seems to me to be splitting hairs, and, in view of the prior art, to be sustaining a patent for a mere change of degree, and utterly unwarranted.

As it is not pretended that the first claim of the patent is infringed, there should be a reversal, instead of a modification, of the decree of the court below.

STARRETT v. J. STEVENS ARMS & TOOL CO.

SAME v. ATHOL MACH. CO.

(Circuit Court, D. Massachusetts. July 29, 1899.)

Nos. 1,027 and 1,028.

1. PATENTS—INFRINGEMENT SUITS—LACHES.
   A delay of 10 years by a patent owner after knowledge of an alleged infringement, and correspondence with defendant, who in good faith contended for a construction of the patent avoiding infringement, *held* to be such laches as would bar all relief in equity.[1]

2. SAME—INFRINGEMENT—SPRING CALIPERS AND DIVIDERS.
   The Fay patent, No. 319,215, for spring calipers and dividers, construed as including, as one element of the combination, the fulcrum and socket joint shown in the drawings and described in the specifications, and *held* not infringed.

---

[1] As to laches as a defense in suits for infringement, see note to Taylor v. Spindle Co., 22 C. C. A. 211.

These were two suits in equity, brought by Laroy S. Starrett against the J. Stevens Arms & Tool Company and the Athol Machine Company for alleged infringement of a patent for spring calipers and dividers.

Edward S. Beach, for complainant.
George L. & Reuben L. Roberts, for defendants.

BROWN, District Judge. These suits are for infringement of letters patent No. 319,215, granted June 2, 1885, to Charles P. Fay, for spring calipers and dividers. Both claims are in controversy. They are as follows:

"(1) In a caliper or similar implement, the combination of two legs having, respectively, a fulcrum and socket, as at 3, a curved spring embracing said legs, and an adjusting device for the legs, substantially as described. (2) In a caliper or similar implement, the combination, with the notched legs having fulcrum and socket bearing, of the curved spring having notched ends resting in the notches in the legs, and with an adjusting-screw, substantially as described."

The original claims of the patentee were rejected by the patent office on the ground that they were anticipated by the patent to Hopkins, No. 110,657, dated January 3, 1871. After the rejection of the original claims, the patentee substituted the present claims, using the following language in his communication of the claims to the commissioner of patents:

"The device is quite different from the reference. The legs are not pivoted together, but have a fulcrum bearing on each other, and are held together by the spring. It is believed the present claims point out the differences."

The drawings of the patent in suit clearly show a special form of fulcrum bearing, described in the specification as "consisting of a curved laterally-projecting short arm, 3, on one leg, and a socket or recess in the other leg opposite said arm, adapted to receive the end of the latter." Upon removal of the spring that embraces the legs, the legs have no fast connection. The specification further says:

"The slotted form of the spring at its ends, whereby the ends of the legs are engaged therewith, as above set forth, together with the screw-rod, c, conduces to hold the legs of the caliper in such a manner that they remain in the same plane as they would were they provided with the usual pivoted-joint connection."

Upon such statements of the patentee, each claim of the patent in suit must be construed to include as an element of the combination claimed a fulcrum and socket joint such as is shown in the drawings and described in the specification. The prior patents to Hopkins, No. 110,657, January 3, 1871, and to Wright, No. 69,292, September 24, 1867, also require us to regard this special form of joint as essential to the "knock-down" features referred to by the patentee. The patent, thus construed, is not infringed by the defendants. The calipers manufactured by the defendants do not exhibit this form of fulcrum bearing. They are provided with riveted or closed joints, which securely hold the legs together without a spring, herein differing essentially from the calipers described in the patent, wherein the spring is necessary to hold the calipers together at the joint, and is

essential to the operation of the calipers. The defendants' calipers without a spring are capable of some degree of practical use.

I am further of the opinion that in the case against the Athol Machine Company the complainant has been guilty of such laches as to debar him from all relief. It appears that early in 1888, and 10 years before the filing of the bill, the complainant was aware of the manufacture by the Athol Machine Company of the calipers now complained of, and that a correspondence ensued, in which was discussed the question now raised in this court as to the proper construction of the patent, the complainant at that time claiming that any style of joint, whether put together with a rivet or otherwise, could not be used with a detachable spring without infringement, and the complainant alleging that there was no infringement, saying of its structure:

"It is not possessed of what is generally termed 'knock-down' features, but its legs are jointed in an old and well-known way, and are securely riveted together. It has no such joint as is described either in the patent to Charles P. Fay, No. 319,215, of June 2, 1885, or in the patent of James H. Bullard, No. 335,740,, of February 9, 1886."

From that time until the filing of his bill, on May 25, 1898, nothing was done to pursue his claim against the Athol Machine Company, and no explanation or extenuation of this 10-years delay appears. There was manifest good faith in the claim of the defendant that it was not infringing the complainant's device, and it would operate as a great injustice at this late day to interfere with an established business conducted under an open claim of right for so many years. The laches in this case are such as to debar not merely the claim for profits, but any claim to the interposition of a court of equity. Manufacturing Co. v. Williams, 37 U. S. App. 109, 15 C. C. A. 520, and 68 Fed. 489.

The same defense is made by the J. Stevens Arms & Tool Company, but this defendant does not point out in its brief any parts of the record that sustain its defense of laches. Though I consider the validity of the patent in suit exceedingly doubtful, in view of the patents to Hopkins, No. 110,657, dated January 3, 1871; to Wright, No. 69,292, dated September 24, 1867; to Marshall, No. 175,478, dated March 28, 1876; and to Sanborn, No. 57,977, dated September 11, 1866,—I do not deem it necessary to decide this question, as in my opinion the defendant does not infringe the patent fairly construed. The bills will be dismissed.

MAITLAND v. GRAHAM.

(Circuit Court, N. D. Illinois, N. D. May 23, 1899.)

No. 24,342.

PATENTS—PRELIMINARY INJUNCTION—EFFECT OF PRIOR DECISIONS.

The customary rule, that on an application for a preliminary injunction, as between conflicting decisions of two circuit courts of appeals of other circuits as to the validity or construction of the patent, that one will be followed which was rendered on a final hearing, rather than one on a preliminary motion, does not govern the court where the latter goes equally into the merits, and the court rendering it has previously had the same patent before it in other suits.

Poole & Brown, for complainant.
Cyrus J. Wood, for defendant.

KOHLSAAT, District Judge. The facts and argument in this case do not differ materially from those presented in Pelzer v. Newhall (decided by this court on April 13, 1899) 93 Fed. 684. Complainant insists, however, that this court departed from the customary rule in matters of this kind, in choosing to follow the decision of the court of appeals of the Third circuit upon a preliminary injunction (Manufacturing Co. v. Pelzer, 34 C. C. A. 45, 91 Fed. 665), instead of that of the court of appeals of the Second circuit upon a final hearing on the merits (Maitland v. Manufacturing Co., 29 C. C. A. 607, 86 Fed. 124). In view, however, of the fact that the court of the Third circuit had previously gone into the patent fully (Maitland v. Gibson, 11 C. C. A. 446, 63 Fed. 840), including all its claims, and had given the decision in regard to the first claim which caused the reissue of the patent and the modification of that claim, I feel justified, under the circumstances, in giving its decision as to whether or not this modification of the first claim is valid, as full weight as should be given to the decision of the court of the Second circuit. It appears from both opinions that the courts went equally into the merits of the case as the basis of their respective decisions; and, while not desiring to change the usual rule as contended for by complainants, I am of the opinion that the circumstances of this case take it out of that rule. I do not, therefore, find anything presented in this case which should cause me to change my decision as expressed in Pelzer v. Newhall, as in the latter case the merits were gone into before me very fully, and the merits, as presented, caused me to concur in the line of reasoning of the court of appeals of the Third circuit. The preliminary injunction heretofore entered herein is dissolved.

MILLER v. MAWHINNEY LAST CO.

(Circuit Court, D. Massachusetts. July 28, 1899.)

No. 521.

1. PATENTS—CONSTRUCTION OF CLAIMS.
A patentee, in his specification, described a shoe last divided into two sections, hinged together, "so that the rear section * * * can be swung upward and forward," and the last "readily removed from the boot or shoe, a locking or holding device being provided which holds the heel section rigidly in its operative relation to the forepart section when the last is in use, as I will now proceed to describe and claim." The claim, however, did not mention this holding or locking device. *Held*, that in view of the foregoing language, and of the fact that the last would be inoperative without the locking device, the same must be read into the claim as an element.

2. SAME—SHOE LASTS.
The Smith patent, No. 395,668, for a last designed to be suitable for supporting a boot or shoe upper during various operations of the manufacturing process, and also to admit of the easy removal of the last from the upper without straining the same, construed as to claim 2, and said claim *held* not infringed.

This was a suit in equity by Oliver A. Miller against the Mawhinney Last Company for alleged infringement of a patent for a boot and shoe last.

William Quinby, for complainant.
Edward S. Beach, for defendant.

BROWN, District Judge. This suit is for infringement of letters patent No. 395,668, issued January 1, 1889, to George E. Smith, assignor of one-half to William A. Knipe, for a last, the object of the invention being to provide a last suitable to support a boot or shoe upper during various operations of the manufacturing process, and also to admit of the easy removal of the last from the upper without straining the same. Claims 2 and 3 are relied upon. It seems clear, however, that claim 3 is not infringed by the defendant, since one of its elements—"a holder"—is not contained in defendant's last. Claim 2 is as follows:

"(2) A last divided transversely through its body and bottom into two sections, each having a solid bottom, said sections being connected by a hinge at or near the bottom portion of the last, whereby the rear section is enabled to swing upward and forward, as set forth."

In the specification the inventor says:

"The invention consists in a last divided transversely at or near the shank into two sections, which are hinged together, and are formed so that the rear section, which includes the heels, can be swung upward and forward, and thus virtually shorten the last so that it can be readily removed from the boot or shoe, a locking or holding device being provided which holds the heel section rigidly in its operative relation to the forepart section when the last is in use, as I will now proceed to describe and claim."

Although the second claim makes no express reference to any locking or holding device, I am of the opinion that upon a proper construction of the patent such locking or holding device is necessarily

implied as an element in the second claim,—First, because the inventor has stated in that part of his specification above quoted that such a device was to be provided; and, second, because it appears from the testimony of the inventor himself, as well as from the testimony of experts, that without a locking or holding device the last described by the patentee would be practically inoperative. Nowhere in the specification is there a suggestion that without such a device the last would be of practical utility. On the contrary, the specification assumes throughout that such a device is indispensable. It is true that the complainant says, "I do not limit myself, however, to the use of the block, e, as the means for holding the heel section;" but he supplements this by an exposition of equivalent means, thus enforcing the view that a holding device of some character is essential.

The defendant's last consists of two parts connected by a hinge, and does not contain a locking or holding device or any equivalent therefor. The hinge is not located at the bottom portion of the last, nor near the bottom portion of the last, but at a considerable distance above the bottom portion. In consequence of this higher location of the hinge, and of the intentional provision of broad bearing surfaces below the hinge, the defendant's last is self-sustaining, and capable of enduring all necessary manufacturing operations without the aid of a locking or holding device. The construction adopted by the defendant is nowhere suggested in the patent in suit. Though the complainant insists that the language of claim 2 is applicable to the defendant's last, it is evident that in his specification he has not pointed out or described how practically to construct a last according to claim 2, as construed by him. The inventor regards it as indifferent whether the hinge be located at the bottom or near the bottom; and, if a holder is to be employed, there would result little, if any, practical difference whether the hinge were located as in the drawing, or exactly at the bottom of the last. In the defendant's last the hinge cannot be located at the bottom, since such a location, while permitting the easy removal of the last, would render it inoperative. It is plain that in locating the hinge of the patent in suit, the ready removal of the last was the sole consideration. The location of the defendant's hinge was not determined solely by such consideration, but also by the purpose of dispensing with the third part, namely, the holder. Had the inventor of the patent in suit perceived the importance of this location, and the fact that thereby he could dispense with the holder, it was his duty to point this out clearly, and with such definiteness as to enable others to construct an operative last corresponding with the language of claim 2, construed according to his contention. The complainant urges that the words, "or near the bottom portion of the last," apply to the defendant's structure. I do not think, however, that the defendant's hinge is located "near" the bottom of the last in the sense in which the term "near" was used by the inventor. The defendant has endeavored to locate its hinge at the furthest practical distance from the bottom of the last, being guided by the ingenious percep-

tion that a special and valuable result would follow from such location. Therefore it is proper to say that its hinge is located at a considerable distance from the bottom. In amending the original claim of the patent in suit by the addition of the words "or near," the inventor wrote to the commissioner of patents:

"We submit that it is eminently proper that the words 'or near' be inserted as above indicated, because the pin, which is the center or axis on which the rear section swings, is not located exactly at the bottom of the last, but near the bottom. Hence the desired amendment will simply make the claims correspond with the drawing."

As the inventor states that he uses the words, "or near" in order that the language of the second claim should be verbally descriptive of what was pictorially set forth in the drawings, it is obvious that he did not intend the second claim to describe or suggest a structure so radically different from his own as the defendant's last. Furthermore, if claim 2 were to be considered as claiming broadly a two-part last, with the hinge located solely with a view to the easy removal of the last, and regardless of the ability of the last to endure manufacturing operations without the aid of a holder, it would be void in view of the patent to A. W. Rogers, No. 321,640, dated July 7, 1885. This shows clearly the complainant's construction, "whereby the rear section is enabled to swing upward and forward." Such changes from Rogers as would be necessary in adapting his invention to a solid-bottomed last would be obvious to those of ordinary mechanical skill. If, therefore, we should adopt the complainant's construction of claim 2, and hold that it did not imply a locking device, we should then be obliged to hold the claim void for lack of novelty. The bill will be dismissed.

HOYT v. COMPUTING SCALE CO.

(District Court, S. D. Ohio, W. D. July 22, 1899.)

No. 1,771.

PATENTS—ACTION FOR PENALTIES—PLEADING.

In an action in a federal court in Ohio to recover penalties for marking unpatented articles as patented, plaintiff alleged, in substance, that defendant, on a certain date, and each and every working day thereafter until the commencement of the suit, did "mark upon 1,500 spring-balance computing scales the words and figures, 'Patented Feb. 13—94,' " and asked judgment for $150,000. *Held*, that each marking, or at least the markings done on each day or time of marking, constituted a separate cause of action; and defendant was entitled under the Ohio statute to have the different causes of action separately stated and numbered.

This was an action at law by George B. Hoyt against the Computing Scale Company to recover penalties under the patent laws. The case was heard on a motion by defendant to require plaintiff to separately state and number his causes of action.

W. T. Porter, for plaintiff.

McMahon & McMahon, for defendant.

THOMPSON, District Judge. This cause is submitted to the court upon a motion to require the plaintiff to separately state and number his causes of action. The petition charges, in substance, that the defendant, on the 15th day of June, 1898, and on each and every day thereafter (Sundays and legal holidays excepted) until the commencement of the suit, did, contrary to the statutes of the United States, and for the purpose of deceiving the public, mark upon 1,500 spring-balance computing scales the words and figures, "Patented Feb. 13—94," and asks judgment for $150,000, one-half to be paid to the United States, and the other half to the plaintiff. It will be seen that the plaintiff treats each marking as a separate and distinct offense, and claims a penalty of $100 therefor. If each marking be a separate cause of action or offense, the defendant, under the provisions of section 5061 of the Ohio Revised Statutes, is entitled to have them separately stated and numbered. They may differ in time only, and not in circumstances, but the defendant has a right to know, before being called on to answer, how many scales were marked each day or time of marking. He is entitled to an opportunity to admit or deny the facts constituting each separate cause of action. And, while the plaintiff treats each marking as a separate cause of action, yet it is a question whether the continuous markings of a day or given time would constitute more than a single cause of action,—a question which I do not now decide, although I am inclined to the opinion that it would constitute but one cause of action. I think it but fair to the defendant that he should be advised by the petition whether each marking is or is not distinct from the others in point of time and circumstances. Whatever discretion a federal court may be vested with to depart from the state practice where the due enforcement of the laws of the United States requires it, that discretion cannot be invoked in such a case as this, not only because the enforcement of the rule prescribed by section 5061 of the Ohio Revised Statutes is necessary to the protection of the rights of the defendant, but, as is said in Taft v. Engraving Co., 38 Fed. 29:

"The plaintiff is not suing for the value of his services, or for injury to his property, but simply to make profit to himself out of the wrongs of others; and when a man comes in as an informer, and in that attitude alone asks to have a half million dollars put into his pocket, the courts will never strain a point to make his labors light or his recovery easy."

The motion, therefore, will be sustained.

THE ESCANABA.

(District Court, N. D. Illinois, N. D. July 19, 1899.)

MARITIME LIENS—PRIORITY—CLAIMS FOR TORTS OF MASTER.

The conversion by the master of goods shipped on a vessel constitutes a tort, and a claim therefor against the vessel is entitled to priority over liens for supplies furnished prior to the tort.[1]

On Distribution of Proceeds of the Escanaba after Sale in Admiralty.

Roger M. Lee and Harvey Lantz, for libelant.
C. E. Kremer, for respondent.

KOHLSAAT, District Judge. The only question to be decided herein is as to the priority of the claims of shippers for loss of goods by reason of the tort of the master, and of liens for supplies furnished prior to the happening of the tort. In this case the master converted the goods of intervening petitioners. I think there is no question but that this constituted a tort. I do not appreciate the contention that the action constituted a "quasi" tort, and not such a tort as is covered by the decision in The John G. Stevens, 170 U. S. 124, 18 Sup. Ct. 544. I am of the opinion that the distinction is too technical to be recognized as differentiating the principle laid down in the case of The John G. Stevens from the case at bar, although there are decisions recognizing the distinction in some connections. In view of the decisions in the following cases, to wit, The Quickstep, 9 Wall. 665; Norwich Co. v. Wright, 13 Wall. 122; The M. Vandercook, 24 Fed. 472; The Daisy Day, 40 Fed. 540; and The John G. Stevens, 170 U. S. 124, 18 Sup. Ct. 544,—I have no choice but to hold that the interveners, whose goods were tortiously converted by the master, should have their claims for the goods thus converted given preference over liens for supplies furnished prior to the tort. It is so ordered.

[1] As to liens for maritime torts, see note to The Anaces, 34 C. C. A. 565.

THE TRANSFER NO. 8.

THE R. M. WATERMAN.

(Circuit Court of Appeals, Second Circuit. July 18, 1899.)

Nos. 151, 152.

1. COLLISION—FAILURE TO GIVE PROPER SIGNALS—STEAMERS NEARING BEND IN CHANNEL.

Inspectors' rule No. 5, which requires steamers when nearing a short bend or curve in the channel, where from the height of the banks or other cause a steamer approaching from the opposite direction cannot be seen from a distance of half a mile, to signal upon arriving within half a mile of such curve or bend, as literally construed, is imperative on every steamer "nearing" such short curve or bend, whatever may be her intention as to future navigation after she shall have reached it, and the rule applies to a steamer passing up the west channel of the Harlem river on approaching Horn's Hook, though bound up the Sound.

2. SAME—DETERMINING FAULT—MANEUVERS OF VESSEL IN DANGEROUS SITUATION.

Where the failure of a steamer to give the required signals on nearing a bend in the channel which hid her from a vessel approaching from the other direction was plainly the cause of the two vessels being placed in a dangerous situation, and a collision resulted, the maneuvers of the other vessel in attempting to avert the collision will not be severely scrutinized, for the purpose of placing upon her a part of the responsibility.

Appeal from the District Court of the United States for the Southern District of New York.

These causes come here upon appeals from decrees of the district court, Southern district of New York, holding the tugs Transfer No. 8 and R. M. Waterman both in fault for a collision that took place on December 7, 1896, near the mouth of the Harlem river, off Horn's Hook, at Ninety-Sixth street, by which the barge Maine, belonging to the libelant Philadelphia & Reading Railroad Company was damaged and sunk, and the Waterman sustained damages to her propeller, etc. The Maine was the starboard boat of four barges that were going up the East river in a strong flood, in tow of the Waterman, on a hawser of about 30 fathoms. The facts attending the collision are fully set forth in the opinion of the district judge as follows:

"The tide at Horn's Hook was running probably from three to four knots, and the speed of the boats was about four knots more. They went up in about mid-channel on the westerly side of Blackwell's Island, and, when off Eighty-Fourth street, Transfer No. 8 was seen emerging from behind the point at Horn's Hook, heading in a southerly direction diagonally across the river, on a line about parallel with a line drawn from Horn's Hook to Blackwell's Island light, and about 200 feet above that line. Transfer No. 8 had two car floats in tow, one on each side of her, 247 feet long, and each loaded with cars. She had come down the Harlem river, and rounded to port across the stream, in order to go to the easterly side of Blackwell's Island, where the flood tide was not so strong as on the westerly side. A little to the starboard of the tug Waterman and her tow was the tug Genesta, coming up with a schooner in tow on a hawser about 30 fathoms long, and overtaking the Waterman. When No. 8 first became visible, the tug Genesta was probably between the Waterman and her tow, and about 30 feet to starboard of the tow. She was gaining rapidly upon the Waterman, and, as soon as No. 8 became visible, she gave her a signal of one blast, indicating that she would go ahead of No. 8. The pilot of No. 8 claims that he had just previously given a signal of two whistles,

designed for the Waterman; that when the Genesta's signal was heard, he was giving signals to his engineer to slow and stop, because he knew that the Genesta must go ahead of him; that the Genesta very soon afterwards gave a second signal of one whistle, when a little ahead of the Waterman, which was heard by No. 8, and was immediately answered by the latter with one whistle; that No. 8 soon after gave two whistles to the Waterman; and that by these signals it was intended to bring No. 8 to a stop, and that the Genesta with her tow should pass in front of No. 8, while the Waterman with her tow should go astern of her. No. 8 came to a stop when a little more than half way across the channel towards Blackwell's Island. The Genesta and her tow passed ahead and within 25 feet of her, but the Waterman's tow, not being far enough to the westward to clear, the stem of the barge Maine struck the starboard side of No. 8's starboard float about 18 feet from her stern." 82 Fed. 478.

Henry W. Taft, for the Transfer.
Philip Carpenter, for the R. M. Waterman.

Before WALLACE and LACOMBE, Circuit Judges, and THOMAS, District Judge.

LACOMBE, Circuit Judge (after stating the facts as above). The district judge held the Waterman in fault for various acts and omissions, which need not all be discussed, inasmuch as we are satisfied that one of them—viz. her failure to give proper signals—was the proximate and sufficient cause of the catastrophe. The conditions of navigation at this part of the river are accurately and clearly set forth by the district judge:

"In going past Blackwell's Island by the westerly channel, the Harlem river diverges five points to port around that point. The direct channel to the Sound, through Hell Gate, diverges about half a point to starboard. There is a large and constant traffic up and down the Harlem river around the Hook, and a still larger traffic past the Hook to the eastward, so that these lines of traffic cross each other, when boats on the flood tide go down as usual to the eastward of Blackwell's Island. The channel between Horn's Hook off Eighty-Ninth street and Mill Rock to the eastward, forming the north of the Harlem river, is less than 1,200 feet wide; and between Mill Rock and the flats off Ninety-Third street there is only about 600 feet of available breadth of water. Vessels coming down the Harlem river in the middle of the channel, heading, * * * as did No. 8, for the line of Avenue B., cannot be seen by vessels coming up in mid-channel below the Hook [and, we may add, cannot see the upcoming vessel] until they are so near to each other that on a strong flood tide there is not reasonable and sufficient time and space for the observation and maneuvers necessary to avoid collision with any certainty, if signals are not exchanged before the vessels themselves are seen."

The witnesses from Transfer No. 8 testify she gave a long blast of her whistle somewhere between Ninety-Second and Ninety-Sixth streets, and the district judge credited their testimony, although he found that this whistle was not heard by those on the Waterman. We see no reason to discredit this evidence from Transfer No. 8, and concur in the conclusion that she sounded a bend-warning whistle at the proper time. Concededly no such whistle was blown by the Waterman, or, indeed, by the Genesta. They did not answer the Transfer's warning signal, because they did not hear it, and they did not sound any warning signal of their own, because they assumed that they were not under any obligation to do so, inasmuch as, although

nearing a bend, where the height of the bank cut off all view of an approaching vessel, they did not intend to make any turn themselves when they reached the bend.

Inspectors' rule No. 5 provides as follows:

"Whenever a steamer is nearing a short bend or curve in the channel, where, from the height of the banks or other cause, a steamer approaching from the opposite direction cannot be seen for a distance of half a mile, the pilot of such steamer, when he shall have arrived within half a mile of such curve or bend, shall give a signal by one long blast of the steam whistle, which signal shall be answered by a similar blast, given by the pilot of any approaching steamer that may be within hearing. Should such signal be so answered by a steamer upon the farther side of such bend, then the usual signal for meeting and passing shall immediately be given and answered; but, if the first alarm signal of such pilot be not answered, he is to consider the channel clear and govern himself accordingly."

This rule, literally construed, is imperative upon every steamer "nearing" such short bend or curve, whatever may be her own intention as to future navigation after she shall have reached it. It makes no difference whether she intends to curve around the bend, or to anchor off it, or just short of it, or to continue on in a straight line beyond it; if, after she has reached a point half a mile away from it, she intends to continue her movement, so as to bring herself nearer to it, she is "nearing" such bend, and the language of the rule requires her to sound the bend-warning whistle. And it seems to us that the spirit of the rule would require such an interpretation, even if the language were obscure. The signal, which gives warning that there is a hidden vessel nearing the bend, is manifestly designed to notify the other vessel approaching from an opposite direction, not only that if her own approach is slow she may suddenly find another vessel in her water, but also that if her own approach is swift she is likely, on passing the bend, to find herself suddenly in close proximity to another vessel. As the district judge says: "The reasons for the inspectors' rule are almost equally applicable to vessels going on either side of the Hook;" and in our opinion the language of the rule makes the giving of a bend-warning signal by boats approaching such bend from either side imperative, no matter what may be their future course after reaching the bend. We conclude, therefore, that the Waterman was clearly in fault for not giving such signal when nearing Horn's Hook, and are satisfied that her failure to do so was the proximate and efficient cause of the collision. By reason of her failure to give timely warning of her approach, the Transfer, incumbered with two heavy car floats, ran out of the shelter of the Hook into the full force of the flood tide, with Mill Rock to leeward, and found herself in the presence of two ascending tugs and tows on her starboard hand, avoidance of which, under the circumstances, would prove to be a most difficult matter.

The district court held the Transfer No. 8 also in fault, because she kept so long near to the New York shore. This finding is a corollary to the conclusion of that court that the inspectors' rule did not require a bend-warning signal from vessels approaching the bend, bound up the Sound. Of course if no such signals from them

can be counted on, the vessel bound down should keep far enough out in the river to see what perils lie ahead of her, since she is not to hear of them. But if the inspectors' rule be obeyed,—and the Transfer was entitled to assume that it would be,—she might have held her course under the shelter of the Hook, with the assurance that when she left it she would find no approaching vessel within half a mile. Inasmuch as we hold that the rule required a bend-warning signal from the upcoming tugs, we must acquit the Transfer of fault in navigating under the assumption that there was nothing below the bend within a half a mile.

The district court further held the Transfer in fault for undertaking the dangerous maneuver of passing ahead of the Waterman and behind the Genesta. We do not find it necessary to enter into any elaborate discussion of the navigation of the vessels after they came in sight of each other. This may not be a case for the application of the rule in extremis, but the fault of the Waterman is so glaring, and its consequences precipitated a situation involving such difficulties, that we are not inclined to be severely critical of the maneuvers by which the Transfer undertook to escape from it. We fully concur with the finding of the district judge that at this part of the river, "on a strong flood tide, there is not reasonable and sufficient time and space for the * * * maneuvers necessary to avoid collision with any certainty, if signals are not exchanged before the vessels themselves are seen." The responsibility for this collision rests upon the vessel which, by failure to give notice of her own approach, deprived the other of the "reasonable and sufficient time and space" which it needed properly to carry out the obligations laid upon it by the starboard-hand rule.

The decrees of the district court are reversed, with costs to the claimant, owner of the Transfer, against the Waterman in the first suit, and against libelant in the second suit, and causes remitted, with instructions to decree in the first suit in favor of libelant against the Waterman, with interest and costs, and to dismiss the libel against Transfer No. 8, with costs, and in the second suit to dismiss the libel, with costs.

In re BRANT.

(Circuit Court, S. D. California. August 28, 1899.)

No. 722.

RECEIVERS—JURISDICTION TO APPOINT—EX PARTE APPLICATION.

A court has no jurisdiction to appoint a receiver for a corporation, either original or ancillary, except in a pending suit, and an ex parte application for appointment as an ancillary receiver will not be entertained.

This was a petition by Henry Brant for appointment as ancillary receiver for the American Building, Loan & Investment Society.

Holdridge O. Collins (Lorin C. Collins, Jr., and William Meade Fletcher, of counsel), for petitioner.

Graves, O'Melveny & Shankland, opposed.

WELLBORN, District Judge. In this matter the petition is entitled "Marcus M. Towle, Complainant, vs. American Building, Loan & Investment Society, Defendant," indicating the pendency here of a suit in equity. No such suit, however, has been brought in this court, and said title is erroneously employed. There is no defendant to the proceeding, but it is purely ex parte, and for this reason, namely, because no suit in equity is pending here, I hold that this court is without jurisdiction to appoint a receiver of any sort, either ancillary or original. 2 Daniell, Ch. Pl. & Prac. (6th Ed.) p. 1734, notes 10, a; Smith, Rec. p. 35, § 13; 2 Beach, Mod. Eq. Prac. § 721, note 6; Mercantile Trust Co. v. Kanawha & O. Ry. Co., 39 Fed. 337; High, Rec. §§ 83, 84; Baker v. Backus' Adm'r, 32 Ill. 96; Pressley v. Harrison, 102 Ind. 19, 1 N. E. 188; Jones v. Schall, 45 Mich. 380, 8 N. W. 68; Bank v. Circuit Judge, 43 Mich. 296, 5 N. W. 627; Guy v. Doak, 47 Kan. 236, 27 Pac. 968.

In 2 Daniell, Ch. Pl. & Prac. (6th Ed.) p. 1734, the text is as follows:

"Except in the cases of infants, the court has no jurisdiction to appoint a receiver, unless a suit is pending."

In 2 Beach, Mod. Eq. Prac. § 721, the text is as follows:

"Except in the cases of lunatics or infants, whose position as wards of the court gives them the right to apply by petition, or in cases similarly situated, it is a prerequisite to the power of a judge to act upon the application for a receiver that there should be a case pending in which the receiver is to be appointed."

In Baker v. Backus' Adm'r, supra, the court says:

"This power to appoint a receiver is most usually called into action either to prevent fraud, save the subject of litigation from material injury, or rescue it from threatened destruction. A receiver is defined to be an indifferent person between the parties, appointed by the court, and on behalf of all parties, and not of the complainant or one defendant only, to receive the thing or property in litigation, pending the suit. Edward, Rec. 3. In the English chancery it is held that a suit must be pending, save in peculiar cases, such as infancy and lunacy, before a receiver will be appointed. Anon., 1 Atk. 578; Ex parte Whitfield, 2 Atk. 315. Lord Hardwicke, in the last case, says expressly: 'The court has not a jurisdiction to appoint a receiver unless a cause was depending. The jurisdiction which a court exercises with respect to idiots and lunatics is a particular one.' The necessary implication from all these is, a suit being necessary, and the receiver appointed for all the parties to it, that he whose property is to be taken from him and placed in the power of a re-

ceiver should be a party to the pending suit. We think it is indispensable he should be a party, that he may resist the application, the granting of which may work to him irretrievable injury."

In Pressley v. Harrison, supra, the court says:

"If an immediate necessity therefor is shown to exist, the application for a receiver may be entertained when the action is commenced, which, under the rule here, is when process is issued, or an appearance to the action is entered, in the manner recognized; but, as the appointment of a receiver in any case is a provisional remedy, auxiliary to the action or the relief prayed for therein, neither the court in term nor judge in vacation can acquire jurisdiction to appoint a receiver until there is an action pending. The application for a receiver is an interlocutory proceeding in a pending suit."

In Jones v. Schall, supra, the court says:

"This appointment of a receiver, even if one could have been appointed at any stage of the case, was absolutely void, as the bill had not been filed at the time."

In Bank v. Circuit Judge, supra, Judge Cooley, delivering the opinion of the court, says:

"The order appointing a receiver was void, for the reason that it was made when there was no suit pending."

In Guy v. Doak, supra, the court says:

"So it seems, from a general consideration of these cases, that, however much parties to the action may participate in the proceedings, and recognize for the time being an acting receiver, they still, at any stage of the action, may take advantage of the fact that the court had no power or jurisdiction to appoint a receiver at any time before the action was actually begun. * * * We have been unable to find a single reported case anywhere that sustains a court in the appointment of a receiver before an action is pending, but, on the contrary, the text-books and reports are all against the existence of such a power."

The foregoing extracts show that the conclusion which I have reached as to lack of jurisdiction in this matter is supported by an unbroken line of authorities, and, after a full review of them, I do not see how the courts could have held otherwise; indeed, the contention that, because receiverships are matters of equitable cognizance, a receiver can be appointed through an ex parte procedure, and without suit, in cases other than the exceptional ones above instanced, now seems to me as untenable as would be the contention that a superior court, because of its general jurisdiction, has power to render judgment against the maker of a promissory note, without process or action against such maker, and on the ex parte application of the holder. The petition of Henry Brant will be denied, and the order of December 21, 1896, appointing W. K. Sullivan receiver, will be vacated.

SULLIVAN v. SWAIN et al.

(Circuit Court, S. D. California. August 28, 1899.)

No. 726.

JURISDICTION OF FEDERAL COURTS—AMOUNT INVOLVED—SUIT BY RECEIVER OF ANOTHER FEDERAL COURT.

To confer jurisdiction on a federal court of a suit brought by a receiver of another court, though by reason of the fact that he is the receiver of a federal court the suit be regarded as one arising under the laws of the United States, it is essential that it should involve the jurisdictional amount of $2,000.

This was a suit for foreclosure, brought by William K. Sullivan, as receiver of the American Building, Loan & Investment Society, against Herbert Swain and others. On motion to dismiss for want of jurisdiction.

Holdridge O. Collins (Lorin C. Collins, Jr., and William Meade Fletcher, of counsel), for complainant.

Grave, O'Melveny & Shankland, for defendants.

WELLBORN, District Judge. The original complainant, William K. Sullivan, who, on his ex parte petition, was appointed an ancillary receiver by this court prior to the institution of said suit, having since died, and the petition of one Henry Brant to be appointed successor to said Sullivan having been denied by an order this day entered in Re Brant (No. 722) 96 Fed. 257, for lack of jurisdiction, and the appointment of said Sullivan having, for the same reason, in the same order, been vacated, it follows that, in determining the question of jurisdiction in the pending suit, the suit must be considered as an independent suit for foreclosure, brought by a foreign receiver, and without any reference whatever to said appointment. Under these circumstances it seems to me that there is no escape from defendants' contention that, inasmuch as the matter in dispute is less than $2,000, this court is without jurisdiction. If it be conceded that the suit is one arising under the constitution and laws of the United States because brought by the receiver of a federal court, still the other requisite to federal jurisdiction, namely, that the amount involved must exceed $2,000, is lacking. It is true that where a receiver, in administering his trust, brings an action in the court which appointed him, such court has jurisdiction of the action without regard to the amount involved or the citizenship of the parties (White v. Ewing, 159 U. S. 36, 15 Sup. Ct. 1018; Lanning v. Osborne, 76 Fed. 319); but in such a case the jurisdiction is upheld on the ground that the action is but auxiliary to—indeed a part of—the original suit, in which the receiver was appointed. This ground of jurisdiction, however, manifestly does not exist where the receiver sues in a jurisdiction other than that of his appointment. The suit will be dismissed for lack of jurisdiction.

UNITED STATES v. JACOBUS.

JACOBUS v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. July 18, 1899.)

Nos. 117, 118.

APPEAL—ACTION AGAINST UNITED STATES—AMENDMENT OF STATUTE.

Act June 27, 1898, c. 503, amending section 2 of the judiciary act of 1887, which confers on circuit and district courts jurisdiction of suits on claims against the United States, by providing that such jurisdiction shall not extend to cases brought to recover fees, salary, or compensation for official services of officers of the United States, does not affect the provisions of the act amended relating to appeals, and a judgment rendered by a circuit court prior to the passage of the amendatory act, and which is therefore unaffected thereby, may be reviewed on appeal by either party, the circuit court retaining jurisdiction to at least vacate its judgment if held erroneous.

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

These are cross writs of error to review a judgment of the circuit court, Southern district of New York, in favor of John W. Jacobus, heretofore United States marshal of said district, to recover fees or compensation for official services as an officer of the United States. The action was brought under the so-called "Tucker Act" of March 3, 1887, conferring jurisdiction of such claims upon the circuit court. The phraseology of the act is as follows: "Sec. 2. That * * * the circuit courts of the United States shall have [concurrent] jurisdiction [with the court of claims] in all cases where the amount of such claim exceeds $1,000 and does not exceed $10,000." The action was begun in January, 1896. Judgment of the circuit court was entered May 17, 1898, and writs of error sued out in November, 1898. 87 Fed. 99. On June 27, 1898, there was passed an act (chapter 503 of 1898) which amended the second section of the act of 1887 by adding at the end thereof the following: "The jurisdiction hereby conferred upon the said circuit * * * courts shall not extend to cases brought to recover fees, salary, or compensation for official services of officers of the United States, or brought for such purpose by persons claiming as such officers or as assignees or legal representatives thereof." In no other respect is the act of 1887 amended. The United States have moved to dismiss the writ of error on the ground that, inasmuch as it was sued out after the amendment above quoted, this court is without jurisdiction to proceed further in the cause.

D. Frank Lloyd, for the United States.

Henry L. Stimson, for Jacobus.

Before WALLACE and LACOMBE, Circuit Judges, and THOMAS, District Judge.

PER CURIAM. In support of the proposition that upon the repeal of the jurisdiction conferred upon the circuit court to adjudicate such claims in the first instance the jurisdiction of this court to review judgments of the circuit court entered before amendment also determines, several authorities are cited, which do not seem to us, when closely analyzed, to support the proposition. Before discussing them, it may be well to call attention to certain other provisions of the act of 1887. The fourth section provides that:

"The jurisdiction of the respective courts of the United States proceeding under this act, including the right of exception and appeal, shall be governed

by the law now in force, in so far as the same is applicable and not inconsistent with the provisions of this act; and the course of procedure shall be in accordance with the established rules of said respective courts, and of such additions and modifications thereof as said courts may adopt."

Section 9 provides that:

"The plaintiff or the United States shall have the same rights of appeal or writ of error as are now reserved in the statutes of the United States in that behalf made, and upon the conditions and limitations therein contained. The modes of procedure in claiming or perfecting an appeal or writ of error shall conform in all respects, and as near as may be, to the statutes and rules of court governing appeals and writs of error in like causes."

In section 10 there is a clause providing that:

"The attorney general shall determine and direct whether an appeal or writ of error shall be taken or not; and when so directed the district attorney shall cause an appeal or writ of error to be perfected in accordance with the terms of the statutes and rules of practice governing the same."

The same section contains a proviso that:

"No appeal or writ of error shall be allowed after six months from the judgment or decree in such suit."

It seems to be well-settled law—indeed, the district attorney so conceded upon the argument—that, when a final determination by judgment or sentence has been reached before repeal of a statute, such repeal does not affect the judgment. A distinction has been drawn in cases where appeal suspends the judgment, as in admiralty, but the general principle is abundantly supported by authority. See the numerous cases cited in 23 Am. & Eng. Enc. Law, pp. 513, 514. It will be observed that the Tucker act of 1887 most carefully secures both the claimant and the United States against having to submit their controversies to the arbitrament of a single judge. The right of appeal is expressly given, and scrupulously regulated. Under these circumstances, a court should be slow to spell out a repeal by implication of such important provisions so clearly expressed, when the result of such repeal would be to leave the decision of the court of first instance standing as res adjudicata between the parties, with no machinery for reviewing it, or for re-examining into its justice or propriety. As was said before, there has been no express repeal of any of these provisions securing to both sides a right of review.

It may further be noted that the doctrine that a repeal of a statute, the repealing act being silent as to pending cases, takes away all existing rights of action thereunder, even though in suit at the time, was first established where the actions under consideration were brought for penalties or forfeitures. Of this rule Judge Deady, in Eastman v. Clackamas Co., 32 Fed. 33, says that it "is an arbitrary one, and never had anything to commend it, except in the United States an undue sympathy for wrongdoers, and in England an early prejudice among common-law judges against 'statute-made law.'" A more liberal policy was recognized by the federal government when, by the act of February 25, 1871 (now in Rev. St. § 13), it was declared that "the repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred un-

der such statute, unless the repealing act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability." It would seem, then, that this court should not, by dismissing these writs of error, deprive either side of any right given by the act of 1887, and not abrogated by express words of repeal, unless constrained to such a conclusion by controlling authority.

The several authorities cited in support of the motion to dismiss may next be considered. In Hunt v. Palao, 4 How. 589, the territorial court of appeals of Florida had rendered judgment in February, 1844. Florida was admitted as a state March 4, 1845, and had passed a law directing the record and papers of the territorial court to be placed in the custody of the supreme court of the state for safe-keeping. In January, 1846, application was made to the United States supreme court for a writ of error to bring up for revision the record and proceedings of the late territorial court. It was refused. The court held that it must exercise its appellate power in the manner prescribed by the statutes; that under these a writ of error "must be directed to the court which holds the proceedings as part of its own records, and exercises judicial power over them." "But," says Taney, C. J., for the court, "the court which rendered the judgment in the case before us is no longer in existence; the proceedings are not in the possession of any court authorized to exercise judicial power over them, but are in the possession of an officer of another court, merely for the purpose of safe custody. * * * If * * * the judgment of the territorial court were found to be erroneous, and reversed, still there is no tribunal to which we are authorized to send a mandate to proceed further in the case, or to carry into execution the judgment which this court may pronounce." In the case at bar the circuit court is still in existence, still in possession of its records, and, if the right of appeal is not abrogated by the later statute, still possesses sufficient judicial power over them to obey the mandate of this court to the extent at least of vacating an erroneous judgment. Benner v. Porter, 9 How. 235, does not apply. Libelant in that case began suit in a territorial court of first instance after the admission of Florida as a state had abrogated all jurisdiction of the territorial courts. In McNulty v. Batty, 10 How. 72, a writ of error had been taken to the United States supreme court from the territorial court of Wisconsin, and was pending in that court when Wisconsin was admitted as a state. The court calls attention to the fact that its appellate power in such causes does not depend upon the judiciary act of 1789, but upon laws regulating the judicial proceedings of the territory. "These [laws] necessarily ceased with the termination of the territorial government. * * * The writ of error, therefore, fell with the abrogation of the statute upon which it was founded." It is impossible from the statement of facts in Insurance Co. v. Ritchie, 5 Wall. 541, to determine whether the statute conferring jurisdiction upon the circuit court was repealed before or after judgment in that court. The syllabus would seem to indicate that repeal was before judgment. There was no statute giving, in terms, a right of appeal in causes like the

one then before the court, and remaining unaffected by any express repeal. In Assessors v. Osbornes, 9 Wall. 567, the repealing act deprived the circuit court of jurisdiction before it had rendered judgment. The supreme court reversed the judgment, and remanded the cause, with instructions to dismiss the case for want of jurisdiction. No apprehended difficulty as to having its mandate executed seems to have deterred the supreme court from directing the circuit court to reverse its judgment. In Re Hall, 167 U. S. 38, 17 Sup. Ct. 723, the repealing act expressly provided that the original act conferring jurisdiction "be, and the same is hereby, repealed, and all proceedings pending shall be vacated, and no judgment heretofore rendered in pursuance of said act shall be paid." The distinction between this act and the one now before us is quite manifest. In U. S. v. McCrory, 33 C. C. A. 515, 91 Fed. 295, the court of appeals, Fifth circuit, upon the authority of the case last cited, abated a writ of error sued out under circumstances in all respects the same as in the case at bar. The court admits that the jurisdiction of the circuit court of appeals to review, affirm, modify, or reverse the final decision of the court below was not in terms or directly taken away by the amending statute, but, upon the authority of In re Hall, expresses doubt as to the survival of any power to enforce whatever judgment the appellate court might render.

The decisions above set forth do not seem to be controlling of the case at bar, while in U. S. v. Boisdore's Heirs, 8 How. 113, will be found authority for entertaining and disposing of these writs of error. The facts in the case last cited are these: In 1824 congress passed an act enabling the claimants to lands within the limits of the state of Missouri and territory of Arkansas to institute proceedings in United States district courts to try the validity of their claims. The second section provided that the party against whom the judgment or decree of the district court may be finally given shall be entitled to an appeal within one year from the time of its rendition, to the United States supreme court. The act further provided that any claim which shall not be brought by petition before the said district courts within two years from the passing of the act, or which, after being brought before said courts, shall, on account of the neglect or delay of the claimant, not be prosecuted to a final decision within three years, shall be forever barred. In 1844 congress passed another act, providing, as to certain lands in Missouri, Mississippi, and other states, that "so much of the expired act of 1824 as related to the state of Missouri be, and is hereby, revived and re-enacted and continued in force for the term of five years, and no longer." The Boisdore proceeding was begun in due time, prosecuted to final hearing in the district court within the three years, and appeal was taken within a year from the time of rendition of the judgment. The appeal was pending and unheard on June 17, 1849, when the five-year term provided for in the act of 1844 expired. Thereupon, at the January term in 1850, motion was made to dismiss the appeal on the ground that by the expiration of the five years the supreme court no longer had jurisdiction of the case. But that court called attention to the fact that neither the act of 1824 nor that of 1844 contained any

clause limiting the time within which such court might hear and determine appeals duly taken, and added:

"As there is no clause of limitation applying to the whole act, nor as to the time within which this court shall exercise the appellate power conferred on it, the act of 1824 in this respect is a perpetual one; and, if any appeal were at this day depending, which has been regularly brought up from the state of Missouri or the territory of Arkansas, the court would have jurisdiction to hear and decide it."

Inasmuch as in the case at bar the amending act has not repealed, and has in no way modified, the provisions of the act of 1887 touching appeals, the decision in U. S. v. Boisdore's Heirs is authority for the proposition that this court should hear and determine such appeals when duly taken within the six-months period prescribed by the act of 1887. The motion to dismiss is denied.

McGROTTY v. FLETCHER et al.

(Circuit Court, S. D. New York. August 11, 1899.)

PARTIES—RIGHT OF CESTUI QUE TRUST TO SUE—REFUSAL OF TRUSTEE.

A legatee cannot maintain an action against a former executor of the will for an alleged devastavit where there is an administrator c. t. a., except in case the latter cannot properly represent the estate, or refuses to act; and a request by such administrator, in response to a demand for bringing suit, for such information in regard to the evidence as will show the probability of a recovery, cannot be construed as a refusal to sue.

This was a suit by a legatee against the estate of a former executor of the will, based on an alleged devastavit.

J. K. Hayward, for complainant.
William A. Copp, for defendants Fletcher.
Chas. H. Shaw, for defendant Trust Co.

TOWNSEND, District Judge. The complainant herein is the legatee of one George S. Stringfield, deceased. The defendants F. N. Fletcher and E. B. Fletcher are executors of the estate of William Fletcher, and the defendant the Continental Trust Company is the administrator of Stringfield's estate cum testamento annexo. Stringfield left legacies to various persons, including the sum of $1,000 to complainant, but his estate is insufficient to pay the same unless recovery can be had out of a sum alleged to be due it from the estate of William H. Fletcher, upon the following facts: Stringfield had a policy of life insurance for $15,000, which he assigned to said William Fletcher on condition that Fletcher should show an insurable interest therein. Fletcher thereafter paid the premiums until the death of Stringfield. In 1893 the insurance company paid the $15,000 to William Fletcher, and he claimed and retained it as against Stringfield's estate. He and one Schuster were Stringfield's executors. Both died without having paid said legacy to complainant. She claims that said William Fletcher, by appropriating all of said $15,000, was guilty of a devastavit. It is admitted that said W. H. Fletcher had an insurable interest in the life of said Stringfield. It

is unnecessary to state further facts, or to consider the alleged conflict between the state and federal courts as to the question of insurable interest, or the various other legal questions raised by counsel for complainant. The bill alleges as follows:

"That on or about the 25th day of August, 1897, this plaintiff, by her attorney, J. K. Hayward, Esq., caused a demand to be made in writing upon said Continental Trust Company, as such administrator c. t. a., by delivering a copy thereof to the vice president of said company, requiring said company, as said administrator c. t. a., to forthwith bring an action against the estate of William H. Fletcher, to recover said $10,000 for the estate of said George S. Stringfield, or, in the event of its declining so to do, to forthwith notify her of its declination thereof, through her counsel, J. K. Hayward, Esq., of No. 38 Park Row, New York City; and said plaintiff further alleges, upon information and belief, that said trust company, as administrator c. t. a., as aforesaid, subsequently declined to bring said action."

The only evidence relied on to support the allegation that the Continental Trust Company declined to sue is found in the following letters:

"Stringfield Estate. September 28th, 1897.

"J. K. Hayward, Esq.—Dear Sir: The Continental Trust Company, of the city of New York, referring to your letters of August 25th and September 21st last, desires to know full particulars of the evidence, if any there be, which will sustain an action by the company, as administrator c. t. a. of the estate of George S. Stringfield, against the executor of William H. Fletcher, deceased, in order that the company may judge of the propriety of bringing such an action, and decide upon the form of action in case it may seem proper to bring suit. The company does not find in the papers you submit sufficient evidence of the existence of your lien for $500, and would like further information on this point. Yours, truly, Chas. H. Shaw,

"Atty. for Continental Trust Co., as Adm. c. t. a."

"McGrotty v. Trust Co. et al. November 8th, 1897.

"J. K. Hayward, Esq.—Dear Sir: The case I referred to this morning is St. John v. Insurance Co., 13 N. Y. 31, and I understand that case to be controlling. If you can show that my view of the law is incorrect, I will advise the Continental Trust Co. to proceed against Fletcher's executor. In the meantime the Trust Co. does not refuse to bring any proper suit against anyone, but is ready to do anything which should be done to preserve the best interests of the Stringfield estate.

"Yours, truly, Chas. H. Shaw."

This suit was brought on October 4, 1897. It is settled law in the state of New York that a policy of insurance on one's own life is assignable, and that, if the policy be valid in its inception, it is valid in the hands of the assignee, without reference to the amount of the consideration for the assignment. St. John v. Insurance Co., 13 N. Y. 31; Valton v. Assurance Co., 20 N. Y. 32; Olmsted v. Keyes, 85 N. Y. 593. The Continental Trust Company and the said Francis N. and E. B. Fletcher are all residents of the state of New York. The action, therefore, would have to be brought by it in the courts of the state of New York, where such an assignment is valid. It is well settled that the trustee is the proper party to bring a suit in this action, and that the beneficiary is not entitled to sue except by reason of the incompetency of the trustee, or his refusal to act, or because for some other reason he cannot faithfully represent the cestui que trust. Clyde v. Railroad Co., 55 Fed. 448, and cases there cited. The request of the trustee for further information was, therefore, a

reasonable one, and there is no proof of his declination to act. The suit should therefore be dismissed.

This conclusion renders it unnecessary to discuss the other objections to the bill. The other legatees mentioned in the will are not made parties to the bill. It does not appear that this legatee sues for the benefit of any of the other legatees, and the only relief prayed for is for an accounting, and payment to the complainant of the balance due her, and for further general relief. Let the bill be dismissed.

NEW YORK COMMERCIAL CO. v. FRANCIS et al.

(Circuit Court, D. Connecticut. August 16, 1899.)

No. 925.

ESTOPPEL—PERMITTING CORPORATE STOCK TO STAND IN ANOTHER'S NAME.

The fact alone that a partnership owning stock in a corporation allows it to stand on the books in the name of one of the partners, in order to qualify him to act as a director, does not create an estoppel against the firm or its creditors which will render the stock subject to the individual debts of such partner, although he may have represented himself as the owner, and secured credit thereby, where it is not shown that his creditors knew that the stock stood in his name, or were influenced by the fact.

This was a bill for an injunction to prevent the sale on execution of stock in a corporation on which complainant had levied an attachment in an action in a state court.

W. L. Bennett, for complainant.
T. M. Maltbie, for defendant Francis.
J. K. Beach, for defendants Earle Bros.

TOWNSEND, District Judge. Final hearing on bill and answer. From an order granting an injunction pendente lite the defendant appealed, and the circuit court of appeals discussed the facts set out in the affidavits of the parties, and held "the order pendente lite was properly made, and should be continued until it is ascertained whether Earle Bros. are the equitable owners of the stock, and, if they are, whether their equities have become subordinate to those of Francis by their laches or by their conduct." The relations of the parties and their respective claims sufficiently appear from the report of said case. 28 C. C. A. 199, 83 Fed. 769. Each of the parties claims a lien by attachment on 76 shares of stock of the Seamless Rubber Company, standing on the books of said company in the name of said J. P. Earle, but claimed by complainant to be the property of said partnership of Earle Bros. The court of appeals quotes the following language from Mowry v. Hawkins, 57 Conn. 453, 18 Atl. 784:

"In the absence of fraud, stock may stand in the name of one which belongs to another without being liable to attachment for the debts of the nominal owner. This must be so as to all creditors who have not been misled or deceived by it, and as to those who are advised as to the true state of the title."

The court then says of the rule thus established:

"It is one which we are satisfied is in accordance with the general rule, and with the principles of justice, unless the equitable owner is prevented by an

estoppel from showing the truth, or there has been some illegality or violation of a statutory requirement." Cooper v. Griffin [1892] 1 Q. B. Div. 740.

It now appears from the uncontradicted evidence that in May, 1882, the partnership of Earle Bros. made a bargain with the owners of said stock to purchase 153 shares thereof; that a certificate for 115 shares in the name of Earle Bros. was delivered in May, 1882, and a certificate for the remaining 38 shares, in the name of J. P. Earle, was delivered in the autumn of said year; that subsequently, in 1892, a stock dividend of 100 per cent. was declared; and that a certificate for 115 additional shares was made out in the name of Earle Bros., and for 38 additional shares was made out in the name of J. P. Earle, which, with the preceding 38 shares, make up the 76 shares here in controversy. The testimony and books support the claim that, although the certificates were delivered in two lots, they were parts of one agreement for the purchase of a lot of 153 shares. The whole of said stock was paid for by said partnership, which, since its purchase, has been continuously in possession of said certificates, and has used the stock as its own as collateral for firm loans, and has received and appropriated the dividends therefor. It further appears from the testimony of William P. Earle that said stock was placed in the name of J. P. Earle to qualify him to act as a director in said Seamless Rubber Company. This evidence is practically uncontradicted. I therefore find that Earle Bros. are the equitable owners of said stock.

I have not overlooked the arguments of defendant that Joseph P. Earle, having furnished substantially the entire capital of said firm, when the surplus earnings were invested took the 38 shares of stock as his extra share, nor the inference drawn by counsel for defendant from the entries in the private ledger, nor the contention that Henry Earle did not become a member of said partnership till 1893, and that he never had any interest in said stock except as trustee for Joseph and William Earle, and that Joseph P. Earle withdrew from the firm, because a careful examination of the evidence fails to disclose any sufficient or satisfactory proof to support said contentions, assuming them to be material to the issue herein. It does not appear except from Joseph P. Earle's statements that he took said stock as his extra share. Such statements by Joseph in his own favor are insufficient to support the claim of the defendant herein, claiming through said Joseph P. Earle, as against the complainant claiming through Earle Bros. Furthermore, their truth is disproved by the facts above stated. That Henry Earle did become a partner in said firm is directly proved by uncontradicted testimony, and the agreement between complainant and Earle Bros. shows that in 1898 Joseph P. Earle was a member of said firm. The single contention on the part of defendant which deserves serious consideration is stated by defendant's counsel as follows:

"In this case the question of equitable estoppel arises. One of the partners represents himself as the owner, individually, of certain property which stands in his individual name, and thereby induces the defendant to give him personal credit for a large amount."

The court of appeals has held that the record entries of Joseph P. Earle's ownership are not alone conclusive. The other fact relied on and proved is that said Joseph P. Earle did represent himself to defendant as the owner of this stock. That the beneficial owners of the stock allowed it to stand in the name of another in order to qualify him to be a director is no ground of estoppel, for an estoppel cannot be founded on a statement of the truth or on the doing of a lawful act. Cooper v. Griffin [1892] 1 Q. B. Div. 740; Howard v. Sadler [1893] 1 Q. B. Div. 1. In the latter case the court says:

"It is also contended that the directors of the Great Western Railway Company [the beneficial owner] enabled Sadler to commit a fraud by obtaining credit on the faith of his possession of the shares; but what they did was lawful, for allowing Sadler's name to remain on the register did not, as the law has been decided, imply that he was the beneficial owner of the shares. According to the decisions, the directors made no misstatements, for what they allowed to be stated was the truth, and therefore there can be no estoppel."

Earle Bros. made no representations other than suffering the stock to stand in Joseph P. Earle's name in order to qualify him to act as a director, and it is not alleged in the pleadings, or claimed in the proof, that the defendant knew of such entry, or was induced to act, or changed his position, by reason thereof. Although Joseph P. Earle, without the knowledge of Earle Bros., did make such representations, and defendant acted thereon, this does not constitute an estoppel against them, although it would have estopped Joseph P. Earle. Mowry v. Hawkins, 57 Conn., at page 460, 18 Atl. 784.

The question submitted by the court of appeals to this court as to the partnership of Earle Bros. was "whether their equities have become subordinated to those of Francis by their laches or by their conduct." I fail to find any evidence of laches or inequitable conduct which can be brought home to said partnership. Especially do I find that the essential element of an estoppel, inducement to act by false representations by one on whose representations reliance may be lawfully placed, is not proved. A decree may be entered accordingly.

UNITED STATES v. SAUNDERS et al.

(Circuit Court, D. Washington, E. D. August 30, 1899.)

1. INDIANS—HOMESTEADS ON PUBLIC LANDS—STATUTORY PROVISIONS.
   Act Jan. 18, 1881 (21 Stat. 315), relating to homesteads acquired by Indians, is a special act, which, by its terms, applies only to the Winnebagoes of Wisconsin; and a clause in a patent issued to an Indian of a different tribe for a homestead acquired under the act of March 3, 1875, embodying the provision of section 5 of the act of 1881, which prohibits the alienation of the land for 20 years, is void.

2. SAME—EFFECT OF VOID LIMITATION IN PATENT.
   The insertion of such void limitation, however, in a paragraph separate from the granting clause, does not affect the validity of the patent to convey the land to the patentee, and he takes the title in fee simple, without any restrictions upon his power of alienation.

3. SAME—EFFECT OF ACT OF 1884.
   The provision of the general act of July 4, 1884 (23 Stat. 96), giving Indians the right to avail themselves of the homestead laws, and providing that patents for homesteads taken by Indians shall be of the legal effect,

and declare that the United States will hold the land in trust for 25 years, during which time it shall be exempt from taxation, is prospective only in its operation, and does not affect land to which an Indian had perfected his right of homestead, under the act of 1875, prior to its passage.

4. EQUITY JURISDICTION—SUIT BY UNITED STATES TO ANNUL DEED.
There is no ground upon which the United States can maintain a suit in equity against the grantees of an Indian who are in possession of land conveyed to such Indian by a patent issued by the land department, containing a provision prohibiting its alienation, for the purpose of annulling the deed to defendants, in the absence of a law forfeiting the grant in case of such alienation.

Suit in equity by the United States to annul a deed given by an Indian to the defendant Wirt W. Saunders, purporting to convey the title to the grantor's homestead. Heard on demurrer to the bill of complaint. Demurrer sustained.

Wilson R. Gay, U. S. Dist. Atty.
Jones, Belt & Quinn, for defendants.

HANFORD, District Judge. In the month of December, 1878, Quin-ne-mo-se, an Indian of the Cœur d'Alene tribe, filed in the proper district land office of the United States his application for 160 acres of land situated in this state, then Washington Territory, and within what is now the Spokane land district, as a homestead, to which he was entitled under the provisions of an act of congress approved June 3, 1875 (1 Supp. Rev. St. U. S. [2d Ed.] p. 78), which authorizes Indians born in the United States, and who abandon their tribal relations, to take up public land pursuant to the homestead law of 1862. In February, 1884, said Indian made his final proof, and received a patent certificate, and in June, 1888, a patent was issued to him similar in form to other homestead patents, except that, following the habendum clause, there is inserted a conditional clause as follows:

"This patent is issued upon the express condition that the title hereby conveyed shall not be subject to alienation or incumbrance, either by voluntary conveyance or by judgment, decree, or order of any court, or subject to taxation of any character, but shall remain inalienable, and not subject to taxation for the period of twenty years from the date hereof, as provided by act of congress approved January 18, 1881."

The act of January 18, 1881 (21 Stat. 315), is a special act, which, by its title, and by specific provisions in the body thereof, is so limited as to affect only transactions with and rights of the Winnebago Indians of Wisconsin. The fifth section of the act is as follows:

"Sec. 5. That the titles acquired by said Winnebagoes of Wisconsin in and to the lands heretofore and hereafter entered by them under the provisions of said act of March third, eighteen hundred and seventy-five, shall not be subject to alienation or incumbrance, either by voluntary conveyance or by the judgment, decree, or order of any court, or subject to taxation of any character, but shall be and remain inalienable and not subject to taxation for the period of twenty years from the date of the patent issued therefor. And this section shall be inserted in each and every patent issued under the provisions of said act or of this act."

It is only by giving to the last sentence of this section a strictly literal construction that any color of authority can be shown for con-

necting patents issued to Indians other than the Winnebagoes of Wisconsin with this law; and, reading the whole section, including the last sentence, literally, it is impossible to discover a suggestion of a limitation upon any title other than "the title acquired by said Winnebagoes of Wisconsin." If the distinction between general and special statutes shall be ignored in this case, and if the last sentence of the section above quoted may be regarded as being an entirely distinct law, of general application, and broad as its terms, and mandatory in its character, still it is no more relevant to the rights of the defendants or their grantor than a verse from the first chapter of Genesis. It simply requires the insertion of the whole of section 5 in every patent issued pursuant to the act of March 3, 1875, as well as in those issued under this act of January 18, 1881, and the only effect which the insertion can have is to apprise all who read a patent in which it is inserted that all titles acquired by the Winnebagoes of Wisconsin to lands under the homestead law are inalienable by the grantees, and not subject to taxation for the full period of 20 years after the date of the patent issued therefor. A general law was passed by congress, and approved July 4, 1884, enabling Indians to avail themselves of the provisions of the homestead law as fully and to the same extent as citizens, and providing that patents for homesteads taken by Indians shall be of the legal effect and declare that the United States will hold the land thus entered for 25 years in trust for the sole use and benefit of the Indian by whom the entry shall have been made, or his widow and heirs, and will, at the expiration of said period, convey the same to said Indian or his widow and heirs "in fee, discharged of said trust, and free of all charge and incumbrance whatever." 1 Supp. Rev. St. U. S. (2d Ed.) p. 450. This law, however, was enacted after Quin-ne-mo-se had fully perfected his right to his homestead. It must be construed prospectively, and not retroactively. Therefore, in my opinion, it has no bearing on this case. The patent issued to Quin-ne-mo-se is a conveyance to him and to his heirs of the title in fee, and is in accordance with his rights under the laws which were in force from a time prior to the date of the filing of his homestead application until after he had fully complied with all requirements essential to the perfecting of his title. The condition in the patent is not coupled with the granting words, but is in a separate paragraph. It is separable from the grant, repugnant to the grant, not required nor authorized by any law, and is, in my opinion, void, and may be declared to be void without impairing the validity of the patent as a conveyance of the title to the patentee. From the fact that Quin-ne-mo-se made the proofs required to obtain a patent for the land under the homestead law, it may be fairly inferred that he was born in the United States, that he had voluntarily taken up his residence separate and apart from any tribe of Indians, and adopted the habits of civilized life. By reason of these facts, and by virtue of the sixth section of the act of congress approved February 8, 1887, known as the "Dawse Act" (1 Supp. Rev. St. U. S. [2d Ed.] p. 536), he was, at the time of giving the deed in question, a citizen of the United States, entitled to all the rights, privileges, and immunities of such citizens, including

the right to buy, sell, and convey the title to property. Having the full title to his homestead, and being under no legal disability to dispose of it, his deed to the defendant Saunders is not void nor voidable, but is a valid contract.

The bill of complaint is styled a "bill to quiet title to lands," but it would be contrary to all rules of equity practice to render a decree in this case for that form of relief, for the simple reason that the bill shows affirmatively that the defendants are in possession of the land. No reason is assigned for demanding equitable relief except that the deed given by Quin-ne-mo-se to Mr. Saunders, and the claims to the land now being asserted by the defendants, constitute a cloud upon the title of the United States. The case must have been commenced upon the theory that by obtaining a deed from an Indian Mr. Saunders acquired all his grantor's rights, and that said rights have been forfeited to the government by reason of the unlawfulness of the transaction, or else upon the theory that no confiscation of property is asked for, because the deed is absolutely void, and no property is conveyed thereby. Take either horn of the dilemma, and the result is the same, for there is no ground for an appeal to a court of equity. In the first place, the forfeiture of an estate is a penalty, which must be prescribed by law, or it will be not adjudged; and my attention has not been directed to any statute declaring a forfeiture for such causes as are in this bill set forth. In the second place, if the deed is void, it cannot cloud the title of the owner, nor justify the expense and bother of a suit. The case might very well have been disposed of by refusing the relief for which there is a specific prayer on the ground that a court of equity will not grant a decree quieting the title to real estate in favor of a party who lacks the first essential to that form of relief, viz. possession of the property, but upon the idea that possibly, under the general prayer, the government might be entitled to have the deed surrendered for cancellation, in order to prevent the fraudulent use of it, I have given consideration to the arguments of counsel upon the main question as to the validity of the deed given by Quin-ne-mo-se to Mr. Saunders, with the result already indicated; that is to say, I have reached the conclusion that said deed is a valid and effective instrument conveying the title to said Indian's homestead. Demurrer sustained.

JOHNSON et al. v. MILLER et al.

(Circuit Court of Appeals, Fourth Circuit. August 26, 1899.)

No. 276.

INSOLVENT CORPORATIONS—CREDITORS' SUITS—RIGHT TO DISMISS.

After a court of equity has assumed charge of the affairs of a corporation on a creditors' bill alleging insolvency, and at the instance of the complainant and with the consent of the defendant has appointed a receiver, issued an injunction restraining creditors from pursuing other remedies, and required them to prove their claims therein, which many of them have done, such creditors have an interest in the suit, and the parties to the record no longer have the right, by agreement between themselves, to terminate it. Under such circumstances, an application to dismiss is ad-

dressed to the discretion of the court, which, in acting upon it, will take into consideration the interest of those who, by its own orders, have been brought into the litigation.

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

This case comes up on appeal from the circuit court of the United States for the Western district of Virginia, sitting in equity. The record is voluminous, but the matter in controversy is in a very narrow compass. The facts bearing upon it are these: The Southern Building & Loan Association is a corporation of the state of Tennessee, doing business not only in that state, but in several other states of the Union, among them the state of Virginia. On January 20, 1897, Linda H. Johnson, a citizen of the state of Indiana, in behalf of herself and all other stockholders and creditors of the corporation, filed in the circuit court of the United States for the Eastern district of Tennessee a creditors' bill, making the corporation a party defendant, alleging its insolvency, and praying the appointment of a receiver. A temporary receiver was thereupon appointed, and the usual rule to show cause was issued. On the 27th of January of the same year she filed a similar bill in the circuit court of the United States for the Western district of Virginia, alleging the insolvency of the corporation, the possession by it of assets within that district, praying the appointment of a receiver within that jurisdiction, and also asking for the aid of an injunction. Process was duly issued upon the filing of this bill, and served on J. R. Miller, the agent and attorney in fact of the defendant corporation. He had been appointed, among other things, for this purpose, under the requirements of section 1104 of the Code of Virginia. The circuit court, upon the filing of this bill, appointed a temporary receiver, granted the prayer for injunction, and issued the ordinary rule to show cause. The circuit court of the United States for the Eastern district of Tennessee, upon the return of the rule to show cause issued by it, became satisfied that the corporation was not insolvent, revoked the appointment of the temporary receiver, and dissolved the injunction. Thereupon, on April 16, 1897, the chancery court of Knox county, Tenn., upon a full hearing of bill, answer, affidavits, and exhibits in a creditors' bill, wherein J. T. Barrow and wife were complainants and this same corporation defendant, adjudged the corporation to be insolvent, and appointed D. A. Carpenter and John W. Conner permanent receivers. On July 5, 1897, Linda H. Johnson filed an amended and supplemental bill against the defendant in the circuit court for the Western district of Virginia, enlarging upon and adding to the allegations of her original bill, and stating the facts above narrated as to the proceedings in Tennessee. On July 5, 1897, the Southern Building & Loan Association filed its answer to the original, amended, and supplemental bills. In this answer it admitted the principal facts alleged by complainant; among other things, this: "Respondent is content to admit that, in the present condition of affairs, it will be necessary for this honorable court to appoint receivers to take charge of the assets of respondent in the state of Virginia, and collect the same, and under proper directions of this honorable court to transmit the same to the chancery court of Knox county, Tennessee, there to be distributed among the stockholders of respondent." At the July term of the court at Abingdon, the court, after a full hearing, granted the prayer for a permanent receiver; named as such J. R. Miller, who had been theretofore appointed temporary receiver; named a commissioner before whom all creditors of the defendant corporation were to present their claims, after notice published in two newspapers within the district; and continued the injunction against all creditors and stockholders of the corporation, forbidding them from intermeddling with the property of the corporation, and also forbidding its officers and agents from interfering with, or disposing of, its said property. The receiver gave the bond required of him. The commissioner published his notice as directed, and proceeded to secure proof of, and to report upon, many claims presented to him. On the same day upon which the original bill of Linda H. Johnson was filed in the circuit court for the Western district of Virginia, Mrs. Virginia M. Campbell filed a creditors' bill against this same corporation in the chancery court of the city of Richmond, Va., alleging its insolvency, and praying the appointment of a receiver, and

on that day the said chancery court at Richmond appointed the Virginia Trust Company such receiver. This receiver duly qualified. On the same day, also, Charles Watson filed a creditors' bill against the same corporation in the hustings court of the city of Petersburg, Va., praying the appointment of a receiver, and that court appointed Alexander Hamilton such receiver. Each of these receivers began to discharge the duties devolving upon them. On March 24, 1898, the chancery court of Knoxville, Tenn., in the cause of Barrow and wife against the Southern Building & Loan Association, instructed its receivers, Carpenter and Conner, to apply to the chancery court at Richmond, Va., praying that they be appointed by this last-named court co-receivers with the Virginia Trust Company. This application was accordingly made, and such proceedings had therein that the chancery court at Richmond named as its receivers, with the Virginia Trust Company, the said Carpenter and Conner, and also Alexander Hamilton, whom the hustings court at Petersburg had selected. Thus the assets of the insolvent corporation lying within the jurisdiction of the circuit court of the United States for the Western district of Virginia are in course of administration in that district. As large a portion of the assets as could be reached by the chancery court of Richmond are being administered in that court, and the chancery court at Knoxville, Tenn., is co-operating with the court at Richmond. On March 31st Linda H. Johnson, J. T. Barrow and wife, and the Southern Building & Loan Association filed their petition in the main cause in the circuit court of the United States for the Western district of Virginia, out of which grows the appeal in this case. This petition, at great length, sets out the proceedings in the courts of Tennessee, in the chancery court at Richmond, Va., and in the hustings court of Petersburg, and in the main cause in the circuit court of the United States in the Western district of Virginia, and the confusion which must arise from the variety of jurisdictions of this litigation; that the parties to this litigation had come together, and had entered into an agreement, "the object and purpose of which was and is to avoid further litigation, to provide for a speedy settlement of pending disputes, and to avoid unnecessary delay and expenses in collecting and realizing the assets of this association in the interest of its stockholders." A copy of this agreement is filed among the many exhibits to the petition. The prayer of the petition is that the court enter a decree in pursuance of said agreement, and that it allow a motion for the dissolution of the injunction heretofore made by this court to be entered, and to dissolve said injunction, and that it instruct the receiver and the commissioner of this court to take no further steps in reference to the notes, bonds, and mortgages of borrowers from said association residing within the state of Virginia; that it pronounce such further decree as will properly protect the interests of stockholders in said association, for the purpose of collecting and covering into the registry of this court the proceeds from the sales of real estate within the jurisdiction of this court, and, after payment of the expenses in this court, the residue be transmitted to Knoxville, Tenn., for general distribution. This petition having been presented to the court, counsel were heard thereon. The court refused to grant the prayer, and dismissed the petition. Thereupon an appeal was allowed and taken to this court. The errors assigned are the refusal to dissolve the injunction, the refusal to modify former decrees and orders of the court, refusal to grant the prayer of the petition, and the dismissal of the petition. Inasmuch as the injunction had been granted upon the application of Linda H. Johnson, one of the petitioners, and the receiver had been appointed in accordance with her request, to all of which the Southern Building & Loan Association, another of the petitioners, had formally assented, and as all of the orders and decrees were passed either on her motion or without any objection on her part and on that of the corporation, and as no fraud, collusion, or improper action has been suggested, or ever been suspected, on the part of Mrs. Linda H. Johnson or the association in obtaining this injunction or the passage of these orders or decrees, Barrow and wife cannot now come in as parties to this litigation, and seek to oppose and nullify these orders. Forbes v. Railroad Co., 2 Woods, 334, Fed. Cas. No. 4,926. It is manifest, therefore, that the real ground of exception is that the circuit court did not reverse its action, stay all further proceedings, and practically end the suit in that court upon the request of the parties to the record

as complainant and defendant, sustained by Barrow and wife, the litigants at the home of the defendant corporation.

S. S. P. Patteson, W. P. McRae, and Willis B. Smith (Webb & McClung, on the brief), for appellants.

J. E. Moore, J. H. Larew, and Charles V. Meredith (Moore & Addison and Meredith & Cocke, on the brief), for appellees.

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

SIMONTON, Circuit Judge (after stating the facts as above). We are not called upon to express any opinion as to the expediency of the purpose of the petitioners. However desirable may be the end they have in view, we can only inquire as to the errors committed by the court below. The prayer of the petition was addressed largely to the discretion of the court. It was in the position to know how the litigation was affecting the rights of all parties interested in it, and to decide how the grant of the prayer of the petition would affect these rights. Linda H. Johnson had filed a creditors' bill. She was acting, not only in her own behalf, but she was asking that others should come in. Every one of the orders and decrees was passed either on her motion or with her acquiescence. She persevered in her applications to the circuit court of the Western district of Virginia, after the proceedings in the federal court in Tennessee, the chancery court in the same state, and in the two state courts in the state of Virginia; and in all this the Southern Building & Loan Association was a party, fully concurring. At their instance, the court below assumed the administration of the affairs of this insolvent corporation within its jurisdiction. The receiver was appointed, and gave his bond, assuming all his duties. The commissioner was named, who called in the creditors, naming time and place. Creditors came in, their claims were presented, and are under adjudication. The parties originally on the record have lost their control of the case. Others, at their instance, have been invited or forced to come in, and these are vitally interested in the administration which the court is exercising. When, therefore, these original parties to the record now come in and ask the court to reverse or modify its orders, to dissolve its injunction, to stay its hand, stop here, and surrender its administration of the rights involved in the cause, they are not the only parties whose wishes must be consulted. The stockholders and creditors who have been called into that court, and who have been forbidden to go elsewhere, must be consulted. As they are in no way represented in this petition, the court, at the least, must be convinced that it is for their interest, as well as that of the petitioners, that the prayer of the petition be granted. The record does not inform us on that point. The court below, however, was in possession of the whole case. It had knowledge of the number and character of the claims presented under its order, and of the condition of the litigation therein. It was the duty of the court to exercise its discretion in this matter, and, if it were of the opinion that the rights of any other party would be prejudiced by granting the prayer of the

petition, it could properly reject it; especially so as these parties are not before the court on their own motion, but in obedience to its process, as they have been prevented by its order from seeking relief elsewhere, and have been compelled to be where they are. The court below did exercise its discretion, and dismissed the petition, notwithstanding the wish of the parties to the record and their attorneys. We are of the opinion that in this case the court below has committed no error. The principle upon which the court acted is stated in Daniell, Ch. Prac. (5th Am. Ed.) p. 794: "After a decree has been made of such a kind that other persons besides the parties on record are interested in the prosecution of it, neither the plaintiff nor defendant, on the consent of the other, can obtain an order for the dismissal of the bill." This is cited and approved by the supreme court of the United States in Chicago & A. R. Co. v. Union Rolling-Mill Co., 109 U. S. 713, 3 Sup. Ct. 594.

The decree appealed from is affirmed.

VROOMAN et al. v. GRAFFLIN et al.

(Circuit Court of Appeals, Fourth Circuit. August 26, 1899.)

No. 285.

CANCELLATION OF DEED—CONVEYANCE IN TRUST—CONFIDENTIAL RELATIONS OF PARTIES.

An intestate at the time of his death was engaged in partnership with his son in a business extending through several states, and requiring large capital, sales being made on long credit. His indebtedness and that of the firm was over $200,000, and the value of his estate depended upon the efficient management and winding up of the business. The partnership articles provided that, in case of the death of a partner, the business should continue for five years, to enable it to be closed up without loss. He left surviving him, besides the son, two daughters, each entitled to an equal share in his estate. One of the daughters, then 47 years of age, being about to marry and remove to a distance, on the advice of her father's legal adviser executed a deed conveying to her brother in trust for five years all her interest in her father's estate, with full power to deal with the property in his discretion, but reserving to herself her share of the annual income. The brother did not solicit the conveyance, or know of it, until it had been determined upon. *Held*, that under the circumstances such conveyance was not an improper one, and, it appearing that the grantor was a woman of more than usual intelligence and business capacity, and that she fully understood the nature and effect of the conveyance, that it would not be set aside as improvident, or obtained by improper means.

Waddill, District Judge, dissenting.

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

S. S. Field and William Pinkney Whyte, for appellants.

Frank Gosnell (T. M. Lanahan, on the brief), for appellees.

Before SIMONTON, Circuit Judge, and PAUL and WADDILL, District Judges.

SIMONTON, Circuit Judge. This is an appeal from a decree of the circuit court of the United States for the district of Maryland,

sitting in equity. The bill of complaint was filed by Walter Vrooman and Amne L., his wife, seeking to set aside and declare fraudulent and void a certain deed of trust executed between the said Amne L., before her marriage, under the name of Amne L. Grafflin, and her brother, William H. Grafflin. The circuit court, on a full hearing of the cause, passed upon the issues of law and of fact involved therein, and dismissed the bill. The complainants, accepting the ruling of the court upon the issues of law, excepted to the finding on the facts, and so the case comes here.

George W. Grafflin, a merchant of Baltimore, died intestate in November, 1896, leaving an estate, real and personal, estimated to be worth between $600,000 and $1,000,000. He and his son, the principal defendant, had been trading under the firm name of George W. Grafflin & Co. Their business was that of the manufacture and sale of fertilizers, and was very extensive, ramifying into many states. The fortune of Mr. Grafflin was in this business, in shares of stock in many fertilizer companies, and in land. His lands were estimated at about $100,000, and his whole property was used in sustaining the credit and promoting the interests of his business. He died, as has been said, intestate, leaving as his sole heirs and distributees at law his son, William H. Grafflin, and two daughters, Mrs. Laura Elma Buck, a widow, and Miss Amne L. Grafflin, the complainant. Miss Grafflin was possessed in her own right of real estate in Baltimore, the family residence and the lot adjoining, and one-half of the life insurance of her father, $10,000, besides a bank account. Besides this, she had her undivided third interest in her father's business, its assets, and the real estate. Early in January, 1897, about two months after the death of her father, Miss Grafflin announced her engagement to marry Walter Vrooman, a clergyman and politician, resident in St. Louis, Mo. Between her and her brother there had always existed the most tender affection and unfailing confidence. When he heard of the projected marriage, William H. Grafflin, though much distressed thereat, would not discuss it with his sister, but he advised her, as she was about to leave Baltimore, and reside in St. Louis, she ought to have some person, in whom she could confide, to represent her, and act for her in the settlement of her father's complicated estate. He recommended Mr. B. F. Newcomer, a well-known and highly respected merchant of Baltimore, for this purpose, and also suggested that she should consult Mr. Lanahan, a leading member of the bar of that city, the confidential counsel of her father for many years, and at that time the legal adviser of the estate. Recognizing the necessity and propriety of this, she consulted Mr. Lanahan, and had a protracted interview with him. He encouraged her to deal frankly with him as her legal adviser, and sought to know the purpose she had in view. As the result of this interview, he prepared the deed in question. He then visited her with the draft, read it carefully to her, she sitting by his side overlooking the deed, gave to her all the explanations she asked for, called attention specially to the provision made for her future husband, and at the conclusion of the examination with her of the deed asked her if she understood it, and was satisfied with it. She replied that she

did understand it, and was satisfied. Some days afterwards the deed was sent to her through a clerk of Mr. Lanahan, and was formally executed by her, and then by W. H. Grafflin. At no time did the latter confer with his sister with respect to the deed. But Mr. Lanahan, in his conference with Miss Grafflin, after inquiring and ascertaining that she had complete confidence in her brother, then suggested that she select him, and not Mr. Newcomer, as the person to act for her. She promptly and cordially assented. It then became necessary to show him the deed, and this was done. The deed was promptly placed on record. It is now charged that this deed in no sense expressed the desire or purpose of Miss Grafflin; that all she desired to do was to give her brother a power of attorney to act for her; and that the deed was the result of treacherous conduct on the part of Mr. Lanahan. "He found it an easy matter for a woman totally ignorant of affairs, and unaccustomed to looking for legal pitfalls, and reposing absolute confidence in those with whom she was dealing, to be betrayed into signing so extraordinary a paper as this deed." These are grave charges.

What kind of a paper was it necessary to prepare in order to carry out the purpose of both parties to it? The undivided estate of George W. Grafflin, in which his three children were interested, consisted, as has been said, in the business of his firm, the stock and plant on hand, shares in several fertilizer companies, and in certain parcels of real estate, acquired, no doubt, in the exigencies of his business. The business,—the manufacture and sale of fertilizers,—of vast extent, requires great capital. He borrowed large sums of money in order to conduct it. The bills payable of the firm on December 1st after his death amounted to $175,000. His floating debt was some $60,000. The policy of the business was to sell the goods on a long credit. The collections depended largely on the success of the farmers who used the fertilizers. The utmost care was necessary to the watching, collecting, compromising, and realizing on these outstanding credits. For this reason the co-partnership articles provided that upon the death of a partner the business should go on for five years, so that it be wound up naturally under one possessed of knowledge and skill in the business. Upon success in this depended the solvency of the estate of the intestate. In winding up this large business, and in disposing of the parcels of real estate, uniformity of purpose and perfect unanimity in management were essential. The interests of the three children of the intestate were undivided, and were equal. If it were necessary, in every business emergency which should arise, that each one of them should be consulted, and should concur, great delay would be occasioned, and many a valuable opportunity would be lost. William H. Grafflin was the surviving partner. He was on the most intimate and confidential terms with his sister, and possessed her entire confidence. He is a man of capacity. What more natural, more essential course could be adopted than to put on him the sole responsibility, and intrust him with the sole management of the whole estate? To accomplish this, this paper was suggested and prepared. A power of attorney could not have accomplished it. Miss Grafflin was about to be married.

Her marriage would clothe her husband with an interest in real estate in which she was a part owner. It would itself operate as a revocation of the power of attorney. Story, Ag. § 481; Mechem, Ag. § 268; Giffin v. Blandin, 80 Md. 136, 30 Atl. 624. It was suggested at bar that in a case like this it would be a power coupled with an interest, and so irrevocable. It is difficult to see how such a power would be one coupled with an interest. If such be the case, then Miss Grafflin would have been placed irrevocably in the power of her brother, and be remitted to a civil suit for damages against him for misfeasance or malfeasance,—a result tenfold worse than that which is now set up to avoid this deed. The deed in question seeks to meet the end in this way: It deals only with the undivided interest in George W. Grafflin's estate. It conveys all of this undivided interest of Miss Grafflin to her brother as trustee. Thus his accountability to the prompt and complete remedies in equity was secured. It gave the trustee the most ample power in the disposition and management of this undivided interest. It thus secured uniformity of purpose and perfect unanimity in the management of the complex common property. But, his duties being under an express trust, he was always subject to the supervision of a court of equity. It secured to Miss Grafflin her share in the net annual income of the estate. Nor are safeguards wanting. The co-partnership articles directed that the business must be settled within five years from the death of a partner. This deed was revocable in five years. Although she had, for business purposes, given the sole management to her brother, she had the absolute disposition of all her property, of every kind and description, by will; and, in case she made no such disposition, a provision was made for her husband, the suggestion for which she herself approved and confirmed. The usual provision for substitution of trustee was adopted. As W. H. Grafflin knew all that was necessary in the business, he was the best person to judge of the qualifications of his successor. If he failed to name one, Miss Grafflin had the sole right to do so. This deed, therefore, gave to William H. Grafflin a free hand in winding up and settling the estate of the intestate. It interfered in no way with the property in which Miss Grafflin had the sole interest. That was carefully excluded from his contract. It accomplished the precise purpose which Miss Grafflin told her sister just before her marriage it was intended to accomplish. "I have had Mr. Lanahan make a paper giving Will the power for five years to do as he pleases with my affairs. He doesn't even have to send to St. Louis for my signature. You know that if I am here on the spot, and Will should ask me or should ask you for our signatures to any paper, we would not hesitate." This deed was dated February 13, 1897, and was recorded on the 15th of the same month. It is not enough, however, that the provisions of the deed were wise. Was Miss Grafflin imposed upon, advantage being taken of her weakness, confidence, or affection? She was, at the date of the deed, 47 years old. She is a woman of culture, had interested herself in social and political problems, and was a member of several literary clubs. She has unusual intelligence. In her examination as a witness she has betrayed a clearness of comprehension

and a faculty of expression much above the average. Her letters in the case are clear, business-like, to the point, and masculine in their directness. Mr. Lanahan read the deed to her, and was careful in learning if she understood it. On cross-examination she showed that she has not been a perfunctory listener. There is no evidence whatever that W. H. Grafflin used any effort to procure her signature to the deed. It is impossible to escape the conclusion that at the time she executed the deed she understood its purpose, and was satisfied with it. After her marriage, and when she was in St. Louis, her opinion changed. The strongest influences were brought to bear upon her, and at last, in despite of her life-long confidence in her brother, she was persuaded that he was the abettor or the willing tool of an infamous piece of treachery upon the part of Mr. Lanahan, a member of the bar, distinguished for his character and learning. Her husband and herself instituted the proceedings in the circuit court, attacking the bona fides of the deed. The court accepted the law upon which complainants relied. It treated the case as if the fiduciary relation between Miss Grafflin and her brother cast suspicion upon any contract between them. The defendants bore the burden of showing bona fides in the deed. After full hearing, the court uses this language:

"With this rule of law applied to the facts of this case, about which there is but little controversy, we are forced to the conclusion that the deed of February 13, 1897, was made by the complainant, Amne L. Grafflin, freely, and of her own accord; that it was her voluntary and unbiased act; and that she deliberately executed it, knowing full well its nature and effect."

A careful examination of the testimony, and grave consideration of the arguments of counsel, lead this court to the same conclusion. The decree of the circuit court is affirmed.

WADDILL, District Judge, dissents.

HAYDEN v. WILLIAMS et al.

(Circuit Court of Appeals, Second Circuit. July 18, 1899.)

No. 51.

1. NATIONAL BANKS—BOOKS OF CORPORATION—SUIT AGAINST STOCKHOLDERS.
   In a suit between the receiver of a national bank and a stockholder the books of the bank are evidence to establish acts of the corporation and its financial condition at a particular time, though not as to dealings between the corporation and the defendant.

2. SAME—STOCKHOLDERS—RECOVERY OF DIVIDENDS RECEIVED AFTER INSOLVENCY.
   The receiver of an insolvent national bank may recover from a stockholder dividends declared and paid after the bank became insolvent, where necessary to meet the demands of creditors.

Appeal from the Circuit Court of the United States for the Southern District of New York.

These are cross appeals from a decree of the circuit court, Southern district of New York, ordering the payment of certain moneys to the

complainant. The defendants appeal from the whole decree. The complainant appeals from it because it did not give him more.

Edward W. Paige, for complainant.

Theodore De Witt, for defendants.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

LACOMBE, Circuit Judge. The complainant is the receiver of the Capital National Bank of Lincoln, Neb., which suspended payment in January, 1893, being at that time in a condition of such utter financial rottenness that, although the stockholders have been assessed to the full value of their holdings, its creditors will not receive 75 per cent. of their claims, even if all the assets were collected at their fair valuation, and in addition thereto every dividend which was paid out during the 10 years of the bank's existence were restored to the receiver. The suit was brought to compel the repayment of and accounting for certain dividends paid by the bank above named to the defendants as the holders of capital stock of the bank of the par value of $5,000, on the grounds alleged in the bill, that each of said dividends was fraudulently declared and paid out of the capital of the bank, and not out of net profits, and that the bank was insolvent when each dividend was declared, and has since remained insolvent. A similar suit was brought against the stockholders resident in Nebraska, and, upon appeal from a decree on demurrers, was sustained by the circuit court of appeals in the Eighth circuit, defendants in that case conceding, by their demurrers, that the bank was insolvent when each dividend was paid. Hayden v. Thompson, 17 C. C. A. 592, 71 Fed. 60. The bank was organized in 1883, with a capital of $100,000, which was increased to $200,000, June 2, 1884, and to $300,000, July 21, 1886. The dividends which were paid from time to time were as follows:

Date.	Amount Paid in Dividends.	Defendant Received.	Date.	Amount Paid in Dividends.	Defendant Received.
1885, Jan. 13.....	$15,000	$187 50	1889, Jan. 8.....	18,000	300 00
" July 14.....	13,000	162 50	" July 9.....	18,000	300 00
1886, Jan. 12.....	16,000	200 00	1890, Jan. 14.....	15,000	250 00
" July 13.....	14,000	175 00	" July 11.....	15,000	250 00
1887, Jan. 11.....	18,000	300 00	1891, Jan. 13.....	15,000	250 00
" July 12.....	18,000	300 00	" July 13.....	15,000	250 00
1888, Jan. 10.....	18,000	300 00	1892, Jan. 12.....	15,000	250 00
" July 10.....	18,000	300 00	" July 12.....	12,000	200 00

All dividends except the last were paid to the defendant Williams, a stockholder to the amount of $5,000 from the organization of the bank. The last dividend was paid to defendant Dodd, who bought Williams' stock, and had the same transferred to his own name, December 16, 1891. The circuit court held, following Hayden v. Thompson, supra, that the statute of limitations for an "action upon a contract obligation or liability, express or implied," viz. six years, applied, and limited complainant's recovery to the dividend of January, 1889, and those subsequent thereto. Inasmuch as complainant appellant has submitted no argument criticising this ruling of the circuit court, it need not be discussed here. The defendants interposed answers

putting in issue the allegations of the bill, and setting forth that they had received the dividends in good faith and in the ordinary course of business, without notice of the matters alleged in the bill; and pleaded as an equitable discharge the payment to the receiver of an assessment of 100 per cent. under section 5151 of the Revised Statutes of the United States; also that the matters in the bill are matters which may be tried at law, and for which complainant is not entitled to equitable relief. The circuit court decreed in favor of the complainant for the dividends received and not barred by the statute of limitations, without interest, viz. $1,850 against Williams, and $200 against defendants jointly.

Before entering upon any discussion of the law of the case, it will be desirable to look into the character of the evidence taken, and to determine what it shows. The evidence as to financial condition of the bank was found in its books and reports. The record does not disclose any general offer of all the books to be marked in evidence, but it is quite manifest that they were present at the examination of the expert witnesses, who testified to the results of their investigation of the entries. The testimony of the witness is frequently interrupted to mark in evidence the volume and page of some entry to which he is referring. The identity of the books was proved by the cashier and by bookkeepers of the defunct bank and by the receiver. Many of the entries in them were proved by the persons who made them. So far as the examination of the experts showed, the books were accurate and correct, except when the object and purpose was to conceal shortages and bad debts, and to make a better showing than the real condition of the bank justified. The receiver was the principal expert witness. He had prepared tabulations from the books setting forth in convenient collocation the various entries which supported his conclusions, but, whenever challenged upon cross-examination as to any item, he turned at once to the book from which it was taken, and such entry is indicated upon the record here by volume and page. He testified that the results which he had tabulated and testified to were obtained exclusively from the books, papers, and records of the bank, which were numerous and extensive. He offered to allow counsel for the respondents to examine the books, expressed his entire readiness and willingness to produce them for their inspection, and to point out in them all the data and facts and figures and transactions to which he testified, and to furnish for their use any data arising out of or touching any matter about which he testified, or upon which they might wish to cross-examine him. The facts, therefore, as to the financial condition of the bank when the successive dividends were paid, were proved by the entries in its books. And the first question which arises upon this appeal is whether the books themselves were competent evidence, without independent proof of the accuracy of the entries they contained. Counsel for respondent appellants has cited numerous cases to support the proposition that copies of the books are not admissible, being secondary evidence. But no such question arises in this case. The books themselves were produced, and the various papers objected to and marked as exhibits are the ordinary computations, abstracts,

and summaries which are always admitted for convenience of presentation when the original books containing the items abstracted or summarized are open to the inspection of court and counsel. The only question arising on this branch of the case is whether, when the identity of the books is established, the books "prove themselves." It is stated by the text writers that, as regards the members of a corporation, its books are public books; that they are evidence by way of admissions between members of the corporation. 1 Starkie, Ev. pt. 2, § 120; 1 Phil. Ev. 422, and note 800 in 3 Phil. Ev. 1156, 1157; 2 Phil. Ev. (5th Ed.) p. 295, Cowen & Hill's and Edwards' notes. There is an important qualification to this rule, however, which is relied upon by respondents, and which will be found expressed in the opinion of this court in Carey v. Williams, 25 C. C. A. 227, 79 Fed. 906, in these words:

"The books and records of corporations, when properly kept, are evidence of the acts and proceedings of the corporate body, but cannot be used to establish claims or rights of the corporation against third persons, unless pursuant to the sanction of some statute, and they are not evidence against a stockholder in respect to a contract entered into by him with the corporation, notwithstanding he has access to them, because as to such contract he is regarded not as a stockholder, but as a stranger."

In that case it was sought to show by the entries in the books of an express company that Williams was a stockholder, and therefore liable for an unpaid balance due on the stock. In Rudd v. Robinson, 126 N. Y. 113, 26 N. E. 1046, the court said:

"The books of corporations, for many purposes, are evidence, not only as between the corporation and its members, and between members, but also as between the corporation or its members and strangers. They are received in evidence generally to prove corporate acts of a corporation, such as its incorporation, its list of stockholders, its by-laws, the formal proceedings of its board of directors, and its financial condition when its solvency comes in question. But we have not been able, after a careful examination of the authorities, * * * to find any case in which it has been decided that the books of account of a corporation are competent evidence, of themselves, to establish an account or claim against a trustee or stockholder in an action brought in behalf of the corporation; and it has been repeatedly said by judges and text writers that they are not competent for that purpose. In Whart. Ev. (3d Ed.) § 662, it is said that even in suits against its members its books cannot be used as 'proving,' in behalf of the corporation, self-serving entries. In Ang. & A. Corp. (11th Ed.) § 679, it is said, 'Entries in the books of a corporation of private pecuniary transactions with a stockholder are not admissible against him, when it does not appear by whom the entries were made.' See, also, 2 Wat. Corp. 646."

That in an action between stockholders the books are admissible to show the financial transactions of the corporation, its assets and liabilities, see Hubbell v. Meigs, 50 N. Y. 491. In Haynes v. Brown, 36 N. H. 545, it was held that the books of a corporation were not admissible against a member of the corporation as evidence of his private transactions or dealings with the company, and that in respect to them he is to be regarded as a stranger. There is no real discrepancy between the authorities as to the credit to be given to the books of a corporation. The rules governing their admission have been tersely and correctly stated by complainant's counsel, substantially as follows: (1) As against a stranger, they are not competent

evidence of any facts stated in them; although the entries in them may, like all other entries, be proved to be correct by human testimony. (2) As between a corporation and its members, and as between the members of a corporation, the books are evidence of what is in them, except the dealings of the corporation with that particular member. (3) As to his own dealings with a corporation, a member of the corporation is considered a stranger, and, as to those dealings, the entries in the books are not evidence against him. In the case at bar the entries in the books which were relied upon by complainant (except as to payment of the dividends and transfer of the stock, neither of which was denied) did not relate at all to any dealings with the defendants or either of them, but solely to acts of the corporation, and to its financial condition at stated periods. The books were, therefore, competent evidence to the extent to which they are relied upon to sustain the judgment. It is not necessary to rehearse the various items of proof from which it appears that, by reason of false entries of credit and of failure to charge off items of loss, the apparent profits out of which dividends were declared did not exist, and that, on the contrary, the financial condition of the bank steadily deteriorated from 1883 till its doors were closed. Suffice it to say that when some of the dividends were paid the capital was impaired, and when other dividends were paid the bank was insolvent.

At the close of the argument it was found that the case presented two questions of law concerning which this court desired the instruction of the supreme court. A certificate was therefore prepared, which briefly rehearsed the facts above set forth, and stated that:

"When the dividend of January 6, 1889, was declared and paid, and when each subsequent dividend down to and including July, 1891, was declared and paid, there were no net profits, the capital of the bank was impaired, and the dividends were paid out of capital, but the bank was still solvent. When the dividends of January and July, 1892, were declared and paid, there were no net profits, the capital of the bank was lost, and the bank actually insolvent."

The two following questions were submitted, upon the facts set forth:

"(1) Can the receiver of a national bank recover a dividend paid not at all out of profits, but entirely out of capital, when the stockholder receiving such dividend acted in entire good faith, believing the same to be paid out of profits, and when the bank at the time such dividend was declared and paid was not insolvent? (2) Has a United States circuit court jurisdiction to entertain a bill in equity brought by a receiver of a national bank against stockholders to recover dividends which, it is claimed, were improperly paid, when such suit is brought against two or more stockholders and embraces two or more dividends, and when the objection that there is an adequate remedy at law is raised by the answer?"

No question was propounded as to the dividends paid when the bank was actually insolvent, as we had no doubt the receiver could recover them in a proper action. The supreme court answered the first of these questions in the negative, but did not answer the second question at all, on the expressed ground that it was thought "unnecessary to answer it in order to enable the court below to proceed to judgment in the case." This disposition of the certified questions leaves this court in some perplexity as to the disposition to

be made of the case. Complainant, in our opinion, is clearly entitled to recover, in some form of action, for the January, 1892, dividend ($250) paid to Williams, and the July, 1892, dividend ($200) paid to Dodd, since the bank was actually insolvent when both these dividends were declared and paid. Indeed, the opinion of the supreme court intimates that such payment during insolvency may be recovered back. But can it be recovered by suit in equity such as this? On this point we are still uncertain, and the views of the several members of the court are not harmonious. Without discussing the point, and with the caution that this decision is not to be taken as authority thereupon, the proper course would seem to be to proceed to judgment, as indicated in the opinion of the supreme court, against the complainant for the years when the bank was still solvent, and against the defendants for the dividends paid during insolvency. Inasmuch as a negative answer to the second question would have disposed of the whole case, we may assume that in declining to answer it the supreme court assumed we would so dispose of the case as to give complainant a decree for part of his claim. The decree of the circuit court is reversed, and cause remanded, with instructions to decree in conformity with this opinion, without interest or costs.

BOARD OF COM'RS OF STANLY COUNTY, N. C., et al. v. COLER et al.

(Circuit Court of Appeals, Fourth Circuit. August 11, 1899.)

No. 290.

1. STATUTE—VALIDITY OF ENACTMENT—CONSTITUTIONAL REQUIREMENTS.
   Under the requirement of Const. N. C. art. 2, § 14, that no law shall be passed authorizing the imposition by the state or a municipality of any tax upon the people unless the bill for that purpose is read the second and third times on different days, and the yeas and nays on its passage are called and recorded on the journal of each house, to sustain the power of a county to issue bonds and levy a tax for their payment it must be shown that the legislative journals contain the record of the yeas and nays on the passage of the act under which such power is claimed, and the journals are, by virtue of the constitutional provision itself, the evidence of such fact.

2. RAILROADS—POWER OF COUNTY TO SUBSCRIBE TO STOCK—STATUTE OF NORTH CAROLINA.
   Code N. C. § 1996, providing that "the boards of commissioners of the several counties shall have power to subscribe stock to any railroad company or companies when necessary to aid in the completion of any railroad in which the citizens of the county may have an interest," applies only to railroads which had been commenced prior to the adoption of the constitution of 1868, in which a county has a pecuniary interest, and which have not been "completed."

3. FEDERAL COURTS — FOLLOWING STATE DECISIONS — VALIDITY OF STATE STATUTE.
   Where the highest court of a state has directly determined that a state statute authorizing counties to issue bonds was not passed in conformity to the requirements of the constitution, and is therefore not a law of the state, such decision is binding on a federal court in a subsequent action brought therein to enforce bonds purporting to have been issued under

such statute, though the parties to such suit were not parties to the state decision.[1]

4. SAME—CONSTRUCTION OF STATE STATUTES.

The decision of the supreme court of a state that certain bonds issued by a county were void for want of power in the county, under the state constitution and statutes, to issue them, is binding on a federal court in a suit upon the same bonds, although the plaintiff was not a party to the state decision, unless at the time the bonds were issued and sold the constitution or statutes had been given a different construction.

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

A. C. Avery and David Schenck, Jr. (James E. Shepherd, on the brief), for appellants.

Charles Price, for appellees.

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

GOFF, Circuit Judge. In 1870 the Yadkin Railroad Company was organized under the laws of the state of North Carolina. The corporation was created by an act of the assembly of that state passed in the year 1871, and the charter was amended by an additional act passed in 1887. By virtue of the provisions of the amended act, Stanly, a county of North Carolina, was authorized to subscribe to the capital stock of said railroad. As provided by the legislation mentioned, the question was submitted to a vote of the people of that county, and a subscription of $100,000 was ordered to said stock. The commissioners of the county, as authorized by such vote, prepared and issued bonds to the amount of $100,000, face value, and delivered them to the railroad company. These bonds, it is alleged in the bill, were placed on the market, and sold to bona fide purchasers for value. Each of the bonds on its face recites that it is one of a series issued by authority of an act of the assembly of North Carolina ratified March 3, 1887, and of sections 1996–1999 of the Code of North Carolina, and authorized by a majority vote of the qualified voters of Stanly county at an election regularly held for that purpose August 15, 1889, and issued to pay the subscription made by that county to the capital stock of the Yadkin Railroad Company. For four successive years after these bonds were issued a tax was regularly levied and collected for the purpose of paying the interest due on them, and the coupons representing the same were duly paid. The tax for the fifth year was also levied and collected. Then the commissioners of said county (certain taxpayers joining with them) instituted proceedings in the superior court of that county against the treasurer of the same, the object of which was to prevent the application of the money in the hands of that official, collected for the purpose of paying the interest on said bonds, from being so applied, and also to have said bonds decreed invalid. The contention of the plaintiffs in that suit was that all of said bonds and coupons were void,

[1] As to the construction of state statutes generally, see note to Wilson v. Perrin, 11 C. C. A. 76.

and in support of such claim they alleged that neither of the acts of the assembly referred to—the act of 1871, under which the railroad company was organized, and the amendment thereof in 1887, under which the subscription was alleged to have been made—was passed in accordance with the requirements of section 14, art. 2, of the constitution of North Carolina, in that neither of said acts, in fact, passed three separate readings in the house of representatives of said state on three different days, and also because the yeas and nays were not taken in said house upon any reading of either of the acts, and for the reason that the yeas and nays, if taken at all, were not entered upon the journal of the house upon any of the readings of said bills. The superior court of Stanly county, on the final hearing of such suit, decreed that the bonds were invalid, and made permanent an injunction by which said treasurer was inhibited from paying the interest then due on them. Subsequently, on appeal, the supreme court of North Carolina affirmed this ruling. Board v. Snuggs, 121 N. C. 394, 28 S. E. 539. The complainants below, appellees here, citizens and residents of the state of New York, and the owners and holders of a large number of such bonds, amounting to over $60,000, face value, which they had purchased in open market for value before maturity, being unable to collect the interest then due on the same, although a tax had been levied and collected for that purpose, instituted this suit in the circuit court of the United States for the Western district of North Carolina against the board of commissioners of said county and such treasurer, for the purpose of securing such payment, and to prevent such treasurer from using the tax so in his hands for any other purpose than that for which it was collected. Complainants below alleged that they so purchased the bonds in good faith, and without any notice, expressed or implied, that they were otherwise than legal and valid; that the interest then due them and unpaid amounted to $3,870; that although the said commissioners had made such levy, and the same had been collected and was then in the hands of their treasurer, he refused to pay such interest; that, as said tax had been collected for the sole purpose of paying that interest, the treasurer was, in fact, a trustee, holding the same for the use of and in trust for the complainants; that said commissioners, with others, had instituted such suit in the superior court of Stanly county against their treasurer, but that complainants were not, nor was any other of the bondholders, made a party to such suit, and that, therefore, they were not bound by the decree entered therein. The prayer of the bill was for an accounting, for an injunction restraining the treasurer from paying out or using said fund so in his hands for any other purpose than the settlement of said interest coupons, and for further and general relief. The court below, on reading the verified bill and exhibits filed therewith, granted a restraining order in substance as prayed for, and set the application for an injunction and the appointment of a receiver for hearing on a day mentioned. The defendants below answered said bill, denying the material allegations thereof, and claiming that the bonds so held by the complainants were not only voidable, but absolutely void, for the reasons set forth in the bill that had been so filed in the superior

court of Stanly county. The case was duly matured, and the court below, having considered the same, entered a decree sustaining the validity of the bonds, granting the injunction as prayed for, and appointing a receiver to take charge of the money so in the hands of said treasurer. 89 Fed. 257. From this decree the defendants below sued out this appeal.

The first question raised by the assignments of error is as to the validity or constitutionality of the legislation under which the bonds claimed by the appellees were issued. In the case of Board v. Snuggs, supra, the supreme court of North Carolina held that the bonds issued under the legislation mentioned were not the valid obligations of that county. The reasons given by that court in support of said decision were that the journals of the two houses of the general assembly of that state, for the sessions thereof when chapter 236 of the Acts of North Carolina of 1870–71 and chapter 183 of the Acts of that state for the year 1887 were passed, did not show affirmatively that the yeas and nays, on the second and third readings of the bills, had been entered upon said journals, as required by the constitution of that state; and also that the Code of North Carolina (section 1996), authorizing county commissioners to subscribe stock to a railroad company when necessary to aid in the completion of a railroad, did not include a railroad not begun to be built before the constitution of that state was adopted. And said supreme court also held that it was competent to introduce such journals for the purpose of showing that an act that had been duly enrolled, and approved by the presiding officers of said houses, was not, in fact, passed in the manner required by the constitution of that state; and that, where the journals of the general assembly show that a law authorizing a county to issue railroad-aid bonds was not passed in the manner required by the constitution, the purchasers of the bonds were chargeable with notice of such fact. The special provision of the constitution so referred to is as follows (article 2, § 14):

"No law shall be passed to raise money on the credit of the state, or to pledge the faith of the state, directly or indirectly, for the payment of any debt, or to impose any tax upon the people of the state, or to allow the counties, cities, or towns to do so, unless the bill shall have been read three several times in each house of the general assembly, and passed three several readings, which readings shall have been on three different days, and agreed to by each house, respectively, and unless the yeas and nays on the second and third reading of the bill shall have been entered on the journal."

The people of the state of North Carolina, in their constitution, have expressly limited the power of their legislature relating to taxation, and pointed out the certain indispensable prerequisites that must not only exist as a fact, but also appear on the journals of that legislature in a certain way. The constitution thus, in plain words, clearly indicates the way, and the only way, that the legislature can authorize the counties and the cities of the state to exercise the power of taxation. The entry of the yeas and nays on the last two readings must appear on the journal in order to comply with the requirements of the constitution, and unless they do so appear the bill has not become a law, and the evidence of its nullity is the journal provided by that constitution itself. On this point we quote from the

opinion of the supreme court of North Carolina in Board v. Snuggs, supra, as follows:

"The entry showing who voted on the bill, and how they voted, must be made before the bill can ever become a law. The constitution does not allow the certificate of the presiding officers, or any other power, to cure such an omission. The certificate of these officers will be taken as conclusive of the several readings in ordinary legislation, even if it could be made to appear that the journals were silent in reference thereto, because, in ordinary legislation, the directions of the constitution are not a condition precedent to the validity of the act. But in that class of legislation, the purpose of which is to legislate under section 14 of article 2 of the constitution, a literal compliance with the language of that section is a condition precedent, and one which must be performed in its entirety, before the bill can ever become a law. This point, however, has been so recently and so thoroughly discussed in the case of Union Bank of Richmond v. Commissioners of Town of Oxford, 119 N. C. 214, 25 S. E. 966, that it will be unprofitable to enter into another protracted discussion of it here. The authorities there cited are numerous, and most of them directly in point."

We also quote from the same opinion the following:

"The plaintiffs were allowed to produce copies of the house journal, certified by the secretary of state, to show that the above-mentioned acts were not passed by the general assembly in accordance with the requirements of the constitution. The journal showed that the bill which became chapter 236 of the Laws of 1870–71 was introduced on the 31st of March, 1871, and referred to the committee on internal improvements; that it was reported favorably on the next day, and that on the 3d of April, two days after its introduction, it passed its second and third readings, and that there was no entry of the yeas and nays on either of its readings. From that journal it appears that the bill which was enacted into chapter 183 of the Laws of 1887 passed its second reading on February 26th, and that the yeas and nays were called on that reading and entered on the journal; that the bill passed its third reading on the 28th of February, but that the yeas and nays were not entered on the journal on that reading. We are of the opinion tnat it was competent to introduce the house journal as proof that the acts referred to were not passed according to the requirements of the constitution, and that they established that fact. That provision of the constitution (article 2, § 14) is mandatory, as we have decided in Union Bank of Richmond v. Commissioners of Town of Oxford, 119 N. C. 214, 25 S.•E. 966."

The complainants below insisted that, even if the court should hold that the acts referred to were not passed according to the requirements of the constitution of North Carolina, and that they were therefore void, yet that still the bonds so issued were valid, nevertheless, for the reason that the commissioners of Stanly county had the power to issue the same under the authority of sections 1996, 1997, 1999, and 2000 of the Code of that state; and that, as all the sections of said Code were enacted by having been read three several times in each house of the general assembly, and by having passed three several readings on three different days in either house, and by having the ayes and nays on the second and third readings entered in the respective journals, the action so taken under the provisions of said sections was legal, and the bonds so issued were valid. The court below so held, and the remaining assignments of error relate thereto. Again do we quote and adopt the following portion of the court's opinion in the case of Board v. Snuggs:

"But the defendant, for his protection, presents the view that, even if it be conceded that the acts above referred to were not passed according to the re-

quirements of the constitution, and for that reason might be held void by this court, yet the commissioners of the county had the right to submit the question of subscription, embracing the question of issue of bonds, and the levy of taxes to pay the same, principal and interest, to the voters of the county, and, upon approval by a majority of the qualified voters, to issue the bonds, under sections 1996–2000 of the Code. All the sections of the Code were enacted by having been read three several times in each house of the general assembly, having passed three several readings on three different days in either house, the yeas and nays in the second and third readings having been entered on the journals of the senate and house of representatives, respectively. But did the sections above mentioned give additional and complete authority to order the election, issue the bonds, and levy the taxes to pay them, principal and interest? Section 1996 is in these words: 'The boards of commissioners of the several counties shall have power to subscribe stock to any railroad company or companies, when necessary to aid in the completion of any railroad, in which the citizens of the county may have an interest.' It will be necessary, in order that that section may be construed to give authority to the commissioners to issue the bonds, that the language should include a railroad not begun to be built before the constitution was adopted; that the word 'completion' should be construed 'building' or 'construction,' extending even to the building of a new road; for, in the case before us, it appears that the road had not begun to be built. We cannot see why the word 'completion' should be thought to have been used by the legislators in any other sense than the one most usual and natural. Ordinarily the words 'to complete' are understood to mean 'to finish,' 'to fulfill,' and the word 'completion' to mean the 'finishing' or 'accomplishing in full' of something which has already been commenced; as, for instance, it is most frequent to hear the word 'completion' used in connection with the finishing years and months of the education of the young. * * * The object of the statute must have been to provide, by general act, means by which the counties, without special legislation for each county by separate bills, might be enabled to complete unfinished railroads in which the counties had a pecuniary interest. At the time of the enactment of the statute of 1868–69, and always since that time, any county of the state, duly observing the limitations of section 7, art. 7, of the constitution, and under an act passed according to the requirements of section 14, art. 2, Id., could, and can, subscribe to the capital stock of a railroad company, whether unfinished or to be begun. The act of 1868–69, however, considering the condition of affairs then existing,—that is, that there were counties which had a pecuniary interest in the railroads that had been begun but were unfinished,—enabled such counties to make subscriptions of bonds to complete such unfinished roads at the earliest moment, and with the least cost, by a general law passed according to section 14, art. 2, of the constitution. This reasoning leads us to the still further conclusion that, at the time when the act of 1868–69 was brought forward in Code, § 1996, and the four succeeding sections, it could have had reference to no cases except those where the counties had a pecuniary interest in unfinished railroads at the adoption of the constitution of 1868, and that, therefore, the Code sections could not apply to the present case, because the Yadkin Railroad was not begun to be constructed until about 1889. We have given to the matters embraced in this case a patient and thorough consideration. We are aware of the hardships and losses that may follow from our decision, and we are also aware of the probable complaints likely to be made by persons interested. But the constitutional requirement which we have discussed is clear in its meaning and its language, and it is also mandatory. We must obey it in our interpretation of its meaning. Investors in such securities who may meet with losses have no one to blame but themselves, for the journals of the general assembly are open to public inspection, and the constitution of the state is a part of the public literature."

The questions raised by this appeal, and the legislation involved with the same, have been directly considered by the supreme court of the state of North Carolina, and the decisions of that court have been against the contention of the complainants below. Union Bank of Richmond v. Commissioners of Town of Oxford, 119 N. C. 214, 25 S.

E. 966; Board v. Snuggs, 121 N. C. 394, 28 S. E. 539; City of Charlotte v. Shepard, 120 N. C. 411, 27 S. E. 109; Rodman v. Town of Washington, 122 N. C. 39, 30 S. E. 118; Board v. Call (N. C.) 31 S. E. 481 (in which case it was also held that sections 1996–2000 of the Code of North Carolina, "authorizing county commissioners to subscribe stock to a railroad company when necessary to aid in the completion of a railroad, do not include a railroad not commenced before the constitution of 1868 was adopted"). With these decisions of the supreme court of North Carolina we are in full accord. If we had reached a different conclusion, nevertheless would not the determination of the court of last resort in North Carolina, upon the questions involved herein, relating as they do to the constitution of that state, and to the validity of certain acts of its general assembly and their construction, be respected by this court? Indeed, are we not bound by them? The supreme court of the United States, in Leeper v. Texas, 139 U. S. 462, 467, 11 Sup. Ct. 577, 579, said:

"It must be regarded as settled that whether statutes of a legislature of a state have been duly enacted in accordance with the requirements of the constitution of such state is not a federal question, and the decision of state courts as to what are the laws of the state is binding upon the courts of the United States. Town of South Ottawa v. Perkins, 94 U. S. 260, 268; Post v. Supervisors, 105 U. S. 667; Norton v. Shelby Co., 118 U. S. 425, 440, 6 Sup. Ct. 1121; Railroad Co. v. Georgia, 98 U. S. 359, 366; Baldwin v. Kansas, 129 U. S. 52, 57, 9 Sup. Ct. 193."

In Post v. Supervisors, 105 U. S. 667, Mr. Justice Gray said:

"* * * Third. The construction uniformly given to the constitution of a state by its highest court is binding on the courts of the United States as a rule of decision. Fourth. An act of the legislature of a state which has been held by its highest court not to be a statute of the state, because never passed as its constitution requires, cannot be held by the courts of the United States, upon the same evidence, to be a law of the state. Fifth. That which is not a law can give no validity to bonds purporting to be issued under it, even in the hands of those who take them for value and in the belief that they have been lawfully issued. It was accordingly held that, the act of the general assembly of Illinois of February 18, 1857, under which the bonds in suit were issued, having been adjudged by the supreme court of that state, in 1870, in the case of Ryan v. Lynch, 68 Ill. 160, and Miller v. Goodwin, 70 Ill. 659, upon proof that the journals did not show it to have been enacted in conformity with the requirements of the constitution, to have never become a law, and to have conferred no power, although referred to in later statutes as an existing law, those decisions must govern the action of the courts of the United States. The weight of those decisions as authoritative exposition of the constitution of the state is not affected by the fact that these plaintiffs were not parties to the suits in which they were delivered. Elmwood Tp. v. Marcy, 92 U. S. 289; East Oakland Tp. v. Skinner, 94 U. S. 255."

The contention of the appellees that there were prior adjudications of the supreme court of North Carolina, inconsistent with the decisions of that court in the cases of Union Bank of Richmond v. Commissioners of Town of Oxford, and Board v. Snuggs, supra, which had become rules of property, and which were overruled by those decisions, is not sustained by an analytical examination of the cases referred to, and in our opinion that court has not, in any of the cases called to our attention, enunciated a doctrine really in conflict with its decisions in the two cases we have last mentioned. It is true that in some instances the language used by the court is misleading

in its tendencies, and even susceptible of the said construction so placed upon it; but a careful consideration of the cases, and of the facts to which they relate, forces the conclusion that the court had no intention of including within the purview of its judgment bills of the character of those embraced by the provisions of section 14, art. 2, of the constitution of the state of North Carolina. In Carr v. Coke, 116 N. C. 223, 22 S. E. 16, the supreme court held that the certificate of the presiding officers is conclusive that the bill has passed, but that case does not decide that such certificate is proof that the yeas and nays were entered upon the journal. That question was not then before the court, and that decision should be considered in the light of the facts under which it was written. In Brodnax v. Groom, 64 N. C. 244, the matter discussed and decided had reference to section 12, art. 2, of the constitution, which is in the following words:

"The general assembly shall not pass any private law, unless it shall be made to appear thirty days' notice of application to pass such a law shall have been given, under such direction and in such manner as shall be provided by law."

The question was whether the courts would go behind the signatures of the presiding officers in order to ascertain if certain preliminary matters had been complied with, and the result reached was that the courts would presume that the legislature had ascertained that the notice required had been given, and that the certificate of the presiding officers must be regarded as conclusive of the subject. The case of State v. Robinson, 81 N. C. 409, relates to section 23, art. 2, of the constitution, which reads as follows:

"All bills and resolutions of a legislative nature shall be read three times in each house before they pass into laws, and shall be signed by the presiding officers of both houses."

The question was if the proper construction of said section would admit of the enforcement, as a law, of a bill which had passed both houses of the general assembly, but had not been signed by the presiding officers. The decision was that such a bill was incurably defective. In State v. Patterson, 98 N. C. 660, 4 S. E. 350, the supreme court construed article 2, § 21, which is as follows: "The style of the acts shall be, 'The general assembly of North Carolina do enact.'" Judge Merrimon, in delivering the opinion of the court, said:

"More particularly, for the present purpose, when the constitution prescribes and directs, in terms or by necessary implication, that a particular power shall be exercised in a specified way, or a particular thing shall be done by a particular co-ordinate branch of government (as the legislature), or by a particular officer or class of officers, and prescribes the way and manner of doing it, such direction cannot be disregarded. A due observance of it is essential, because the constitution so provides, and its provisions are not in vain or of trifling moment. It is not the nature of constitutions of government to provide nonessentials,—useless, unimportant details, such as may be disregarded and dispensed with. As we have said, they are organic, made upon solemn consideration by the sovereign authority, and contain general, essential provisions. Details are avoided in them unless deemed important,—essential. Nonessential details are left in the discretion of those who exercise and administer the powers of government. If this were not so, why prescribe the way and manner? Why not leave these things to convenience and the authority charged with the exercise of the power? Why direct them? Why restrict them? And if such directions may be disregarded, ignored, suspended in some

respects, then to what extent, and in what respect? If one co-ordinate branch of the government, or any class of officers, may do so, why may not another, and all, as to duties devolved upon them, respectively, directly by the constitution? The answer to these and like questions must be that requirements of the constitution shall prevail and be observed; and when it prescribes that a particular act or thing shall be done in a way and manner specified, such direction must be treated as a command, and an observance of it essential to the effectiveness of the act or thing to be done. Such act cannot be complete, such thing is not effectual, until done in the way and manner so prescribed."

This case was decided December 5, 1887, and indicated clearly the absolute necessity of a strict observance of all the requirements of the constitution in the matter of the enactment of laws, and is in entire harmony with the later decisions of that court, now the subject of criticism by counsel in connection with the questions under consideration. In this connection, it is well to keep in mind the fact that the bonds held by the complainant below were not issued until after July 1, 1890. The case of Field v. Clark, 143 U. S. 649, 12 Sup. Ct. 495, is not in conflict with the conclusion we reach. The particular subject we dispose of was specially pretermitted by the court in that case as follows:

"In regard to certain matters, the constitution expressly requires that they shall be entered on the journal. To what extent the validity of legislative action may be affected by the failure to have those matters entered on the journal we need not inquire; no such question is presented for determination. But it is clear that, in respect to the particular mode in which, or with what fullness, shall be kept the proceedings of either house relating to matters not expressly required to be entered on the journal, * * * these and like matters were left to the discretion of the respective houses of congress."

The court below held that the legislation relating to the Yadkin Railroad Company, under which the election authorizing the bonds to be issued was held, was invalid, because the requirements of the constitution of North Carolina as to entering the yeas and nays on the journal were not complied with. In this we agree with that court. But it is also held that, under sections 1996–2000 of the Code of North Carolina, the county commissioners had the power to subscribe for and issue the bonds, notwithstanding the fact that the proposed railroad had not then been begun, and though the citizens of the county had not any direct interest in it. This ruling of the court below is opposed to the construction put upon those sections of the North Carolina Code by the supreme court of that state, and, considering the facts connected with this controversy, we take the construction of that court as the ruling to be followed by us at this time. The decree appealed from is reversed, and this cause is remanded, with directions to dissolve the injunction, discharge the receiver, and dismiss the bill.

BOARD OF COM'RS OF OXFORD, N. C., et al. v. UNION BANK OF RICHMOND, VA.

(Circuit Court of Appeals, Fourth Circuit. August 11, 1899.)

No. 297.

1. FEDERAL COURTS—FOLLOWING STATE DECISIONS.
   The fact that the supreme court of a state on one appeal sustained the validity of a statute does not affect its right to declare the statute void on a subsequent appeal in the same suit, on a ground not presented by the record or considered on the first appeal, nor the weight to be given to such decision by a federal court.
2. SAME—CONSTRUCTION OF STATE STATUTES.
   A decision of the supreme court of a state holding municipal bonds void for want of power in the municipality to issue them, the question being one depending on the construction of the state constitution and the validity of state statutes, will be followed by a federal court in an action between the same parties on the same bonds, though by reason of a nonsuit taken by plaintiff the decision of the state court did not pass into a final judgment so as to render the question res judicata.[1]
3. MUNICIPAL BONDS—POWER TO ISSUE—CONSENT JUDGMENT.
   Where a town had no power, under the constitution and statutes of the state, to issue bonds to a railroad company, the defect cannot be cured nor such bonds rendered valid by the consent of its officers to a compromise judgment by which it issued a smaller amount than that voted, the question of the town's power not being involved or determined by the judgment.
4. SAME—ESTOPPEL TO CONTEST VALIDITY—ACTION OF OFFICERS.
   The officers of a town cannot by any agreement, or by the payment of interest on bonds, estop the town from raising the question of the legal existence or constitutionality of the statute under which such bonds were issued.

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

R. O. Burton, for plaintiffs in error.

C. M. Busbee and J. S. Manning (John W. Hinsdale, on the brief), for defendant in error.

Before GOFF, Circuit Judge, and MORRIS and WADDILL, District Judges.

GOFF, Circuit Judge. This action at law was brought in the circuit court of the United States for the Eastern district of North Carolina by the Union Bank of Richmond, Va., a corporation organized under the laws of the state of Virginia, against the board of commissioners of Oxford, a municipal corporation existing under the laws of the state of North Carolina. The object of the suit was to recover the amount claimed by the plaintiff to be due from the defendant for interest on certain bonds, as shown by coupons then in the possession of the plaintiff, and also to compel the defendant, by mandamus, to levy taxes and pay the plaintiff the sum due it.

The general assembly of the state of North Carolina, at its session held in the year 1891, passed an act to incorporate the Oxford & Coast Line Railroad Company. Laws 1891, c. 315. Under the pro-

[1] As to conclusiveness of judgment between state and federal courts, see note to Kansas City, Ft. S. & M. R. Co. v. Morgan, 21 C. C. A. 478.

visions of this act certain counties, cities, towns, and townships were authorized to issue bonds to aid in the construction of said railroad. On March 9, 1891, certain of the citizens and taxpayers of the town of Oxford petitioned the mayor and board of commissioners of that town to provide for an election, under the provisions of the then existing laws, on the proposition to subscribe the sum of $40,000 to aid in the building of the Oxford & Coast Line Railroad, and to issue the bonds of said town to that amount for such purpose. Such election was ordered and duly held, with the result that the bonds were authorized to be issued. On the 4th of August, 1891, at a meeting of the board of commissioners of Oxford, the following order was passed and entered of record:

"Resolved, that the bonds of the town of Oxford, to the amount of forty thousand dollars, of the denomination of one thousand dollars each, payable on the 1st day of December, 1921, with interest not exceeding six per cent. per annum, payable on the first days of June and December every year until maturity, with the right to the town, after ten years, upon three months' notice in some newspaper published in the town of Oxford and the cities of Baltimore and New York, to redeem said bonds, upon paying the sum of $1,050, and the accrued interest on each bond, and upon the completion of a contract by the authorities of the Oxford & Coast Line Railroad for the construction of the same, be delivered to the president of said railroad company to aid or assist in building said railroad, and that whatever proportion of said $40,000 is used in building and equipping said road shall be considered a subscription to the capital stock of said railroad, and a certificate shall be issued to the town of Oxford for stock to said amount."

On the 14th day of July, 1892, the Oxford & Coast Line Railroad Company, together with one James T. Pruden, instituted a proceeding for a mandamus in the superior court of Granville county, N. C., against the board of commissioners of Oxford, returnable to July term, 1892. In the complaint then filed the facts hereinbefore stated were referred to, and, in addition, it was set forth that on the 26th of February, 1892, a contract was duly entered into by and between said railroad company and James T. Pruden for the construction and operation of the road from Dickerson's Station, on the Durham & Northern Railroad, to the town of Oxford; and that on the 3d day of March, 1892, said Pruden began the actual construction of said line of road, and had been, and then was, engaged in grading and preparing the roadbed, and would soon be ready to lay the track and complete the road for the transportation of freight and passengers; that on May 2, 1892, the said board of commissioners adopted a resolution concerning said bonds, which attempted to nullify the action of said board taken when the result of the election was declared, and that the mayor of the town of Oxford had refused to sign the ordinance directing said subscription, and that said board of commissioners have resolved to and do uphold him in such refusal, contrary to the plighted faith of said town as expressed at said election, and as declared by the resolution of the commissioners themselves; also that the railroad company was desirous of performing its contract with said Pruden, and was unable to do so because of the refusal of said commissioners to issue and deliver the bonds. Therefore the plaintiff in such petition prayed that the defendants be required to perform their said contract, and that a writ of mandamus issue com-

manding said board to issue the $40,000 of bonds so subscribed by said town, and for other and proper relief. The defendants duly answered the petition, and, pending the controversy, an agreement of compromise was entered into between the railroad company, its contractor, Pruden, and the board of commissioners of Oxford, by which it was provided that, in the adjustment of the existing differences, the town should issue its bonds for $20,000 (in the sum of $1,000 each, payable August 1, 1922, with interest, as shown by coupons attached), which should purport on their face to be issued under and in pursuance of said chapter 315, Laws 1891, and chapter 21 of the Private Laws of 1885, and the election held April 27, 1891, as also under the said agreement of compromise, which was to be entered in said suit as the judgment of the superior court of Granville county, with the assent of all the parties thereto. The compromise agreement was dated July 25, 1892, and the judgment of the court, in substance the same as the agreement, was entered during its July term, 1892. On August 1, 1892, the board of commissioners of Oxford issued 20 bonds of the denomination of $1,000 each, which were delivered to the president and treasurer of the Oxford & Coast Line Railroad Company. It is recited on the face of each of said bonds, as follows:

"This bond is issued in pursuance of the powers and the authority granted by the state of North Carolina, as provided in chapter 49 of the Code of North Carolina, and in pursuance of the authority granted by section 30 of the charter of said town of Oxford, which is embraced in chapter 21 of the Private Laws of 1885, as passed by the general assembly of said state, and in pursuance of the authority granted by chapter 315 of the Laws of 1891, passed by the general assembly of North Carolina, ratified the 5th day of March, 1891, entitled 'An act to incorporate the Oxford & Coast Line Railroad Company,' and in pursuance of an election held in said town of Oxford on the 27th day of April, 1891, and of a settlement and adjustment of a controversy and litigation in which the Oxford & Coast Line Railroad Company et al. were plaintiffs and the board of commissioners of Oxford and the mayor of said town were defendants, adopted by the board of commissioners July 25, 1892, and the judgment and decree of his honor, H. G. Connor, judge presiding at the hearing of said action, at July term, 1892, of Granville superior court."

The plaintiff below, on the 12th day of September, 1892, purchased in good faith, in the usual course of business, 16 of said bonds, paying for each the sum of $975, the plaintiff having no other notice than such as the law implies and as is contained on their face concerning such bonds. The coupons maturing May 1, 1893, were paid by defendants below when the same were presented. The other coupons, showing the interest due on the bonds held by the plaintiff when this suit was instituted, amounting to $4,320, were duly presented at maturity for payment, and payment was refused. The Oxford & Coast Line Railroad has not, as yet, been completed.

The plaintiff below, before it instituted this suit, had sued the defendants below in the superior court of Granville county, N. C., and that case was twice before the supreme court of that state, being reported as Union Bank of Richmond v. Board of Com'rs of Town of Oxford, 116 N. C. 339, 21 S. E. 410, and 119 N. C. 214, 25 S. E. 966. Such suit was a petition for a mandamus to compel the commissioners of the town of Oxford to levy taxes to pay the interest due on said bonds. The superior court of Granville county, at the close of the

evidence when the case was first tried, intimated an opinion that the bonds were issued without authority of law, and thereupon the plaintiff submitted to a nonsuit and appealed. The supreme court then held that Acts 1891, c. 315, § 10, relating to these bonds, and providing for the mode of payment thereof, was not void under article 7, § 7, of the constitution of North Carolina, because it did not provide for a special election to authorize the issuance of the bonds, as the general laws relating to such elections were applicable. Consequently the nonsuit was set aside, and a new trial granted. When the second trial was held in the superior court of Granville county the point was made, for the first time, that, conceding that Acts 1891, c. 315, by its terms authorized the election, still that act was invalid because it had not been passed in compliance with the requirements of the constitution of North Carolina concerning acts granting the power to counties, cities, and towns to issue bonds. Such provision is article 2, § 14, and is as follows:

"No law shall be passed to raise money on the credit of the state, or to pledge the faith of the state, directly or indirectly, for the payment of any debt, or to impose any tax upon the people of the state, or to allow the counties, cities or towns to do so, unless the bill for the purpose shall have been read three several times in each house of the general assembly, and passed three several readings, which readings shall have been on three different days, and agreed to by each house respectively, and unless the yeas and nays on the second and third reading of the bill shall have been entered on the journal."

During the second trial in the superior court it was shown that, on the passage of said act in the house of representatives, it passed its second and third readings on the same day, and that the yeas and nays were not entered on the journal on either of said readings. The superior court held that, nevertheless, the bonds were valid, and a verdict was directed for the plaintiff, on which a judgment for the amount claimed was rendered. The defendants appealed, and the supreme court reversed said judgment, holding that the bonds were absolutely void, and incapable of ratification. When the certificate and opinion of the supreme court reached the court below, the plaintiff voluntarily submitted to a nonsuit, and then instituted the suit we now consider, declaring on the same coupons sued on in the state court, and also on others that had become due after the beginning of said first suit. The case was regularly brought on for a hearing, when the court below entered a judgment in favor of the plaintiff for $4,320, the full amount due on the interest coupons that had matured when this action was instituted, and also directed that a writ of mandamus issue to the defendants, commanding them to levy sufficient taxes to pay said judgment and the cost of this litigation. 90 Fed. 7. Thereupon the said defendants applied for and were awarded the writ of error we are now disposing of.

The court below appears to have reached the conclusion it did because of the belief entertained by it that, previous to the time of the issuing of the bonds in controversy, the courts of the state of North Carolina had held that the laws under which they were issued were valid and constitutional, and that their invalidity is now claimed only because of the decisions of said courts, subsequently rendered, which overrule such former judgments, and which, in their force and

effect, impair the obligations of contracts, the impairment of which is prohibited by the constitution of the United States. In the opinion of this court, announced during the present term, in the case of Board of Com'rs of Stanly Co. v. Coler, 96 Fed. 284, we have fully considered and disposed of the questions relating to the validity of legislation of the character of that under which the bonds now in controversy were issued. This case, so far as it relates to the questions growing out of the provisions of section 14, art. 2, of the constitution of North Carolina, is governed by the decision we announced in that case, and to it and the authorities there cited we now refer in disposing of the like questions herein involved. A further consideration of the points there discussed will be unprofitable.

The contention that the supreme court of North Carolina, when this matter was before it, decided the essential matters involved in favor of the validity of the bonds in suit, is not in our judgment sustained by the opinion of that court. Union Bank of Richmond v. Board of Com'rs of Town of Oxford, 116 N. C. 339, 21 S. E. 410. That court decided the case as it was then made and submitted to it, and the record discloses the fact that the questions relating to section 14, art. 2, of the constitution were not raised or presented for consideration until during the second trial of the case. The matter of the efficacy of the act chartering the railroad was not presented by the record when the case first went to the supreme court, and as a matter of course was not passed upon. But the plaintiff below could not have been injured in the least, even if there had been a change of judicial construction when the opinion was announced as reported in 119 N. C. 222, 25 S. E. 966, for the reason that the plaintiff had been the owner of said bonds since the 12th day of September, 1892, and the decisions mentioned were not rendered until on the 26th of March, 1895, and the 17th of November, 1896, respectively. The supreme court of North Carolina has passed upon the identical questions and facts involved in this controversy. It has construed both the constitution of that state and the legislation of the same relating to the bonds in suit, and it has decreed the absolute want of authority in the board of commissioners of the town of Oxford to issue said bonds. Our views concur with the decision of that court in the particulars mentioned; but, independent of that, the construction by that court of the constitution and laws of that state would, under the circumstances of this case, be followed by us.

The defendant in error insists that the judgment by consent entered in the suit instituted by the railroad company in the superior court of Granville county against the plaintiffs in error binds the latter to a compliance with the terms thereof, and renders valid the bonds issued thereunder. This claim is without merit, and is, we think, the result of a misconception of the effect of the compromise that was effectuated by the judgment referred to. The town had no legal right to donate the bonds to the railroad company, nor had it the power to issue them, in order to secure the compromise, unless such power was expressly granted by legislative enactment; and that such was the understanding at the time between the parties to the controversy is shown by the reference, both in the judgment and on

the face of the bonds, to the act of the assembly under which the authority to issue them was claimed. The railroad company insisted that the town should issue to it bonds to the amount of $40,000, by virtue of the action taken under the legislation referred to, and the town, while not admitting its liability to that amount, offered to adjust the controversy by issuing, under said enactment, bonds of the character therein described to the amount of $20,000. That offer was accepted by the railroad company, and the compromise agreement was signed, the consent judgment entered, and the bonds issued. The validity of the legislation involved was not in issue, and if that legislation was invalid when the compromise was entered into the rendition of the judgment based thereon did not make it valid. If the town had not the power to issue the bonds, the consent of its board of commissioners to the compromise agreement would not cure that defect. Kelley v. Milan, 127 U. S. 139, 8 Sup. Ct. 1101; Doon Tp. v. Cummins, 142 U. S. 366, 376, 12 Sup. Ct. 220; Norton v. Shelby Co., 118 U. S. 425, 451, 452, 6 Sup. Ct. 1121. The board of commissioners of the town of Oxford cannot, by its action, by its agreement, or consent judgment, or the payment of interest on the bonds, estop that municipality from ascertaining the legal existence or constitutionality of an act of the general assembly of North Carolina under which it is claimed that its inhabitants are liable to taxation. Marsh v. Fulton Co., 10 Wall. 676; Town of South Ottawa v. Perkins, 94 U. S. 260; Doon Tp. v. Cummins, supra; Daviess Co. v. Dickinson, 117 U. S. 657, 665, 6 Sup. Ct. 897; Lewis v. City of Shreveport, 108 U. S. 282, 2 Sup. Ct. 634; East Oakland Tp. v. Skinner, 94 U. S. 255; Lake Co. v. Graham, 130 U. S. 674, 9 Sup. Ct. 654. The judgment of the court below will be reversed, and this cause will be remanded, with instructions to set aside the order awarding a writ of mandamus, and then dismiss the complainant's bill.

NARRAMORE v. CLEVELAND, C., C. & ST. L. RY. CO.

(Circuit Court of Appeals, Sixth Circuit. July 5, 1899.)

No. 677.

1. MASTER AND SERVANT—ASSUMPTION OF RISK BY SERVANT.
   In the absence of statutory provision, a switchman employed in the yards of a railroad company assumes the risk incident to unblocked switches and guard rails, where, in general, there are no blocks used in such yards, and the servant has been employed therein for such a length of time that in the exercise of ordinary observation he must have known such fact.
2. SAME.
   The doctrine of the assumption of risk by a servant is that it is a term of the contract of employment, express or implied, and no right of action accrues to the servant for an injury due to such risk, because, under the contract, the master has violated no legal duty in failing to protect the servant from dangers the risk of which he agreed to assume.
3. SAME—FAILURE OF RAILROAD COMPANY TO BLOCK SWITCHES—EFFECT OF OHIO STATUTE.
   The purpose of the Ohio act of March 23, 1888 (85 Ohio Laws, p. 105), requiring railroad companies to block the frogs, switches, and guard rails on their tracks, under penalty of a fine, was to protect employés of such

companies from a well-known danger of their service, the risk from which, from the nature of their employment, they were compelled to assume; and although an employé impliedly waives a compliance with the statute, and agrees to assume the risk from unblocked switches and guard rails, by continuing in the service without complaint, a court will not recognize or enforce such agreement. The imposition of a penalty for a violation of the statute does not exclude other means of enforcement; and to permit a company to avail itself of such an assumption of risk by its employés is, in effect, to enable it to nullify a penal statute, and is against public policy. The assumption of risk by the employé, however, which is a matter of contract, is not to be confused with contributory negligence.

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

This writ is brought to review a judgment for the defendant in a suit to recover damages for personal injuries sustained by plaintiff while in defendant's employ as a yard switchman in its railroad yards at Cincinnati, Ohio. While plaintiff was attempting to couple two freight cars, his foot was caught in an unblocked guard rail, and in his effort to extricate the foot his right hand was crushed between the drawheads of the cars, and injured so badly as to require amputation. Plaintiff had been in defendant's employ seven months. About one-third of that time he was engaged during the daytime, and two-thirds during the night. He had had nine years' experience as a railroad man. A railroad man of experience can see at a glance whether a guard rail or switch is blocked or not. There were a great many guard rails and switches in the yards where plaintiff worked. With the exception of a few, where experimental blocks were used, the defendant did not use blocks in either its guard rails or switches. Plaintiff said he did not know that the guard rail in which his foot was caught was not blocked, and that he had not noticed whether the guard rails and switches of defendant generally were blocked or not. The plaintiff relied on the following statute of Ohio, passed March 23, 1888 (85 Ohio Laws, p. 105): "Every railroad corporation operating a railroad or part of a railroad in this state shall, before the first day of October, in the year one thousand eight hundred and eighty-eight, adjust, fill or block the frogs, switches, and guard-rails on its tracks, with the exception of guard-rails on bridges, so as to prevent the feet of its employés from being caught therein. The work shall be done to the satisfaction of the railroad commissioner. Any railroad corporation failing to comply with the provisions of this act, shall be punished by a fine of not less than one hundred dollars, nor more than one thousand dollars." It appeared from the evidence that the defendant company was operating this railroad at the time of the passage of the act, and has operated it ever since. At the close of the evidence the trial court directed the jury to return a verdict for the defendant on the ground that defendant's failure to block its rails and switches was obvious, and the plaintiff must be held, notwithstanding the statute, to have assumed the risk of injury therefrom, and upon such verdict entered judgment for the defendant.

C. M. Cist and Harlan Cleveland, for appellant.

Judson Harmon, for appellee.

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

TAFT, Circuit Judge (after stating the facts as above). In the absence of the statute, and upon common-law principles, we have no doubt that in this case the plaintiff would be held to have assumed the risk of the absence of blocks in the guard rails and switches of the defendant. His denial of knowledge of the fact that the particular guard rail causing the injury was unblocked is entirely immaterial. Nor is his vague statement that he was so busy as not to notice whether the rails and switches of plaintiff generally were

unblocked in a yard where there were hundreds of guard rails and switches, and in which he was constantly at work for seven months, of more significance or weight. His evidence upon this point is not creditable to him. He could only have been ignorant of the admitted policy of the defendant in respect to blocks through the grossest failure of duty on his part in a matter that much concerned his personal safety and the proper operation of the road. In such a case the authorities leave no doubt that the servant assumes the risk of the absence of the blocks, and the employer cannot be charged with actionable negligence towards him. Railway Co. v. Seley, 152 U. S. 145, 14 Sup. Ct. 530; Appel v. Railway Co., 111 N. Y. 550, 19 N. E. 93; Railway Co. v. Risdon's Adm'r, 87 Va. 335, 339, 12 S. E. 786; Wood v. Locke, 147 Mass. 604, 18 N. E. 578; Railway Co. v. McCormick, 74 Ind. 440; Railway Co. v. Ray (Ind. Sup.) 51 N. E. 920; Rush v. Railway Co., 36 Kan. 129, 12 Pac. 582; Mayes v. Railway Co., 63 Iowa, 562, 14 N. W. 340, and 19 N. W. 680; Wilson v. Railroad Co., 37 Minn. 326, 33 N. W. 908; Railway Co. v. Baxter, 42 Neb. 793, 60 N. W. 1044; Railway Co. v. Davis, 54 Ark. 389, 15 S. W. 895.

The sole question in the case is whether the statute requiring defendant railway, on penalty of a fine, to block its guard rails and frogs, changes the rule of liability of the defendant, and relieves the plaintiff from the effect of the assumption of risk which would otherwise be implied against him. We have already had occasion to consider in a more or less direct way the effect of the statute. Railway Co. v. Van Horne, 16 C. C. A. 182, 69 Fed. 139; Railway Co. v. Craig, 19 C. C. A. 631, 73 Fed. 642. In these cases we held that the failure on the part of a railway company to comply with the statute was negligence per se. A further consideration of the statute confirms our view. The intention of the legislature of Ohio was to protect the employés of railways from injury from a very frequent source of danger by compelling the railway companies to adopt a well-known safety device. It was passed in pursuance of the police power of the state, and it expressly provided, as one mode of enforcing it, for a criminal prosecution of the delinquent companies. The expression of one mode of enforcing it did not exclude the operation of another, and in many respects more efficacious, means of compelling compliance with its terms, to wit, the right of civil action against a delinquent railway company by one of the class sought to be protected by the statute for injury caused by a failure to comply with its requirements. Unless it is to be inferred from the whole purview of the act that it was the legislative intention that the only remedy for breach of the statutory duty imposed should be the proceeding by fine, it follows that upon proof of a breach of that duty by the railway company, and injury thereby occasioned to the employé, a cause of action is established. Groves v. Lord Wimborne [1898] 2 Q. B. 402, 407; Atkinson v. Waterworks Co., 2 Exch. Div. 441; Gorris v. Scott, L. R. 9 Exch. 125. In this case there can be no doubt that the act was passed to secure protection and a newly-defined right to the employé. To confine the remedy to a criminal proceeding in which the fine to be imposed on conviction was not

even payable to the injured employé or to one complaining, would make the law not much more than a dead letter. The case of Groves v. Lord Wimborne involved the construction of a statute quite like the one at bar, and a right of action was held to be given thereby to the injured servant in addition to the criminal prosecution. The courts of Ohio have given the statute under discussion the same construction. Railroad Co. v. Lambright, 5 Ohio Cir. Ct. R. 433, affirmed by the supreme court of Ohio without opinion, 29 Wkly. Law Bul. 359.

Do a knowledge on the part of the employé that the company is violating the statute, and his continuance in the service thereafter without complaint, constitute such an assumption of the risk as to prevent recovery? The answer to this question is to be found in a consideration of the principles upon which the doctrine of the assumption of risk rests. If one employs his servant to mend and strengthen a defective staircase in a church steeple, and in the course of the employment part of the staircase gives way, and the servant is injured or killed, it would hardly be claimed that the master was wanting in care towards the servant in not having the staircase which fell in a safe condition. Why not? Because, even if no express communication is had upon the subject, the servant must know, and the master must intend, that the dangers necessarily incident to the employment are to be at the risk of the servant, who may be presumed to receive greater compensation for the work on account of the risk. The foregoing is an extreme case, perhaps, but it fairly illustrates the principle of assumption of risk in the relation of master and servant. Assumption of risk is a term of the contract of employment, express or implied from the circumstances of the employment, by which the servant agrees that dangers of injury obviously incident to the discharge of the servant's duty shall be at the servant's risk. In such cases the acquiescence of the servant in the conduct of the master does not defeat a right of action on the ground that the servant causes or contributes to cause the injury to himself; but the correct statement is that no right of action arises in favor of the servant at all, for, under the terms of the employment, the master violates no legal duty to the servant in failing to protect him from dangers the risk of which he agreed expressly or impliedly to assume. The master is not, therefore, guilty of actionable negligence towards the servant. This is the most reasonable explanation of the doctrine of assumption of risk, and is well supported by the judgments of Lord Justices Bowen and Fry in the case of Thomas v. Quartermaine, 18 Q. B. Div. 685, 695. See, also, language of Lord Watson in Smith v. Baker (1891) App. Cas. 325, and O'Maley v. Gaslight Co., 158 Mass. 135, 32 N. E. 1119. It makes logical that most frequent exception to the application of doctrine by which the employé who notifies his master of a defect in the machinery or place of work, and remains in the service on a promise of repair, has a right of action if injury results from the defect while he is waiting for the repair of the defect, and has reasonable ground to expect it. Hough v. Railway Co., 100 U. S. 213; Railroad Co. v. Babcock, 154 U. S. 190, 14 Sup. Ct. 978; Snow v.

Railway Co., 8 Allen, 441; Gardner v. Railroad Co., 150 U. S. 349, 14 Sup. Ct. 140. From the notice and the promise is properly implied the agreement by the master that he will assume the risk of injury pending the making of the repair.

If, then, the doctrine of the assumption of risk rests really upon contract, the only question remaining is whether the courts will enforce or recognize as against a servant an agreement express or implied on his part to waive the performance of a statutory duty of the master imposed for the protection of the servant, and in the interest of the public, and enforceable by criminal prosecution. We do not think they will. To do so would be to nullify the object of the statute. The only ground for passing such a statute is found in the inequality of terms upon which the railway company and its servants deal in regard to the dangers of their employment. The manifest legislative purpose was to protect the servant by positive law, because he had not previously shown himself capable of protecting himself by contract; and it would entirely defeat this purpose thus to permit the servant "to contract the master out" of the statute. It would certainly be novel for a court to recognize as valid an agreement between two persons that one should violate a criminal statute; and yet, if the assumption of risk is the term of a contract, then the application of it in the case at bar is to do just that. The cases upon the subject are by no means satisfactory, and, strange as it may seem, but few are in point. There is one English case which entirely supports our conclusion, and several dicta by English judges of like tenor. Several American cases on their facts also sustain the principle, though it must be confessed they do not very clearly state the true ground of their conclusion. There is one American case which is directly to the contrary, and possibly one other ought so to be regarded. There are several American cases that are said to be opposed to our view, but an examination of the facts in each will clearly distinguish them from the case at bar.

In the case of Baddeley v. Granville, 19 Q. B. Div. 423, the action was for the wrongful death of a miner, due to his employer's violation of a statute, and the defense of assumption of risk was set up. Section 52 of the coal mines regulation act of 1872 required a banksman to be constantly present while the men were going up or down the shaft, but it was the regular practice of the defendant, as the plaintiff's husband well knew, not to have a banksman in attendance during the night. The plaintiff's husband was killed, in coming out of the mine at night, by an accident arising through the absence of a banksman. It was held that the plaintiff's intestate did not, by continued service after he knew of the violation of the statute, thereby assume the risk of danger therefrom. The court say (page 426):

"An obligation imposed by statute ought to be capable of enforcement with respect to all future dealings between parties affected by it. As to the result of past breaches of the obligation, people may come to what agreements they like, but as to future breaches of it there ought to be no encouragement given to the making of an agreement between A. and B. that B. shall be at liberty to break the law which has been passed for the protection of A. If the supposed agreement come to this: that the master employs the servant on the terms that the latter shall waive the breach by the master of an obligation im-

posed on him for the benefit of others as well as of himself, such an agreement would be in violation of public policy, and ought not to be listened to."

The judges deciding the case of Thomas v. Quartermaine, 18 Q. B. Div. 685, 696, 703, had affirmed the view that assumption of risk did not apply to the neglect of a specific statutory duty imposed for the benefit of a class, but it was not the case before them. They said that the case of Clarke v. Holmes, 7 Hurl. & N. 937, 6 Hurl. & N. 349, proceeded on this ground, though it is difficult to find the ground stated in the opinions. Durant v. Mining Co., 97 Mo. 62, 10 S. W. 484; Grand v. Railroad Co., 83 Mich. 564, 47 N. W. 837; Coal Co. v. Taylor, 81 Ill. 590; and Boyd v. Coal Co. (Ind. App.) 50 N. E. 368, —were all cases where assumption of risk would have been a complete defense if applicable in case of a failure by the master to discharge a statutory duty to the servant, and the latter's express or implied acquiescence therein; and yet the servant was given judgment. The reasons stated in some of these cases for the conclusion are not entirely satisfactory, and in the cases from Illinois and Indiana no distinction is made between the doctrine of assumption of risk and of contributory negligence, but they are all authorities on their facts for our conclusion. The case of Knisley v. Pratt, 148 N. Y. 382, 42 N. E. 986, however, presented the precise question for decision, and the court of appeals held expressly that a servant, by continuing in the employment of a master who is violating a statute passed to protect the servant, does assume the risk of danger from such violation, and cannot make it the ground of recovery. This is followed by the circuit court of appeals for the Second circuit in a New York case. Carpet Co. v. O'Keefe, 25 C. C. A. 220, 79 Fed. 900. The court of appeals of New York, in Huda v. Glucose Co., 154 N. Y. 474, 482, 48 N. E. 897, does not treat the question decided in the Knisley Case as controlling the case of servants acquiescing in and assuming the risk of a violation of a fire-escape statute by their master, and the court declined to decide it. The decision in the Knisley Case is largely based on the decision of O'Maley v. Gaslight Co., 158 Mass. 135, 32 N. E. 1119, and Goodridge v. Washington Mills Co., 160 Mass. 234, 35 N. E. 484. We think the learned court of appeals of New York failed to observe that the O'Maley and Goodridge Cases were not suits under a statute defining and enjoining a specific duty of a master for the protection of servants, but were suits under an employer's liability act, which relieved the servant from the burden of certain defenses by the master in suits for injury sustained by him while in his master's employ, but did not attempt to change the master's duty to the servant, or to change the standard of negligence between them as that was fixed at common law. Hence it was held by the supreme judicial court of Massachusetts that the doctrine of assumption of risk applied to suits under the statute as at common law, and Thomas v. Quartermaine, 18 Q. B. Div. 685, which was also a suit under an employer's liability act, was much relied on. And yet in Thomas v. Quartermaine, as we have seen, the two lord justices, forming the majority deciding the case, expressly pointed out that in a suit under a statute positively fixing a standard of duty the doctrine of assumption of

risk could not be applied. The distinction between the employer's liability act and acts for the protection of servants in the nature of police legislation, like the act under consideration, is clearly shown in Griffiths v. Earl of Dudley, 9 Q. B. Div. 357, where, though the court held that a servant might "contract the employer out" of liability under the former act, it was said that this could not be done in respect of a liability arising under a statute like the one at bar, passed for the protection of servants. The Knisley Case, which, in our judgment, was wrongly decided, and many others in which a right conclusion was reached, seem to us to confuse an agreement to assume the risk of an employment, as it is known to be to the servant, and his contributory negligence. That, under certain circumstances, the one sometimes comes very near the other, and cannot easily be distinguished from the other, may be conceded; but in most cases there is a broad line of distinction, and it is so in this case. For years employés worked in railroad yards in which blocks were not used, and yet no one would charge them with negligence in so doing. The switches and rails were mere perils of the employment. Assumption of risk is in such cases the acquiescence of an ordinarily prudent man in a known danger, the risk of which he assumes by contract. Contributory negligence in such cases is that action or nonaction in disregard of personal safety by one who, treating the known danger as a condition, acts with respect to it without due care of its consequences. The distinction has been recognized by the supreme court of the United States. In Railway Co. v. O'Brien, 161 U. S. 451, 16 Sup. Ct. 618, the court said:

"The second instruction was properly refused because it confused two propositions,—that relating to the risks assumed by an employé in entering a given service, and that relating to the amount of vigilance that should be exercised under given circumstances."

In Hesse v. Railroad Co., 58 Ohio St. 167, 169, 50 N. E. 355, Judge Shauck, speaking for the supreme court of Ohio, said:

"Acquiescence with knowledge is not synonymous with contributory negligence. One having full knowledge of defects in machinery with which he is employed may yet use the utmost care to avert the dangers which they threaten."

The distinction is exceedingly well brought out in Railway Co. v. Baker, 33 C. C. A. 468, 91 Fed. 224, by Judge Woods, speaking for the circuit court of appeals for the Seventh circuit. There the action was for damages against a railroad company for injury sustained by reason of a breach of a federal statute requiring the company to furnish grab irons. The statute, out of abundant caution, expressly provides that the continued service of the employé with knowledge of the breach of statutory duty by the company should not be regarded as an assumption of the risk. The court held that this proviso did not prevent the company from successfully maintaining the defense of contributory negligence. Assumption of risk and contributory negligence approximate where the danger is so obvious and imminent that no ordinarily prudent man would assume the risk of injury therefrom. But where the danger, though present and appreciated, is one which many men are in the habit of assum-

ing, and which prudent men who must earn a living are willing to assume for extra compensation, one who assumes the risk cannot be said to be guilty of contributory negligence if, having in view the risk of danger assumed, he uses care reasonably commensurate with the risk to avoid injurious consequences. One who does not use such care, and who, by reason thereof, suffers injury, is guilty of contributory negligence, and cannot recover, because he, and not the master, causes the injury, or because they jointly cause it. Many authorities hold that contributory negligence is a defense to an action founded on a violation of statutory duty, and this undoubtedly is the proper view. Such is the case of Krause v. Morgan, 53 Ohio St. 26, 40 N. E. 886, where the employé, in spite of a warning from his superior, and in the face of the most palpable danger, exposed himself to certain injury, and then sought to hold his employer liable because he had not employed the statutory methods of protecting him from the danger. In Railway Co. v. Craig, 19 C. C. A. 631, 73 Fed. 642, we held that the Krause Case was one of contributory negligence, and followed it as such. The syllabus confuses the difference between assumption of risk and contributory negligence, but the syllabus and opinion are, of course, to be restrained to the facts. The following cases, relied on by counsel for the railway company, were also cases of contributory negligence in suits for violation of specific statutory duty: Coal Co. v. Estievenard, 53 Ohio St. 43, 40 N. E. 725; Coal Co. v. Muir, 20 Colo. 320, 38 Pac. 378; Holum v. Railway Co., 80 Wis. 299, 50 N. W. 99; Grand v. Railroad Co., 83 Mich. 564, 47 N. W. 837; and Taylor v. Manufacturing Co., 143 Mass. 470, 10 N. E. 308. In the last two cases the distinction between contributory negligence and assumption of risk is clearly referred to.

For the reasons given, we think the court below was in error in holding that the plaintiff assumed the risk of injury from the failure of the defendant to comply with the statute passed for his protection, and that the case should have been submitted to the jury on the issue whether, assuming the unblocked guard rails and frogs as a condition of the situation, he used due care to avoid injury therefrom. Judgment reversed, at costs of the defendant, with directions to order a new trial.

In re ROSSER.

(District Court, E. D. Missouri, N. D. August 25, 1899.)

EXAMINATION OF BANKRUPT—CRIMINATING EVIDENCE.

Under the fifth amendment to the constitution of the United States, which declares that "no person * * * shall be compelled in any criminal case to be a witness against himself," where a person is under examination before a referee in bankruptcy he is not obliged to answer questions when he states that his answers might tend to criminate him; and this is true notwithstanding section 7 of the bankrupt act provides that "no testimony given by him shall be offered in evidence against him in any criminal proceeding."

(Syllabus by the Court.)

B. A. Jamison, for trustee.

P. H. Cullen and J. D. Hostetter, for bankrupt.

ROGERS, District Judge. Sidney J. Roy, one of the referees in bankruptcy for the Northern division of the Eastern judicial district of Missouri, certified to this court for its opinion this case, the facts of which are as follows: Rosser was adjudicated a bankrupt, and cited to appear by said referee at New London, in the county of Ralls, state of Missouri, on June 23, 1899, to undergo an examination by the trustee or his attorneys. That Rosser, in pursuance of the citation, appeared, was duly sworn, and in the course of an examination by the said referee testified in substance and to the effect that he had mortgaged a certain piece of property, about 30 days before he was adjudicated a bankrupt, for $2,500, and that he had received the money, and that one Logan, who loaned him the money, counted it out to his attorney, Mr. Cullen, and that Mr. Cullen counted it out to him, the bankrupt; whereupon the following questions were put to him, and the following answers made:

"Q. What was done then? A. We went back in the back room, and counted the money out. Q. Who counted it out? A. Mr. Logan counted it to Mr. Cullen, and Mr. Cullen counted it out to me. Q. How much was it for? A. $2,500.00. Q. What did you do with it? A. I decline to answer that question. Q. Why do you decline to answer that question? A. Because I have reasons for it. Q. What reasons have you? A. I don't wish to state them. I don't care to tell the reasons. Q. Did you pay Mr. Cullen any portion of it? A. No, sir. Q. You are certain of that? A. Yes, sir. Q. Did you pay Mr. Logan any of it? A. No, sir. Q. You are certain of that also? A. Yes, sir. Q. Did you pay anybody else any of it for Mr. Logan? A. No, sir. Q. Did you pay any one any portion of that $2,500.00 for Mr. Cullen? A. No, sir. Q. Have you still that $2,500.00 in your possession? A. I decline to answer any questions about that $2,500.00. Q. Why do you decline to answer them? A. I have a reason for it. Q. What reasons are they? A. Well, the reason is, it might turn up something to criminate me. Q. In what way would it criminate you? A. Well, there are several different ways. Q. What ways are they? A. I don't know. Q. Who told you not to answer that question? A. I don't know as anybody told me not to answer that question. Q. Did Mr. Cullen tell you not to answer? A. No, sir. Q. Did Mr. Hostetter tell you not to answer? A. No, sir. Q. Did you ask him whether you should answer that question, if it should be put to you? A. I don't remember asking him that. Q. Do you swear that you didn't ask him? A. I don't remember what I have asked him. I have asked him several questions. Q. You don't remember? A. No, sir."

Further on in the examination it appeared that, in addition to Mr. Cullen, who was one of the bankrupt's attorneys, the brother of the bankrupt had also employed another attorney, Mr. Hostetter, and the following questions were put to the bankrupt, and the following answers given:

"Q. Did you have any other talk with him after that, up to last night? A. Yes, sir. Q. When and where? A. I met him in Hannibal, and had a talk there, before Mr. Roy. He was there at one time. Q. Did you talk with him about what you should testify to? A. No, sir. Q. Didn't have any talk with him at all? A. I had a talk with him. I never had any talk with him about what I should testify to. Q. Did you ask him as to whether you should answer questions as to the—about the—$2,500.00? Did either one of them tell you that you should refuse to answer questions as to what you had done with the $2,500:00 in case the question was asked you? A. No, sir. Q. Did any one ever tell you that? A. No, sir. Q. Why did you think it might tend to criminate you? A. I have reasons for it. Q. What are your reasons? They are made independent of any suggestions that have been made to you by any party [to] in regard to the matter? A. Yes, sir. Q. Then you decided not to

answer the question without its being suggested to you by any one? A. Yes, sir. Q. Where did you get the idea that it would criminate you? Have you talked with any one about it? A. It would have to start from somewheres. It might as well start from me as anybody. Q. You got it from yourself? A. Yes, sir. Q. By intuition? A. I got it from myself. Q. It was simply from the fact that your own conscience had told you that you had committed some crime, and that you must not answer that question? A. I got it from myself. I hadn't committed any crime, however. Q. Why do you refuse to answer it, then, if you hadn't committed any crime? A. I had my reasons for it. There was other things besides crime. Q. What other things were they? A. I don't know. Q. You state that at Mexico, on the 17th of March, 1899, W. H. Logan paid you $2,500.00 in cash. A. Yes, sir. Q. And that you received it from him. Now, I ask you what you did with that $2,500.00. A. I decline to answer that question. The Referee: You will have to answer the question. The Witness: I am not prepared to answer that question now. The Referee: You will have to answer it. Mr. Jamison: Q. Do you still refuse to answer that question? A. Yes, sir. Mr. Jamison: May it please the court, in view of the fact that this witness has refused to answer the question, or any question, about what he did with the $2,500.00 which was paid to him by Mr. W. H. Logan on the 17th day of March, 1899, I move that this witness be declared in contempt of court, and that all that portion of his testimony commencing with his statement with reference to what he and Cullen and W. H. Logan did after leaving Mexico, also on March 17, 1899, down to the last question asked him, be certified up to his honor, Judge Elmer B. Adams, judge of the district court, for action thereupon, forthwith. (So ordered by the referee.)"

Upon this matter being certified up to the district judge for his opinion, an order was made by the district judge requiring said Rosser to show cause, if any he have, before Hon. John H. Rogers, acting judge of said court, at his chambers in the federal building in the city of St. Louis, Mo., on Monday, the 24th day of July, 1899, at 10 a. m., why he should not be punished as for a contempt. On the 24th day of July the said Rosser appeared, and filed the following answer:

"Now comes the said bankrupt, and, showing cause to the citation in this case, says that he refused to answer the question propounded to him before the referee for the reason that his answer to said question, and to questions of similar import, would have a tendency to show and prove, and would prove, that he is guilty of crimes under the law of the state and United States, and would point out to the public when and where and how to obtain evidence against him showing him to be guilty of criminal acts."

This answer was duly sworn to. It will be observed, in passing, that this answer is directly in conflict with his testimony wherein he says that at the time he refused to answer the question he had not committed any crimes. It is true that at another place in his testimony he stated that to answer the question would tend to criminate him. The question therefore arises as to whether or not the court can compel him, by proceedings for contempt, to show what disposition he has made of the $2,500, which unquestionably belongs to his creditors, and should have been placed in his schedules as a part of the assets of the bankrupt, and turned over to his trustee. Assuming that he has sworn to his schedules as the bankrupt law requires, it must be admitted that, if he were compelled to answer the question, and it should appear that he still has the $2,500, either in his own possession, or has placed it where it is held by some other person for him, but subject to his control, he ought to be indicted, under the bankrupt law, for perjury. If he has not got the money, but has

made way with it in some way, so that it is not under his control, and is not held for him, and he has no interest in it, then he could answer the question without incriminating himself. But it is impossible for the court to determine which state of facts is true. That question can only be determined by his answering the question, and disclosing what he has done with the $2,500. The court is of the opinion that, under such circumstances, to compel him to answer the question is a violation of rights guarantied to him by the fifth amendment to the constitution. See Counselman v. Hitchcock, 142 U. S. 547, 12 Sup. Ct. 195; Brown v. Walker, 161 U. S. 591, 16 Sup. Ct. 644.

It was urged in argument that he could not avail himself of this provision of the constitution, because, under the seventh section of the bankrupt law, it is expressly provided, "but no testimony given by him shall be offered in evidence against him in any criminal proceeding." But this language is not half so strong nor half so broad as the language of the act of February 25, 1868 (15 Stat. 37), which was considered, and the same argument made, in the case of Counselman v. Hitchcock, 142 U. S. 560, 12 Sup. Ct. 195, in which case the court held that the witness could not be compelled to answer. That act, as will be seen by an examination of the case of Brown v. Walker, was subsequently amended, and the language of the act made still broader, and yet, when that act came to be considered, it was upheld by a bare majority of the court, four of the judges dissenting, and holding that the witness should not have been compelled to answer the questions. A critical examination of these two cases, I think, justifies the court in the conclusion that the witness in this case ought not to be compelled to answer the question, and may rely upon the constitutional guaranty found in the fifth amendment. The bankrupt, therefore, will be discharged.

In re ROSSER.

(District Court, E. D. Missouri, E. D. August 26, 1899.)

BANKRUPTCY—REFUSAL TO TURN OVER ASSETS.

A bankrupt who admits that he had in his possession $2,500 in cash, three or four weeks before proceedings in bankruptcy were begun against him, and who refuses, when an order is made upon him, to turn it over to the trustee, or to give any account of what disposition he has made of it, should be committed to prison until he disgorges the same.

(Syllabus by the Court.)

In Bankruptcy.

On April 7, 1899, an involuntary petition in bankruptcy was filed in this court against George P. Rosser, and on May 11th following he was adjudicated a bankrupt. On June 5th thereafter one Frederick E. Neeper was appointed his trustee in bankruptcy, and, having duly qualified, was, at the commencement of these proceedings, acting as such. At the relation of said trustee, Sidney J. Roy, referee in bankruptcy of this court, cited said bankrupt to appear before him at Hannibal, Mo., on the 23d day of June, 1899, to submit to an examination in accordance with the ninth paragraph of the seventh section of the act of July 1, 1898, commonly called the "Bankrupt Act." Rosser appeared, and, among other things, testified that on the 17th day of March,

1899, he mortgaged certain real estate for the sum of $2,500 to one Logan, and he refused to tell what had become the money, or to give any account thereof. Thereupon the referee in bankruptcy made an order requiring him to pay over the money to the trustee, which he refused to do, and the referee entered an order declaring him in contempt of court, and certified the matter to this court for its opinion and action. The other material facts will sufficiently appear in the opinion.

B. A. Jamison, for trustee.
P. H. Cullen and J. D. Hostetter, for bankrupt.

ROGERS, District Judge (after stating the facts as above). Accompanying the certificate of this case to this court, the referee sent up the testimony of Rosser and that of various other witnesses, who were examined on the 23d and 24th days of June, 1899, and also the schedules as filed by the said Rosser. From these schedules and the testimony of said Rosser the following facts appeared: Rosser began the general merchandise business at Center, Ralls county, Mo., in the month of June, 1898. It is not made to appear from the testimony that at the time he entered the business he was in debt. On the contrary, it appears that he had a cash capital of about $2,000, a portion of which was in bank. He first bought out a small stock of goods, and then began making small purchases, but later made large purchases of various merchants in different cities, chiefly in the city of St. Louis. During the months of January and February, 1899, large quantities of these goods purchased were delivered. Early in March following, and before the bills for these large quantities of goods had matured, Rosser began negotiating a trade of his entire stock of goods and merchandise to one Briscoe for a house and lot in said town of Center, and a 120-acre tract of land situate near thereto. The negotiations were pending about 12 days, and on the 16th of March the trade was consummated. Immediately before the trade was consummated, an invoice of the goods on hand was taken, showing something about $3,600 of stock on hand. Of this stock $3,000, as invoiced, was turned over to Briscoe for the realty aforesaid, and the remainder of the stock was sold in job lots to confidential friends, former employés, and near relatives. The persons to whom these job lots of goods were sold were creditors of Rosser, and, notwithstanding that fact, paid cash for the goods which they bought. The 120-acre tract of land which Briscoe conveyed to him in part payment for the goods was mortgaged at that time for nearly its full value, and the mortgage due. The house and lot were unincumbered, and worth about $1,400. Pending the negotiations for this trade between Briscoe and himself, Rosser, with the assistance of his attorney, was negotiating a loan upon the land and house and lot above referred to. The deed from Briscoe to the bankrupt for the house and lot and land was executed on the 16th of March, and on the day following a man by the name of Logan, with whom Rosser's attorney had been negotiating for a loan, advanced to Rosser $2,500 on the land and house and lot, and took a mortgage to secure the same, which matured in six months. The deeds from Briscoe to Rosser, and the mortgage from Rosser to Logan, were recorded about the same time,—possibly on the same day,—so that the negotiations for the sale of the mer-

chandise and the mortgage of the property to be received therefor were being conducted at one and the same time, and, presumably, with the knowledge of all of the parties. Not one cent of the proceeds of the sale of his stock of goods, wares, and merchandise, nor of the proceeds of the mortgage of $2,500, was appropriated to the payment of his creditors. As stated, when he engaged in business, he was not in debt; had capital amounting to not less than $2,000,—possibly more. When he consummated the trade above referred to, nine months after he began business, his mercantile debts amounted to about $5,400, and, including the mortgage on the land, there were other debts amounting in the aggregate to about $4,500; in other words, he was indebted, when he quit business, in about the sum of $10,000. Among his assets is the 120-acre tract of land covered by two mortgages for a larger amount than the value of the land and the house and lot. His other assets are purely nominal. His condition may be summed up as follows: His $2,000 was gone, the merchandise he had was gone, his assets were nominal, and he owed $10,000 in money. By his own testimony he showed that about two-thirds of the goods he had bought were paid for in cash, and his outstanding accounts are so small as to show that his collections must have been excellent. Upon being interrogated before the referee as to what he had done with the $2,500 for which he had mortgaged the real estate, he declined to answer, upon the ground he could not answer the question without incriminating himself, and yet, in his testimony, he says that he had not, at that time, committed any crime. After a thorough and searching investigation, no information was furnished by the bankrupt as to what he had done either with the money he had received on the mortgage or with the money for which he had sold the goods. He claimed to have come to St. Louis immediately after getting the money on the mortgage, and to have remained here a short while, and seeks to leave the impression that he was dissipating, and, probably, gambling, but does not positively so state, but does say that when he returned he did not have the money, and declines to give any disposition he had made of it whatever. Upon appearing in this court he first filed an answer, in which he asked for time to produce testimony to show that he was unable to comply with the order of the referee in bankruptcy requiring him to pay over the $2,500, and also stated his inability to do so. This answer was not under oath. It was accompanied, however, by an affidavit of one of his attorneys, in the nature of a complaint, that the referee had not allowed him to be present when other witnesses were examined, and that the referee would not allow his counsel to cross-examine him. The court thereupon made an order permitting him to be cross-examined, and set the case down, on motion of his counsel, for hearing on the following day. At the hearing he declined to be cross-examined, and filed an answer, in substance to the effect that he had disposed of this $2,500 before the proceedings in bankruptcy were instituted against him, and that he was wholly without the power to pay the money, because he did not have it, and had no way of raising it. He makes no disclosure whatever as to how he disposed of it, to whom he disposed of it, what he disposed of it for, or anything about

it, beyond what has been stated. The petition of the trustee, heretofore filed, is now pending to commit him for contempt for not obeying the order of the referee to turn over the money.

I have carefully read over all the testimony, and carefully considered the questions involved, because of its important bearing, not only upon the rights of the bankrupt, but as it may affect the general administration of the bankrupt law. The ninth paragraph of section 7 of the bankrupt law provides that the bankrupt shall, "when present at the first meeting of his creditors, and at such other times as the court shall order, submit to an examination concerning the conduct of his business, the cause of his bankruptcy, his dealings with his creditors and other persons, the amount, kind and whereabouts of his property, and, in addition, all matters which may affect the administration and settlement of his estate"; and section 41 provides that "a person shall not, in proceedings before a referee, disobey or resist any lawful order, process, writ," etc.; and in paragraph b of that section it is provided "that the referee shall certify the facts to the judge, if any person shall do any of the things forbidden in the section. The judge shall thereupon, in a summary manner, hear evidence as to the acts complained of, and if it is such as to warrant him in so doing, punish such person in the same manner and to the same extent as for a contempt committed before the court of bankruptcy, or commit such person upon the same conditions as if the doing of the forbidden act had occurred with reference to the process of, or in the presence of, the court." The question, therefore, arises whether the order made by the referee was a lawful order, within the meaning of section 41 of the bankrupt act. The present bankrupt law is new, and there are very few adjudications. A good deal of light, however, is thrown upon this subject by decisions under the English bankrupt law, as well as under the former bankrupt laws of this country. A case strikingly in point with this (in which the cases are reviewed) is the case of In re Salkey, 21 Fed. Cas. 235 (No. 12,253), in which Judge Blodgett said:

"The bankrupts in this case occupy substantially the attitude of saying to the court: 'We have had in our possession assets to the value of over $20,000 between January and October, 1873, and refuse to give any account thereof. We have not turned them over to our assignee. We do not admit we have them in our possession. The court and creditors must help themselves; do the best you can. We stand mute, and refuse to throw any light upon the subject of the disposition of this large amount of funds.'"

That statement is no stronger than the facts in this case. Between June, 1898, and March, 1899, this defendant had in his possession many thousands of dollars' worth of goods. He had capital, when he entered business, of $2,000. He quit business with the $2,000 gone, $10,000 in debt, $5,400 contracted for merchandise bought, and in about one month before he was adjudicated a bankrupt he had in his possession $2,500 in cash, raised by mortgage, and several hundred dollars in cash, the proceeds of the sale of the goods. He says:

"I have paid no debts. I have no goods. I disposed of the $2,500 in money. My book accounts are practically worthless, and nominal in amount. My

other assets amount to very little. I decline to give any account of what I have done with the money I have received on this mortgage, and I have not turned over to the trustee that which I received for goods. Now, do the best you can. I decline to give any account of what I did with it."

In the case of In re Salkey, supra, Judge Blodgett said:

"Is the court to sit tamely by, and be baffled by such acts of practical contumacy on the part of a bankrupt? Perhaps no more forcible illustration of the necessity of the exercise of the powers specifically granted to the English bankrupt court, and, as I have claimed, impliedly granted to the bankrupt courts under our law, could be imagined than the case before us. Here the bankrupts admit that between the 1st of January, 1873, and the time that proceedings in bankruptcy were commenced against them, they had merchandise and property in their possession which they had purchased on credit, and not paid for, to the value of over $35,000. They refuse to explain what has become of that property. They offer no hypothesis to account for its disappearance, but simply say, in response to the final order for accounting, that they have no further account to give. Can it be said that any reasonable mind should be satisfied with such an accounting by a bankrupt for his assets? Can it be said that a court charged with the administration of the estate of a bankrupt, and bound to see that all the estate goes to the assignee for the benefit of creditors, is to be satisfied, on such a showing, that the bankrupts have honestly turned over to the officers of the court all their assets? Ought the court to be put off with mere silence, or refusal or neglect to account in a reasonable manner for assets traced clearly to and admitted by the bankrupts themselves to have been in their hands and under their control at so recent a date? The administration of bankrupt estates is, in the main, unsatisfactory at best; but how much more must it be if there is no power to unearth concealed assets, and compel bankrupts to disgorge their hidden property. The duty of the bankrupt is to honestly account for his assets according to facts. He may have lost his property by unfortunate speculations, or by gambling, even, so that it is beyond his reach or that of his assignees, and a true statement of the facts would be an accounting for it. That is a showing of what has become of it, within the intention of the law; but until some explanation is made the court must hold the bankrupt accountable. If, upon such examination, it is made to appear to the satisfaction of the court that a bankrupt has assets secreted which he has not delivered to his assignee, surely it could not be expected that the court should be content with the mere barren results of the information which the examination should give; but the court clearly has the power to enforce the surrender of the property, if it appears to the satisfaction of the court that it is still in the control of the bankrupts themselves, or no disclosure is made to show that any other person has possession of it. The conclusion is inevitable, from the admissions of the bankrupts in the examinations, that they still have the possession, in some manner, of those goods or their proceeds, or they have information or knowledge as to where those goods or proceeds can be found, and fraudulently withhold such information."

If this language had been used with reference to the case at bar it must be conceded it could not have been more apposite. In this connection, see the Case of Purvine, reported in the National Bankruptcy News, June 15, 1899, No. 14, p. 326, decided by United States District Judge Edward R. Meeks. In both cases cited the parties were committed until they disgorged the assets in their possession.

If any case was ever presented to a court of justice which disclosed a more deliberate and corrupt scheme on the part of a bankrupt to swindle his creditors than the one at bar, I have not met with it. The story he tells of what he did after getting the money is so evasive, unreasonable, and incredible as to produce but one effect,—that of utterly destroying the credibility of the bankrupt. Indeed, his whole evidence covering the period in which he was in business shows

a degree of recklessness, want of probity, and dishonesty rarely exhibited in courts of justice. If the bankrupt law is to be administered so as to permit a man, by deliberate dishonesty, to dissipate his assets in the way the defendant is shown to have made away with his, and escape responsibility by perjury, and thereby swindle his creditors, the bankruptcy court must inevitably become a harbor of refuge for rascals; and honest men, who have been unfortunate in business, and for whose benefit the law was enacted, will hesitate to accept its beneficent provisions, because a discharge in bankruptcy will become a badge of vice and crime. Either one of two things is true in this case,—this mortgage upon which he claims to have raised $2,500 is a sham, intended for the purpose of enabling him to appropriate the land in question ultimately to his own use, or else he got the $2,500. If he got the $2,500, he has it now, or he has invested it in something else, or he has deposited it somewhere with some one, to be held in trust for him. He does not deny having invested it in other property, nor does he attempt to account for it, so that it may be, while he has not the money itself, he has that which represents it; and, in the judgment of the court, either the money or that which represents it is still under his control, notwithstanding his answer. It cannot be assumed that a man who has practiced such rascality as this has done it for the purpose of giving away the money, and he is unwilling, under oath, to state that he has either gambled it away, or that he has lost it in dissipation and vice. He has sworn, and other witnesses have sworn, that he received the money,—among others, his attorney, and Logan, who loaned him the money; and Logan has sworn that it was never returned to him, and, indeed, denies any collusive conduct between himself and the bankrupt as to the mortgage on the property. The court must therefore assume that it is true that the bankrupt got the $2,500 in cash. He has so testified himself, and, having made his bed by saying he got it, he must now lie upon it, or produce the money. In the language of Judge Blodgett, it seems to me that the court ought not to allow itself and the creditors of this man to be mocked in this way. It ought to compel him to account for this money, or, if he has invested it otherwise, to make it known, and turn over whatever he has invested it in to the trustee, to the end that justice may not only be done to the creditors of the bankrupt, but that such high-handed and impudent attempts at swindling may, as far as possible, be prevented in the future. The order of the court, therefore, will be that the bankrupt stand committed to jail until he shall account for and surrender to the trustee the $2,500, the proceeds of the mortgage, which he received on the 17th day of March, 1899.

In re IDZALL.

(District Court, S. D. Iowa, C. D. August 24, 1899.)

No. 571.

1. BANKRUPTCY—DISCHARGE—CONCEALMENT OF PROPERTY—EVIDENCE.
Creditors opposing the discharge of a bankrupt on the ground of his having concealed property from his trustee must assume the burden of proving such concealment; and it is not sufficient for them to show merely his former ownership of certain goods, and that he is not now able to account for the same, but there must be evidence of his present possession or control of such property.

2. SAME—FAILURE TO KEEP BOOKS—INTENT.
Under Bankruptcy Act 1898, § 14b, it is not sufficient to forfeit a bankrupt's right to discharge that he has failed to keep books of account or records from which his true condition might be ascertained, but it must further be shown that such failure was "with fraudulent intent to conceal his true financial condition."

3. SAME—EVIDENCE OF INTENT.
Where it appeared that a bankrupt had not kept such books or records as would be sufficient to disclose his true financial condition, but that his system or method of keeping his accounts, incomplete and insufficient as it was, had been persisted in by him during the whole time he had been in business (about nine years), and had not been in any respect changed after the passage of the present bankruptcy act, *held* not sufficient to justify the court in inferring that the bankrupt's failure to keep proper books was "with fraudulent intent to conceal his true financial condition."

In Bankruptcy. On application for discharge.

Dudley & Coffin, for opposing creditors.
Read & Read, for bankrupt.

WOOLSON, District Judge. The grounds of opposition to discharge, as finally presented, are: (1) That the bankrupt knowingly and fraudulently, while a bankrupt, concealed from his trustee property belonging to his estate; and (2) that with fraudulent intent to conceal his true condition, and in contemplation of bankruptcy, the bankrupt, since July 1, 1898, has failed to keep books of account or records from which his true condition might be ascertained.

1. As to such concealment, which must, in this case, be of money or property, the evidence submitted fails to show either. The bankrupt is unable to account satisfactorily for nearly $1,600 of goods bought by him after August, 1898. The opposing creditors do not claim that such evidence shows any of said goods as being in his possession, or under his control. Nor do they claim that he has been or is withholding from the trustee any money which was received for such goods. But they claim that he should have said goods, or their proceeds, or else be prepared to account for same. He is not able to account for them. It must be borne in mind, however, that we are not here considering mere carelessness in business matters, however gross may be such carelessness. The charge is concealment, and that is an affirmative act, implying something of present possession or control. For one cannot, in the sense here intended, conceal that which has entirely passed from his possession or control. If the goods were sold before institution of bankruptcy proceedings,

then they did not belong to the bankrupt's estate at the time when bankruptcy proceedings were instituted, and are not concealed by the bankrupt. If the proceeds of these goods were paid out by Idzall before such proceedings were instituted, then he has not the money. It never was a part of the estate, and he is not concealing same. His inability to point out where these goods went, and to account for the money received for such as were sold, shows strikingly lax business methods, or, rather, lack of business methods. The burden is on the opposing creditor to prove concealment. This has not been done.

2. The books in which Idzall made his business entries are fragmentary. His "blotter," with its attempted entries of daily sales, is unintelligible, even under Idzall's efforts at explaining same. He kept no cash book, and no merchandise account. His bills of goods purchased were placed "on a hook," he says, in his office, and his method of ascertaining to whom and for what amounts he was owing for goods bought was to consult this hook. As he paid a bill, he took the bill off this hook, and laid it away. He apparently made some effort to keep some sort of "accounts" under different headings. So far as related to the banks with whom he dealt, he has kept a fairly intelligible account in his books. But in his examination Idzall could not tell the gross amount of sales during any month since June, 1898, nor the gross amount of money received on sales for any such month, nor the parties to whom or purposes for which a large part of his moneys were paid out. He could only partially state these facts. He was not "able to keep books," he testifies. Yet he was doing some wholesaling, and was retailing each business day. His brother traveled as salesman for him. Idzall testifies that he never took any list or invoice of the goods which the brother carried on each trip, and that his brother, when starting on each trip, took such goods as he desired, put them in his salesman's trunk, from time to time remitted proceeds, and at end of trip the brother paid over whatever amount he acknowledged to be net proceeds of his sales; that no list or invoice was taken of goods returned at close of trip, and no settlement was ever had with the brother during all the time the brother was making these trips as such salesman. So far as concerns "failure to keep books of account or records from which his true condition might be ascertained," there could scarcely be found a case where, with any attempt whatever to keep books, there was a greater failure in so keeping same that therefrom the true financial condition might be ascertained. But such mere failure does not fill the terms of the present law. The statute of 1867 was not, on this point, reenacted in the present statute. Here there must additionally appear that such failure was "with fraudulent intent to conceal his true financial condition," etc. If such intent can be deduced from mere failure to keep proper books of account, the deduction might easily be here made, so far as merely the actual condition of the books since July 1, 1898, is concerned. And counsel for opposing creditors has strongly urged that therefrom the court must find such fraudulent intent. Without attempting to define the quantum of evidence, or in what lines it must run, to justify finding this fraudulent intent to

conceal the true financial condition, I am unable in this instance to find such intent under the evidence. Idzall had been in business about nine years, when he was adjudicated a bankrupt. During all that period, his attempts at bookkeeping were made in two ledgers (one largely relating to before, the other during and since, 1898) with a blotter in use for daily sales. So far as I can ascertain from the evidence and from an inspection of these books, there seems no change in his attempted keeping of them. Whatever of method existed at any time seems to have been continued without change. No evidence is produced tending in any way to show that his earliest efforts at this bookkeeping were attended with or caused by any attempt at concealing his true financial condition. He seems to have kept merely such accounts as sufficed to inform him of sales and purchases made on credit, where partial payments were to be made, and of the condition of his bank account. But he seems not to have understood that books of account might be so kept as that therefrom the financial condition of the merchant could be obtained at any time; and his examination shows that he did not know what was meant by "bills payable" and "bills receivable," and he kept no accounts concerning them. With this evidence before me as to his attempted bookkeeping methods, and as to its being the same from his starting as a merchant, and the fact that since the present bankruptcy statute went into effect no change in such bookkeeping has been had, I am unable to find that there was fraudulent intent, since the present bankruptcy statute went into effect, to conceal his true financial condition in Idzall's failure to keep books of account which a prudent merchant would have kept, and from which his true financial condition might have been ascertained.

In what has above been said, I desire that I be not misunderstood. This case is decided upon the exceedingly peculiar facts attending it. The lack of business system shown in the evidence could scarcely fail to bring financial disaster in its train. The only wonder is that it was delayed so long. The evidence could scarcely have presented looser business practice, and less regard for that scrutiny and carefulness in business methods which must underlie mercantile success. The decision herein reached finds its basis almost entirely on the fact that, whatever intent might have been inferred from the evidence and inspections of the books relating to matters occurring since July 1, 1898, is negatived or overthrown by the evidence and inspection of the books for seven or eight years prior thereto. This evidence, admitted without objection, compels me to overrule the objections to discharge here presented. The decision herein reached must not be misinterpreted as in any wise justifying failure to keep proper books of account. If the merchant cannot himself keep a set of books, from which at any time his true financial condition can be ascertained, it is his duty to employ some competent person for that purpose. Due regard for his own business safety, if no other reason existed, should induce him to keep a proper set of books. And this practice is now so universal that it may well be regarded with suspicion when a merchant fails to keep such books, and therefore may justly require him to produce some satisfactory reason why he

fails to observe in his business that bookkeeping which is generally regarded as an essential part of safe business methods, and as conserving honesty in business affairs. Let an order be entered overruling the objections to the application for discharge, at costs of opposing creditors, and discharging the bankrupt.

In re WOODRUFF (two cases). In re McCORVEY. In re COWDREY.

(District Court, S. D. Georgia, W. D. August 4, 1899.)

1. BANKRUPTCY—WAIVER OF EXEMPTIONS—JURISDICTION OVER EXEMPT PROPERTY.

A court of bankruptcy, by virtue of the powers conferred upon it by Bankruptcy Act 1898, c. 2, § 2, and particularly the grant of authority to "determine all claims of bankrupts to their exemptions," has jurisdiction to protect and enforce, against property set apart to the bankrupt as exempt under the laws of the state, the rights of creditors who hold his notes or other like obligations containing a written waiver of the exemption, but who have not reduced their claims to judgment, nor otherwise established a specific lien on such property.

2. SAME—RIGHTS OF CREDITORS.

On the petition of creditors who hold notes or other obligations of the bankrupt containing a written waiver of exemptions, but who have not obtained judgments, nor otherwise established liens on the property, the court of bankruptcy will direct the trustee to administer the property set apart to the bankrupt as his homestead exemption, the same as other property of the estate, but keeping a separate account of the proceeds. Such proceeds will constitute a special fund for distribution to those creditors who hold waivers of exemptions, and they will be required to exhaust this fund before coming upon the general estate. The bankrupt, or any one in his behalf, may redeem the homestead by paying the claims of such creditors.

3. SAME—STAY OF DISCHARGE.

A bankrupt's application for discharge may be stayed until there has been a definite settlement of the rights of creditors who claim the privilege of enforcing their claims against property which has been set apart to the bankrupt as his homestead.

In Bankruptcy. On petitions of certain creditors of Eli Woodruff, Z. B. Woodruff, H. J. McCorvey, and W. D. Cowdrey, bankrupts, praying for a stay of proceedings on the applications of the said bankrupts, respectively, for discharge, and for other relief.

Hall & Wimberly, Greer & Felton, and Ansley & Ansley, for petitioning creditors.

Allen Fort, for bankrupts.

SPEER, District Judge. These are plenary proceedings in equity brought by certain creditors of the bankrupts above mentioned. They are all alike. The petitioners hold promissory notes given by the bankrupts containing waivers of the right to the homestead and exemption allowed by the laws of the state of Georgia. These waivers constitute a part of the contract of indebtedness, and were made in accordance with the provisions of the constitution of the state empowering the debtor to waive or renounce in writing his right to the benefit of the exemption therein provided. Petitioners allege that the trustees of the estates of the bankrupts have set apart the ex-

emptions under the provisions of the act of congress, and have reported the items and estimated value thereof to the court; the bankrupts themselves have applied for a discharge; the petitioners hold no security for their debts, except in so far as the waiver of homestead and exemption may be construed as a security; and that, if a discharge is granted by the court at this time without making some provision for the enforcement of the waiver notes, the petitioners will be without remedy. This is made to appear by a recitation of the law of Georgia (Code, § 2850). This provides how the exemption can be subjected to the payment of the debt containing a waiver of homestead. It is by putting the debt in judgment, and causing execution issued thereon to be levied on the exempted property. The bills allege that, the entire estates of the bankrupts not consumed in expenses having been set apart by the trustees as exemptions, if the discharge in bankruptcy shall now be granted by the court, without reserving to the petitioning creditors the right to sue on said debts and put the same in judgment, or without giving judgments creating liens thereon, the petitioners will be left without the means of enforcing their rights created by the waivers of exemption. The prayers are that the bankrupts' applications for discharge be stayed and not granted until the petitioners are given an opportunity to enforce their waivers of homestead either by proceedings in the state court or in this court, or that, in the event discharges shall be granted, the same be so molded as to save to the petitioners their right to reach the exemptions set apart to the bankrupts, and that in the meantime the court will protect and preserve the exempted property, and provide for its due administration, distribution, etc. The defendants, who are the bankrupts, demurred to the petition for want of jurisdiction, and argument was heard thereon.

The question presented by the pleadings and argument in these causes is of first importance. It affects the vast preponderance of the written promises to pay which have been made in this state since the adoption of the constitution in 1877. It is this: Has the bankruptcy court jurisdiction to protect or enforce against the bankrupt's exemption the rights of creditors not having a judgment or other lien, whose promissory notes or other like obligations to pay contain a written waiver of the homestead and exemption authorized and prescribed by the constitution of the state, or are such creditors to be remitted to the state courts for such relief as may be there obtained?

The constitution of the state provides (article 9, § 1):

"There shall be exempt from levy and sale, by virtue of any process whatever under the laws of this state, except as hereinafter excepted, of the property of every head of a family, or guardian or trustee of a family of minor children, or every aged or infirm person, or person having the care and support of dependent females of any age, who is not the head of a family, realty or personalty, or both, to the value in the aggregate of sixteen hundred dollars."

Code, § 5914, provides:

"The debtor shall have power to waive or renounce in writing his right to the benefit of the exemption provided for in this article except as to wearing apparel, and not exceeding three hundred dollars' worth of household and kitchen furniture, and provisions, to be selected by himself and his wife, if any, and he shall not, after it is set apart, alienate or encumber the property

so exempted, but it may be sold by the debtor and his wife, if any, jointly, with the sanction of the judge of the superior court of the county where the debtor resides or the land is situated, the proceeds to be reinvested upon the same uses."

The statutory remedy for the enforcement of simple promises to pay, containing a waiver of the homestead, is found in section 2850 of the Code, which is as follows:

"In all cases when any defendant in execution has applied for, and had set apart a homestead of realty and personalty, or either, or where the same has been applied for and set apart out of his property, as provided for by the constitution and laws of this state, and the plaintiff in execution is seeking to proceed with the same, and there is no property except the homestead on which to levy, upon the ground that his debt falls within some one of the classes for which the homestead is bound under the constitution, it shall and may be lawful for such plaintiff, his agent or attorney, to make affidavit before any officer authorized to administer oaths, that, to the best of his knowledge and belief, the debt upon which such execution is founded is one from which the homestead is not exempt, and it shall be the duty of the officer in whose hands the execution and affidavit are placed to proceed at once to levy and sell, as though the property had never been set apart. The defendant in such execution may, if he desires to do so, deny the truth of the plaintiff's affidavit by filing with the levying officer a counter affidavit."

The constitution now of force, which contains the provisions above quoted, was adopted in 1877. This constitution was substituted for that of 1868, which made provision for a much larger homestead exemption, namely, $2,000 in land and $1,000 in personalty. The constitution of 1868 was adopted shortly after the late Civil War, when the dire necessities of the people resulting therefrom had caused a popular demand for large measures of relief to debtors. It was soon found, however, that the policy of allowing a homestead exemption so large that it practically protected all the property in the state from levy and sale for debt had destroyed private credit. The people concluded that they had gone too far, and that the remedy was worse than the malady. A convention was called to change the constitution, and perhaps the most important change in the organic law effected by that body was the revision of the homestead, and the reduction of its value to the amount now prescribed. But this was not the only change in the homestead law effected by the constitution of 1877. Under the constitution of 1868, it was impossible for the debtor to avoid the effectiveness of his exemption by any waiver or renouncement of his right thereto in a simple promise to pay. This inhibition upon the citizens of the state was scarcely less injurious to the credit of the people than the large homestead itself. The farmers, merchants, and business men of small property, who constituted an immense majority of the people, had no basis of credit to obtain funds by means of which the really enormous resources of the state could be developed through individual ventures. This being true, the people perceived that not only must the homestead be reduced in size, but that the head of a family in whose favor it was allowed must be given the privilege of waiving it, in order to obtain credit. This resulted in that clause of the constitution above quoted, which made the waiver of homestead effective. In reliance upon this provision of the organic law, for nearly a quarter of a century, almost if not

quite all of the important contracts for lending money in this state have been made. It was, indeed, essential to private credit. A simple calculation, based upon the number of persons in Georgia entitled to the $1,600 homestead of the present constitution, and the aggregate values of property in the state, will demonstrate that, without the power to waive the homestead, values equaling all the property of the state could be set apart and exempted, and therefore withdrawn from the assets of the people available as security for debt. It may be further said that the great material development of the state during the last 22 years has been largely attributable to the stability of credit and the confidence of business men resulting from this clause of the constitution. If this provision is now to be rendered nugatory, it is obvious that it may produce the most far-reaching and disastrous results. It remains to be determined if the act of congress of 1898 creating a uniform system of bankruptcy has so impaired the remedy of creditors holding "waiver notes," as they are called, which have not yet been reduced to judgment, that the homestead exemption set apart by the trustees in bankruptcy shall be practically beyond their reach. It is insisted, for the petitioners, with great earnestness and force, that the controversy before the court possesses this wide significance. It is contended that the discharge in bankruptcy of the debtor will discharge the debt to secure which the waiver of homestead exists, and, this being true, that suit cannot be brought in the state court to obtain judgment and execution by means of which the waiver can be made effectual. Nor does the defendants' counsel seek to evade the force and significance of this contention. He denies that this court has jurisdiction to take any action to protect the creditors holding waiver notes. He says that it is no concern of the court whether the waiver is valid or invalid, whether it is destroyed or preserved. He declares that the creditor who holds a waiver has a debt no more sacred than one who does not have it; "the law pays them both,—discharges them alike." He contends that, if the waiver amounts to a lien upon the homestead property, the creditor can go into the state court and seek to subject it thereto; otherwise, that the debt is ended by the discharge in bankruptcy. It cannot be well contended, however, that the waiver constitutes a lien, in view of the conclusive holding of the supreme court that it does not. Stafford v. Elliott, 59 Ga. 837. Let us inquire if the legislation of congress on this subject is capable of this alarming construction:

Section 6 of the bankrupt act provides:

"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 in the state wherein they have had their domicile for the six months, or the greater portion thereof, immediately preceding the filing of the petition."

It further provides that the bankrupt, in filing his petition, shall set up his claim to exemption; that is, he shall assert what property he claims. It makes it the duty of the trustee to set apart the bankrupt's exemption, report the items, and estimate the value thereof to the court, as soon as practicable after his appointment. This is, of course, merely a ministerial duty. The statute also gives to the

court of bankruptcy the power "to determine all claims of bankrupts to their exemptions." It seems clear, from this recital, that the initial clause of the bankrupt act, relating to the exemption, is a limitation upon the operation of the act itself, rather than a positive enactment interfering with the homestead legislation of the several states. "This act shall not affect the allowance to bankrupts of the exemptions which are prescribed by the state laws in force." If this be true, then it is also true that no exemptions are allowed thereby which are not prescribed by the state laws in force, and, if an exemption is set apart to the bankrupt, it is by the appropriate remedy to be subjected to the rights of the creditors therein which the law of the state has defined. And yet it is also true that if the exemption is set apart, and the bankrupt is also given his discharge, the creditor holding the waiver would be forbidden by the act to bring or maintain his action in the state court. Where, then, is his remedy? It must exist. He has a right. "Ubi jus, ibi remedium." I should have had less difficulty in indicating the remedy, and granting the relief sought by the petitioners, but for the fact that it has been recently decided by a learned judge, whose opinions are entitled to much consideration, that when the bankrupt's exemptions have been set apart by the trustee, and the action of the trustee approved, the court has no further control over the exempted property, and will not retain jurisdiction over it for the purpose of enforcing the rights of the creditor holding a note in which the bankrupt has waived his right to homestead and exemption. In re Camp, 91 Fed. 745 (decision by Judge Newman). In that case the question arose upon the application for the exemption out of the partnership assets, made by a member of a bankrupt firm who had no private property. The partnership was between father and son. The son applied for exemption, and the evidence, said the learned judge, "fails to show that B. T. Camp, the son, has such interest in the partnership assets as would authorize the allowance to him of the exemption. All it does show is to the contrary." It followed, then, that the court could not and did not allow any exemption at all. In that condition of the record, the learned judge remarked:

"While, in view of what has been stated above, it may be unnecessary at present to determine the next question raised in this case, still, as it is one of general importance, and will frequently arise, it may as well be decided now as hereafter. The question is as to the effect in bankruptcy of a waiver of all rights of homestead and exemption contained in notes made by the bankrupt."

It seems justifiable to conclude from this recitation that, since there was no exemption before the court, the decision of my learned Brother, that he had no jurisdiction to enforce a waiver thereon, was not the result of the clear and exhaustive consideration usual with him when rights are actually in controversy, but may be regarded as merely a dictum. A dictum is defined to be "an opinion expressed by the court, which, not being necessarily involved in the case, lacks the force of an adjudication." The supreme court of the United States has held that, in order to make an opinion a decision, there must have been an application of the judicial mind to the precise question necessary to be determined to fix the rights of the parties;

and, therefore, said the learned judge delivering this opinion, "this court has never held itself bound by any part of an opinion which was not needful to the ascertainment of the question between the parties." Carroll v. Carroll's Lessee, 16 How. 287. In view of this authority, with great deference to my learned Brother of the Northern district, I feel at liberty to examine the reasoning and authorities by which he reached this conclusion. The opinion in Re Camp is principally based upon a decision in Re Bass, 3 Woods, 382, Fed. Cas. No. 1,091, where Justice Bradley rendered the opinion. There, it is true, the learned associate justice of the supreme court held that the exempted property constitutes no part of the assets in bankruptcy. "The agreement of the bankrupt in any particular case to waive the right to the exemption makes no difference," said Justice Bradley, "but, whether so or not, it is not for the bankruptcy court to inquire. The exemption is created by the state law, and the assignee acquires no title to the exempted property. If the creditor has a claim against it, he may prosecute that claim in a court which has jurisdiction over the property which the bankrupt court has not." The great eminence of the learned justice pronouncing this decision, like the high authority of his opinions, cannot be questioned. The ruling was made, however, upon a construction of the bankrupt act of 1867; and it related to the homestead law of 1868, under a condition of the law and at a time when it was true, as stated by Justice Bradley, that the agreement of the bankrupt in any particular case to waive the right to the exemption made no difference. The decision of the question now before the court must be made upon a construction of the bankrupt act of 1898, and the homestead law as prescribed by the state constitution of 1877, and now it does make a difference whether there was a waiver of the right to exemption under the act of 1877 in such promises to pay as those presented by the petitioners here. Under the constitution of 1868 there could be no effective waiver of homestead except in an instrument creating a lien, and the bankrupt law of 1867 provided that the person holding a lien need not come before the bankrupt court at all, but might enforce his lien by a proceeding in the state court irrespectively of the bankrupt proceedings. Under the constitution of 1877, as we have seen, the waiver of exemption is effective, although it may be made in an instrument not creating a lien,—in a simple promise to pay. Besides, there is no provision in the bankruptcy legislation which authorizes the holder of a simple contract note, although it contains a waiver of exemption, to go forward and sue the note to judgment, in a state court or elsewhere, after the discharge in bankruptcy has been granted. Judge Bradley's ruling goes on the idea that there is a forum elsewhere to determine the right of the creditor in whose favor the lien existed. We have seen that when such right existed there was such a forum under the bankruptcy legislation by which the decision of Justice Bradley was controlled. It will be presently seen that there is no forum now, other than the bankrupt court, to hear the claims of any creditor holding a waiver note which had not been reduced to judgment at the time the proceedings in bankruptcy were filed. It follows that the wide variation between the homestead law of 1868 and that of 1877,

and the bankruptcy law of 1867 and that of 1898, distinguishes the decision of Justice Bradley from the case now before the court. This is true, I think, of all the other cases cited by Judge Newman in support of his conclusion.

For the clearer understanding of the distinction between the effect of the waiver under the law of Georgia as it existed when it was construed by Justice Bradley, it may be serviceable to consider briefly certain decisions of the supreme court of the state bearing on the subject. The first of these will indicate that the learned justice was right in his conclusion that there was a forum which could effectively enforce a waiver of the homestead when the instrument in which that stipulation existed was a lien. This is the case of Simmons v. Anderson, 56 Ga. 55. There Chief Justice Warner said:

"The only question made here was whether the defendant in the mortgage fi. fa. could waive his right as the head of a family to claim a homestead in the property described in the mortgage, so as to prevent him from afterwards obtaining a homestead on the specific property mortgaged, and claiming the same as homestead exemption, as the agent of his wife, from being subject to the mortgage fi. fa."

The decision was that the waiver in the mortgage was binding, and it was enforced by the courts of the state. This was under the homestead law of 1868. A very different rule was announced, however, by the same court, where the waiver of a homestead did not appear in an instrument creating a lien. This will be found in Stafford v. Elliott, 59 Ga. 837; Mr. Justice Jackson delivering the opinion of the court. This, too, was under the constitution of 1868. "This case," said the learned justice, "involved the question of the effect of a general waiver of the right of homestead made in a promissory note." The agreed facts were: Stafford, Blalock & Co. held a note against Z. H. Elliott, dated and due in 1873. They sued the note to judgment, and caused execution to be issued and levied upon 150 acres of land. The note was an ordinary promissory note, except that it contained a waiver of the right of homestead,—what is commonly called a "general waiver." At the time Elliott gave the note, he owned the land. After giving the note, he applied for and procured a homestead on the land, as agent of his wife and children; and the question submitted was whether the land was subject to levy and sale for the debt or not. The court held that no lien whatever was created by the note, and proceeded to distinguish the case of Simmons v. Anderson, supra, remarking:

"This case is wholly unlike that, in that no lien is created in this case, and, further, if he obtains credit by creating a lien on a particular piece of property, and in express words makes the lien secure by covenanting not to take a homestead on it, then he is estopped from so doing; but a general waiver like this in the promissory note, describing nothing, creating a lien on nothing, does not estop him."

And so the land was held not subject to the debt. See, also, Burroughs v. White, 69 Ga. 845.

The effectiveness and validity of the waivers in instruments creating a lien, and the distinction between that and the general waiver like those now under consideration, and the different rules obtaining under the constitution of 1868 and that of 1877, were again before

the supreme court of the state in the case of Broach v. Powell, 79 Ga. 81, 3 S. E. 763. In that case, also, an exemption in bankruptcy was relied upon by the debtor. There Chief Justice Bleckley, with his accustomed vigor and clearness, reaffirms the previous rulings, and so conclusively establishes the law that further citation of authority will be superfluous.

From these authorities the conclusion is, I think, irresistible that the holder of a waiver obligation, whether special in the form of a lien or a general waiver, as in a promissory note, had, under the bankrupt act of 1867, no right to admission to the court of bankruptcy for the purpose of enforcing his demand against the bankrupt exemption, as it was then limited by the homestead law of 1868. If his waiver was general, he had no right anywhere, as against that homestead. If his waiver was in the form of a lien, or in an instrument creating a lien, as held by Justice Bradley in Re Bass, supra, and the supreme court of Georgia in the decisions above quoted, he might enforce his claim in the state court,—the forum provided for him. There was no failure of remedy for him. The contrary is true now, as to creditors holding waivers in promissory notes and similar promises to pay. We have seen that the supreme court of the state has held that these waivers do not constitute a lien against the homestead property unless they have been reduced to judgment. They cannot be reduced to judgment in the state court, if, after their execution, the bankruptcy court takes jurisdiction of the debtor's property, brings in the creditors, and proceeds conformably to the bankruptcy law to set apart the exemption and to grant the discharge. The obvious conclusion is, that unless this large class of creditors are to be deprived of the effectiveness and vitality of that stipulation provided for them by the organic law of the state which was the security for their debt, that it is the duty of the bankrupt court by suitable decrees to afford them the opportunity of establishing the lien provided for them by the law of the state. There are no liens existing in behalf of the petitioners now before the court, but they all have waiver notes which entitle them to liens. "Id certum est quod certum reddi potest." Under the plenary power given the bankrupt court by the act of congress, it is competent to protect the rights of these creditors, and to avoid the rude shock to private credit in this state which would result if such creditors should be turned out of court with no opportunity whatever, in the face of the bankruptcy discharge, to establish their liens in the courts of the state. A construction which would lead to these calamitous results should not be adopted, unless rendered obligatory upon the court by the plainest and most imperative provisions of the law. Now what appropriate remedy is there within the jurisdiction of the court to grant relief to creditors of this class? Shall the creditor be remitted to the state court? This would seem antagonistic to the scheme, and even to the philosophy, of the bankruptcy legislation. These creditors have already been brought before this court. Having no liens, they had no power to stay out, unless they wished to abandon their debts altogether. Shall we bring them in here, and then turn them out, and require each man to bring a separate suit elsewhere, with all the

costs and expenses incident thereto? It is true, I think, that a very large proportion of the bankrupts in this state will possess assets less in value than the amount of the exemption. Quite as large a proportion have waived this exemption in favor of their creditors. Shall all the creditors of such bankrupts be denied relief here, when they are already before the court, and driven to a multiplicity of suits, which will eat up the substance of the debt, when in one cheap, uniform method of procedure the rights of everybody may be adjudicated in this court? Fortunately the court of bankruptcy is given jurisdiction to do everything necessary to the administration and distribution of the bankrupt estates. Bankr. Act 1898, c. 2, § 2. And, after this enumeration of powers, it is also declared by the law that this express grant shall not take away any of the powers the court would have had but for the enumeration of certain specific powers. Upon examination it will be seen that the limitations upon the power of the court were much greater under the act of 1867. The court of bankruptcy, as we have seen, is now given the express power "to determine all claims of bankrupts to their exemptions." Now, what does this language import? If the court has the power to determine that the bankrupt is entitled to his exemption as against the creditors, it certainly has the correlative power to determine the right of the creditor to attack the exemption upon any legal ground. This language is not a limitation upon the power of the court, to be strictly construed, but it is a grant of jurisdiction, which must be beneficially construed to carry out its purpose. The language must have a reasonable construction, and with the express grant of power to determine all claims of the bankrupt to his exemption there seems clearly to go the power to determine that the bankrupt has no claim to an exemption in favor of particular creditors, because, under the constitution of his state, as to them he has solemnly renounced and waived it.

Pursuant to these conclusions, in the cases before us the demurrer will be overruled, the applications for discharge will be stayed, and, since these claims and the waivers of exemption are not contested, the court will by suitable decree establish the lien of the creditors against the homestead set apart by the trustee. Since the property is already in custodia legis, the levy thereon provided for by the statute of the state may be regarded as superfluous. In the meantime the application for discharge will be stayed until the rights of the petitioning creditors are definitely settled, and the referees will be directed by suitable orders in similar cases which may subsequently arise to report whether the creditor, under the law of Georgia, is entitled, because of the provisions of his contract, to have his lien established against the exemption of the bankrupt. Let a suitable order be drawn, directing the trustee to carve out of the property set apart as a homestead exemption to the bankrupt free from the claims of general creditors a portion of said property of the value of $300, which shall be set apart as a homestead to said bankrupt, to be free from the claims of all creditors of said bankrupt, including such creditors as hold general waivers of homestead. The other portion of said property set apart in the $1,600 exemption shall be dealt with by the

trustee precisely as if it did not constitute part of the homestead exemption, except that a separate account shall be kept of the proceeds of said portion, and the same shall constitute a special fund for distribution to the creditors holding general waivers of homestead made by the bankrupt, and to this fund they must first resort for payment of their claims before sharing in the general fund; provided, however, that should the bankrupt, or any one for him, pay off the claims of such creditors holding general waivers of homestead within 30 days from this date, the entire $1,600 homestead set apart shall stand and be approved as the exemption of the bankrupt.

In re LEGG et al.

(District Court, D. Connecticut. July 31, 1899.)

No. 60.

1. BANKRUPTCY—TITLE OF TRUSTEE—CONDITIONAL SALES.
   Where a state statute provides that conditional sales of personal property, unless by writing, acknowledged and recorded, shall be deemed absolute sales, except as between the parties or their personal representatives, property held by a bankrupt purchaser under a bill of sale not acknowledged or recorded will vest in his trustee for the benefit of the estate, and cannot be reclaimed from him by the vendor, although, as against the bankrupt himself, such vendor might have claimed the property for nonpayment of the price.
2. SAME—CONFLICT OF LAWS.
   Where a contract of conditional sale of personal property is made in one state, but provides for the delivery of the chattels in another state, and their use there by the purchaser, it is to be governed, in a contest between the vendor and the trustee in bankruptcy of the vendee, by the law of the latter state, not the former.

In Bankruptcy. On review of decision of referee in bankruptcy.

David Strouse, for trustee in bankruptcy.
Edgar M. Warner, for claimant, Woonsocket Napping Mach. Co.

TOWNSEND, District Judge. This is an appeal from a decision of the referee denying the application of the Woonsocket Napping Machine Company for the delivery of a certain napping machine. Said machine was sold in Rhode Island, and shipped to Connecticut, the freight being paid by the purchaser, now bankrupt, under a written agreement, signed by said purchaser, which provided that the machine should remain the property of the vendor until paid for. The agreement was made in Rhode Island, where such an agreement need not be recorded, and provided that the machine should be shipped to Connecticut, where such agreements must be acknowledged and recorded in order to be valid against third parties. The Connecticut statute of 1895 (chapter 212) is as follows:

"Section 1. All contracts for the sale of personal property, except household furniture, musical instruments, bicycles, and such property as is by law exempt from attachment and execution, conditioned that the title thereto shall remain in the vendor after delivery, shall be in writing, describing the property, and all conditions of said sale, acknowledged before some competent authority, and recorded within a reasonable time in the town clerk's office in the town where the vendee resides.

"Sec. 2. All conditional sales of personal property which shall not be made in conformity with the provisions of the preceding section shall be held to be absolute sales, except as between the vendor and the vendee or their personal representatives, and all such property shall be liable to be taken by attachment and execution for the debts of the vendee, in the same manner as any other property not exempted by law."

There is due on said machine $308 under said contract. Counsel for the Woonsocket Napping Machine Company claims that the trustee in bankruptcy takes only the title of the bankrupt, and that the contract was complete in the state of Rhode Island, where the agreement of sale was executed. In support of the first proposition he relies upon the decision of the referee in the Case of George W. McKay, in the district court for the Northern district of Ohio. The decision of the referee on said point was as follows:

"The assignee took the property subject to such equities, liens, or incumbrances as would have affected it had no adjudication in bankruptcy been made. The assignee can assert in behalf of the general creditors no claim to the proceeds of the sale of the property which the bankrupts themselves could not have asserted in a contest exclusively between them and the mortgagee. * * * A comparison of the bankrupt acts of 1867 and of 1898 does not show that the trustee under the act of 1898 has any greater rights than the assignee had under the act of 1867." 1 Nat. Bankr. News, 133.

Sections 67a and 70a (5) of the act of 1898 provide as follows:

"67a. Claims which, for want of record or for other reasons, would not have been valid liens as against the claims of the creditors of the bankrupt shall not be liens against his estate."

"70a. (Stating what property passes to the trustee.) Property which, prior to the filing of the petition, he (bankrupt) could by any means have transferred, or which might have been levied upon and sold under judicial process against him."

These provisions are not found in the law of 1867. I am therefore of the opinion that the alleged title of claimant is not valid against the estate of the bankrupt, and that the trustee has greater rights than the assignee had under the act of 1867, and has the right to said property. That such a conditional bill of sale is not valid as against execution creditors in Connecticut unless recorded, is established by the following cases: In re Wilcox & Howe Co., 70 Conn. 224, 39 Atl. 163; Cash-Register Co. v. Woodbury, 70 Conn. 321, 39 Atl. 168. It is settled by numerous decisions that, where such a contract contemplates or expressly provides that the property is to be delivered or used in another state, the law of the latter state prevails. Hart v. Manufacturing Co., 7 Fed. 543; Pittsburgh Locomotive & Car Works v. State Nat. Bank of Keokuk, 19 Fed. Cas. 785 (No. 11,198); Heryford v. Davis, 102 U. S. 235; Chicago Ry. Equipment Co. v. Merchants' Bank, 136 U. S. 268, 280, 10 Sup. Ct. 999; McGourkey v. Railway Co., 146 U. S. 536, 13 Sup. Ct. 170. In the case at bar it is clear that the parties contemplated a transaction to be carried out and completed in the state of Connecticut, and that the transaction is to be governed by the law of said state. It is also clear, from the character of the contract, that it is not a lease; that, whatever may have been the language used, the parties contemplated, not a borrowing or a hiring, but a conditional sale, which, under the Connecticut statute, is to be treated as an absolute sale of the property. Hery-

ford v. Davis, supra; Chicago Ry. Equipment Co. v. Merchants' Bank, supra; Loomis v. Bragg, 50 Conn. 228; Hine v. Roberts, 48 Conn. 267. The decision of the referee is affirmed.

BUTTFIELD v. BIDWELL et al.

(Circuit Court of Appeals, Second Circuit. July 18, 1899.)

No. 161.

COMMERCE—REGULATING IMPORTATION OF TEAS.

In the act of March 2, 1897, regulating the importation of teas, which provides that the secretary of the treasury "shall fix and establish uniform standards of purity, quality, and fitness for consumption of all kinds of teas imported into the United States," and prohibits the importation of any teas below the standards so fixed, the word "quality" is inserted in addition to the requirements of the former statute, and under such act it is competent for the secretary to fix a standard of quality, and to exclude from importation teas below such standard, although they are equal to the standard of purity, wholesomeness, and fitness for consumption in other respects.

Appeal from the Circuit Court of the United States for the Southern District of New York.

For opinion in circuit court, see 94 Fed. 126.

James L. Bishop, for appellant.

Edward B. Whitney, for appellees.

Before PECKHAM, Circuit Justice, and WALLACE and SHIPMAN, Circuit Judges.

PER CURIAM. The basic question in this case is as to the true construction of the act of congress of March 2, 1897, entitled "An act to prevent the importation of impure and unwholesome tea." Section 1 makes it unlawful "to import or bring into the United States any merchandise as tea which is inferior in purity, quality, and fitness for consumption to the standards provided in section 3 of this act, and the importation of all such merchandise is hereby prohibited." Section 2 provides for the appointment by the secretary of the treasury, immediately after the passage of the act, and on or before February 15th of each subsequent year, of a board of tea experts, "who shall prepare and submit to him standard examples of tea." Section 3 provides that the secretary of the treasury, upon the recommendation of said board, "shall fix and establish uniform standards of purity, quality and fitness for consumption of all kinds of teas imported into the United States," samples of such standards to be deposited in various custom houses, and supplied to importers and dealers at cost, and declares that "all teas, or merchandise described as tea, of inferior purity, quality and fitness for consumption to such standards shall be deemed within the prohibition of the first section hereof." Sections 4–7 provide for the examination of importations of tea, for a re-examination by the board of general appraisers in case of a protest by the importer or collector against the finding of the primary examiner, and for testing the purity, quality, and fitness

for consumption in all cases of examination or re-examination "according to the usages and customs of the tea trade, including the test of an infusion of the same in boiling water, and, if necessary, chemical analysis." The complainant alleges that the secretary of the treasury, assuming to act under the authority of these provisions, has fixed and established standards of purity, quality, and fitness for consumption of teas, but that the defendants, under regulations and instructions promulgated by the secretary, have continuously excluded from import into the United States, and threaten to continue to do so, teas in all respects equal to the said standards in purity, wholesomeness, and fitness for consumption, because the same were not of a taste, flavor, cup quality, appearance, color, or size of leaf equal to the said standards. Upon the legal theory that within the true meaning of the act of congress no teas are prohibited from import which are equal to the standards which have been established "in purity, wholesomeness, and fitness for consumption, and freedom from adulteration or extraneous matter," notwithstanding they are not of the quality in other respects required by the standards, the complainant insists upon the remedy of an injunction. The argument for the complainant in effect requires the word "quality," wherever used in the act of congress, to be eliminated, or, if not eliminated, to be read as a synonym for "purity" or "fitness for consumption." The history of the enactment shows that the word was industriously inserted to make the act a more stringent substitute for the existing legislation. By the act of March 3, 1883, then in force, any merchandise imported "for sale as tea," adulterated with spurious or exhausted leaves, or containing such an admixture of deleterious substances as to make it "unfit for use," was prohibited; and exhausted leaves were defined to include any tea which had been deprived of its proper quality, strength, or virtue by steeping, infusion, decoction, or other means. Thus the importation of tea containing such an admixture of leaves as to be deprived of its proper quality or virtue by any method of treatment was prohibited. That act, however, contained no provision for the establishment of government standards; and the establishment of uniform standards in the interest of the importer and of the consumer had become a recognized necessity. In a report by the senate committee on commerce, in 1897, the provision was suggested as designed, among other things, to protect the consumer against "worthless rubbish," and insure his "receiving an article fit for use." The report pointed out that the "lowest average grade of tea ever before known was now being used" by our consumers, and proposed as a remedy the establishment of standards of the "lowest grades of tea fit for use." As originally introduced in the house, the bill prohibited the importation of "any merchandise as tea which is inferior in purity or fitness for consumption to the standards provided in section 3 of this act." It was amended in the senate by inserting the word "quality" between the words "purity" and "fitness for consumption" wherever they occurred in the house bill. The amendment evinces the intention of the senate to authorize the adoption of uniform standards by the secretary of the treasury which would be adequate to exclude the lowest grades of tea, whether demonstrably of inferior

purity, or unfit for consumption, or presumably or possibly so because of their inferior quality. The house concurred in the amendment, and the measure was enacted in its present terms. We conclude that the regulations of the secretary of the treasury are warranted by the provisions of the act, and for this reason that the complainant is not entitled to an injunction. This conclusion renders it unnecessary to consider the other objections which have been urged against his suit. The order denying a preliminary injunction is affirmed.

AMERICAN WALTHAM WATCH CO. v. SANDMAN.

(Circuit Court, S. D. New York. July 28, 1899.)

UNFAIR COMPETITION—"WALTHAM" WATCHES.

The word "Waltham," on watches, while originally used in a geographical sense only, has by its long-continued use by the American Waltham Watch Company acquired a secondary meaning, as a designation of the watches manufactured by that company; and its use by another manufacturer, without some accompanying statement to clearly distinguish its watches from those manufactured by such company, and in a manner calculated to, and which does, deceive purchasers, constitutes unfair competition.[1]

This was a suit in equity for an accounting and an injunction against unfair competition in trade.

Frank L. Crawford, for complainant.

H. H. Kellogg and Oliver R. Mitchell, for defendant.

TOWNSEND, District Judge. On final hearing herein, complainant asks for an injunction and accounting against the defendant by reason of his unlawful use of the word "Waltham" on watches sold by him. The supreme court of Massachusetts has decided the same questions as are herein involved adversely to the claims of defendant.

Complainant is, and has been for nearly 50 years, a manufacturer of watches at Waltham, Mass. It was practically the pioneer in the watch business in this country. Prior to 1854, the date of the establishment of its business, only two attempts had been made in this country to manufacture watches, both of which were unsuccessful. Its business has grown to an enormous extent, nearly 8,000,000 of watch movements being sold by it, all of which, with but few exceptions, have borne the name "Waltham," and over $1,000,000 have been expended by it in advertising and familiarizing the public with its watches. It appears that originally the name "Waltham" was thus used in a geographical sense, but by continued use it has acquired a secondary meaning, as a designation of watches of a particular class, and purchasers have come to understand that watches stamped with the name "Waltham" are watches made by complainant. In 1895, one E. A. Locke, for whom this defendant was sole selling

[1] As to unfair competition generally, see note to Scheuer v. Muller, 20 C. C. A. 165, and note to Lare v. Harper & Bros., 30 C. C. A. 376.

As to use of geographical names as trade-marks or trade-names, see note to Hoyt v. J. T. Lovett Co., 17 C. C. A. 657, and note to Illinois Watch-Case Co. v. Elgin Nat. Watch Co., 35 C. C. A. 242.

agent, began the manufacture of watches in Waltham under the name of "Columbia Watch Company." Said Locke was not a resident of Waltham. Before locating his business there, he talked with one Frederick Ripley of the value of the name "Waltham" in connection with watches, and said that, if he ever were to manufacture watches, he would do so at Waltham; and he further said to Ripley "that he considered Waltham the best place in the world to manufacture watches, because the word 'Waltham' would sell a watch"; and in answer to the question how the word "Waltham" had come to be known all over the world he said, "Through the Waltham watch, that is manufactured in Waltham by the American Company." Said Locke has made watches similar in appearance to those manufactured by complainant, and stamped with the names of fictitious corporations and the words "Waltham, Mass." They were of an inferior quality, and were sold for a much lower price than those of complainant. While the number of watches made by said Locke prior to 1898 did not exceed 25,000, such watches were stamped with much higher numbers, so as to suggest, together with the name "Waltham," the older and original manufacture of watches by complainant; and purchasers were actually deceived into believing they had purchased the original Waltham watches, when in reality they had bought watches of defendant's manufacture.

The controlling questions herein have been elaborately discussed by Judges Knowlton and Holmes, of the supreme judicial court of Massachusetts, in American Waltham Watch Co. v. United States Watch Co., 53 N. E. 141, and in the views therein expressed I heartily concur. The ground of said decisions is that such conduct is in violation of the law against unfair trade, and is intended to deceive and defraud the public, and to deprive the complainant of the trade and good will to which it is entitled. In the course of his opinion Judge Knowlton said:

"I am of the opinion that this word [Waltham] has acquired a secondary meaning, in connection with the plaintiff's watches, of which the defendant has no right to avail itself, to the damage of the plaintiff, and that there should be an injunction against the use by the defendant of the word 'Waltham,' or the words 'Waltham, Mass.,' upon plates of its watches, without some accompanying statement which shall clearly distinguish its watches from those manufactured by the plaintiff. I find that the use of the word 'Waltham', in its geographical sense, on the dial, is not important to the defendant, and that its use should be enjoined. Specimens of watch movements were put in evidence by the plaintiff, which showed that it would not be difficult to make prominent upon the plate, in connection with the words 'U. S. Watch Co., Waltham, Mass.,' the words 'No connection with the Am. Waltham Watch Co.,' or 'Not the original Waltham Watch Co.,' or similar explanatory statement."

And Judge Holmes, delivering the opinion of said court sustaining the decision of Judge Knowlton, said:

"Whatever might have been the doubts some years ago, we think that now it is pretty well settled that the plaintiff, merely on the strength of having been first in the field, may put later comers to the trouble of taking such reasonable precautions as are commercially practicable to prevent their lawful names and advertisements from deceitfully diverting the plaintiff's custom."

A decree may be entered for an injunction and an accounting.

WELSBACH LIGHT CO. v. APOLLO INCANDESCENT GASLIGHT CO. et al.

(Circuit Court of Appeals, Second Circuit. April 4, 1899.)

No. 107.

1. PATENTS—LAPSE OF FOREIGN PATENT FOR SAME INVENTION.

Under Rev. St. § 4887, the fact that a foreign patent has lapsed for the nonpayment of an annuity pending an application for a United States patent for the same invention does not render the latter patent void when issued, but it will remain in force to the end of the term prescribed in such foreign patent.

2. SAME—INCANDESCENT MANTLES.

The Rawson patent, No. 407,963, for improvements in incandescent mantles for gaslights, is not void because of the lapse, for want of payment of an annuity, of a previous French patent for the same invention, pending the application for the United States patent.

Appeal from the Circuit Court of the United States for the Southern District of New York.

Letters patent No. 407,963, dated July 30, 1889, issued to Frederick L. and William Stepney Rawson, for improvements in the "production of incandescent mantles," were sustained by Judge Townsend in the suit of The Complainant v. Sunlight Incandescent Lamp Co., 87 Fed. 221. A bill in equity against the present defendant for the infringement of the same patent was subsequently brought in the Southern district of New York, and a motion for a preliminary injunction, which was based upon the prior adjudication, was heard before Judge Lacombe. The defendant's affidavits disclosed as new matter that the Rawson application was filed August 21, 1888; that French letters patent had been issued for the same invention to the same inventors for the term of 15 years on November 2, 1887, and had lapsed at the expiration of 1 year for the nonpayment of an annuity then due, and, consequently, before the issuance of the United States patent on July 30, 1889. The question of the effect upon the patent in suit of this lapse of a prior foreign patent was one of novelty, which Judge Lacombe thought ought not to be answered upon preliminary motion, which he therefore denied. 94 Fed. 1005. This appeal is from that order.

John R. Bennett, for appellant.

Edmund Wetmore, for appellees.

Before WALLACE and SHIPMAN, Circuit Judges.

SHIPMAN, Circuit Judge (after stating the facts as above). The French patent for a term of 15 years was issued before the date of the application for the United States patent for the same invention, and was in full force at that date, but lapsed for the nonpayment of an annuity before the United States patent issued. The effect which the lapse had upon the life of the United States patent depends upon the proper construction of section 4887 of the Revised Statutes, which was the section in force when the patent was issued, and which was as follows:

"Sec. 4887. No person shall be debarred from receiving a patent for his invention or discovery, nor shall any patent be declared invalid by reason of its having been first patented or caused to be patented in a foreign country unless the same has been introduced into public use in the United States for more than two years prior to the application. But every patent granted for an invention which has been previously patented in a foreign country shall

be so limited as to expire at the same time with the foreign patent, or, if there be more than one, at the same time with the one having the shortest term, and in no case shall it be in force more than seventeen years."

No one of the five decisions of the supreme court which may be supposed to bear upon a decision of this motion was based upon the facts of this case. In Bate Refrigerating Co. v. Hammond, 129 U. S. 151, 9 Sup. Ct. 225, the application for the United States patent was filed December 1, 1876, and the patent was issued on November 20, 1877. A Canadian patent had been issued for five years from January 9, 1877, and, in pursuance of Canadian law, was extended without interruption for two terms of five years each. The question being whether the United States patent expired at the end of five years or of fifteen years from its date, the supreme court said:

"We are of opinion that in the present case, where the Canadian statute under which the extensions of the Canadian patent were granted was in force when the United States patent was issued, and also when that patent was applied for, and where, by the Canadian statute, the extension of the patent for Canada was a matter entirely of right, at the option of the patentee, on his payment of a required fee, and where the fifteen years' term of the Canadian patent has been continuous and without interruption, the United States patent does not expire before the end of the fifteen years' duration of the Canadian patent. This is true although the United States patent runs, on its face, for seventeen years from its date, and is not, on its face, so limited as to expire at the same time with the foreign patent; it not being necessary that the United States patent should, on its face, be limited in duration to the duration of the foreign patent."

In Pohl v. Brewing Co., 134 U. S. 381, 10 Sup. Ct. 577, letters patent of the United States had been issued March 18, 1879, upon application filed in the preceding January. German letters patent for the same invention had been issued to the same inventor in September, 1877, which could run until December, 1891, but became forfeited in 1880 for neglect to pay the required annuities, and a French patent for the same invention began to run from September, 1877, for 15 years, but expired in 2 years by reason of the same neglect. The supreme court held that the potential term, and not the period of actual existence, was to govern, and said:

"There is nothing in the statute which admits of the view that the duration of the United States patent is to be limited by anything but the duration of the legal term of the foreign patent in force at the time of the issuing of the United States patent, or that it is to be limited by any lapsing or forfeiture of any portion of the term of such foreign patent, by means of the operation of a condition subsequent, according to the foreign statute. In saying that 'every patent granted for an invention which has been previously patented in a foreign country shall be so limited as to expire at the same time with the foreign patent,' the statute manifestly assumes that the patent previously granted in a foreign country is one granted for a definite term; and its meaning is that the United States patent shall be so limited as to expire at the same time with such term of the foreign patent."

The decision in Commercial Mfg. Co. v. Fairbank Canning Co., 135 U. S. 176, 10 Sup. Ct. 718, has no appreciable bearing upon this case. An original United States patent was applied for December 13, 1873, and was issued December 30, 1873. A Bavarian patent was granted April 8, 1873, and expired April 8, 1876, by limitation of its term. An Austrian patent was granted October 31, 1869, and expired May 26,

1876, "on account of not being carried out" in Austria. Application for a reissue of the United States patent was made in May, 1882, and was granted June 13, 1882. The great question before the circuit and the supreme courts was whether the foreign patents were identical with those of the United States, and the circuit court, upon finding that they were, said that the reissue was void, because "the application on which it was granted was not made until May 20, 1882." The supreme court found that the circuit court's findings of fact and conclusions of law were correct.

The decision in Bate Refrigerating Co. v. Sulzberger, 157 U. S. 1, 15 Sup. Ct. 508, was confined to the single point that the provisions of section 4887 "refer to foreign patents granted previously to the issue of letters patent for the same invention by the United States, and not to foreign patents granted previously to the application for the American letters."

The remaining case is that of Huber v. Manufacturing Co., 148 U. S. 270, 13 Sup. Ct. 603, which is thought to have an important bearing upon the question now at issue. Letters patent of the United States were granted to an assignee of the inventors on June 27, 1882. An English patent, dated April 7, 1874, for the same invention, had been granted to the inventors for 14 years, but expired on April 7, 1881, by reason of the nonpayment of stamp duty. The application for the United States patent was filed more than seven months after the English patent had become void. The case was tried in the circuit court after the decision in the Bate Case and before that in the Pohl Case, and its opinion, based upon a widely extended misapprehension of the tendency of the Bate decision, was to the effect that under section 4887 the term of the actual existence, and not the legal term, of the foreign patent, limited the duration of the United States patent, and that the section "presupposed that at the date of the United States patent there was in force a foreign patent for the invention, and that, if there was no such foreign patent in force when the patent was issued, but only one which had lapsed and become void, although theretofore granted for the invention, there was no authority in law for the United States grant." The circuit court decreed that the United States patent was issued without authority of law, and was void, upon reasoning which was decided in the Pohl Case to be without foundation. Judge Blatchford was careful not to affirm, although he quoted the theory upon which the decree of the trial court was based. He had previously said that the "decision was made upon the interpretation which the [circuit] court gave to" the Bate Case. Pohl v. Brewing Co., supra. His conclusion was, "We are of opinion that, as in the case at bar the foreign patent was not in force when the United States patent was issued, the latter patent never had any force or validity"; and gave as the apparent reason for the conclusion that "the delay in applying for the United States patent until after the foreign patent expired amounted to an abandonment of the right to a United States patent. This is in accordance with the view of the commissioner of patents in Mushet's Case" (1870), which was an application for the extension of the term of a United States patent after the foreign patent for the same invention had ex-

pired,—an application which was at that time to be made to the commissioner of patents.

All the decisions of the supreme court upon section 4887 were intended to be limited to the question which arose upon the precise facts of the respective cases, and are to be so regarded, notwithstanding any general language which was used. The Huber Case is an authority only for the right to obtain a United States patent applied for seven months after a foreign patent had expired, and after its owners manifestly regarded it as of no importance, and consequently after the abandonment of the right to a United States patent. There has been no authoritative decision by that court upon the facts of the case at bar. The Pohl and Huber Cases simply suggest what may be their decision upon the facts as now presented. Section 4887 provided that prior foreign patenting should not be a bar to a United States patent, unless under certain circumstances, but that such patent should not extend beyond the term of the life of its foreign predecessor. If the invention or the right to a patent had been abandoned before the application for a United States patent, its issuance was prohibited under another section. If there had been no abandonment before application, but the issuance of the United States patent was delayed until the foreign patent had become forfeited by noncompliance with some statutory provision, the question is whether, when issued, its life had been destroyed, or whether its life was upon the declared or legal term of the foreign patent. If its life was destroyed, its destruction was effected while the application was under examination, and was delayed in the patent office. Such a result would be at variance with the spirit of the section, the intent of which was to make the United States term coterminous with the possible foreign term. If its life is a continuous one for 15 years, the construction makes the patent system a uniform one, and independent of mishaps occurring after the applicant was entitled to his patent, and which would have had no effect if the office could have been more prompt. The appellee's construction, in view of the effect of the decision in the Pohl Case, seems harsh and inequitable. Under that decision the legal term of a foreign patent in being when the United States patent was issued is the term of the life of the later patent, although the foreign patent should be forthwith forfeited. Under the construction asked for, if the foreign patent was forfeited pending the application for an American patent, its issuance is barred. It is very probable that any difficulty which exists in the construction of the section is because it was drawn with reference only to the state of facts which ordinarily arise, and the conditions which we are now considering did not occur to the draftsmen. The section is applicable to the case at bar because the foreign patent was "previously patented"; but there is no requirement that the foreign patent must be in force at the date of the United States patent, and in searching for the meaning of the section, as applied to this case, the words "to expire at the same time" should have the same construction in each set of circumstances, and should be taken to mean that the United States patent expires at the end of the term prescribed in the previous foreign patent.

The appellees make the point that a Rawson German patent of July 24, 1887, was void ab initio by reason of the publication of the specification of the Rawson English patent on July 23, 1887, because the German statute provides that an invention is not regarded as new if it has already been described in any printed publication, or publicly used in Germany, at the time of application for a patent, etc. The filing of the application must have been on July 23d, as appears from the testimony of one of the defendant's witnesses, and it does not appear that the English specification was published before July 23d. This point is without value as it is now presented.

The order of the circuit court is reversed, with costs.

DAVEY PEGGING-MACH. CO. v. ISAAC PROUTY & CO. et al.

(Circuit Court, D. Massachusetts. August 4, 1899.)

No. 971.

PATENTS—VALIDITY AND INFRINGEMENT.

The Davey patent, No. 555,434, for an improvement in pegging-machines, consisting in a device which goes inside a shoe to support the insole while the awl and peg are successively driven through the leather, is void for want of invention, as to claims 1, 2, 3, and 10, the patentee having used only ordinary mechanical skill for the purpose of reducing both the vertical dimensions and the diameter of the work-supporting anvil or button; and, even if these claims be conceded to show invention, they must, in view of the prior state of the art, be limited strictly to the exact construction shown and described. *Held*, therefore, that the patent was not infringed by defendants.

This was a suit in equity by the Davey Pegging-Machine Company against Isaac Prouty & Co. (incorporated) and others for alleged infringement of a patent for an improvement in pegging-machines.

Fish, Richardson & Storrow, for complainant.

Louis W. Southgate, for defendants.

BROWN, District Judge. This suit is for infringement of letters patent No. 555,434, granted February 25, 1896, to John F. Davey, for an improvement in pegging-machines. The invention relates to a device which goes inside a shoe to support the insole while the awl and peg are successively driven through the leather. The specification states that it is the purpose of the invention to overcome certain difficulties, and—

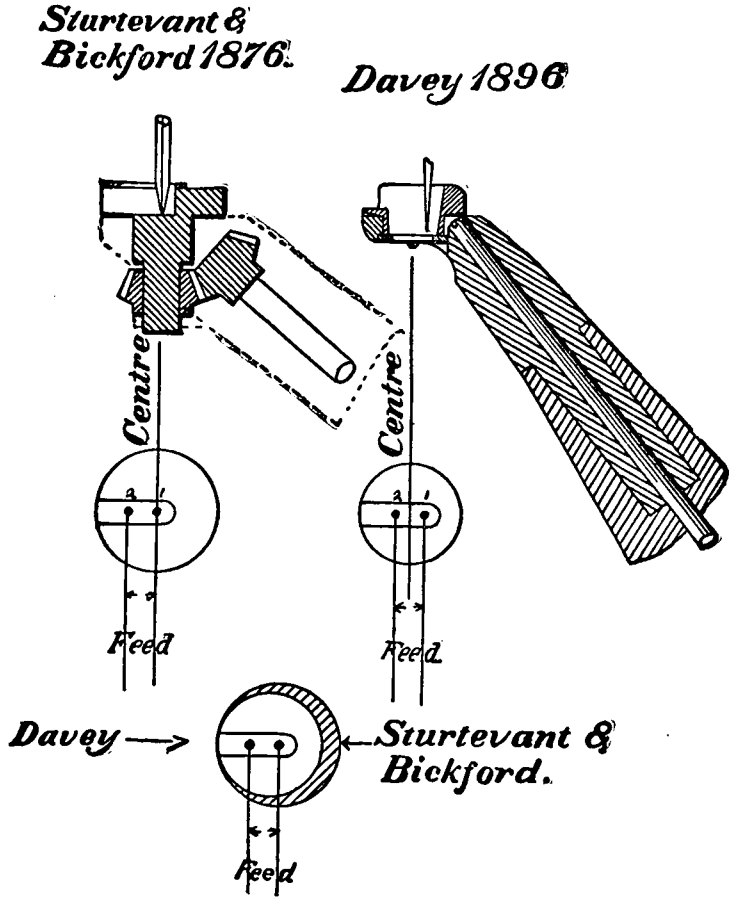
"To provide a horn-tip and work support therein by means of which shoes can be pegged rapidly and satisfactorily after the last is drawn. To this end the horn-tip of the machine embodying this invention is provided with an annular support, and a work-supporting anvil or button mounted to rotate therein, and provided with gearing by which it is retained in the same position with relation to the awl and driver of the machine, whatever may be the position of the horn, which has to be rotated in presenting different parts of the edge of the shoe to the awl and driver in the usual manner."

Claim 1 of the patent in suit is as follows:

"(1) A work-support for pegging-machines, comprising a horn-tip provided with a supporting-annulus, combined with a button having a shank contained

within said annulus, and a supporting portion resting on said annulus, said button being provided with external gear-teeth in a portion of its surface in bearing engagement with said annulus, substantially as and for the purpose described."

The first question is as to the validity of this claim,—especially in view of the patent to Sturtevant & Bickford, dated February 15, 1876 (No. 173,428), for a pegging-machine. The following drawings illustrate the respective devices of Sturtevant & Bickford, 1876, and of Davey, 1896.



The defendants' device is illustrated in the drawings of the patent No. 580,379, to P. R. Condon, dated April 13, 1897.

I am of the opinion that claim 1 involves no patentable invention. The complainant says of the device of Sturtevant & Bickford that its vertical dimensions are such that it never could be brought within the toe of the shoe, and I think it clearly appears that claim 1 relates exclusively to mechanical changes for the reduction of the ver-

tical dimensions. In Sturtevant & Bickford, the gears for holding the button against the rotation of the horn are affixed to a portion of the shank of the button that extends below the annulus. Davey locates his gear-teeth at a higher point, and is thus able to dispense with any extension of the shank below the annulus. No new function or mode of operation results. The complainant's brief says:

"The sole function of the location of the teeth in the Davey patent is to minimize the vertical dimensions of the button, and prevent the necessity of a downward extension of the shank below the supporting annulus."

Height was reduced by a change of location of the gears. In making this change, Davey was working upon an ordinary problem, common in the mechanic arts, and made only an ordinary mechanical change. If it were necessary to find in the art of shoemaking instances of the adoption of similar mechanical means for the purposes of that art, we might refer to the following prior patents, namely: No. 233,561, to J. R. Scott, October 19, 1880; No. 304,689, to E. F. Arnold, September 9, 1884; No. 398,305, to E. B. Allen, February 19, 1889; No. 444,126, to W. Carey, January 6, 1891; No. 492,906, to R. Ley, March 7, 1893; and No. 536,183, to W. Carey, March 26, 1895.

Furthermore, the claim, if valid for the exact construction displayed, must be strictly limited thereto; and, so construed, it is not infringed by the defendants.

The purpose of Sturtevant & Bickford was both to drive the pegs and to cut off their ends; and their device is further criticised on the ground that the amount of awl-feed which would be permitted in any button of practical size is wholly inadequate for practical purposes in a machine, because the blade provided to cut the pegs would permit, at most, an awl-feed movement of about three-sixteenths of an inch in a button of an inch in diameter, whereas there are often only three pegs to an inch, and therefore a feed of one-third of an inch is required. In the Sturtevant & Bickford device the awl-passage is at the center, and the lateral movement is confined within the radial length of the button. This length is partly occupied by the blade. Inspection of the drawings will show that the patentee of the patent in suit employs an eccentric awl-passage, and obtains the desired length of feed-traverse by passing, not from the center outward, but from an eccentric point on one side of the button to an eccentric point on the other side of the button. He is thereby enabled to reduce in size the button. This feature of an eccentric awl-passage is made an element in claims 2, 3, and 10, which are as follows:

"(2) The combination of the rotatable horn of a pegging-machine, with a work-supporting button pivotally supported in the tip thereof, and provided with an eccentric awl-passage, and means for preventing rotation of the button when the horn is turned, substantially as and for the purpose described. (3) The combination of the rotatable horn of a pegging-machine, with a work-supporting button pivotally supported in the tip thereof, and provided with an eccentric awl-passage, and a slot extending laterally therefrom through and to the other side of the axis of the button, and means for preventing rotation of the button when the horn is turned, substantially as and for the purpose described." "(10) The combination of the horn adapted to rotate upon a verti-

cal axis provided at its tip with a supporting-annulus concentric with its axis of rotation, with a button supported by said annulus and provided with an eccentric awl-passage within the opening of the annulus, and means for preventing rotation of the button when the horn is turned, substantially as and for the purpose described."

The essential feature of each of these claims is the employment of a central feed-traverse to reduce the size of the button. The specification and briefs point out no purpose in employing the eccentric awl-passage, other than the reduction of the diameter of the button. This reduction enables the patentee to make his button 20 per cent. smaller. The above drawings illustrate this. I am of the opinion that the problem of reducing the diameter of the button, like that of reducing its vertical dimensions, was an ordinary mechanical problem, solved by ordinary mechanical skill, involving no invention. Sturtevant & Bickford had clearly pointed out the mechanical operation of the work-support, and left Davey merely the task of making smaller what they had devised.

Should we concede, however, the validity of claims 2, 3, and 10, I am of the opinion that the defendants do not infringe those claims. Davey reduces the size of his button by a central traverse. He adopts an eccentric awl-passage because he proposes to feed across the center, and thus save room. He says in his specification:

"By having the slot extend across at both sides of the axis, as shown, the button may be of much smaller diameter than would be the case if the awl entered directly over the axis of the button, which latter would then have to have a radial slot of sufficient length to accommodate the feed movement of the awl."

Though the defendants employ an eccentric awl-passage, they do not employ it for a central feed-traverse, nor for the purpose of obtaining that reduction of the size of the button which, so far as has been made to appear, was Davey's sole reason for employing an eccentric awl-passage. The complainant thus describes in its brief the operation of the defendants' device:

"The awl moves laterally from the eccentric awl-passage where it descends to the center of the button. The awl then is lifted and retracted, and the peg is driven at this point. The next feed movement of the awl carries the peg held in the work against a stationary knife which is screwed to the top of the button, with its edge a little beyond the center of the button, and thereby, as the work is carried along, the peg is gradually severed."

The traverse of the defendants' awl is therefore entirely within the radial length of the button, as was the case in the device of Sturtevant & Bickford. Mr. Metcalf, the defendants' expert, correctly says:

"The relation of defendants' machine to the machine of the patent in suit is that defendants, instead of using the central feed-traverse, which gives to the machine of the patent in suit whatever advantage there may be in the reduction of the necessary size of the button, have foregone that advantage, in order that, by using a one-sided feed-traverse, they might gain the greater advantage of being able to cut off the peg points without the use of an additional machine."

The defendants' button has all the disadvantages of size resulting from the employment of the one-sided or radial feed-traverse of

Sturtevant & Bickford, pointed out by the complainant as a reason for considering that device inoperative.

There is, in my opinion, no infringement in the use of an eccentric awl-passage in a button of a size unreduced from that of Sturtevant & Bickford. To make a positive reduction in the size of an old button is one thing; to use the same-sized button used by Sturtevant & Bickford, and to make room on the face thereof for other parts, is another and distinct thing. The substantial difference in function fully meets the charge that the defendants, in using an eccentric awl-passage, appropriated anything invented or foreseen by Davey. The combination of the defendants should not be considered merely as a pegging device. The defendants successfully accomplish pegging and cutting pegs in one operation. Were it not that they desire to cut the pegs, which Davey's device could not do, they might dispense with the eccentric awl-passage, and peg with the Sturtevant & Bickford button, reduced only in its vertical dimensions. It is fair to say, therefore, that the eccentric awl-passage is employed by the defendants for cutting purposes, and not for pegging purposes. The contention of the complainant that the defendants' button would be larger in size, did they not employ an eccentric awl-passage, and that, therefore, the defendants have employed the eccentric awl-passage for the same purpose for which the complainant employs it, seems to me entirely untenable. It is not true that the defendants' button, considered merely as a pegging button, would be any larger without an eccentric awl-passage. It is only the defendants' new combination of a pegger and cutter that would be larger, and, as the complainant has not invented or claimed such combination, his patent, if valid, could not be suffered to defeat a meritorious and different invention. Furthermore, if claims 2, 3, and 10 could be fairly read to cover broadly a horn-tip and geared button having an eccentric awl-passage, irrespective of the purpose to be effected by the combination, the claims would be void, in view of the patent to Carey (No. 536,183), dated March 26, 1895. The bill will be dismissed.

JENNINGS et al. v. ROGERS SILVER PLATE CO.

(Circuit Court, D. Connecticut. August 14, 1899.)

No. 882.

PATENTS—INFRINGEMENT—ESTOPPEL.

Complainant notified defendant that he had been granted a patent for a certain design, which both parties were then manufacturing, and requested him to cease infringing it. After some correspondence, defendant stated that he would not willfully violate the rights of others, and asked when the patent was issued. Complainant replied that the patent had been allowed, and had gone to issue, and stated that, as soon as he obtained a copy from the patent office, he would forward it to defendant. This he never did, and defendant, without making further inquiries, continued to make and sell the infringing goods for more than a year and a half. *Held* that, notwithstanding plaintiff's neglect to comply with his promise, he was not estopped from claiming full damages upon an accounting.

This was a suit in equity by Jennings Bros. against the Rogers Silver Plate Company for alleged infringement of a patent for a design for a mirror frame.

J. C. Chamberlain, for plaintiffs.
J. G. Calhoun, for defendant.

TOWNSEND, District Judge. Final hearing on bill and answer, alleging infringement of patent No. 23,654, for a design for a mirror frame, issued September 25, 1894, to Charles F. Mosman, and duly assigned to complainant herein. Infringement is not denied, and validity is admitted, except as affected by a claim of prior use for more than two years before April 26, 1894, the date of the application for the patent. The only evidence in support of this defense is the testimony of one of complainants, as follows:

"About when did you first see the design of this mirror frame as shown you, I presume, by Mr. Mosman?" "About the latter part of March, 1892. However, there probably was a few changes made in the drawing subsequent to that time. We bought the design shortly after. I think in the month of April, 1892."

Not only is this statement too indefinite as to the date, and as to what were the changes made in the drawing, even if it were otherwise sufficient, but it is overcome by the positive testimony of the patentee, who states that he did not make the first design until about the 1st of May, 1892. The only serious contention of defendant is to the effect that complainant is estopped to ask for anything more than nominal damages, by reason of the following facts: Each of the parties manufactured these designs for about a year and a half before the patent was issued. On August 8, 1894, complainant wrote defendant as follows:

"We made application several months ago, and have been granted patent on the mirror stand and frame known as our 'scroll design,' a cut of which design is hereto attached. We are informed and believe that you are manufacturing this article, which, if true, is an infringement on our patents. We therefore give you notice to at once discontinue the manufacture of said articles, and thereby to cease from such infringement. Unless this is promptly done by you, we shall be compelled to apply to the courts to protect our rights under the patent, and to obtain redress for such damages as you have caused and may cause us by such infringement. Your prompt acknowledgment is desired."

On August 8th and 29th respondent wrote to complainant, asking for information as to when and where said patent was issued, and, in response to complainant's threat to bring suit, wrote, "We shall not willfully violate any obligation, either legal or moral, that we are under towards others in trade," and added, "We renew our request for the date of your patent." To this letter, complainant, on August 31st, 1894, replied as follows:

"The patent referred to for a design for a mirror frame called 'scroll pattern,' of which we sent you descriptive cut, has been granted and gone to issue. As soon as we have copy from the patent office we will forward same to you."

The patent issued September 25, 1894, but complainant never sent respondent a copy thereof, and respondent kept on manufacturing said design for a year and a half, when complainant, without notice, brought suit.

It is not necessary to comment upon the broken promise of complainant, or the negligence of respondent in manufacturing and selling the infringing goods for more than a year and a half after the issuance of the patent without learning whether such a patent had been issued, and without making any further effort to learn about it, simply because counsel told him, as he says, that "I could await a reply from Jennings Bros., who promised to send me a copy of their patent when issued." The patent has expired, and the only question herein raised was whether or not complainant was entitled to an accounting. This should be allowed.

The questions as to the effect of the alleged laches of complainant and as to the interference by defendant with complainant's rights, can safely be reserved until the coming in of the master's report. Let an order be entered for an accounting, with costs.

CHATILLON v. FORSCHNER et al.

(Circuit Court, S. D. New York. August 7, 1899.)

1. PATENTS—INVENTION—ANALOGOUS USE.
It being old in the arts to use a metal ring, rim, or band to protect porcelain and other frangible plate, and also to prevent the chipping or cracking of enameled metal vessels, there is no invention in simply applying to an enameled flanged scale pan a protecting metal ring which overlaps the edge of the pan and the bottom edge of the flange.

2. SAME—SCALE PANS.
The Chatillon patent, No. 304,172, for an improvement in scale pans, is void for want of invention.

This was a suit in equity by George H. Chatillon against George Forschner and Richard Forschner for alleged infringement of a patent for an infringement in scale pans.

Kenyon & Kenyon, for complainant.
Edwin H. Brown and W. L. Goldsborough, for defendants.

TOWNSEND, District Judge. At final hearing on bill and answer herein the defendants deny patentable novelty in and infringement of patent No. 304,172, issued August 26, 1884, to complainant for a scale pan. Complainant, in support of the claim of patentable novelty, proves the following facts: (1) Defects in prior scale pans, which had existed for many years, and were remedied by this device; (2) general acquiescence; (3) the extreme delicacy of adhesion of porcelain to metal; (4) the difficulty of connecting the suspension hoop to the pan and the solution thereof by the addition of a protecting ring to said pan; (5) the objection obviated of lodgment of meat, blood, and other matter in cracks and crevices which interfered with proper cleansing. The other contentions, based on allegations of increased sales and on expert opinions, are not sufficiently supported.

The answer to the forcible argument of counsel for complainant is found in the patent itself. All that the patentee attempted to cover by his first claim was a combination with his brother's old enameled

flanged scale pan "of a protecting ring, which overlaps the edge of the scale pan and the bottom edge of the flange." In his specification, after stating that during the past 11 years they have sold a very large number of his brother's scale pans, he says:

"But in many cases we have found that the enamel on the outer surface of the downwardly-projecting flange, and particularly on the edge of the scale pan, is liable to become broken and worn. The object of my present invention is to avoid this disadvantage by applying to the downwardly-projecting flange of the scale pan a protecting ring, which overlaps the edge of the scale pan, and also the bottom edge of the flange. This protecting-ring also affords additional strength to the connections between the suspension-hoop and the scale pan."

Can it involve invention worthy of the reward of a monopoly of 17 years to put a binding or frame about an article to protect it from wear and tear and breakage? If the court should not take judicial notice that this is a well-known expedient, it might be enlightened by patent No. 95,742, to Stevens, which claimed "a porcelain or other frangible plate with a metal band, rim, or clamp spun upon the flange thereof," and states that a "slight blow * * * will often disfigure and mar it by chipping off the enamel or vitreous glazing on the surface; * * * that the inequalities of the chipped or injured places retain the impurities, and are hard to reach so as to free them properly of the minute accumulations therein"; and that his invention is designed to prevent the destruction of, and to protect, said plates. The Manning patent of 1877 is a further answer to complainant's contention, for it covers an enameled metal vessel protected against chipping and cracking by a metal ring.

Counsel for complainant attempts to meet this evidence by the claim that the patents cited are not in an analogous art. But, even if the application of a metal rim to a plate were not analogous to its application to a scale pan, this would not be material, provided such operation were common to the general field of arts. Manufacturing Co. v. Holtzer, 15 C. C. A. 63, 67 Fed. 910. If the mechanic is directed to protect a picture, he frames it; or a garment, he binds it. The metal rim of the scale pan is no more different in construction or function from the frame of mirror or placque than from the prior Manning coffee pot, as to which complainant's expert admits that "the object stated in the Manning patent, No. 189,762, to be gained by placing the metal ring around the rim of the bottom, and the bottom edge, of the pot of that patent, is to protect the pot from injuries caused by the chipping or cracking of the vitreous material on the surface of the pot." Counsel for complainant further contends that enameled metal is a different substance from the porcelain of the Stevens plate, with different vibrations, and different coefficients of cohesion. But, granting this to be so, the use of a protecting ring is merely the application of an old device to a new material without any new or unexpected result. The object is the same,—protection; the means the same,—a ring; the result the same,—continued cohesion and increased strength; and, further, the prevention, as stated in the Stevens specification and in complainant's brief,—of "cracks and crevices" which "afford lodgment for particles, * * * and thus prevent

the proper cleansing." Finally, counsel for complainant argues that this patent in fact provides the ring as a new strengthening fastener for the hoop, and permits a construction of the scale pan which dispenses with the necessity of using enamel on the edge of the face and on the flange of the scale pan. But neither of these objects is claimed by the patentee. He says, on the contrary, that the object of his invention is, inter alia, to protect "the enamel on the outer surface of the downwardly-projecting flange, and particularly on the edge of the scale pan." The defendants manufacture scale pans in accordance with the specifications of patent No. 571,157, issued to George S. Forschner, November 10, 1896. The only material difference between their construction and that of the patent in suit is that the latter shows a flange integral with the scale pan, while defendants' flange is not integral, and, in consequence thereof, is claimed to have different functions.

In view of the conclusions already stated, it is unnecessary to discuss the claim of noninfringement on this ground, or the defenses of mere aggregation and of two years' public use and sale before the application. Let the bill be dismissed.

ACME FLEXIBLE CLASP CO. v. CARY MFG. CO

(Circuit Court, S. D. New York. July 29, 1899.)

1. PATENTS—CONSTRUCTION OF CLAIMS—ESTOPPEL OF PATENTEE.
   Where two of the three claims of an application were rejected, leaving the third to stand without modification, and this action was acquiesced in by the patentee, *held*, that a mere remark by the examiner in the course of the proceedings that there did not appear to be any material difference in the claims did not estop the patentee from claiming the construction shown by the specification and claim allowed, or limit him to a construction embracing only what was shown by the rejected claims.
2. SAME—ANTICIPATION—PRIOR USE.
   Under Rev. St. §§ 4886, 4923, the mere secret practice of a process or the physical presence of a product or manufacture in this country is insufficient as an anticipation unless and until the public acquires or has opportunity to acquire therefrom such knowledge as would enable one skilled in the art to practice the invention. Such alleged anticipations, whether by foreign printed publication or physical presence in this country, must so embody the complete patented article, or be so substantially like it, that a specification could be based thereon.
3. SAME—STAPLE FASTENER FOR WOODEN VESSELS.
   The Swett patent, No. 314,204, for a staple fastener for wooden vessels, construed, and *held* not anticipated, valid, and infringed.

This was a suit in equity by the Acme Flexible Clasp Company against the Cary Manufacturing Company for alleged infringement of a patent for a staple fastener for wooden vessels.

Dyrenforth & Dyrenforth and W. A. Redding, for complainant.
A. G. N. Vermilya, for defendant.

TOWNSEND, District Judge. Final hearing on usual bill and answer, raising questions of validity and infringement of patent No. 314,204, issued March 17, 1885, to William O. Swett, complainant's

assignor, for a staple fastener for wooden vessels. The single claim thereof is as follows:

"A fastener for securing wooden package covers, formed of a single piece of metal, with tapered shanks, D, and a thin metal plate, A, which is thick enough at its junction with bases, C, of shanks, D, to form heads, B, for driving the shanks, D, in the wood, as specified."

The fastener is in the form of a double-pointed staple, so thick at the corners as to furnish sufficient heads for the shanks, and so thin in the center as to be nonelastic, and easily bent over the corners of the wooden box. The specification says:

"The invention consists in a staple whose pointed shanks are projections from a plate which is made so thin at its middle portion as practically to be nonelastic, whereby the shanks, which are driven into the wood, will not be drawn out by the spring of the metal, and at the same time the thickness of the connecting plate shall not be such as to interfere when storing or handling fastened packages, or the shanks be removed by contact with other articles."

By this unique construction of a double-pointed staple the inventor so successfully accomplished the object of his invention that his sales amount to 60,000,000 a year, and for 13 years the public have acquiesced in the validity of his patent, except in a single instance, where this defendant co-operated with complainant in successfully stopping infringement by threat of suit.

The defendant manufactures an infringing staple under a patent issued to its president June 22, 1897. Said staple is practically identical in construction with that of complainant, except that the middle piece of metal is split and spread apart instead of being flattened. Its purpose and use is the same as that of complainant, as appears from the following statement in the specification:

"Generally, in such uses, the clasp must be bent over a corner, and the end or ends driven into the wood of the parts to be secured together. It is therefore important that the end of the tang or prong to be driven should be sharp; that the body of said prong should be stiff enough to penetrate the wood without bending; that the part immediately adjacent to the prong should be of sufficient body to constitute a good driving surface; that the remainder of the body intermediate the ends should be wide enough to make a good bearing surface where it rests against the parts to be secured, and should also be flexible enough to bend readily at almost any point intermediate the prongs (if there are two), that it may be easily applied to the intended use."

The defenses alleged are as follows: (1) Limitation of the claim by proceedings in the patent office, and denial of infringement by reason thereof; (2) denial of invention in view of the prior art; (3) anticipation.

There is nothing in the first point. All that Swett, the patentee, did, was to acquiesce in the action of the patent office in rejecting two of his three claims, leaving the second claim exactly as it was originally drawn. A mere remark of the examiner, "It is not seen that there is any material difference in the claims," does not estop the patentee from claiming the construction shown by the specification and original claim. It is the construction of the patent as finally issued which is to be considered. Reece Buttonhole Mach. Co. v. Globe Buttonhole Mach. Co., 10 C. C. A. 194, 61 Fed. 958. Defendant says that, because the examiner, in rejecting the other claims,

said they were the same as the claim allowed, and because one of the rejected claims was for a staple whose plate was "formed of less metal in cross section than the adjoining parts," complainant is limited to that construction of the claim allowed, and because splitting the metal in defendant's staple does not cause it to have less metal in the center, defendant does not infringe. There is no law to justify, and no proof to support, this contention. The utmost that can be argued as to this latter point is that Swett, in his specification, stated as a preferred construction one where there was not so much metal in cross section as at the heads of the pointed shanks.

In support of the defense of lack of patentable novelty in view of the prior art defendant has cited five patents. The Barney and Butterfield patent of 1874 had no thin shank, and did not have to be bent. The earlier patent to Carey, the president of the defendant corporation, issued in 1876, had none of the material elements of the patent in suit, and was not intended to be bent. The Winne patent of 1878, for a fastener for barrel hoops and heads, contains no hint of the patented invention; and Willard's patent of 1884 was for the combination of two nails with a piece of wire having eyes in its ends. Patent No. 244,282, issued to Moore in 1881, was cited by the patent office in rejecting claims 1 and 3. Counsel for defendant insists that the only difference between complainant's device and that of Moore is that the latter is not in one piece. Moore's tub fastener consisted of "a strip of tin or other suitable sheet metal into opposite ends of which are inserted headed nails," and a fold-over strip to keep the nails from falling out, "for fastening the covers of butter tubs." It was not made in a single piece; it was not adapted to the purposes of the patented staple; it was not so constructed as to be nonelastic, so that the shanks should not be drawn out by the spring of the metal, and the plate was not so thickened at the bases of the shanks as to form driving heads. This device has no bearing on the novelty of the patent in suit.

The defense of anticipation is a substantial one, and deserves and has received exhaustive consideration. Two reputable disinterested tea merchants, Messrs. Hamilton and Mead, testify that small fasteners, which in general appearance and construction strikingly resemble the patented staple, were in use in this country, or were in the possession of the witnesses, prior to the date of the patent in suit. Hamilton says these fasteners were used in London prior to 1870 in securing parts of tea boxes together which were shipped to this country; that he came to this country in 1885, and saw tea boxes with fasteners in use which, to the best of his knowledge and belief, were the same to all practical purposes as those used in London; and that such fasteners were in general use in this country on tea chests which had come from China in 1874 or 1875. Mead says he is not familiar with the method of securing the parts of packages of tea together, but he produces three of these fasteners, which he testifies have been upon a tea chest during the whole time that it has been in his possession, a period of more than 17 years, and which he removed therefrom on the morning of his examination. He further says he has seen tea coopers use fasteners of somewhat similar make in coopering teas in this

country. Hamilton was not cross-examined. Mead testified on cross-examination that it was the usual custom to cover tea packages with paper or matting which entirely hid the joints, and any fastener employed at the joints. There is no reason to doubt that this testimony was given by disinterested intelligent witnesses who were seeking to state the facts exactly as they believed them to exist, and this evidence is to be accepted as true. The defendant claims that this evidence shows a prior public knowledge or use of the patented invention in this country. Why does the patent law provide that anticipation may be shown by a prior public use or knowledge in this country, but not in a foreign country, and that, in order to establish anticipation in a foreign country, a patent or printed publication must be proved? It seems clear that congress intended to benefit the American public by a grant of a patent to the individual who, believing himself to be the first inventor, was the first in fact to disclose such invention in this country. This is shown by a comparison of section 4923 with section 4886, of the Revised Statutes. I therefore understand the law on this subject to be that the mere secret practice of a process or the physical presence of a product or manufacture in this country is insufficient as an anticipation unless and until the public acquires, or has opportunity to acquire, therefrom such knowledge as would enable one skilled in the art to practice the invention. Such alleged anticipation, whether by foreign printed publication or physical presence in this country, must so embody the complete patented article, or be so substantially like it, that a specification could be based thereon. Draper v. Wattles, 7 Fed. Cas. 1061 (No. 4,073); Hays v. Sulsor, 11 Fed. Cas. 915 (No. 6,271); Whitney v. Emmett, 29 Fed. Cas. 1076 (No. 17,585). As Mr. Chief Justice Taney says in Gayler v. Wilder, 10 How. 497, "By knowledge and use the legislature meant knowledge and use * * * accessible to the public." It is the inventor who is the first to confer on the public in this country the benefit of the invention, who is entitled to a patent. This rule has been applied to a process in Boyd v. Cherry, 50 Fed. 279, and to a product in Matheson v. Campbell, 24 C. C. A. 384, 78 Fed. 914. "The knowledge and use of an invention in a foreign country by persons residing in this country will not defeat a patent which has here been granted to a bona fide patentee, who, at the time, was ignorant of the existence of the invention or its use abroad." Doyle v. Spaulding, 19 Fed. 744; Rob. Pat. § 315. Hamilton's knowledge of the use of Chinese staples in this country prior to the patent is so indefinite as to be insufficient, and his knowledge as to such use abroad is immaterial. Mead's testimony fails to show any material fact other than that the fasteners were removed that morning from a chest which had been in his possession for more than 17 years. It does not appear that he had ever seen said staples until the day of the hearing. He does not state when he has "seen tea coopers use fasteners of somewhat similar make in this country." The testimony of the two witnesses, taken together, shows that Mead had no knowledge of the practice followed in applying these fasteners, and that Hamilton is uncertain as to the construction of the earlier staples. How these alleged anticipating staples were originally made, or how

applied, does not appear; nor does it appear whether the flattened center was a feature of the original construction, or was due to the hammering when they were applied. In the latter case, as they would not infringe if later, they would not anticipate. Because of the indefiniteness of this testimony, and because no tea chests and no practical tea coopers were introduced to show the facts essential to prove public knowledge and use, I am constrained to hold that this defense is not sufficiently proved to overthrow the presumption of the validity of this patent, which has been acquiesced in for 14 years. But, even if these witnesses had shown that tea chests fastened abroad with confessedly anticipating staples had been imported into this country prior to the date of this patent, I think, under the foregoing rules of law, such evidence would be insufficient to show anticipation, because it is admitted that it was the custom to cover packages containing such fasteners "before shipment to this country, and this covering entirely hid the joints, and any fasteners employed at the joints." It is clear that the public has derived the benefit of the knowledge of this invention from the patentee. It is not clear that any person ever knew of the existence in this country of the fasteners introduced as anticipations. The first knowledge proved to have existed in this country of the exact construction of these staples was when the witnesses recently removed them from tea chests. And, inasmuch as it was essential to establish such prior knowledge of construction, operation, and use as would be equivalent to the specifications of a patent, and such proof was not furnished, I think the defense is not sustained. The usual decree may be entered.

THE SIR ROBERT FERNIE.

(District Court, D. Washington, W. D. September 2, 1899.)

No. 197.

SALVAGE—AMOUNT AND APPORTIONMENT—EVIDENCE CONSIDERED.

The Sir Robert Fernie, a steel bark, worth from $75,000 to $100,000, and loaded with a cargo of wheat of the value of $96,000, was moored to a buoy in Tacoma Harbor, when, about 10 o'clock on a stormy night, with a southwest gale, the buoy's anchor chain parted, and the ship began drifting broadside towards the north shore. Her windlass had been taken out for repair, and she had no means of handling chain cable, and had only part of her complement of men. She sent for the tug Fairfield, which, though shorthanded, came to her assistance. Being unable to procure further help, the Fairfield, which was a new boat, by the utmost exertions, during which she severely strained her machinery, succeeded in holding the ship off the beach near which she had drifted until the wind abated, and, after five hours' work, brought her back to anchor uninjured. *Held* that, in view of the certainty that serious injury would have resulted to the cargo, and probably to the ship, but for the efforts of the tug, which involved danger to both tug and crew, the owners and crew were entitled to salvage, which was awarded in an aggregate of $5,300.

In Admiralty. Suit for salvage by the owners and crew of the steam tug Fairfield. Hearing on the merits. Decree for libelants.

J. M. Ashton, for libelants.

Williams, Wood & Linthicum and H. S. Griggs, for claimant.

HANFORD, District Judge. For services in rescuing the bark Sir Robert Fernie from a situation of peril on the night of November 2–3, 1898, the owners and crew of the steam tug Fairfield have brought this suit to recover salvage. At the time of rendering the services the Fairfield was a new vessel, employed in a general towing business about Tacoma Harbor, and in all the waters of Puget Sound and the Straits of Juan de Fuca, having power sufficient to handle a ship of 3,000 tons in ordinary weather. Her value was about $12,000; her usual complement of officers and men consisted of a captain, mate, engineer, fireman, one deck hand, and a boy; and her average earnings were $50 per day. At the time of being called to assist the Sir Robert Fernie the engineer and deck hand were absent, but the engineer joined the vessel in the manner hereinafter related in time to relieve the fireman, who had been, during the night's experiences, doing all the work in the engine room. The Sir Robert Fernie is a large, steel-hull, four-masted bark, nine years old at the time of the occurrence, and worth, as near as I can estimate her value, from $75,000 to $100,000. She was loaded with a cargo of 3,916 long tons of wheat, of the value of $96,000, and destined on a voyage around Cape Horn to some port in Great Britain. Being thus loaded, she was moored to a buoy in Tacoma Harbor, awaiting the completion of a new windlass to replace her old one, which had been taken out on account of being damaged and unserviceable. Her steam winch was out of order, so that during the night in question she had no means of handling chain cables. Besides her lack of equipments for contending against the elements, she was not fully manned, only part of her usual complement of able seamen being on board, and her officers seemed to have but little confidence in the loyalty of the men she did have. It is proved by statements afterwards made by her captain, and also by the answer verified by him, that one of the most important acts of seamanship during the night was performed by the ship's cook; and it is made a matter of record in the ship's log, written by the first mate, and signed by the captain, three mates, and two able seamen, that in heaving the sounding line it parted, and about 70 fathoms of line was lost; and on examination of that part of the line which remained on the reel it was found that the line had been cut at the place where it parted, and also cut in other places, by some person, maliciously. There was considerable delay in some of the important operations during the night, which the captain ascribed to the unwillingness of his men, and he expressed his belief that they had tried to run the ship ashore. The buoy to which the ship was moored was placed in the harbor for the accommodation of ships by the city government, and consisted of a raft, attached to a 5,500-pound anchor by 60 fathoms of chain cable, weighing 15,000 pounds. When the buoy was picked up, it was found that the chain cable had become unshackled, or had parted, near the anchor, for about 60 fathoms of chain was still appended to the log raft. This had been dragged by the ship across the bay to a place less than one-fourth of a mile from the north shore, where the depth of the water is only about 50 feet. At that place the chain dragging on the bottom must have held the ship's head so that the wind would make her swing shore-

ward, and, allowing for the slope of the beach, there could not have been much water under her stern. The night of November 2d was dark and stormy. There was a heavy rainfall, and a southwest gale prevailed during most of the night, with frequent squalls of great violence. The condition of the weather is established beyond question by the testimony of well-known citizens, who have no interest to induce them to give false testimony, and who have had lifelong experience in battling with the elements upon the ocean. Their testimony is corroborated by reports of the storm published next day in the daily papers, by the fact that the ship dragged the buoy and 60 fathoms of chain across the bay, by the conduct of the captain of the Sir Robert Fernie in calling for assistance, by the record of the ship's log, and by the record of the United States weather station at Tacoma, which shows the velocity and direction of the wind during the night, as follows:

9:40	p. m.	26	miles	per	hour	from	the	southwest.
10:15	"	20	"	"	"	"	"	"
11:45	"	22	"	"	"	"	"	"
12:01	a. m.	21	"	"	"	"	"	"
1:02	"	10	"	"	"	"	"	"
2:16	"	10	"	"	"	"	"	"
3:27	"	9	"	"	"	"	"	"
4:00	"	12	"	"	"	"	"	"
5:02	"	11	"	"	"	"	"	"

In such weather the water would necessarily be rough, and the testimony shows that the doors of the engine room of the Fairfield had to be kept shut to keep the water which was breaking over the sides of the steamer from flooding the engine room. And yet in the face of these incontrovertible facts the captain of the Sir Robert Fernie and his subordinate officers and the seamen whom he called as witnesses have endeavored to minimize the merit of the services rendered by the libelants by swearing that the weather was fine, with only light breezes with occasional puffs, which amounted to nothing, and that there was no sea on; Capt. Cannon himself going to the extreme of absurd prevarication by swearing that at about 2:30 a. m., when the ship was finally brought to a place of safety, and moored, there was no wind, and the water was smooth as oil. The testimony of these witnesses appears to be so untrustworthy that I reject it entirely as to all matters in which they contradict other witnesses. During the fiercest part of the gale—about 9:30 p. m.—the ship was discovered to be drifting, and as soon as practicable the captain dispatched a boat's crew to request the Fairfield to come to his relief, and at the same time blue lights were burned as a signal. Those on board the Fairfield responded with commendable promptness, not waiting to send for the engineer, but went out in the gale as soon as sufficient steam could be made, arriving alongside of the ship on the weather side between 10 o'clock and 10:30. Instead of taking the towline which the tug was ready to pass on board, Capt. Cannon requested that the tug come alongside, and that her captain should come on board his ship for consultation. As the result of the consultation which was held, more blue lights were burned as a signal of distress, and the ship's boat crew was again sent ashore, accompanied

by the mate of the tug, for the purpose of securing another tug, because Capt. Cannon was excited, and he did not have confidence that a tug of the Fairfield's capacity would be able to save his ship, which was then being driven broadside before the southwest gale towards the northern shore of the harbor. The ship's yards were then braced around to point towards the wind, and the tug, short-handed as she was, the mate, engineer, and deckhand being absent, undertook the heavy task of pulling the ship's head to the wind, and towing against it. To watch the towline, steer the tug, direct the movements of the tug and the ship, work the engine, and stoke the furnace, the captain, fireman, and boy on board the Fairfield all had to do double work, and the engine and boiler of the tug were severely strained by the efforts made to increase her power to the utmost. The evidence shows that to prevent the loss of any force the safety valves were screwed down, and the pressure of steam was raised considerably above the full limit specified in the tug's certificate of inspection, in consequence of which considerable expense was incurred afterwards in readjusting the different parts of the engine, and for new bolts and rivets and repairs to the boiler. By the utmost exertions of the tug she was able to hold the ship from going ashore, and when the wind moderated she managed to pull her some distance towards the southern shore, but during the succession of squalls which were encountered the tug and her tow were frequently driven astern. After considerable delay the ship unshackled her cable from the buoy, and when the wind moderated—after 1 o'clock—the tug succeeded in towing her back to a mooring near the coal bunkers on the southerly side of the bay. When the worst part of the struggle was passed, the ship's boat returned, having been unsuccessful in finding another tug in condition for immediate service, but she brought the Fairfield's engineer, who then relieved the exhausted fireman. Considering the state of the weather and the disabled condition of the Sir Robert Fernie, without the means or the men to safely handle her anchors, I consider the probability so strong that it amounts to certainty that she would have been driven upon the beach if she had not been saved by the exertions of the Fairfield and her crew; and, loaded as she was, the consequence of being cast upon the beach in the storm would necessarily have been quite serious. If she had escaped the danger of striking on rocks, still the incline of the beach would have caused her to list over towards the water, if she had been driven on broadside, or, if otherwise, one end would have been depressed, and in either position the incoming tide would have filled her with water, and ruined her cargo, before adequate appliances to lift her could have been obtained. Under the most favorable conditions which could be expected, she would have been obliged to meet heavy bills for expenses of surveys, unloading, lightering, reloading, and probably docking. For being saved from such peril, Capt. Cannon offered the captain of the Fairfield as recompense the sum of $30, which being declined the offer was increased to $50; and when the answer was filed in this action $200 was deposited in court, which the answer alleges is reasonable compensation; and after this suit had been commenced an agent of the firm which loaded the Sir Robert Fernie

sought an interview with the captain of the steam tug, and made a tender of his good offices in arranging a compromise, in which he expressed disapproval of the niggardly offer which had been made by Capt. Cannon, and expressed his own idea that $250 would be reasonable compensation, and he has testified in this case that Capt. Burley assented to that proposition. It is obvious, however, that, instead of really assenting to his statement, Capt. Burley did nothing more than decline to give it serious consideration. One part of the defense in the case is founded upon the claim that the services of the Fairfield were rendered in pursuance of a contract made during the afternoon preceding the occurrences narrated. The evidence shows that Capt. Burley did offer to tow the Sir Robert Fernie to a different mooring buoy without making any charge therefor, which offer was declined. Capt. Burley also at the same time promised to come to the relief of the ship during the night if his assistance should be required, and also promised that he would not make any unreasonable charge. Capt. Cannon himself does not pretend that any definite arrangement was made by which he retained the Fairfield in his service during the night, or became obligated to pay any sum for her services, unless, in case of an emergency, he should call for her to come to his relief. This shows that there was no contract binding upon either party, or which can stand in the way of the libelants' claim for compensation for a salvage service. I find from the evidence that the libelants, with promptness and courage, exposed themselves and their vessel to hardship and peril in the endeavor to rescue the Sir Robert Fernie and her cargo, and their efforts were in the highest degree successful. The value of the property saved is a large amount, compared with which the amount awarded to the libelants as their compensation is inconsiderable. The time during which the libelants were engaged in the service was something less than five hours. Considering this fact and all the circumstances developed in the evidence, and not particularly mentioned, as well as all the facts which I have mentioned, I regard as reasonable compensation, and therefore award, to the libelants the following sums, viz.: To the owners of the Fairfield, $3,000; to Captain Burley, $800; to Arthur Thompson, the boy, and Joseph Herbert, the mate, each $400; to Oscar Lawrence, the fireman, $500; and to George A. Kingsbury, the engineer, $200.

STATE OF ARKANSAS v. KANSAS & T. COAL CO. et al.

(Circuit Court, W. D. Arkansas, Ft. Smith Division. September 2, 1899.)

1. REMOVAL OF CAUSES—JURISDICTION OF FEDERAL COURT—AMOUNT INVOLVED.
The state of Arkansas, at the relation of a prosecuting attorney, filed a bill in one of her own courts against the Kansas & Texas Coal Company and the St. Louis & San Francisco Railroad Company, both corporations organized under the laws of the state of Missouri, alleging that the coal company was threatening and about to import into one of the towns and counties in said state, over the line of its co-defendant's railroad, a large number of armed men of the low and lawless type of humanity, to wit, about 200, to the great danger of the public peace, morals, and good health of said town and county. The defendants removed the case to this court, whereupon the plaintiff moved to remand the same for reasons which will appear in the opinion. *Held*, the amount involved in a suit for an injunction for the purpose of determining the jurisdiction of a federal court is the value of the right to be protected, or the extent of the injury to be prevented, by the injunction.[1]

2. SAME—CITIZENSHIP.
A suit between a state and a citizen or corporation of another state is not a suit between citizens of different states, and a circuit court of the United States has no jurisdiction of it on the ground of diverse citizenship.[2]

3. SAME.
In Railroad Co. v. James, 16 Sup. Ct. 621, 161 U. S. 545, it is decided that said railroad company is a Missouri corporation.

4. SAME—FEDERAL QUESTION.
The plaintiff's complaint, on its face, raises a federal question under the interstate commerce clause of, as well as under the fourteenth amendment to, the constitution of the United States, and therefore this court has jurisdiction thereof on removal.[3]

5. CONSTITUTIONAL LAW—POWER OF STATE—LABORERS ENTERING STATE.
No statute of this state inhibits the class of persons described in the bill coming into this state. It will be time enough to decide whether the state has the power to prohibit their coming when a proper case, based on such a statute, is brought to the attention of the court. Under the fourteenth amendment, and under the interstate commerce clause, of the constitution, they now have that right.

6. SAME—REGULATION BY COURTS.
It is not within the power of any court, state or federal, to prescribe what rules and regulations are needful to the welfare, peace, health, safety, and morals of the state, or to determine, without legislation, what class or classes of persons may lawfully come therein. That power belongs to the legislatures of the states, and must be exercised within constitutional bounds.

7. INJUNCTION—DISSOLUTION.
The class of persons described in the bill having the right to come into the state, the injunction granted by the state court preventing their coming into the state is dissolved.

---

[1] As to jurisdiction of federal courts as dependent on amount in controversy, see note to Auer v. Lombard, 19 C. C. A. 75, and, supplementary thereto, note to Tennent-Stribling Shoe Co. v. Roper, 36 C. C. A. 459.

[2] As to diverse citizenship as a ground for federal jurisdiction, see note to Shipp v. Williams, 10 C. C. A. 249, and, supplementary thereto, note to Mason v. Dullagham, 27 C. C. A. 298.

[3] As to jurisdiction in cases involving federal question, see note to Bailey v. Mosher, 11 C. C. A. 308, and, supplementary thereto, note to Montana Ore-Purchasing Co. v. Boston & M. Consol. Copper & Silver Min. Co., 35 C. C. A. 7.

8. SAME—RESTRAINING PROSECUTION.

The motion for a restraining order to prevent the state from the prosecution of the suit in the state court, notwithstanding the removal to this court, is overruled.

(Syllabus by the Court.)

On Motions to Dismiss and to Restrain Prosecution of Suit in State Court.

On April 23, 1899, this cause was brought by the state (at the relation of Jo Johnson, prosecuting attorney for the Twelfth judicial circuit) in the circuit court of Sebastian county for the Greenwood district, in the state of Arkansas. From the complaint it appears that both defendant companies are Missouri corporations; that the defendant coal company (hereinafter designated "Coal Company," for convenience), when the bill was filed, owned and was operating a coal mine at Huntington, in said Greenwood district of Sebastian county, and that the defendant railroad company (hereinafter designated "Railroad Company," for convenience) owned and operated a railroad in said county and Twelfth judicial circuit. Omitting, for the purposes of this motion, irrelevant matter, the bill charges "that the defendant Coal Company is threatening and is about to import into said county [Sebastian], and town of Huntington, over a line of their co-defendant's railroad, a large number of armed men of the low and lawless type of humanity, to wit, about two hundred, to the great danger of the public peace, morals, and good health of said county, and more particularly of said town." On the 18th of July, 1899, the defendants filed a joint petition in said court, accompanied by a bond in the usual form, and prayed for an order of removal of this case to this court. The order of removal was denied by the state court, and thereupon the defendant companies procured, and afterwards, on the 25th of July, 1899, caused to be filed in this court, a transcript of all the proceedings of the state court. On August 7, 1899, the state filed in this court a motion to dismiss the case for the following reasons: (1) Because the petition for removal and transcript of the record of the circuit court of Sebastian county for the Greenwood district thereof show that it is not removable to this court, under the laws of the United States; (2) because the state of Arkansas being plaintiff, and defendants alleged to be citizens of the state of Missouri, this court could acquire no jurisdiction on the ground of diverse citizenship; (3) because the record aforesaid shows it is not a civil action for the enforcement of a right arising under the constitution and laws of the United States, or treaties made under their authority, or arose under the constitution, laws, and treaties aforesaid; (4) because, under the constitution and laws of the state of Arkansas the St. Louis & San Francisco Railroad Company, one of the defendants, is a domestic corporation, and is subject to the jurisdiction of the courts of said state.

Ben T. Duval, for plaintiff.
Hill & Brizzolara, for defendants.

ROGERS, District Judge (after stating the facts as above). Counsel who filed the motion to dismiss has made no point with reference to the first paragraph of the motion, and it is not necessary to consider it, unless it be intended thereby to raise the question that it does not appear that the amount in controversy exceeds the sum of $2,000. That question is res adjudicata in this court. Humes v. City of Ft. Smith, 93 Fed. 857. See, also, Railroad Co. v. Ward, 2 Black, 485.

It has been held that a state is not a citizen. And under the judiciary acts of the United States it is well settled that a suit between a state and a citizen or corporation of another state is not between citizens of different states, and that the circuit court of the United States has no jurisdiction of it, unless it arises under the constitution, laws, or treaties of the United States. Ames v. Kansas,

111 U. S. 449, 4 Sup. Ct. 437; Stone v. South Carolina, 117 U. S. 430, 6 Sup. Ct. 799; Germania Ins. Co. v. Wisconsin, 119 U. S. 473, 7 Sup. Ct. 260. The second paragraph of the motion to dismiss, therefore, is well taken.

The fourth paragraph of the motion has been settled adversely to the motion in the case of Railway Co. v. James, 161 U. S. 545, 16 Sup. Ct. 621.

Nothing remains to consider except the third paragraph of the motion. It is conceded, and is settled law, that under the act of August 13, 1888, a case (not depending on the citizenship of the parties, nor otherwise specially provided for) cannot be removed from a state court into the circuit court of the United States as one arising under the constitution, laws, or treaties of the United States, unless that appears by the plaintiff's statement of his own claim; and, if it does not so appear, the want cannot be supplied by any statement in the petition for removal, or in the subsequent pleadings. Tennessee v. Union & Planters' Bank, 152 U. S. 454, 14 Sup. Ct. 654; Chappell v. Waterworth, 155 U. S. 102, 15 Sup. Ct. 34; Postal Tel. Cable Co. v. Alabama, 155 U. S. 482, 15 Sup. Ct. 192; Land Co. v. Brown, 155 U. S. 488, 15 Sup. Ct. 357; Railroad Co. v. Cody, 166 U. S. 607, 17 Sup. Ct. 703; Walker v. Collins, 167 U. S. 57, 17 Sup. Ct. 738. The cases cited make it clear that in determining whether or not the present case is a suit of a civil nature arising under the constitution or laws of the United States, or treaties made or which shall be made under their authority, must be determined by an examination of the complaint itself, and not by anything which is found either in the petition for removal or in any subsequent pleadings filed. Attention is therefore directed to an examination of adjudged cases determining when a suit is one "arising under the constitution or laws of the United States," etc. In Tennessee v. Union & Planters' Bank, 152 U. S. 459–462, 14 Sup. Ct. 654, 656, it was said:

"The earliest act of congress which conferred on the circuit courts of the United States general jurisdiction of suits of a civil nature, at common law or in equity, 'arising under the constitution or laws of the United States, or treaties made or which shall be made under their authority,' was the act of March 3, 1875, c. 137 (18 Stat. 470). Under section 1 of that act, providing that those courts should have original cognizance of such suits when the matter in dispute exceeded the sum or value of $500, their jurisdiction was exercised in cases in which the plaintiff's statement of his cause of action showed that he relied on some right under the constitution or laws of the United States. Feibelman v. Packard, 109 U. S. 421, 3 Sup. Ct. 289; Kansas Pac. R. Co. v. Atchison, T. & S. F. R. Co., 112 U. S. 414, 5 Sup. Ct. 208; New Orleans v. Houston, 119 U. S. 265, 7 Sup. Ct. 198; Bachrack v. Norton, 132 U. S. 337, 10 Sup. Ct. 106; Cooke v. Avery, 147 U. S. 375, 13 Sup. Ct. 340. And under section 2 of that act, which provided that any suit of a civil nature, at law or in equity, brought in any state court, 'and arising under the constitution or laws of the United States, or treaties made or which shall be made under their authority,' might be removed by either party into the circuit court of the United States, it was held sufficient to justify a removal by the defendant that the record at the time of the removal showed that either party claimed a right under the constitution or laws of the United States. Railroad Co. v. Mississippi, 102 U. S. 135; Ames v. Kansas, 111 U. S. 449, 462, 4 Sup. Ct. 437; Brown v. Houston, 114 U. S. 622, 5 Sup. Ct. 1091; Society v. Ford, 114 U. S. 635, 642, 5 Sup. Ct. 1104; Pacific Railroad Removal Cases, 115 U. S. 1, 5 Sup. Ct. 1113; Tennessee v. Whitworth, 117 U. S. 129, 139, 6 Sup. Ct. 645, 649; Southern

Pac. R. Co. v. California, 118 U. S. 109, 16 Sup. Ct. 993; Bock v. Perkins, 139 U. S. 628, 11 Sup. Ct. 677. But, as has been decided under that act, 'the suit must be one in which some title, right, privilege, or immunity on which the recovery depends will be defeated by one construction of the constitution, or a law or treaty of the United States, or sustained by a contrary construction.' Carson v. Dunham, 121 U. S. 421, 427, 7 Sup. Ct. 1030, 1033. 'A cause cannot be removed from a state court simply because, in the progress of the litigation, it may become necessary to give a construction to the constitution or laws of the United States (Water Co. v. Keyes, 96 U. S. 199, 203); and the question whether a party claims a right under the constitution or laws of the United States is to be ascertained by the legal construction of its own allegations, and not by the effect attributed to those allegations by the adverse party.' Railroad Co. v. Mills, 113 U. S. 249, 257, 5 Sup. Ct. 456, 459. Even under the act of 1875 the jurisdiction of the circuit court of the United States could not be sustained over a suit originally brought in that court, upon the ground that the suit was one arising under the constitution, laws, or treaties of the United States, unless that appeared in the plaintiff's statement of his own claim. This was distinctly adjudged, and the reasons clearly stated, in Metcalf v. Watertown, 128 U. S. 586, 589, 9 Sup. Ct. 173, 174, in which Mr. Justice Harlan, after pointing out that the cases in which it had been held sufficient that the federal question upon which the case depended was first presented by the answer or plea of the defendant, were cases of removal, in which, therefore, the requisite of jurisdiction appeared on the record at the time when the jurisdiction of the circuit court of the United States attached, said: 'Where, however, the original jurisdiction of a circuit court of the United States is invoked upon the sole ground that the determination of the suit depends upon some question of a federal nature, it must appear at the outset, from the declaration or the bill of the party suing, that the suit is of that character; in other words, it must appear, in that class of cases, that the suit was one of which the circuit court, at the time its jurisdiction is invoked, could properly take cognizance. If it does not so appear, then the court, upon demurrer or motion, or upon its own inspection of the pleading, must dismiss the suit; just as it would remand to the state court a suit which the record, at the time of removal, failed to show was within the jurisdiction of the circuit court. It cannot retain it in order to see whether the defendant may not raise some question of a federal nature upon which the right of recovery will finally depend; and, if so retained, the want of jurisdiction at the commencement of the suit is not cured by an answer or plea which may suggest a question of that kind.' That view has been affirmed and acted on at the present term in Mining Co. v. Turck, 150 U. S. 138, 143, 14 Sup. Ct. 35, 37. The same rule applies more comprehensively to the acts of 1887 and 1888. In section 1, as thereby amended, the words giving original cognizance to the circuit courts of the United States in this class of cases are the same as in the act of 1875 (except that the jurisdictional amount is fixed at $2,000), and it is therefore essential to their jurisdiction that the plaintiff's declaration or bill should show that he asserts a right under the constitution or laws of the United States. But the corresponding clause in section 2 allows removals from a state court to be made only by defendants, and of suits 'of which the circuit courts of the United States are given original jurisdiction by the preceding section,' thus limiting the jurisdiction of a circuit court of the United States on removal by the defendant under this section to such suits as might have been brought in that court by the plaintiff under the first section. 24 Stat. 553; 25 Stat. 434. The change is in accordance with the general policy of these acts, manifest upon their face, and often recognized by this court, to contract the jurisdiction of the circuit courts of the United States. Smith v. Lyon, 133 U. S. 315, 320, 10 Sup. Ct. 303; In re Pennsylvania Co., 137 U. S. 451, 454, 11 Sup. Ct. 141; Fisk v. Henarie, 142 U. S. 459, 467, 12 Sup. Ct. 207; Shaw v. Mining Co., 145 U. S. 444, 449, 12 Sup. Ct. 935; Martin's Adm'r v. Railroad Co., 151 U. S. 673, 687, 14 Sup. Ct. 533."

In Ames v. Kansas, 111 U. S. 462, 4 Sup. Ct. 443, Chief Justice Waite, delivering the opinion of the court, and sustaining its jurisdiction, said:

"The right set up by the company, and by the directors as well, will be defeated by one construction of these acts and sustained by the opposite construction. When this is so, it has never been doubted that a case is presented which arises under the laws of the United States,"—citing Cohens v. Virginia, 6 Wheat. 264, 379; Water Co. v. Keyes, 96 U. S. 201; Railroad Co. v. Mississippi, 102 U. S. 140.

In Starin v. City of New York, 115 U. S. 257, 6 Sup. Ct. 31, the same learned chief justice said:

"The character of a case is determined by the questions involved. Osborn v. President, etc., 9 Wheat. 737, 824. If from the questions it appears that some title, right, privilege, or immunity on which recovery depends will be defeated by one construction of the constitution or a law of the United States, or sustained by the opposite construction, the case will be one arising under the constitution or laws of the United States, within the meaning of that term as used in the act of 1875; otherwise not. Such is the effect of the decisions on this subject,"—citing Cohens v. Virginia, 6 Wheat. 264; Osborn v. President, etc., 9 Wheat. 737; Mayor v. Cooper, 6 Wall. 247; Water Co. v. Keyes, 96 U. S. 199; Tennessee v. Davis, 100 U. S. 257; Railroad Co. v. Mississippi, 102 U. S. 135; Ames v. Kansas, 111 U. S. 449, 4 Sup. Ct. 437; Kansas Pac. R. Co. v. Atchison, T. & S. F. R. Co., 112 U. S. 414, 5 Sup. Ct. 208; Society v. Ford, 114 U. S. 635, 5 Sup. Ct. 1104; Pacific Railroad Removal Cases, 115 U. S. 1, 5 Sup. Ct. 1113.

In Southern Pac. R. Co. v. California, 118 U. S. 112, 6 Sup. Ct. 993, the same learned chief justice approved Railroad Co. v. Mississippi, supra, Ames v. Kansas, supra, Starin v. City of New York, supra, quoting the same language which he had previously used in Starin v. City of New York. In Germania Ins. Co. v. Wisconsin, 119 U. S. 475, 7 Sup. Ct. 260, the same learned chief justice again reiterated the same doctrine, using the same language which had been used in Ames v. Kansas, supra.

In Minnesota v. Duluth & I. R. R. Co., 87 Fed. 498, Judge Lochren, delivering the opinion of the court, calls attention to what has been held in Tennessee v. Union & Planters' Bank, supra, Starin v. City of New York, supra, and Carson v. Dunham, supra, and further states that on the precise point under consideration the decisions under the act of March 3, 1887, are equally applicable to the act of August 13, 1888. He then says:

"To give the United States circuit court jurisdiction, it is not necessary that it should appear that plaintiff's right to recover is based upon and supported by some provision of the constitution or statutes of the United States. A federal question is equally presented if it appears from plaintiff's statement of facts that a construction which may be fairly claimed and contended for of a provision of such constitution or statutes would defeat plaintiff's right to recover."

In Lowry v. Railroad Co., 46 Fed. 83, Judge Caldwell said:

"It is enough that there is a federal question in the case, whether it is relied on by the plaintiff or the defendant. A case arises under a law of the United States wherever that law is the basis of the right or privilege or claim or protection or defense of the party, in whole or in part, by whom it is set up."

To the cases cited might be added many others to the same effect. These, however, suffice to show and establish the rule. It remains to apply the principles declared to the case at bar. In the examination of the complaint for the purposes of this motion, its crudities, or the insufficiency of facts to warrant the relief sought, if such be the

case, are not open to attack or criticism, since defects in these regards may be corrected by amendments in either of the courts having jurisdiction, if the facts warrant. This court is limited now to the question as to whether, at the time the jurisdiction of this court was invoked, it appeared from the plaintiff's complaint that the controversy between the parties involved a federal question. The substantial and material allegations of fact in the complaint is (and it is the only allegation of fact in it which is considered substantial and material) that the defendant Coal Company "is threatening and is about to import into said county, and town of Huntington, over the line of their co-defendant's railroad, a large number of armed men of the low and lawless type of humanity, to wit, about two hundred." The allegations as to what results would follow such importations are merely conjectural or speculative, or at most a matter of opinion upon the part of the relator, depending, of course, upon the type of men imported, and their physical, financial, and moral conditions. Of these conditions it does not appear that the relator knows anything. No facts appear from which it may be seen what the character of the nuisance is which their importation will produce, or in what way the peace, morals, or health of the state and the town will be affected, or in what way riot and bloodshed would be brought about, or the nature and character of the contagious or infectious diseases they would disseminate. It is not even alleged that they now have, or have been subjected to, any such diseases. All these matters are purely speculative. The contention on the part of the plaintiff is that, under the police power of the state, it has the right to prevent the defendant Coal Company from importing into the state, and to prevent the defendant Railroad Company from transporting over its road, the class of persons described in the complaint as "armed men of the low and lawless type of humanity." The contention of the defendants is that the exercise of such a power is in violation of the interstate commerce law and of the fourteenth amendment to the constitution of the United States. On this motion to dismiss or remand my sole duty is to ascertain if any such defense can be fairly claimed or contended for. The merits of the question are not now involved, and should not be determined, except so far as may be necessary in order to determine whether the state's contention involves an invasion of the powers confided to the United States under its constitution or statutes; or, to state it differently, and within the language of the adjudged cases, whether it appears from plaintiff's statement of facts that a construction which may be fairly claimed and contended for of a provision of the constitution or statutes of the United States would defeat plaintiff's right to relief. It is not specifically alleged in the complaint that the defendant railroad company is engaged in interstate commerce. It is alleged that it is a Missouri corporation, and that its co-defendant had threatened and was about to import, over the line of said railroad, a certain designated type of men. It was not argued at the hearing that said company was not engaged in interstate commerce in the transportation of the men referred to, and it is fairly to be deduced from the complaint that such was true. The word "import" itself implies a bringing of men either from a for-

eign country or another state into this state. The same is true of the defendant Coal Company. The employment and shipment of men from other states into Arkansas over its co-defendant's railroad is interstate commerce.

It was argued at the bar that coal mining was not interstate commerce. That is true. This court so held in U. S. v. Boyer, 85 Fed. 425, where a full discussion of what it takes to constitute interstate commerce, and a collation of adjudged cases, may be found, and from which it was deduced that:

"When the [interstate] commerce begins is determined, not by the character of the commodity, nor by the intention of the owner to transfer it to another state for sale, nor by his preparation of it for transportation, but by its actual delivery to a common carrier for transportation, or the actual commencement of its transfer to another state. At that time the power and regulating authority of the state ceases, and that of congress attaches and continues until it has reached another state, and become mingled with the general mass of the property in the latter state. That neither the production or manufacture of articles or commodities which constitute subjects of commerce, and which are intended for trade and traffic with citizens of other states, nor the preparation for their transportation from the state where produced or manufactured prior to the commencement of the actual transfer or transmission thereof to another state, constitutes that interstate commerce which comes within the regulating power of congress. In re Greene, 52 Fed. 113."

But interstate commerce is not confined to goods, wares, and merchandise. It embraces passengers. It was not argued otherwise at the hearing.

In Railroad Co. v. Husen, 95 U. S. 469, which is a case growing out of the statute of the state of Missouri (1 Wag. St. p. 251, § 1) providing that "no Texas, Mexican or Indian cattle shall be driven, or otherwise conveyed into, or remain, in any county of this state, between the first day of March and the first day of November, in each year, by any person or persons whatsoever," the court, in holding the statute unconstitutional because it violated the interstate commerce clause of the federal constitution, said:

"It seems hardly necessary to argue at length that, unless the statute can be justified as a legitimate exercise of the police power of the state, it is a usurpation of the power vested exclusively in congress. It is a plain regulation of interstate commerce, a regulation extending to prohibition. Whatever may be the power of a state over commerce that is completely internal, it can no more prohibit or regulate that which is interstate than it can that which is with foreign nations. Power over one is given by the constitution of the United States to congress in the same words in which it is given over the other, and in both cases it is necessarily exclusive. That the transportation of property from one state to another is a branch of interstate commerce is undeniable, and no attempt has been made in this case to deny it. The Missouri statute is a plain interference with such transportation, an attempted exercise over it of the highest possible power,—that of destruction. It meets at the borders of the state a large and common subject of commerce, and prohibits its crossing the state line during two-thirds of each year, with a proviso, however, that such cattle may come across the line loaded upon a railroad car or steamboat, and pass through the state without being unloaded. But even the right of steamboat owners and railroad companies to transport such property through the state is loaded by the law with onerous liabilities, because of their agency in the transportation. The object and effect of the statute are, therefore, to obstruct interstate commerce, and to discriminate between the property of citizens of one state and that of citizens of other states. This court has heretofore said that interstate transportation of passengers is be-

yond the reach of a state legislature. And if, as we have held, state taxation of persons passing from one state to another, or a state tax upon interstate transportation of passengers, is prohibited by the constitution because a burden upon it, a fortiori, if possible, is a state tax upon the carriage of merchandise from state to state. Transportation is essential to commerce, or rather it is commerce itself; and every obstacle to it, or burden laid upon it by legislative authority, is regulation. State Freight Tax Case, 15 Wall. 232; Ward v. Maryland, 12 Wall. 418; Welton v. Missouri, 91 U. S. 275; Henderson v. Mayor, 92 U. S. 259; Chy Lung v. Freeman, Id. 275. The two latter of these cases refer to obstructions against the admission of persons into a state, but the principles asserted are equally applicable to all subjects of commerce."

It will be observed that the Missouri statute under discussion was a prohibitory statute. In the case at bar the bill is based on no statute. No statute has been referred to as relating to such persons as are designated in the bill. The court knows of none. Indeed, there is none. The state, through its legislature, has not attempted to exercise its police power in this regard. It is an attempt to have the court declare what the law of the state is, or what measures are needful to the state in this behalf, without any expression whatever of the legislative department of the state, and to declare that the designated type of persons mentioned in the bill shall not be brought into the state at all, at any time, by the defendants. It is absolutely and unconditionally prohibitory of the designated class. It may well be inquired whether a state court can lawfully declare, independent of any statute, and independent of the common law, as adopted by statute, what the policy of the state is with reference to persons coming thereto. I have found no case in which it has been done. I find no author who recognizes any such doctrine. All the cases examined have arisen out of statutes alleged to be unauthorized by the police power, or powers reserved to the states. I need not allude to the anomalous condition which would result from prohibiting the defendants in this case from bringing persons into the state of the class designated, and leaving all other companies, and all other persons, the privilege of doing so at their pleasure, for this only tends to show that the police power of the state in this behalf should be exercised by the legislature, and applied to all persons alike. On this point, Prentice, in his work on Police Powers (page 31), says:

"It belongs to the legislative branch of the government to determine primarily what measures are appropriate and needful for the protection of the public morals, the public health, or the public safety."

In Mugler v. Kansas, 123 U. S. 661, 8 Sup. Ct. 297, one of the questions was as to what authority should determine whether the manufacture of particular articles of drink would injuriously affect the public. This question grew out of a law prohibiting the manufacture or sale of liquor in that state. The court said:

"Under our system that power is lodged with the legislative branch of the government. It belongs to that department to exert what are known as the 'police powers' of the state, and to determine, primarily, what measures are appropriate or needful for the protection of the public morals, the public health, or the public safety."

As tending to establish the correctness of this doctrine, in Railroad Co. v. Husen, 95 U. S. 470, it is said:

"We admit that the deposit in congress of the power to regulate foreign commerce and commerce among the states was not a surrender of that which may

properly be denominated 'police power.' What that power is it is difficult to define with sharp precision. It is generally said to extend to making regulations promotive of domestic order, morals, health, and safety. As was said in Thorpe v. Railroad Co., 27 Vt. 149: 'It extends to the protection of the lives, limbs, health, comfort, and quiet of all persons, and the protection of all property within the state. According to the maxim, "Sic utere tuo ut alienum non lædas," which, being of universal application, it must, of course, be within the range of legislative action to define the mode and manner in which every one may so use his own as not to injure others.' It was further said that by the general police power of a state 'persons and property are subjected to all kinds of restraints and burdens in order to secure the general comfort, health, and prosperity of the state; of the perfect right of the legislature to do which no question ever was, or upon acknowledged general principles ever can be, made, so far as natural persons are concerned.' It may also be admitted that the police powers of a state justifies the adoption of precautionary measures against social evils. Under it a state may legislate to prevent the spread of crime, or pauperism, or disturbance of the peace. It may exclude from its limits convicts, paupers, idiots, and lunatics, and persons likely to become a public charge, as well as persons afflicted by contagious or infectious diseases,—a right founded, as intimated in the Passenger Cases, 7 How. 283, by Mr. Justice Greer, in the sacred law of self-defense. Vide Tomlinson v. Hewett, 2 Sawy. 283, Fed. Cas. No. 14,087. The same principle, it may also be conceded, would justify the exclusion of property dangerous to the property of citizens of the state; for example, animals having contagious or infectious diseases. All these exertions of power are in immediate connection with the protection of persons and property against noxious acts of other persons, or such a use of property as is injurious to the property of others. They are self-defensive. But, whatever may be the nature and reach of the police power of a state, it cannot be exercised over a subject confided exclusively to congress by the federal constitution."

See, also, People v. Gillson (N. Y.) 17 N. E. 343.

It will be seen, therefore, that ordinarily, at least, the exercise of what is known as the "police power" of the state is confided to its legislature. But, to recur to the question, is it within the power of the state to enact legislation prohibiting the class of persons designated in the bill coming into the state? If the state cannot prohibit them by legislation, its courts cannot do so in the absence of legislation. It may do so, all will admit, so far, at least, as the United States is concerned, if in doing so no power confided to the general government is invaded thereby. It goes without saying that "no state can exercise power over a subject confided exclusively to congress by the federal constitution. It cannot invade the domain of the national government." Railroad Co. v. Husen, 95 U. S. 471. Let us, therefore, examine more analytically the allegations in the bill describing the class of persons it is sought to prohibit being imported into the state. They are "armed men of the low and lawless type." How are they armed? The bill does not say. The allegation is broad enough to cover all kinds of arms. Article 2, Amend. Const. U. S., declares that, "A well regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed." Section 5, art. 2, of the present constitution of this state declares that "the citizens of this state shall have the right to keep and bear arms for their common defense." In Cooley, Torts, p. 301, the author says:

"No military or civil law can take from the state the right to bear arms for the common defense. This is an inherited and traditionary right, guarantied also by state and federal constitutions. But it extends no further than to

keep and bear those arms which are suited and proper for the general defense of the community against invasion and oppression, and it does not include the carrying of such weapons as are specially suited for deadly individual encounters."

This same doctrine has been recognized by the supreme court of this state in Fife v. State, 31 Ark. 455. The above amendment to the constitution of the United States, however, is a restraint upon federal, and not upon state, legislation. Id. 458. It will be seen by an examination of this case that it is a constitutional right of the citizens of this state, recognized by the court, that the citizens thereof shall have the right to keep and bear arms; and it is also seen from the above amendment to the constitution of the United States that the federal government is denied the power to deprive the people of the right to keep and bear arms. By the fourteenth amendment to the constitution of the United States, "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." By this amendment to the constitution of the United States a citizen of another state is guarantied all the rights and privileges of the citizens of this state, and every state is forbidden to make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, or deny to any person within its jurisdiction the equal protection of the laws. One of the rights, as we have seen, guarantied by the constitution of this state to all of its citizens, is that they shall have the right to keep and bear arms for their common defense. If this right belongs to the citizens of this state under the fourteenth amendment, can the state pass any law which shall deprive citizens of other states of the same right, under the same circumstances? It has not done so. There is no such statute. Is it not, therefore, one of the unavoidable questions in controversy in this suit as to whether or not the state has the power to prohibit men who are armed coming into the state? It must be remembered that there is no allegation in the bill that these men are armed, or banded together, coming or being imported into the state for the purpose of invading it, or violating any of the laws thereof, or that their purpose is in any respect a violation of any of the laws of the state. But these armed men are described in the bill to be "of the low and lawless type." Let us examine what is meant by these words "low and lawless." The Century Dictionary defines "low" as "not high in character or condition; not haughty or proud; meek; lowly; lacking in dignity, refinement, or principle; vulgar, groveling, abject, mean, base; in a mean condition, as 'a low born fellow.'" The word "lawless" is defined by the Century Dictionary as "not subject or submissive to law; uncontrolled by law, whether natural, human, or divine." The question therefore arises whether it is within the power of the state to prohibit the class of persons thus described, while armed, coming or being brought

into the state. No statute has been enacted to that effect. In Buell v. State, 45 Ark. 338, the supreme court said:

"It may be doubted whether it is competent for the legislature to authorize a town council to proscribe any particular class of people against whom no overt act is charged, although in Shafer v. Mumma, 17 Md. 331, such a power, expressly conferred in the charter of Haggerstown, was sustained. Possibly the right to live in a given community is a common right of which a person cannot be deprived, however degraded and subversive of good morals his occupation may be,"—citing Milliken v. City Council, 54 Tex. 388.

In re Ah Fong, 1 Fed. Cas. 213, is a case where a Chinese woman sued out a writ of habeas corpus in the circuit court of the United States for the district of California. She had been brought to San Francisco as a passenger, and, under a statute of California, had been declared by a commissioner of that state to be "a lewd and debauched woman," and was prohibited from landing in the state of California, and was remanded to the custody of the steamship to be transported beyond the state. She sued out a writ of habeas corpus before the state district court of California, and the writ was dismissed. It was appealed to the supreme court of California, and the judgment of the district court affirmed. She then sued out a writ of habeas corpus to the circuit court of the United States, as above stated. Mr. Justice Field delivered the opinion of the court, and in that case said:

"It is undoubtedly true that the police power of the state extends to all matters relating to the internal government of the state, and the administration of its laws, which have not been surrendered to the general government, and embraces regulations affecting the health, good order, morals, peace, and safety of society. Under this power all sorts of restrictions and burdens may be imposed, having for their object the advancement of the welfare of the people of the state; and when these are not in conflict with established principles, or any constitutional prohibition, their validity cannot be questioned. It is equally true that the police power of a state may be exercised by precautionary measures against the increase of crime or pauperism, or the spread of infectious diseases from persons coming from other countries; that the state may entirely exclude convicts, lepers, and persons affected with incurable disease; may refuse admission to paupers, idiots, lunatics, and others, who, from physical causes, are likely to become a charge upon the public until security is afforded that they will not become such a charge; and may isolate the temporarily diseased until the danger of contagion is gone. The legality of precautionary measures of this kind has never been doubted. The right of the state in this respect has its foundation, as observed by Mr. Justice Grier, in the Passenger Cases, 7 How. 462, in the sacred law of self-defense, which no power granted to congress can restrain or annul. * * * Where the evil apprehended by the state from the ingress of foreigners is that such foreigners will disregard the laws of the state, and thus be injurious to its peace, the remedy lies in the more vigorous enforcement of the laws, not in the exclusion of the parties. Gambling is considered by most states to be injurious to the morals of their people, and is made a public offense. It would hardly be considered as a legitimate exercise of the police power of the states to prevent a foreigner who had been a gambler in his own country from landing in ours. If, after landing, he pursued his former occupation, fine him, and, if he persisted in it, imprison him, and the evil will be remedied. In some states the manufacture and sale of spirituous and intoxicating liquors are forbidden and punished as a misdemeanor. If the foreigner coming to our shores is a manufacturer and dealer in such liquors, it would be deemed an illegitimate exercise of the police power to exclude him, on account of his calling, from the state. The remedy against any apprehended manufacture and sale would lie, in such case, in the enforcement of the penal laws of the state. So, if lewd

women, or lewd men, even if the parties be of that baser sort who, when Paul preached at Thessalonica, set all the city in an uproar (Acts xvii., verse 5). land on our shores, the remedy against any subsequent lewd conduct on their part must be found in good laws or municipal regulation and a vigorous police. It is evident that, if the possible violations of the laws of the state by an immigrant, or the supposed immorality of his past life or profession, where that immorality has not already resulted in a conviction for a felony, is to determine his right to land and to reside in the state, or to pass through into other and interior states, a door will be opened to all sorts of oppression. The doctrine now asserted by counsel for the commissioner of immigration, if maintained, would certainly be invoked, and at no distant day, when other parties, besides low and despised Chinese women, are the subjects of its application, and would then be seen to be a grievous departure from principle. I am aware of the very general feeling prevailing in this state against the Chinese, and in opposition to the extension of any encouragement to their immigration hither. It is felt that the dissimilarity in physical characteristics, in language, in manners, religion, and habits, will always prevent any possible assimilation of them with our people. Admitting that there are grounds for this feeling, it does not justify any legislation for their exclusion which might not be adopted against the inhabitants of the most favored nation of the Caucasian race and of Christian faith. If their further immigration is to be stopped, recourse must be had to the federal government, where the whole power over this subject lies. The state cannot exclude them arbitrarily, nor accomplish the same end by attributing to them a possible violation of its municipal laws. It is certainly desirable that all lewdness, especially when it takes the form of prostitution, should be suppressed, and that the most stringent measures to accomplish that end should be adopted. But I have little respect for that discriminating virtue which is shocked when a frail child of China is landed on our shores, and yet allows the bedizened and painted harlot of other countries to parade our streets and open her hells in broad day, without molestation, and without censure. * * * And the power of exclusion by the state, as we have already said, extends only to convicts, lepers, and persons incurably diseased, and to paupers and persons who, from physical causes, are likely to become a public charge. The detention of the petitioner is therefore unlawful under the treaty. But there is another view of this case equally conclusive for the discharge of the petitioner, which is founded upon the legislation of congress since the adoption of the fourteenth amendment. That amendment, in its first section, designates who are citizens of the United States, and then declares that no state shall make or enforce any law which abridges their privileges or immunities. It also enacts that no state shall deprive 'any person' (dropping the distinctive designation of 'citizen') of life, liberty, or property, without due process of law, nor deny to any person the equal protection of the laws. The great fundamental rights of all citizens are thus secured against any state deprivation, and all persons, whether native or foreign, high or low, are, whilst within the jurisdiction of the United States, entitled to the equal protection of the laws. Discriminating and partial legislation, favoring particular persons or against particular persons of the same class, is now prohibited. Equality of privilege is the constitutional right of all citizens, and equality of protection is the constitutional right of all persons. And equality of protection implies not only equal accessibility to the courts for the prevention or redress of wrongs and the enforcement of rights, but equal exemption with others of the same class from all charges and burdens of every kind. Within these limits the power of the state exists, as it did previously to the adoption of the amendment, over all matters of internal police."

Another case—that of Chy Lung v. Freeman, 92 U. S. 275—of the same nature and class as the Ah Fong Case, and originating under the same California statute, came before the supreme court of the United States, and Mr. Justice Miller, in holding that class of legislation void, says:

"The passage of laws which concern the admission of citizens and subjects of foreign nations to our shores belongs to congress, and not to the states.

It has the power to regulate commerce with foreign nations. The responsibility for the character of those regulations, and for the manner of their execution, belongs solely to the national government. If it be otherwise, a single state can, at her pleasure, embroil us in disastrous quarrels with other nations. We are not called upon by this statute to decide for or against the right of a state, in the absence of legislation by congress, to protect herself by necessary and proper laws against paupers and convicted criminals from abroad, nor to lay down the definite limit of such right, if it exist. Such a right can only arise from a vital necessity for its exercise, and cannot be carried beyond the scope of that necessity. When a state statute limited to provisions necessary and appropriate to that object alone shall, in a proper controversy, come before us, it will be time enough to decide that question."

This legislation is held void under the interstate commerce clause of the constitution, which provides that congress shall have power "to regulate commerce with foreign nations and among the several states, and with the Indian tribes."

In the case of Railroad Co. v. Husen, supra, the court, after referring to the Chy Lung Case and the Passenger Cases, said:

"These cases, it is true, speak only of laws affecting the entrance of persons into a state, but the constitutional doctrines they maintain are equally applicable to interstate transportation of property. They deny validity to any state legislation professing to be an exercise of police power for protection against evils from abroad which is beyond a necessity for its exercise wherever it interferes with the rights and powers of the federal government."

Bowman v. Railway Co., 125 U. S. 465, 8 Sup. Ct. 689, 1062, is a case where Bowman sued the railroad company for refusing to convey a large lot of beer into Iowa in violation of a statute of that state. The supreme court of the United States reviewed all the decisions touching the police power of a state and the power of congress to regulate interstate commerce, and in referring to the State Freight Tax Case, 15 Wall. 279 (quoting from Mr. Justice Strong, speaking for the court), said:

" 'Cases that have sustained state laws alleged to be regulations of commerce among the states have been such as related to bridges or dams across streams wholly within a state, police or health laws, or subjects of a kindred nature, not strictly of commercial regulations. The subjects were such as in Gilman v. Philadelphia, 3 Wall. 713, it was said "can be best regulated by rules and provisions suggested by the varying circumstances of different localities, and limited in their operations to such localities respectively." However this may be, the rule has been asserted with great clearness that whenever the subjects over which a power to regulate commerce is asserted are in their nature national, or admit of one uniform system or plan of regulation, they may justly be said to be of such a nature as to require exclusive legislation by congress. Cooley v. Board, 12 How. 299; Crandall v. Nevada, 6 Wall. 42. Surely, transportation of passengers or merchandise through a state, or from one state to another, is of this nature. It is of national importance that over that subject there should be but one regulating power, for, if one state can directly tax persons or property passing through it, or tax them indirectly by levying a tax upon their transportation, every other may, and thus commercial intercourse between states remote from each other may be destroyed. The produce of Western states may thus be effectually excluded from Eastern markets, for, though it might bear the imposition of a single tax, it would be crushed under a load of many. It was to guard against the possibility of such commercial embarrassments, no doubt, that the power of regulating commerce among the states was conferred upon the federal government.' * * * The power conferred upon congress to regulate commerce among the states is, indeed, contained in the same clause of the constitution which confers upon it power to regulate commerce with foreign nations. The grant is conceived in

the same terms, and the two powers are undoubtedly of the same class and character, and equally extensive. The actual exercise of its power over either subject is equally and necessarily exclusive of that of the states, and paramount over all the powers of the states; so that state legislation, however legitimate in its origin or object, when it conflicts with the positive legislation of congress, or its intention reasonably implied from its silence, in respect to the subject of commerce of both kinds, must fail. And yet, in respect to commerce among the states, it may be, for the reason already assigned, that the same inference is not always to be drawn from the absence of congressional legislation as might be in the case of commerce with foreign nations: The question, therefore, may be still considered in each case, as it arises, whether the fact that congress has failed in the particular instance to provide by law a regulation of commerce among the states is conclusive of its intention that the subject shall be free from all positive regulation, or that, until it positively interferes, such commerce may be left to be freely dealt with by the respective states."

In the same opinion, discussing the State Freight Tax Case, 15 Wall. 232, they say:

"If the state has no power to tax freight and passengers passing through it, or to or from it, from or into another state, much less would it have the power directly to regulate such transportation, or to forbid it altogether. * * * It may be material also to state in this connection that congress had legislated on the general subject of interstate commerce by means of railroads prior to the date of the transaction on which the present suit is founded. Section 5258 of the Revised Statutes provides that 'every railroad company in the United States whose road is operated by steam, its successors and assigns, is hereby authorized to carry upon and over its road, boats, bridges, and ferries all passengers, troops, government supplies, mails, freight, and property on their way from any state to another state, and to receive compensation therefor, and to connect with roads of other states, so as to form continuous lines for the transportation of the same to the place of destination.' In the case of Railroad Co. v. Richmond, 19 Wall. 584, this section, then constituting a part of the act of congress of June 15, 1866, was considered. Referring to this act and the act of July 25, 1866, authorizing the construction of bridges over the Mississippi river, the court say: 'These acts were passed under the power vested in congress to regulate commerce among the several states, and were designed to remove trammels upon transportation between different states which had previously existed, and to prevent a creation of such trammels in future, and to facilitate railway transportation, by authorizing the construction of bridges over the navigable waters of the Mississippi. But they were intended to reach trammels interposed by state enactments or by existing laws of congress. * * * The power to regulate commerce among the several states was vested in congress in order to secure equality and freedom in commercial intercourse against discriminating state legislation.' Page 589. Congress had also legislated on the subject of the transportation of passengers and merchandise in chapter 6, tit. 48, of the Revised Statutes; sections 4252–4289, inclusive, having reference, however, mainly to transportation in vessels by water. But sections 4278 and 4279 relate also to the transportation of nitroglycerine and other similar explosive substances by land or water, and either as a matter of commerce with foreign countries or among the several states. Section 4280 provides that 'the two preceding sections shall not be so construed as to prevent any state, territory, district, city, or town within the United States from regulating or from prohibiting the traffic in or transportation of those substances between persons or places lying or being within their respective territorial limits, or from prohibiting the introduction thereof into such limits for sale, use or consumption therein.' So far as these regulations made by congress extend, they are certainly indications of its intention that the transportation of commodities between the states shall be free, except where it is positively restricted by congress itself, or by the states in particular cases by the express permission of congress."

Also (page 702, 102 U. S., Mobile Co. v. Kimball):

"Commerce with foreign countries and among the states, strictly considered, consists in intercourse and traffic, including in these terms navigation and the transportation and transit of persons and property, as well as the purchase, sale, and exchange of commodities. For the regulation of commerce, as thus defined, there can be only one system of rules applicable alike to the whole country; and the authority which can act for the whole country can alone adopt such a system. Action upon it by separate states is not, therefore, permissible."

Further on in the same case the court say:

"In the present case the defendant is sued as a common carrier in the state of Illinois, and the breach of duty alleged against it is a violation of the law of that state in refusing to receive and transport goods, which, as a common carrier, by that law, it was bound to accept and carry. It interposes as a defense a law of the state of Iowa, which forbids the delivery of such goods within that state. Has the law of Iowa any extraterritorial force which does not belong to the law of the state of Illinois? If the law of Iowa forbids the delivery, and the law of Illinois requires the transportation, which of the two shall prevail? How can the former make void the latter? In view of this necessary operation of the law of Iowa, if it be valid, the language of this court in the case of Hall v. De Cuir, 95 U. S. 485, 488, is exactly in point. It was there said: 'But we think it may safely be said that state legislation which seeks to impose a direct burden upon interstate commerce, or to interfere directly with its freedom, does encroach upon the exclusive power of congress. The statute now under consideration, in our opinion, occupies that position.' "

And on page 490, 125 U. S., and page 701, 8 Sup. Ct., of the same case, is the following:

" 'The exclusive state power is made to rest, not on the fact of the state or condition of the article, nor that it is property usually passing by sale from hand to hand, but on the declaration found in the state laws, and asserted as the state policy, that it shall be excluded from commerce. And by this means the sovereign jurisdiction in the state is attempted to be created in a case where it did not previously exist. If this be the true construction of the constitutional provision, then the paramount power of congress to regulate commerce is subject to a very material limitation, for it takes from congress, and leaves with the states, the power to determine the commodities or articles of property which are the subject of lawful commerce. Congress may regulate, but the states determine what shall or shall not be regulated. Upon this theory the power to regulate commerce, instead of being paramount over the subject, would become subordinate to the state police power; for it is obvious that the power to determine the articles which may be the subjects of commerce, and thus to circumscribe its scope and operation, is, in effect, the controlling one. The police power would not only be a formidable rival, but, in a struggle, must necessarily triumph over the commercial power, as the power to regulate is dependent upon the power to fix and determine upon the subjects to be regulated. The same process of legislation and reasoning adopted by the state and its courts could bring within the police power any article of consumption that a state might wish to exclude, whether it belonged to that which was drank, or to food and clothing, and with nearly equal claims to propriety, as malt liquors and the produce of fruits other than grapes stand on no higher ground than the light wines of this and other countries, excluded, in effect, by the law as it now stands. And it would be only another step to regulate real or supposed extravagance in goods and clothing.' "

And on page 495, 125 U. S., and page 703, 8 Sup. Ct., the court say:

"In Brown v. Houston, 114 U. S. 622, 630, 5 Sup. Ct. 1091, 1095, it was declared that the power of congress over commerce among the states 'is certainly

so far exclusive that no state has power to make any law or regulation which will affect the free and unrestrained intercourse and trade between the states as congress has left it, or which will impose any discriminating burden or tax upon the citizens or products of other states coming or brought within its jurisdiction. All laws and regulations are restrictive of natural freedom to some extent, and, where no regulation is imposed by the government which has the exclusive power to regulate it, it is an indication of its will that the matter shall be left free. So long as congress does not pass any law to regulate commerce among the several states, it thereby indicates its will that that commerce shall be free and untrammeled, and any regulation of the subject by the states is repugnant to such freedom. This has been frequently laid down as law in the judgments of this court.' "

It will be observed that no overt act is charged against any of the class of persons threatened and about to be imported by the defendant Coal Company over the defendant Railroad Company's lines. They are not alleged to be convicts or ex-convicts, nor are they alleged to be paupers, idiots, insane, or diseased persons. They are said to be "armed," and to belong to the "low and lawless type of humanity"; not that they are low and lawless themselves, but are of that type. No statute of this state condemns the coming of such men hither. No expression of the legislative will relating to that class of men coming into the state has found a place in our laws. They are silent on the subject. It will be time enough to decide whether the state has the power to prohibit them coming when a proper case, based on such a statute, is brought to the attention of the court. It is enough now to say that, under the fourteenth amendment, and under the commerce clause of the constitution, they now have that right. If they have the right to come, then the Coal Company has a right to import them, with their consent, and the Railroad Company has the right to transport them, with their consent. It is not pretended that they are being brought here by force. In the opinion of the court it is not within the power of any court, state or federal, to prescribe what rules and regulations are needful to the welfare, peace, health, safety, and morals of the state, or to determine, without legislation, what class or classes of persons may lawfully come thereto. That power belongs to the legislatures of the states, and must be exercised within constitutional bounds.

It remains to be added that it has been repeatedly held that a corporation is a person, within the meaning of the fourteenth amendment to the constitution. Smyth v. Ames, 169 U. S. 466, 18 Sup. Ct. 418; Santa Clara Co. v. Southern Pac. R. Co., 118 U. S. 394, 6 Sup. Ct. 1132; Railroad Co. v. Gibbs, 142 U. S. 386, 12 Sup. Ct. 255; Railroad Co. v. Ellis, 165 U. S. 150, 17 Sup. Ct. 255.

It is vain to pursue this investigation further. I cannot avoid the conclusion, in view of the authorities from which I have quoted, that, on the face of the plaintiff's complaint, it appears that a construction of the interstate commerce clause and of the fourteenth amendment to the constitution of the United States are both involved (necessarily so), and would also be involved even if this bill were based on a statute of this state covering the class of persons designated in the bill, and that a correct determination of the case makes it necessary to construe those provisions of the constitution

of the United States, and that the construction placed upon them must necessarily settle the controversy. This conclusion determines the fate of the motion. It is overruled.

From the conclusions arrived at by the court, it is obvious that the injunction in this case must be dissolved. No amount of proof that might be offered could possibly change the result already reached.

It was urged upon the argument that this court had no supervisory control over the action of the state court. That is true; but when this case is removed from the state court into this court it stands here for hearing and determination precisely as if it had been originally brought here, and it will not be contended that, if this court had committed an error in granting an injunction in a given case, when it was so made to appear it could not reverse its action, and dissolve it. The same would be true if the bill were in the state court. The motion, therefore, to dissolve the injunction will be sustained.

The other motion—restraining the plaintiff from the prosecution of this suit in the state court—will not be entertained. If the state sees fit to continue the prosecution of this case in the state court, it will be permitted to do so, so long as in its prosecution it does not interfere with the relief granted the defendants in this suit in this court. It is proper to say that I have given this last question no consideration other than such as is involved in the proprieties of the case. In short, I have not determined that this court has not the power to stay the suit in the state court, but only that the state may, so far as this court is concerned, if it sees fit, proceed with the prosecution of the suit in its own court. The motion, therefore, to enjoin the prosecution of the suit in the state court, will be overuled.

CRUSE v. McCAULEY.

(Circuit Court, D. Montana. August 30, 1899.)

No. 502.

1. WATERS—EVIDENCE OF APPROPRIATION—CERTIFIED COPY OF RECORD.
   The recording of a notice of the appropriation of water in the records of a county in Montana, at a time when there was no law authorizing such record, was of no force or validity, and a certified copy of such record is not admissible in evidence.

2. SAME—APPROPRIATION—WHAT CONSTITUTES.
   The digging of a ditch not exceeding 30 feet in length, into which water from a stream was diverted, and returned to the stream at its foot, together with a notice posted of the appropriation of the water for irrigation of land half a mile distant, does not constitute an appropriation of the water, but is merely evidence of an intention to appropriate, which, to become effective, must be followed within a reasonable time by an actual appropriation to beneficial use.

3. SAME—TIME FOR CONSTRUCTION OF DITCH.
   In the absence of a statute fixing the time within which a notice of intention to appropriate water from a stream for irrigation purposes must be followed by the commencement of work towards its actual appropriation, a delay of 10 months before laying out a ditch to convey water to land

half a mile distant will be held unreasonable, unless extenuating circumstances are shown, and insufficient to entitle the appropriator to a prior right as against one who has meantime commenced the construction of a ditch, and continued the work with reasonable diligence.

4. SAME—DATE OF APPROPRIATION—EFFECT OF RECORDED NOTICE.
The date of the appropriation of water from a stream, given in the recorded notice, is not conclusive against the appropriator, and he may show that the actual appropriation was made at an earlier date, as against one whose appropriation was in fact later, but prior to the date stated in the notice.

5. SAME—RIPARIAN RIGHTS—SETTLER ON PUBLIC LANDS.
The riparian rights of the owner of land acquired by settlement and entry under the public land laws accrue, at latest, at the time of his application for entry, or the filing of his declaratory statement.

6. SAME—ACQUISITION AND EXTENT OF RIGHTS OF PATENTEE.
A patentee of public land over which a stream flows acquires all the rights in the waters of such stream possessed by the United States at the time the patent took effect, which is by relation the date of the application for entry, or the filing of the declaratory statement. Such rights include the right to the use of the waters for the irrigation of the land to a reasonable extent, which cannot be taken away by any state law or custom, except for public purposes. The patentee cannot, however, enjoin the appropriation of water from the stream by others under such state law, without showing that such appropriation will result in damage to him in the use and enjoyment of the land covered by the patent.

This was a suit to enjoin defendant from diverting the waters of a stream, and to recover damages for the previous diversion.

T. J. Walsh, for complainant.

H. S. Hepner, Cort & Worden, and Sanders & Sanders, for defendant.

KNOWLES, District Judge. The first point I will consider in this case is the objection made by plaintiff to the introduction of a certified copy of a notice of appropriation made by the defendant, McCauley, of the waters of the South Fork of McDonald creek. This certified copy is from the records of Meagher county, Mont. In 1882 there was no law in Montana authorizing the recording of a notice of appropriation of water. This record then had no force or validity. It imparted no notice, and was not a step in appropriation of said waters. The objection is therefore sustained. The notice posted at a point in said McDonald creek of defendant's intention of appropriating some 500 inches of the water of that creek was introduced in evidence, and will be considered by the court. This notice of appropriation was posted near a point where defendant afterwards diverted the waters of said creek, by means of a ditch, on the 2d day of July, 1882. At the time this notice was posted, the said McCauley dug a ditch from 15 to 30 feet long, and turned the waters of said creek into the same. The waters that passed into this ditch at its head were returned to the creek at its lower end. The defendant, with his friends, dug this short ditch in about one hour. One ax and a shovel were used in the work, those engaged therein taking turns. The place designated in the notice of appropriation, where the waters of said creek were to be used for irrigation, was some half a mile or more away from the place where the notice was posted. I do not think this notice of appropriation and this short ditch can be treated

as an appropriation of the waters of said creek. They were acts showing an intention to appropriate them. It is said by Kinney in his work on Irrigation (section 159):

"An appropriation of water cannot be constructive, but must be actual. It follows, therefore, that a notice of intention to appropriate the water of a specified stream is not, of itself, sufficient to constitute an appropriation thereof, although in connection with other acts it may be sufficient."

Again, in section 162:

"As we have seen, the appropriation notice cannot be constructive. So, also, no steps which it is necessary to take to make the appropriation complete can be constructive, as the whole theory of appropriation for beneficial uses is based merely upon a prior possessory right of the water, entirely separate from the property in the land over which it runs, and no possession or exclusive property can be acquired while it is still flowing and running in its natural channel or stream. It follows, therefore, that, in order to obtain possession of the water attempted to be appropriated, it is an indispensable requisite that there must be an actual diversion of the water from its natural channel into the appropriator's ditch, canal, reservoir, or other structure."

The defendant at the time this short ditch was dug had not marked out or surveyed any ditch which would convey said waters to the land upon which he expected to use the same. The taking of water out of a stream, and carrying it by means of a ditch some 20 or 30 feet, and then turning it back into the same creek, cannot be said to be an appropriation of the same for any beneficial purpose. If it should be, then, according to the case of Gassert v. Noyes, 18 Mont. 216, 44 Pac. 959, he could not divert the waters away from this creek to the prejudice of plaintiff, as plaintiff had dug his ditch and made his appropriation of water before the defendant had constructed his ditch and taken the water to the land upon which he intended to use the same. Plaintiff's grantor, Chamberlain, commenced his work of appropriating the waters of said creek some time in the early part of the spring of 1883, and before the time defendant had marked out the line of his ditch. The intention to appropriate the waters of said creek, manifested by the notice posted in July, 1882, and the digging of said short ditch, could not interfere with the actual appropriation of plaintiff, unless the doctrine of relation would apply, and connect defendant's after work with the said intention. When a party makes manifest his intention to appropriate water, he must follow up said intention within a reasonable time by making an actual appropriation of the same,—that is, by reducing the same to an actual possession. In this case did the defendant do this? The intention was manifested in July, 1882. The ditch through which this appropriation was to be made was not even marked out or surveyed or located until in April or May, 1883, about 10 months after the notice of intention.

In 1885 the legislative assembly of Montana passed a statute upon the subject of the appropriation of water, and it was therein provided:

"That within forty days after posting a notice of intention to appropriate water, the appropriator must proceed to prosecute the excavation or construct the work by which the water appropriated is to be diverted with reasonable diligence to completion."

See Montana Codes and Statutes (Civ. Code, § 1887).

While this statute did not exist in 1882, and would not be controlling upon the court in determining the question of reasonable diligence, yet it can be seen what the legislative authority of the territory of Montana considered should be the diligence to be exercised in such cases. In California and Idaho the statutes provide the work on the ditch must be commenced in 60 days after the posting of the notice. In Colorado the work of constructing the ditch for the appropriation of water must be commenced within 90 days from the date of posting the said notice. In Oregon it is provided after such notice that within 6 months the actual construction of the work for said purpose must be commenced. In Nevada the work of constructing such a ditch must be commenced within 30 days after making out a certificate describing the ditch to be constructed. A summary of these statutes will be found in Kinney on Irrigation. These statutes show what, in the states named, is considered due diligence in the commencing of work in the construction of a ditch, after notice of intention to appropriate water is given.

It is perhaps true that in considering what would be reasonable diligence in marking out the line of a proposed ditch, and commencing work on the same, a court would not be controlled by any arbitrary rule, but would consider the circumstances confronting an appropriator of water. A court should consider, however, that in a new country, subject to settlement, a proposed locator of water rights should not be guilty of any unnecessary delay in perfecting his appropriation. The rights of newcomers should be considered. In this case the only excuse offered by the defendant for not marking out the line of his proposed ditch and the commencement of the work on the same sooner than he did after the posting of his notice is that at the time and place where the proposed ditch was to be dug it was difficult to employ men for the work. He does not show, however, that he made any serious endeavor to employ such men. Chamberlain, one of the grantors of plaintiff, seems to have had no difficulty in employing men for this very kind of work in the spring of 1883. I do not think defendant has presented a case where it was held that reasonable diligence was shown, where there was the delay which occurred in this case.

In the case of Osgood v. Mining Co., 56 Cal. 571, a large amount of money had been expended in surveying and working upon the proposed ditch before the rights of the plaintiff in that case accrued. The ditch in that case, according to the first survey, was some 60 miles in length. In that case it was held that plaintiff's rights did not accrue until he obtained his patent. This was some years after the line of the ditch was marked out and commenced. I am constrained, therefore, to hold that defendant did not mark out the line of his ditch and commence work thereon within a reasonable time after he had posted his notice,—in other words, he did not pursue the work of appropriation with due diligence after the posting of his notice of appropriation. Before the defendant had commenced work on his ditch, in 1883, the grantor of plaintiff, Chamberlain, had commenced work on his ditch, and had pursued his work with reasonable diligence. The defendant not having pursued his work with proper

diligence, his subsequent work thereon would not relate back to the time of his notice, and cut off Chamberlain's rights.

It is more difficult to tell just how much water the said Chamberlain did appropriate. He claimed but 160 acres of land at the date when he made his appropriation, and the evidence shows that his land required about one inch to each acre thereof. Hence, I hold that defendant must allow sufficient water to run past the head gate of his ditch to allow 160 inches of water to reach plaintiff's land at all times, if there is that much water in the creek. The fact that some of the water which passes defendant's head gate sinks in the bed of the creek, makes no difference. I think the evidence shows that all of this water does not sink.

There is another point defendant makes that should receive some notice. Chamberlain, in his record of his water right in the county of Meagher, states that his appropriation was made in June, 1883. This was after defendant had marked out his ditch, and commenced work on the same. I hold, however, that this record would not prevent plaintiff from showing the true date of that appropriation. No fraud was perpetrated on defendant by that record, and no fraud would be worked upon defendant by controverting the same. Plaintiff would not be estopped then from showing the true date of Chamberlain's appropriation. Plaintiff, however, claims that he has the right to have the waters flow down to him as a riparian proprietor. Chamberlain, under whom plaintiff claims, filed his declaratory statement, making application to enter this 160-acre tract of land, on July 26, 1882. This was about 24 days after defendant had posted his notice of appropriation of the said waters of the South Fork of McDonald creek. As defendant, in my opinion, as above expressed, did not exercise reasonable diligence in marking out the line of his ditch, and in constructing the same, his right would not relate back to this notice, and hence plaintiff's rights as a riparian proprietor would be prior to those of defendant. There are decisions in California which hold that the rights of plaintiff would accrue only at the date of the patent to Chamberlain. This is not, however, the doctrine of the federal courts. Stark v. Starrs, 6 Wall. 402; Gibson v. Chouteau, 13 Wall. 101; Shepley v. Cowan, 91 U. S. 337. In this case the relation would certainly be to the date of filing the declaratory statement by Chamberlain. It is not necessary to discuss in this case whether or not the patent issued to Chamberlain would relate back to his settlement. Had the rights of defendant accrued before Chamberlain filed his declaratory statement, then this question would be presented.

It must be conceded that the United States, as the proprietor of the land over which the South Fork of McDonald creek flowed, had a right to the flow of the waters thereof over its land, as an incident thereto. In the eastern part of Montana, the United States acquired its title to lands by virtue of what is called the "Louisiana Purchase." There cannot be one rule as to the right to the flow of water over its lands in Montana, and another rule as to its lands in Iowa and Missouri. In these last-named states there can be no doubt of the rule that the national government would be entitled to water which

is an incident to its land. As the United States then owns the waters which are an incident to its lands, it can dispose of them separate from its lands if it chooses. Section 2339, Rev. St., provides:

"Whenever by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same."

The practical construction of this statute has been that, as long as land belonged to the United States, the waters flowing over the same was subject to appropriation for any of the purposes named, when such appropriation was recognized by the local customs, laws, or decisions of the courts. But if the water was not so appropriated when it flowed over the public domain, it was not subject to appropriation after the land over which it flowed became private property. Patents of the United States to lands contain this clause: "Subject to any vested and accrued water rights for mining, agricultural, manufacturing, or other purposes," etc. Certainly this means subject to such water rights as existed at the time when the patent took effect. I have said that in this case it would be at the date Chamberlain filed his declaratory statement. If a person receives a patent from the United States for land subject only to accrued water rights, —that is, existing water rights,—and as an incident to, or a part of, this land, there is water flowing over the same or upon the same, he would have all the rights the United States had at that time. I do not think any state law or custom can take away such rights, except for some public purpose. Under this view of the law, the plaintiff became a riparian proprietor in the waters of said McDonald creek. In the case of Mining Co. v. Ferris, 2 Sawy. 176, Fed. Cas. No. 14,371, the United States circuit court for the district of Nevada held that a riparian proprietor may lawfully divert the water of a stream for the purpose of irrigating his lands to a reasonable extent. In a case like this, I should think the defendant might divert the waters of McDonald creek for the irrigation of his land, provided he did not damage the plaintiff by so doing. Before the plaintiff could enjoin the defendant from diverting water from said creek, he must show that he is damaged by that act. The plaintiff has no right to claim, as against defendant, that the water of said creek should be allowed to flow down to his ranch, in order that he should be allowed to irrigate his land, taken as a desert land claim. The grantor of plaintiff, Chamberlain, did not file upon said land until in 1886. Before that time defendant had completed his appropriation of the waters of said creek, and the patent for said land was made subject to this water right.

The decree in this case will be that the defendant be enjoined from diverting any water from said South Fork of McDonald creek until plaintiff has at least, at the place where his ditch enters his land, 160 inches, miner's measurement, of the waters of said creek. This decree will be made subject to the provision that there is sufficient water in the said creek at defendant's dam to furnish this much water.

It is further found that by the diversion of the waters of said creek, in the year 1897, plaintiff was damaged by the defendant, McCauley, in the sum of $500, for which he is entitled to a judgment.

SMITH v. WELLS, FARGO & CO.

(Circuit Court, S. D. California. August 28, 1899.)

No. 754.

RAILROADS—CONTRACT WITH EXPRESS COMPANY—CONSTRUCTION AND EFFECT.

A railroad company entered into a contract by which it undertook to grant to an express company, for a term of five years, exclusive express privileges and facilities upon the entire railroad system of which its line formed a part, in consideration of lump payments to be made to it by the express company. The other roads of the system approved the contract, and an agreement was made—to which the express company was not a party—for division of the payments between them. The contracting railroad and others of the system passed into the hands of receivers, who continued the contract; but on the sale of such road in foreclosure proceedings the purchaser refused to assume responsibility for further performance of the contract by the other roads, and made a new contract. *Held*, that the original contract was entire, and was terminated by such action as to all the roads concerned, and that the receiver of one of such roads, who continued thereafter to furnish facilities and to render service to the express company, but with knowledge of the facts, and that such service was not claimed under the contract, could not maintain an action thereon against the express company to recover payment on the basis of the amount allotted to it for similar service in the distribution of payments made under the contract.

This was an action to recover a balance alleged to be due under a contract for services rendered and facilities furnished by the railroad of which plaintiff was receiver to defendant express company. Heard on demurrer to complaint.

C. N. Sterry, for plaintiff.

Graves, O'Melveny & Shankland and E. S. Pillsbury, for defendant.

ROSS, Circuit Judge. This case is submitted for decision upon a demurrer to the complaint, as amended by two stipulations entered into between the respective parties. The case has been so submitted, as stated by counsel, for the purpose of presenting the entire merits of the cause, and obtaining an adjudication thereon without further proceedings. As thus presented, the facts hereinafter stated appear.

On the 1st day of December, 1892, Wells, Fargo & Co. (hereinafter referred to, for convenience, as the "Express Company") and the Atchison, Topeka & Santa Fé Railroad Company (hereinafter referred to, for convenience, as the "Atchison Company") entered into a contract, in writing, which recited that whereas the Atchison Company then owned, operated, or controlled a large and extensive system of railways, and, by certain leases, contracts, agreements, understandings, and arrangements, constituted a part of a still larger system of railways, made up of its own lines and the lines of the St. Louis & San Francisco Railway Company, the Gulf, Colorado & Santa Fé Railway Company, the Atlantic & Pacific Railroad Company, the

Southern California Railway Company, the Colorado Midland Railway Company, and the Sonora Railway Company (the line of the latter company being in the state of Sonora, republic of Mexico), which said system was commonly known as the "Atchison, Topeka & Santa Fé System," or "Santa Fé Route," and that whereas the Express Company was then engaged in carrying on the express business in various states and territories of the United States and in foreign countries, and in operating an extensive system of express business on and over various railway, stage, and steamship lines in the United States and foreign countries, including the line from New York and other points on the Atlantic coast to San Francisco and other points on the Pacific coast, and to Chicago, St. Louis, Galveston, El Paso, Denver, Los Angeles, San Diego, and other important cities and towns of the United States, therefore, in consideration of the premises, and of the covenants, promises, and agreements therein made by the Atchison Company and the Express Company, and of the benefits to be secured, services to be performed, rights and facilities acquired, and payments to be made as therein set forth, mutually covenanted and agreed, among other things, as follows, to wit:

By article 1 of the contract the Atchison Company agreed to provide and cause to be provided on each of its regular daily passenger trains, and on each of the regular daily passenger trains of the other above-named railroad companies, sufficient facilities of the kind customarily furnished to express companies by railroad companies for the transportation of all freight and express matter which might be tendered by the Express Company to the railroad company, or to either or any of the railroad companies named, at any station at which such passenger trains may stop, and to receive and transport such freight and express matter upon such passenger trains leaving such station next following said tender, and to carry and deliver the same without detention.

By article 2 the Express Company agreed to pay the Atchison Company for the said facilities by the first article agreed to be furnished by the Atchison Company 55 per cent. of the entire gross earnings, of all kinds and character whatsoever, including earnings on money orders received by it in the operation of the express business, upon all of the said named lines of railroad, taken as a whole, as they then existed; and the Express Company, upon the consideration stated, further stipulated and guarantied that the said 55 per cent. of the gross earnings to be paid to the Atchison Company should amount to not less than $1,450,000 per annum, upon all of the said lines of the said different railway companies, taken together as a whole, as they then existed.

By article 3 the Express Company further agreed that it would make payments on account of the contract as follows: On the 1st day of each calendar month, during the existence of the contract, it would pay to the Atchison Company the sum of $120,833.33, being one-twelfth of the said sum of $1,450,000 so guarantied as aforesaid, and would thereafter, without unreasonable delay, ascertain and adjust the earnings of said month, and, as soon as ascertained and adjusted, would pay over promptly any balance that might be due the Atchison Company under the contract for and on account of the earn-

ings for said month, and that if, upon the adjustment for any one month, it should be found that 55 per cent. of the gross earnings was less than the sum for said month paid under the guaranty, then the difference between the said 55 per cent. and the amount paid under the guaranty should be deducted from the amount found due the Atchison Company above the guaranty for the next month, and so on from month to month during the year. Article 3 of the contract further provided that at the end of each calendar year, during the existence of the contract, an adjustment should be made of all the earnings under the contract for the said year, and of payments made by the Express Company to the Atchison Company, and that, if any sum should be found due on the 55 per cent. of the gross earnings upon said final adjustment for said year, the sum so found due, if anything, should be paid by the Express Company to the Atchison Company as soon as such sum should be ascertained.

By article 4 it was provided that, for the purpose of settlement and adjustment as provided for in the contract, the Express Company should report monthly to the Atchison Company the express traffic carried over the several lines of railroad embraced in the contract, and the gross earnings therefrom, in such form as might be agreed upon between the parties to the contract, and further agreed that it would furnish to the Atchison Company such other statements, reports, and information as the Atchison Company might reasonably require, regarding the traffic covered by the agreement and the rates and earnings thereunder, and that the Atchison Company should at any and all times have access to the books and papers of the Express Company for the purpose of verifying the statements, records, and information furnished by the Express Company.

By article 5 the Express Company further agreed that it would not, without the consent of the Atchison Company, charge less than 1½ current railroad tariff freight rates on any matter from or to any intermediate points exclusive to the lines covered by the contract, and, further, that it would not charge, without the consent of the Atchison Company, less than 1½ current railroad tariff freight rates on any matter from or to any points whatever upon the said named railroad lines, except where it should be necessary to do so to meet the competition of other express companies.

By article 6 the Atchison Company further agreed that it would permit the Express Company, and that the Express Company should be entitled, without further additional compensation, to send both ways, over the railroad lines covered by the contract, all its empty messenger safes, boxes, packing trunks, and bullion bags, and should also have the privilege of sending, free of charge, one person on each of said passenger trains as messenger in charge of its property and the property confided to it for carriage, and, when necessary, additional messengers as helpers, or armed as guards for the protection of the Express Company; that such messengers or guards should ride in the car provided by the Atchison Company for the carriage of the goods and property of the Express Company; and the Atchison Company agreed that it would carry the officers, agents, and employés of the Express Company, free of charge, on passenger trains running upon any of the railway lines covered by the contract, whenever such

officers, agents, or employés should be traveling on the business of the Express Company, and for that purpose would, upon the request of the Express Company, furnish transportation to such officers, agents, and employés. Then follow various provisions not important to be mentioned.

By article 10 of the contract the Atchison Company agreed, in consideration of the advantages to be derived from the agreement, that it would not engage, and that none of the companies whose lines are covered by the contract would engage, during the existence thereof, in the express business, nor permit any of its or their employés to receive, carry, or deliver express matter, and that the Express Company should have the exclusive right to conduct the express business on each and every of the said lines of railroad covered by the contract, and that, during the existence of the contract, the Atchison Company, so far as it legally might, would, by all fair and proper means, encourage, facilitate, foster, and promote the business of the Express Company on the lines covered by the contract, and on any other lines over which the Express Company might conduct an express business; and the Express Company agreed that it would encourage, facilitate, foster, and promote the business of the Atchison Company, and of the companies whose lines are or might be covered by the contract.

By article 11 the Atchison Company further agreed that, in addition to the lines mentioned in the contract, therein stated approximately at 9,200 miles, the contract should include any and all other lines of railroad which either it or any of the companies whose lines are embraced in the contract should thereafter, during its existence, own, lease, operate, or control.

By article 12 it was provided that, if the Atchison Company or any of the railroad companies whose lines are included in the contract, should thereafter own, lease, operate, or control any line or lines of railroad not then included in the contract, the Express Company should transact the express business on and over such line or lines of road so soon as such company should be legally able to give to the Express Company the right to do the express business thereon, provided that the Express Company should pay to the Atchison Company for the right to do an express business on and over such line or lines which, in addition to the lines then covered by the contract, the Atchison Company might thereafter own, lease, operate, or control, such amount as might be determined to be fair, just, and reasonable by three arbitrators to be selected in a certain prescribed manner.

By article 13 it is provided that the Express Company should have the right to, and should, operate all extensions of the then existing lines covered by the contract which might be made during its existence, upon the payment of such compensation as might be determined by three arbitrators thereinafter provided for,—such right upon the part of the Express Company to terminate with the expiration of the contract; that is to say, January 1, 1898.

By article 14 it was declared to be the true sense, meaning, and intention of the contract to give the Express Company the exclusive right to do an express business on and over all of the lines mentioned

in the schedule attached thereto, to wit, the lines already named, and over such other lines as might, by extension, purchase, lease, or contract, be subject to the control of the Atchison Company, or to any of the companies named, in accordance with the terms and conditions provided for in the contract.

By article 15 the Express Company covenanted and agreed, in consideration of the premises and of the benefits and facilities conferred upon it by the contract, that it would, to the best of its ability, perform all of the duties thereby imposed on it, and that it would not divert from the lines then or thereafter covered by the contract any express business which properly, fairly, or reasonably should be sent over the said named lines, or any portion thereof, and that it would not, without the consent of the Atchison Company, enter into any contract, agreement, or arrangement for obtaining the right to do an express business over any line or lines which then were or might be competitive with the lines covered by the contract, nor would it do an express business over any such competitive lines: provided, that the covenant should not be construed to limit or interfere with the right of the Express Company to continue doing an express business over any and all lines with which it then had contracts for transacting an express business, or limit or prohibit its right to renew such contracts on their expiration.

By article 16 it was declared that the contract was made by the Atchison Company for and in behalf of itself and the lines controlled and operated by it, and for and in behalf of the said St. Louis & San Francisco Railway Company, Gulf, Colorado & Santa Fé Railway Company, Atlantic & Pacific Railroad Company, Southern California Railway Company, Colorado Midland Railway Company, and Sonora Railway Company, and for and in behalf of all other companies whose assent might be required by the provisions of the contract, and the Atchison Company thereby undertook and agreed to secure the assent of each and every of said named companies, and guarantied that each and every of said named companies would carry out, observe, and perform all of the conditions and obligations of the contract; and the Atchison Company further agreed to receive from, and receipt to the Express Company for, all sums of money which might or should become payable under the contract, and to distribute the same to the various companies interested therein as they might be entitled thereto, and to save the Express Company harmless from all claims of said named companies, or any of them, on account of such compensation.

Provision was next made for the submission to arbitrators of any and all questions that might arise touching the agreement, or the construction of any part thereof, or concerning the business to be carried on thereunder, upon which the parties could not agree; and it concluded with the provision that the contract should go into effect January 1, 1893, and should terminate January 1, 1898.

The contract was approved, ratified, and confirmed on December 6, 1892, by the Sonora Railway Company, Limited; on December 15, 1892, by the St. Louis & San Francisco Railway Company; on December 15, 1892, by the Colorado Midland Railway Company; on De-

cember 17, 1892, by the Gulf, Colorado & Santa Fé Railway Company; on January 12, 1893, by the Atlantic & Pacific Railroad Company; and on February 27, 1893, by the Southern California Railway Company.

In the schedule annexed to the contract, the mileage used by trains handling express matter is given as follows: Of the Atchison, Topeka & Santa Fé Railroad Company, 4,582.12 miles; of the Gulf, Colorado & Santa Fé Railway Company, 1,058 miles; of the Southern California Railway Company, 490.98 miles; of the New Mexico & Arizona Railroad Company, 87.78 miles; of the Sonora Railroad Company, Limited, 262.61 miles; of the St. Louis, Kansas City & Colorado Railroad Company, 61.40 miles; of the Wichita & Western Railway Company, 120.11 miles; of the St. Louis & San Francisco Railway Company, 1,323.17 miles; of the Atlantic & Pacific Railroad Company, Central Division, 112.05 miles; of the Atlantic & Pacific Railroad Company, Western Division, 818.54 miles; of the Manhattan, Alma & Burlingame Railway Company, 56.62 miles; and of the Colorado Midland Railway Company, 335.42 miles.

The action is upon the contract, the substance of which, so far as pertinent to the present cause, has been stated. At the time this contract was made, the Atlantic & Pacific Railroad Company, Western Division, operated its 818.54 miles of railroad, extending from Albuquerque, N. M., to Mojave, in the state of California, under the act of congress approved July 27, 1866. On December 23, 1893, the property of the Atchison Company was by the action of the circuit court of the United States for the Eighth circuit, district of Kansas, placed in the hands of John J. McCook, Joseph W. Reinhart, and Joseph C. Wilson, as receivers. In January, 1894, the Western Division of the Atlantic & Pacific Railroad Company, extending, as has been said, from Albuquerque to Mojave, was placed in the hands and custody of the same persons, as receivers, by the respective United States courts through whose jurisdiction the road was constructed and operated. Subsequently the St. Louis & San Francisco Railway Company and the Colorado Midland Railway Company were each placed in the hands of the same receivers, by competent courts having jurisdiction of the respective roads. The Gulf, Colorado & Santa Fé Railway Company, the Southern California Railway Company, and the Sonora Railway Company were never placed in the hands of receivers, but during all of the times involved in this cause were operated under and through their respective organizations. In 1894 Reinhart resigned his position of receiver, in each case in which he was appointed, and Aldace F. Walker was by the respective courts appointed his successor. In the fall of 1895 Wilson died, and no successor to him was appointed by either of the courts referred to. During the year commencing January 1, 1893, and up to the time of the appointment of the receivers of the Atchison Company, which was in the latter part of December, 1893, the Express Company, under the terms of the contract in question, paid to the Atchison Company the guarantied amount of $1,450,000, in monthly installments of one-twelfth thereof each month. The money so received was apportioned by the Atchison Company among the other parties named in

the contract in the various sums agreed upon between such other railroads and the Atchison Company. The monthly proportion of this money so paid by the Express Company and apportioned by the Atchison Company to the Atlantic & Pacific Railroad Company, Western Division, during this period, was $13,911.73. Subsequent to the appointment of the various receivers of the properties of the several railroad companies that were placed in the hands of such receivers, they (the said receivers) and the several railroads not in the hands of receivers, named in the contract in question, continued the carrying out of the contract in accordance with its terms and conditions, until the modification thereof on May 22, 1895, as next hereinafter stated. The receivership of the Colorado Midland Railway Company withdrew from the agreement on or about May 1, 1895. Upon its withdrawal the contract of December 1, 1892, continued to May 22, 1895, by the mutual consent of the remaining parties, without change, except that there was deducted from the total payments made each month the amount that had theretofore been apportioned by the Atchison Company to the Colorado Midland Railway Company. On that day, to wit, May 22, 1895, article 2 of the contract of December 1, 1892, was, upon the request of the Express Company, and by the authority, so far as concerned the various receivers, of the respective courts appointing and having jurisdiction over them, modified as stated in the following communication:

"Wells, Fargo & Co.—Recvrs. A., T. & S. F. R. R.

"May 22, 1895.

"Modification of Article 2, Original Agreement, Covering Express Facilities.

"A., T. & S. F. R. R. System.

"Aldace F. Walker, John J. McCook, and J. C. Wilson, Receivers.

"New York, May 22, 1895.

"Messrs. Wells, Fargo & Co.—Gentlemen: The receivers of the A., T. & S. F., with the concurrence of the other parties to your contract of Dec. 1, 1892, as evidenced by their signatures hereto, hereby consent that the minimum mentioned in article 2 of said contract be reduced to the sum of $1,310,000.00 per annum; the Colorado Midland having withdrawn from the contract May 1, 1895.

"Yours, truly,
Aldace F. Walker,
"John J. McCook,
"J. C. Wilson,
"Receivers.

"Agreed to by the undersigned:

"Sonora Railway Company,
"By Aldace F. Walker, President.
"St. Louis & San Francisco Ry.,
"By Aldace F. Walker, John J. McCook, J. C. Wilson, Receivers.
"Gulf, Colorado & Santa Fé Ry. Co.,
"By Aldace F. Walker, President.
"Atlantic & Pacific Railroad,
"By Aldace F. Walker, John J. McCook, J. C. Wilson, Receivers.
"Southern California Ry. Co.,
"By Aldace F. Walker, President.
"Wells, Fargo & Co.,
"By [Sgd.] Jno. J. Valentine,
President.

"A true copy.

"[Sgd.] J. F. Scott, for Sec'y A., T. & S. F. R. R. Co.

"Topeka, 7/3, 1895."

From May 22, 1895, to January 1, 1896, the contract of December 1, 1892, as modified by the agreement last set out, was fully carried out by all of the parties to it, except the Colorado Midland Railway Company, which, as before stated, withdrew therefrom May 1, 1895, and there was paid to the receivers of the Atchison Company monthly by the Express Company, after the said modification, one-twelfth of $1,310,000, which the Atchison Company apportioned and divided, as fixed or agreed upon, to the various other beneficiaries; the portion so fixed or agreed upon and paid to the receivers of the Atlantic & Pacific Company after the modification being the sum of $12,565.08 per month. On the 1st day of February, 1896, the receivers, theretofore appointed, of the Atlantic & Pacific Railroad Company's property, resigned; and, their resignations having been accepted, the plaintiff herein, C. W. Smith, was duly appointed receiver in their stead. The property of the Atchison Company was sold under a decree of foreclosure entered in the United States circuit court for the district of Kansas, and, pursuant to the terms of the decree, the entire property of that company was transferred to the purchasers thereof, by the Atchison Company's receivers, at midnight on December 31, 1895, and was by such purchasers at once transferred to the Atchison, Topeka & Santa Fé Railway Company, a corporation incorporated under the laws of Kansas, which took possession of the property on the 1st day of January, 1896. Under the decree by virtue of which the property was sold, the purchasers had 90 days within which to affirm or disaffirm any of the contracts existing with the old Atchison Company, or with the receivers thereof, including the contract in question. From January 1 until May 1, 1896, the services required to be performed by the various railroad companies for the Express Company under the contract of December 1, 1892, were fully performed, except in so far as the failure on the part of the Colorado Midland Company was concerned; and the Express Company paid to the Atchison, Topeka & Santa Fé Railway Company, monthly, one-twelfth of the sum agreed upon by the modification of the contract in question of May 22, 1895, to wit, $1,310,000, to be distributed by it to the parties to whom it belonged. On the 30th day of January, 1896, however, the president of the Atchison, Topeka & Santa Fé Railway Company wrote to the president of the Express Company a letter of which the following is a copy:

"Atchison, Topeka & Santa Fé Railway System.

"President's Office.

"Chicago, January 30th, 1896.

"John J. Valentine, Esq., President Wells, Fargo & Company, San Francisco, California—Dear Sir: I am pleased to be able to advise you that the contract between Wells, Fargo & Company and the Atchison, Topeka and Santa Fé Railroad Company has had the attention of the officers of the Atchison, Topeka & Santa Fé Railway Company, and that this company is willing to operate on the terms of this contract, so far as concerns its railroad and the companies embraced in its system. This, however, does not embrace the Colorado Midland, the Atlantic & Pacific, the St. Louis & San Francisco, the Manhattan, Alma & Burlingame, the St. Louis, Kansas City & Colorado, and the Wichita & Western; these roads being in the hands of receivers. While this company does not assume responsibility for the performance of the

contract by the companies owning these lines or the receivers operating them, it will continue for the present, with the consent of the receivers of these roads, to receive and distribute the monthly payment due to them under the contract; but it may become necessary for you hereafter to deal with them directly. Yours, truly, [Signed] E. P. Ripley."

In response to the foregoing letter, the president of the Express Company wrote the following:

"San Francisco, February 10th, 1896.

"Mr. E. P. Ripley, President Atchison, Topeka & Santa Fé Ry. Co., New York City—Dear Sir: Acknowledging your favor of the 30th, which shall have further consideration at my hands, will you kindly inform me what allotments you make, or that have been made to the present time, in the way of rentals, to the Atlantic & Pacific, the St. Louis & San Francisco, the Manhattan, Alma & Burlingame, the St. Louis, Kansas City & Colorado, the Wichita & Western Railroads; these roads, as you state, being in the hands of receivers, and not subject to the contract of the Atchison, Topeka & Santa Fé Company.

"Very truly yours, [Signed] Jno. J. Valentine, President."

On February 20, 1896, Mr. Ripley again wrote Mr. Valentine as follows:

"February 20th, 1896.

"Mr. Jno. J. Valentine, President Wells, Fargo & Co., San Francisco, Cal.—Dear Sir: I beg to acknowledge receipt of your letter of February 10th. The allotments made of the express earnings as at present are based on an arbitrary, which really shows nothing, and should in no way be taken into account as a basis for future action. I understand, from reading certain correspondence between you and Mr. Walker, that you have not kept the accounts separately, as between the system lines, for the last year or so, and that you cannot show just what amounts each line has earned. Your opinion, however, on this matter, will be of great value to me; and I should be pleased to have you advise me, based possibly on the respective earnings for the last year for which you have them separated, what proportions you think should be allowed to the several lines not now in the Atchison System.

"Yours, truly, E. P. Ripley."

This was followed on the 24th day of February, 1896, by the following letter on the part of the Express Company:

"San Francisco, February 24th, 1896.

"Mr. E. P. Ripley, President Atchison, Topeka & Santa Fé Ry. Co., Chicago, Ills.—Dear Sir: Referring to your favor of the 30th ulto., the receipt of which was acknowledged by my letter to you of the 10th inst., making certain inquiries and promising to give yours further consideration,—to which I have as yet not received an answer, doubtless owing to your absence: In view of your statement that the Atchison, Topeka & Santa Fé Ry. Co. would no longer be responsible for the performance of the contract formerly existing between it and Wells, Fargo & Company, so far as concerns the Colorado Midland, the Atlantic & Pacific, the St. Louis & San Francisco, the Manhattan, Alma & Burlingame, the St. Louis, Kansas City & Colorado, and the Wichita & Western Railroad Companies, but that said Santa Fé Railway Company was willing to continue to furnish express services on its own system, etc.: As advised, the contract referred to is terminated, and it may become necessary for me to negotiate directly with the companies mentioned above as to future services to be rendered by them. We therefore, while reserving all legal rights in the premises pending adjustment by a new agreement, will, for the month of February and thereafter pending existing conditions, advance $109,000 per month to the Santa Fé Company, for itself and for the receiver companies you name, until 55% of monthly gross earnings be ascertained, and a final adjustment reached on that basis. I ask your company, and through you the receiver companies, so far as your relations admit, to consider, in the matter of readjustment, the equities of our situation. The terms hitherto paid are onerous, and should be modified. I submit the following statement of express rentals paid

to the leading railroads west from Chicago as amply sufficient reasons: An average of three years, ending June 30th, 1892, to June 30th, 1894, of mileage, gross earnings, and express rentals per mile, for following railroads (taken from interstate commerce commission reports for 1892–3–4):

	Mileage.	Gross Earnings Per Mile.	Express Rental Per Mile.
C. & No.-Western System	7,976	$5,706 84	$ 86 98
C., R. I. & Pacific Ry.	3,551	5,203 56	95 53
C., M. & St. Paul Ry.	5,902	5,119 12	104 49
C., B. & Q. System	7,091	5,094 67	123 53
Mo., Kas. & Texas Ry.	1,823	5,008 87	84 62
Chicago Gt. Western Ry.	922	4,709 92	83 01
Union Pacific System	7,383	4,657 70	79 34
A., T. & S. F. System	9,088	4,564 36	138 07
ditto, present mileage	8,900	(inc. receiver lines)	148 00
Texas & Pacific Ry.	1,499	4,445 18	113 45
Northern Pacific System	4,569	4,397 87	71 77
Int. & Gt. Northern Ry.	775	4,276 53	97 00
Missouri Pacific System	5,581	4,210 49	89 36
Great Northern Ry.	3,347	3,544 31	45 99

"As you will perceive, the Santa Fé and receiver companies are paid a mileage express rental of 70% more than the Chicago & Northwestern Co., while its general railroad business is 20% less; 40% more than the Chicago, Milwaukee & St. Paul, while its general business is 11% less than that road; and 20% more than the Chicago, Burlington & Quincy System, in comparison with which its general business is 10% less. You and the officers constituting the management of the Atchison, Topeka & Santa Fé are gentlemen of high character. All we ask is equity,—fair treatment. Our position has enabled us, and does now enable us, to serve the Atchison, Topeka & Santa Fé more effectively than any other company possibly could, and that fact ought not to subject us to injustice in the way of excessive rentals. Expecting to have the pleasure of conferring with you in Chicago next month, and bespeaking your favorable consideration, I am,

"Very truly yours, Jno. J. Valentine, President."

On the same day the president of the Express Company wrote to the plaintiff herein, as receiver of the Atlantic & Pacific Company, the following letter, inclosing a copy of his letter of the same date to Mr. Ripley:

"San Francisco, February 24th, 1896.

"My Dear Mr. Smith: In compliance with my promise, I herewith inclose you copy of a letter written to Mr. Ripley to-day. In checking over the gross earnings of railroads, we discovered that the Missouri Pacific had been credited with over a thousand dollars per mile more than it was entitled to, which, as you will see, has been corrected in the letter to Mr. Ripley.

"Yours, truly, Jno. J. Valentine.

"Mr. C. W. Smith, Receiver A. & P. Ry., Albuquerque, N. M."

On July 1, 1896, Mr. Valentine, on behalf of the Express Company, wrote the following letter to Mr. Smith, as receiver of the Atlantic & Pacific Company:

"San Francisco, July 1st, 1896.

"Mr. C. W. Smith, Receiver Atlantic & Pacific Ry., Albuquerque, N. M.—Dear Sir: Acknowledging your telegram of 29th ulto., and referring to within copy of telegram sent to New York 13th ulto. for your information, I have to say that through business, particularly westward, has been steadily falling off for a number of months past, and we find the aggregate of it is over 15 per cent. for the period from December to June; but the greater decline is in the latter months, especially May and June, which have fallen off about 30 per cent. The decline has become so marked that I had communicated by letter

with our officials here and had an old employé, Capt. Bradford, appointed solicitor, and herewith inclose copy of letter which he has filed, without any idea or knowledge that I was going to write to you upon such a subject. I also inclose copy of a letter from Col. Evans of the 12th ult. on same subject. The situation is practically this: The Sunset Line brings New York freight into San Francisco in 14 days by New Orleans, as I understand it, upon guaranty. To meet this a fast freight line is now operating via the Vanderbilt lines, Northwestern and Union Pacific and Central Pacific lines, also making the time in 14 days, which is guarantied. These lines carry freight at the rates Capt. Bradford mentions. The strenuous rivalry they are waging has reduced our through business as stated. I refer to this only to show what is going on in the way of impairing express business, and to explain to you why we will be constrained to ask substantial relief from past requirements. Our express department has not earned a dividend for three years. I send you exchange on New York for $18,000,—$9,000 per month for May and June,—but will not thereby commit ourselves to that, as a guaranty, or otherwise.

"Yours, truly, Jno. J. Valentine, President."

"San Francisco, June 11th, 1896.

"Mr. Jno. J. Valentine, President, etc., San Francisco—Dear Sir: In accordance with your instructions, I was assigned to duty as solicitor by General Agent Titus on May 22nd, since which time I have been at work with but little success. I find the railroad company is active in soliciting, and, with decreased rates, is successful. It guaranties not over 15 days between New York and San Francisco, and not unfrequently places the goods here in 12 days, with rates of $1.50, $2.20, and $2.50 per 100 pounds, which is excluding Wells, Fargo & Co. from the patronage of the merchants on through business from the East. The few merchants that I have seen express wishes to deal with Wells, Fargo & Co., but claim that $14.00 for 7 days is not near enough to $1.50, $2.20, or $2.50 for 12 to 14 days to avail themselves of express service. In each instance I have been most kindly received, and listened to attentively. The disparity in rates is marked, and the difference in time is not sufficient to overcome it.

"Yours, truly, [Signed] J. O. Bradford, Solicitor."

"New York, June 12th, 1896.

"Mr. E. M. Cooper, Manager, San Francisco—Dear Sir: We experienced some falling off at New York in the May business, as compared with the same month in 1895. The total decrease was $4,619.12. In analyzing this deficit, I find it is principally on out business for San Francisco. San Francisco May business in 1895 amounted to $13,997.40: May, 1896, $11,063.03, a decrease of $2,934.47 (21 per cent.), leaving $1,684.65 deficit, to be distributed amongst seven other principal Western points. It seems to me a little missionary work amongst our patrons on the Pacific Coast might increase the volume of shipments westward.

"Yours, truly, [Signed] Dudley Evans, Manager."

"San Francisco, June 13th, 1896.

"Dudley Evans, for C. W. Smith: Approximate gross business $215,000, but, traffic having fallen off radically as compared with last year, I apprehend $215,000 is too high a figure for future earnings. Approximate analysis of business Mojave and North, 64 per cent.; Barstow and South, 17 per cent.; Arizona connections, 3 per cent.; to and from line, 10 per cent.; strictly local, 5 per cent. I will write Mr. Smith, at Albuquerque.

"Jno. J. Valentine."

In response to the last-mentioned letter of Mr. Valentine, Mr. Smith wrote as follows:

"July 7th, 1896.

"Mr. Jno. J. Valentine, President Wells, Fargo and Co., San Francisco, Cal.—Dear Sir: I have yours of the 1st, together with check on New York for $18,000.00, which amount I have instructed our accounting department to credit your company on account. I have noted carefully your allusions to the falling off in express traffic generally, and your attributing the reasons for

such decrease to the fact that the Sunset Line brings New York freight into San Francisco in 14 days by New Orleans, upon a guaranty of the time in transit, and to meet this a fast line is now operating via. the Vanderbilt, Northwestern, Union Pacific, and Central Pacific Lines, also making time in 14 days, which is guarantied, and etc., and etc. Now, if this was a new movement on the part of the Sunset and the Northwestern, Union Pacific Lines, as you infer, then I would be inclined to concede that the causes of the decrease in question put forth were well founded; but in view of the fact that both the Sunset and U. P. Lines have been for years past contracting freight from Atlantic Coast points to Pacific Coast points on a guaranty time schedule not exceeding fifteen days, I feel confident that your reckoning is misplaced. I would not be surprised, however, if the entire cause of your decrease in merchandise tonnage was attributable to the extremely low rates prevailing with transcontinental lines, but I am pleased to inform you that the latter condition will soon be a thing of the past, as it is now understood that the new transcontinental rates that have been agreed upon will take effect August 1st next, which will be an advance over present rates of at least 25%, to which action on the part of the transcontinental lines I feel confident your people will not protest. Regarding a fair and equitable understanding between your company and the receiver of the Atlantic & Pacific Railroad Company which shall prevail during my receivership, I have this suggestion to make, to which I do not believe that you can consistently take exceptions. It is this: The contract now in effect between your company and the Atchison, Topeka & Santa Fé Railway Company is practically the same as the agreement that prevailed during the receivership of that company. Now what we want—and I make the demand predicated upon what I believe is absolute justice—is that this road be allowed the same express revenue per month it will be entitled to when it becomes a part of the Atchison System, as it probably will within the next six or eight months. Can you say nay to this? Very truly yours, [Signed] C. W. Smith."

This letter was answered by Mr. Valentine on July 31, 1896, as follows:

"San Francisco, July 31st, 1896.

"Mr. C. W. Smith, Receiver, etc., Atlantic & Pacific Ry. Co., Albuquerque, N. M.—Dear Sir: In directing our cashier to-day to forward you $9,000 for the month of July, I do so subject to my notice relative to the remittances for May and June; adding that I will either discuss the matter with you by letter later on, or see you in person. Of course, you understand that the rental to the Santa Fé Company remains excessive, and therefore, from our standpoint, you should not expect for the A. & P. the rate that we are compelled to pay the Santa Fé, or that we would under our Santa Fé contract. In other words, the rate paid that company is excessive, and there is no good reason why we should on that account pay so high a one to the Atlantic & Pacific.

"Yours, very truly, Jno. J. Valentine, President."

On December 28, 1896, Mr. Valentine, on behalf of the Express Company, wrote to the plaintiff as follows:

"San Francisco, December 28th, 1896.

"Mr. C. W. Smith, Receiver Atlantic & Pacific Ry., Albuquerque, N. M.—Dear Sir: Referring to sundry correspondence between us,—mine of July 1st, 10th, and 31st, yours of July 7th,—I have to say that for some years past we have in general divided the business for Central California between Pueblo and Oregon and the Albuquerque and Mojave routes, but in the spring and summer months of this year almost the entire tonnage happened to be sent by the Atlantic & Pacific; hence a larger portion had necessarily to be sent during the later months via. Ogden, and the earnings to A. & P. are and will be consequently appreciably less. Therefore, from and after December 1st, 1896, we will remit as an advance payment $7,000 per month. The business strictly local to the line (that is to say, business pertaining to points on the line) does not exceed 8 per cent. of the entire tonnage, so that for every dollar which must absolutely pass over the A. & P. line there are $12 of divertible business. Flanked on both sides as the Atlantic & Pacific road is by the

highways from Ogden and Deming, we are justified in asking just terms. Moreover, the great damage by fire we have suffered for years past has almost all occurred on the Atlantic & Pacific Lines, because of defective cars, tracks, inferior coal, etc. These are merely some of the reasons for asking and expecting a moderate percentage rate,—certainly not to exceed 50 per cent. I will write you again this week, giving you the movement of tonnage for 1896, and hope to see you soon, as you have intimated a visit to California at no distant date. With all good wishes of the season, I am,

"Very truly yours, Jno. J. Valentine, President."

And on January 30, 1897, the president of the Express Company again wrote to Mr. Smith as follows:

"San Francisco, January 30th, 1897.

"Mr. C. W. Smith, Receiver Atlantic & Pacific Ry., Albuquerque, N. M.—Dear Sir: Referring to my letter of December 28th, 1896, and to our discussion of matters of mutual interest between the Atlantic & Pacific and Wells, Fargo & Co. in my office the 13th inst., and confirming my former remarks: I find by reference to the matter that at 50 per cent. we have, up to December 31st, probably overpaid the A. & P. some $7,000, approximately. Hence we will not make any remittance for the present month of January, as the aggregate amount already paid the road from May to December inclusive, $70,000, will probably be 50 per cent. of the business transacted thereon for nine months,—from May 1st, 1896, to January 31st, 1897; the present month estimated. This rate would constitute a rental of some $93,000 per annum, or an average of $112 per mile, while the express rentals of the following roads, having a much greater gross traffic per mile per annum, are as follows:

	Mileage.	Gross Earnings Per Mile.	Express Rental Per Mile.
C. & No.-Western System	7,976	$5,706 84	$ 86 96
C., R. I. & Pac. Ry.	3,551	5,203 56	95 58
C., M. & St. Paul Ry.	5,902	5,119 12	104 49
Mo., Kas. & Texas Ry.	1,823	5,008 87	84 62
Chicago Gt. Western Ry.	922	4,709 92	83 01
Union Pacific System	7,383	4,657 70	79 34
Northern Pacific System	4,569	4,397 87	71 77
Int. & Gt. Northern Ry.	775	4,276 53	97 00
Missouri Pacific System	5,581	4,210 49	89 36
Great Northern Ry.	3,347	3,544 31	45 99
A. & P. R. R.	830	4,025 00	112 00

"Yours, truly, Jno. J. Valentine, President."

In response to the letter last mentioned, Mr. Smith on the 9th day of February, 1897, wrote to the president of the Express Company as follows:

"Atlantic & Pacific Railroad Company, Western Division.

"C. W. Smith, Receiver & Gen'l Manager, Albuquerque, N. M.

"Chicago, Ills., Feb. 9th, 1897.

"Mr. J. J. Valentine, President Wells, Fargo & Company, San Francisco, Cal.—Dear Sir: I am in receipt of yours of the 30th, and have noted with a good deal of interest your arguments elaborately set forth to show how rapidly the express earning capacity of the A. & P. has declined during the past few months. In this connection I desire to advise you that I am, as you know, an officer of the court, and must be governed by its decrees in the management of the Atlantic & Pacific Railroad Company property. Therefore I must respectfully call your attention to the following decree:

" 'The Mercantile Trust Company, Complainant, vs. The Atlantic and Pacific Railroad Company and the United States Trust Company of New York, Defendants.

" 'Now, on this first day of June, A. D. 1895, the receivers heretofore appointed in the above-entitled cause presented their verified petition therein, ask-

ing for authority to unite with the receivers of the Atchison, Topeka and Santa Fé Railroad Company, and with the other auxiliary railroad companies of the Atchison, Topeka & Santa Fé System, in modifying the contract of the first day of December, 1892, between the Atchison, Topeka & Santa Fé Railroad Company and Wells, Fargo and Company, which was by the terms of said contract and by the agreement with the Atlantic & Pacific Railroad Company made applicable to, and a contract for and on behalf of, the Atlantic and Pacific Railroad Company, as well as a contract by and between the parties hereto. And it being made to appear that notice of said application was duly given and served upon the defendant the United States Trust Company of New York, and upon the plaintiff, the Mercantile Trust Company of New York, and upon the Atlantic and Pacific Railroad Company, and the Atlantic & Pacific Railroad Company appearing by its solicitor, Karl A. Snyder, the Mercantile Trust Company appearing by its solicitor, W. B. Childers, and the receivers of the Atlantic & Pacific Railroad Company appearing by its solicitor, C. N. Sterry, said application was duly heard and considered, and upon consideration thereof it is ordered that the receivers heretofore appointed in the above-entitled cause be, and they are hereby, authorized to unite with the receivers of the Atchison, Topeka and Santa Fé Railroad Company, with the St. Louis and San Francisco Railway Company, and with the other auxiliary railway companies of the Atchison, Topeka and Santa Fé Railroad System, in carrying out the agreement shown to have been made by and between the receivers of the Atchison and Topeka and Santa Fé Railroad Company and Wells, Fargo and Company under the order of the Honorable Henry C. Caldwell, circuit judge of the United States circuit court, as shown by said petition; and it is further ordered that the receivers heretofore appointed be, and they are hereby, authorized to make such agreement or contract with Wells, Fargo and Company as may be agreed upon by the receivers of the Atchison, Topeka and Santa Fé Railroad Company, the receivers of the St. Louis and San Francisco Railway Company, and other auxiliary railroad companies of the Atchison, Topeka & Santa Fé Railroad System.

" 'N. C. Collier, Judge of the District Court,
" 'Second Judicial District, Territory of New Mexico.'

"On perusal of the foregoing decree, you will doubtless appreciate the fact that, inasmuch as the contract in question with your company has never been disaffirmed by either my predecessors or by myself, the agreement must necessarily be considered as being still in full force and effect, and in our settlement with your company we cannot recognize any statements of accounts emanating from your office or from your accounting department that are not made up strictly in accordance with the contract that was in force when the above decree was promulgated by the court.

"Very truly yours, [Signed] C. W. Smith."

On February 27, 1897, the president of the Express Company wrote to the plaintiff the following letter:

"San Francisco, February 27th, 1897.

"Mr. C. W. Smith, Receiver Atlantic & Pacific Railway, Albuquerque, N. M. —Dear Sir: Acknowledging your letter of the 9th inst. concerning business relations between Wells, Fargo & Company and the Atlantic & Pacific Railroad since the reorganization of the Santa Fé System and its abrogation of the express contract: The following suggestions are offered for your consideration: The last original contract between Wells, Fargo & Company and the Santa Fé System (previous to the existing one of May, 1896) was made by that company, representing itself and controlled roads, including, among others, the Atlantic & Pacific. When the Santa Fé Company went into the hands of receivers, an application was made to Judge Caldwell to modify that contract; and an order was made to that effect, which is referred to in the copy of an order subsequently made by Judge Collier, and set forth in your letter. By virtue of the authority given by Judge Caldwell, the receivers of the Santa Fé Company modified that original contract; their action was approved by Judge Collier; and it is that proceeding which is invoked by you as authority for claiming compensation as provided in the modified contract.

But, after the Santa Fé System was reorganized and the receivers discharged, the president of that company gave notice that the Santa Fé R. R. Co. would no longer be responsible for the enforcement of that modified contract, and suggested that Wells, Fargo & Company should make arrangements severally with the controlled and auxiliary roads included in the former modified contract. The president of the Santa Fé having announced that his company would no longer be responsible for the performance of the original contract as modified, Wells, Fargo & Company made separate arrangements with that company and several others of the former Santa Fé System for express facilities. I submit that the former existing arrangement was discontinued by the Santa Fé and other contracting parties; that the contract was an entirety, and became ineffectual whenever any company composing the system was eliminated from it, and was not held bound by the terms thereof. It was upon this theory that Judge Caldwell finally announced, at St. Paul, that he would not undertake to enforce the original contract against Wells, Fargo & Company, but authorized the receivers to enter into a modified contract. Now, that modified arrangement was made with the receivers of the Santa Fé Company, and lasted during the time of the receivership, but did not, it would seem, bind the Santa Fé Company as reorganized and relieved from the receivership. At least this appears to have been the view taken by President Ripley, and to explain his action in the premises as the official representative of that company. Hence your theory that the ruling of the court upon a contract that expired of itself, because of the noncohesion of the original parties thereto, and because of the radical change of organization in the party of the first part, is still binding as between the Atlantic & Pacific Railroad and this company, seems not to have a reasonable foundation. Our auditor will remit you $7,000 for the month of February, as approximating the earnings of the line at 50%, which is a fair and reasonable rental, as shown in mine of January 30th. However, since drafting the foregoing, I have received the interstate commerce commission's report, latest date fiscal year of 1895, and append the following therefrom:

	Mileage.	Gross Earnings Per Mile.	Express Rental Per Mile.
C. & N. W. Ry.	5,030	$5,606	$112 64
do. System	7,938	4,782	107 13
C., R. I. & Pac. Ry.	3,571	4,523	114 60
C., M. & St. P. System	6,206	4,431	116 00
M., K. & T. Ry.	2,060	5,692	94 50
Chi. Great Western	924	3,886	81 15
Union Pacific Ry.	1,836	7,951	122 84
do. System	4,903	4,615	72 28
Northern Pacific Ry.	4,649	3,797	53 95
Int. & Grt. Nor. Ry.	775	4,503	84 93
Missouri Pac. System	4,992	4,500	90 80
Great Northern Ry.	3,766	3,490	43 45

"All of which is respectfully submitted.

"Very truly yours, Jno. J. Valentine, President."

On March 17, 1897, Mr. Smith again wrote to the president of the Express Company, the following letter:

"Albuquerque, N. M., Mch. 17, 1897.

"Mr. J. J. Valentine, President Wells, Fargo and Co., San Francisco, Cal.—Dear Sir: In further support of the subject of my letter to you under date of February 9th, to which you replied on February 27th, I desire to call your attention to the opinion very forcibly expressed by Judge C. N. Sterry, attorney & solicitor for the receiver, dated the 15th, herewith inclosed. If it is true, as Judge Sterry alleges (and I do not doubt but what it is), that I am not vested with power, right, or authority, as receiver, to make any modification in the agreement with your company, except that I do so through Judge Collier. This being the case, I am compelled to say to you that I cannot regard any settlement with Wells, Fargo and Company, except that such settlement

is made on the basis of the agreement or understanding which was brought about through my predecessors, and which was confirmed by the court.

"Very truly yours, [Signed] C. W. Smith."

On April 17, 1897, Mr. Valentine replied as follows:

"San Francisco, April 17th, 1897.

"Dear Mr. Smith: While I was absent in Mexico your letter of March 17th came, and, the subject being presented by you in a legal aspect, your communication was referred to our counsel here, Mr. E. S. Pillsbury, who has not yet reported on it. I write this line that you may not deem the delay on my part discourteous. I trust Mr. Pillsbury will give the matter attention soon. His conclusions will be forwarded to you promptly. * * *

"Very truly yours, Jno. J. Valentine, President.

"Mr. C. W. Smith, Atlantic & Pacific Rd., Albuquerque, N. M."

On April 26, 1897, Mr. Smith replied to the last-mentioned letter as follows:

"Pasadena, Cal., April 26th, 1897.

"My Dear Mr. Valentine: I am in receipt of yours of the 17th, which is entirely satisfactory. In this connection, and simply as a reminder, I desire to call your attention to a paragraph or two taken from the original agreement between the A. & P. and Wells, Fargo and Company, which agreement has not expired, and which was never disaffirmed by the receivers: First. Article 19 of the contract reads as follows: 'This contract shall go into effect January 1st, 1893, and shall terminate January 1st, 1898.' Second. As stated in report of the receivers to the Hon. Henry C. Caldwell, circuit judge: 'The contract contains no provision for its modification in any event, being absolute in its terms.' And not only is the life of the contract itself thus definitely and absolutely fixed, but the right of the Express Company to operate any individual line under this contract is just as definitely and absolutely fixed. Third. In article 13 this language is used: 'The right of the Express Company to operate any line or lines that may by virtue of the last two preceding sections be operated by said Express Company shall cease and terminate with the expiration of this contract; that is to say, January 1st, 1898.'

"Very truly yours, [Signed] C. W. Smith.

"Mr. J. J. Valentine, Prest. W., F. & Co., San Francisco, Cal."

On May 27, 1896, the Express Company and the Atchison, Topeka & Santa Fé Railway Company (the new Atchison Company) made a new contract for the future business between it and the Express Company. A copy of this contract is annexed to the amended complaint, and shows that it was a similar agreement to that of December 1, 1892, except that it did not apply to certain railroads included in the former contract; but the amended complaint alleges that the guarantied monthly payments under it aggregated the same sum for the same mileage as was paid or agreed to be paid under the contract of December 1, 1892. The amended complaint also shows that from the 1st day of May, 1896, to the 1st day of July, 1897, the Express Company received and accepted precisely similar services on the part of the receiver of the Atlantic & Pacific Railroad Company, Western Division, that had been given to it under the terms of the contract of December 1, 1892, as modified May 22, 1895, and that it was only able to transact the business so as to form a continuous line from the Pacific Coast to the Atlantic Coast over the Southern California lines by using the Atlantic & Pacific Railroad. The amended complaint further shows that the St. Louis & San Francisco Railway Company and its receivers and the Express Company continued to work under

the modified contract of May 22, 1895, until July 1, 1896, when it entered into a new contract with the Express Company, whereby it was to receive, and it has since received, the same rate per mile as it received under the contract of December 1, 1892, and its modification of May 22, 1895. The amended complaint further shows that the plaintiff, as receiver of the Atlantic & Pacific Railroad Company, and his predecessors in office, fully carried out all of the terms and conditions that were to be performed by the Atlantic & Pacific Railroad Company under the contract of December 1, 1892, and as the same was modified on May 22, 1895. It further shows that from May 1, 1896, to July 1, 1897, the plaintiff, as receiver of the Atlantic & Pacific Railroad Company, Western Division, not only performed all of the services required by the Express Company, but performed them under a claim as indicated in the correspondence that has been set out, the acquiescence in which by the Express Company is shown, if shown at all, by the same correspondence. It further appears from the amended complaint that the Atlantic & Pacific Company was a link in the transcontinental system known as the "Atchison, Topeka & Santa Fé Route," but was not a member thereof; that all of the express business transacted by the defendant from the Pacific Coast as far east as Chicago, passing over the Atchison, Topeka & Santa Fé System, was carried over the Western Division of the Atlantic & Pacific Railroad. During the period covered by the action, to wit, from May 1, 1896, to July 1, 1897, the defendant paid to the plaintiff each month, on account of the services rendered by him, the sum of $7,000; and it is for the difference between that sum and the monthly sum of $12,585.08 apportioned to the plaintiff under the contract of December 1, 1892, as modified by the agreement of May 22, 1895, aggregating $77,911.12, for which the present action is brought. There is no allegation in the complaint of any prevention by the defendant of full performance of the contract on the part of the plaintiff.

The case is, I think, a very plain one. The contract of December 1, 1892, expressly recites (what is also a matter of common knowledge) that the Atchison, Topeka & Santa Fé Railroad Company owned several roads, and controlled others, embraced under the name of the "Santa Fé System" or "Route," extending from Chicago to the Pacific Coast. The defendant then was, and had been for many years, doing an extensive express business throughout the United States, and was by far the most important, if it was not the only, company on the Pacific Coast engaged in that business. Naturally, such traffic was of great importance to it, as well as to the railroad companies. The Express Company sought, and by the contract obtained, the exclusive express facilities over the extensive system of railroads owned and controlled by the Atchison Company, and the latter thereby sought and secured the carriage of the large amount of express matter under the control of the defendant. These advantages and purposes are clearly expressed in articles 10 and 14 of the contract, which read as follows:

"Article X. The railroad company further agrees, in consideration of the advantages to be derived from this agreement, that it will not engage, and that

none of the companies whose lines are covered by this contract will engage, during the existence thereof, in the express business; neither will it or any of said companies permit any of its or their employés to receive, carry, or deliver express matter; and that the Express Company shall have the exclusive right to conduct the express business on each and every of the said lines covered by this agreement."

"Article XIV. It is hereby declared to be the true sense, meaning, and intention of this contract to give the Express Company the exclusive right to do an express business on and over all of the lines mentioned in the schedule hereto attached, and of all such other lines as may, by extension, purchase, lease, or contract, be subject to the control of the railroad company, or to any of the companies mentioned in said schedule, in accordance with the terms and conditions herein provided."

It is not necessary to resort to construction to ascertain whether the intent of the contract was to confer upon the Express Company the exclusive express facilities over all of the lines therein mentioned and provided for; for the parties themselves, in express words, declared that to be its true sense and meaning. And it was for those exclusive facilities over all of the lines that the Express Company agreed to pay the Atchison Company 55 per cent. of the entire gross earnings of all kinds, including earnings on money orders received by it in the operation of the express business, upon all of the said lines of railroad, "taken as a whole, as they then existed," and guarantied that such percentage of the gross earnings "upon all of the said lines of said different railway companies, taken together as a whole, as they then existed," should amount to not less than $1,450,000 per annum, afterwards reduced by the agreement of May 22, 1895, to $1,310,000. The Atchison Company undertook for itself, and on behalf of all of the other companies referred to, to furnish the exclusive express facilities specified; and the obligation thus assumed by the Atchison Company was afterwards, and at the respective dates already stated, agreed to and confirmed by the other companies. The portion of the lump sum that the Express Company agreed to pay the Atchison Company for the exclusive express facilities over all of the designated lines, taken as a whole, to be paid to the other named companies for services rendered by their respective roads, was a matter between them and the Atchison Company. It seems from the letter written by the president of the Atchison, Topeka & Santa Fé Railway Company to the president of the Express Company on the 20th day of February, 1896, that those amounts were arbitrarily fixed by the Atchison Company. But, however that may be, certain it is that the Express Company had nothing whatever to do with that matter. In entering into the contract, the Atchison Company acted for itself and on behalf of the other companies constituting the Santa Fé System, and those other constituent companies afterwards ratified its acts. The contract was plainly entire, providing for exclusive express facilities over the Atchison system of roads, in consideration of certain lump payments to be made to that company by the Express Company. Prior to the beginning of the services for which this action is brought, the contract had come to an end by the passing out of existence of the Atchison Company, and the refusal of its successor to adopt it. Full performance of it during the time involved in the action is not claimed, but it is contended on the part of the plain-

tiff that the defendant demanded and received of the Western Division of the Atlantic & Pacific Railroad Company the services called for by the contract sued on, and that, having done so, the Express Company should be estopped to deny that the Atlantic & Pacific Company should receive the same compensation therefor that was allowed it under the contract. Two answers to this contention readily suggest themselves: The first is that the Express Company never had anything to do with the proportion of the lump sum it contracted to pay the Atchison Company for the exclusive express facilities over the entire system of roads that should be awarded to the Atlantic & Pacific Company for its services as one of the constituent roads, the apportionment being a matter solely between the railroad companies; and, in the next place, the correspondence between the respective parties, upon which the case is in part submitted, clearly shows that the services involved in the action were not demanded or received by the defendant under and by virtue of the contract sued on, and upon the understanding that the Atlantic & Pacific Company was to receive therefor the same compensation that had been apportioned to it by the Atchison Company thereunder; but, on the contrary, it clearly appears from that correspondence that both parties to the suit well understood that it was at least claimed by the Express Company that the contract had been terminated, and that there was a disagreement between them as to what was a fair compensation for the services. A few extracts from the correspondence will make this perfectly plain. In the letter of January 30, 1896, from the president of the Atchison, Topeka & Santa Fé Railway Company to the president of the Express Company, the latter was informed by Mr. Ripley that the new Atchison Company was willing to operate on the terms of the contract in question, "so far as concerns its railroad and the companies embraced in its system. This, however, does not embrace the Colorado Midland, the Atlantic & Pacific, the St. Louis & San Francisco, the Manhattan, Alma & Burlingame, the St. Louis, Kansas City & Colorado, and the Wichita & Western; these roads being in the hands of receivers." Mr. Ripley proceeded to say that while the new Atchison Company "does not assume responsibility for the performance of the contract by the companies owning these lines, or the receivers operating them, it will continue for the present, with the consent of the receivers of these roads, to receive and distribute the monthly payment due to them under the contract; but it may become necessary for you [the president of the Express Company] hereafter to deal with them directly." In reply to that letter, the president of the Express Company wrote on the 24th of February, 1896, to Mr. Ripley in part, as follows:

"In view of your statement that the Atchison, Topeka & Santa Fé Ry. Co. would no longer be responsible for the performance of the contract formerly existing between it and Wells, Fargo & Company, so far as concerns the Colorado Midland, the Atlantic & Pacific, the St. Louis & San Francisco, the Manhattan, Alma & Burlingame, the St. Louis, Kansas City & Colorado, and the Wichita & Western Railroad Companies, but that said Santa Fé Railway Company was willing to continue to furnish express services on its own system, etc.: As advised, the contract referred to is terminated, and it may become necessary for me to negotiate directly with the companies mentioned above.

as to future services to be rendered by them. We therefore, while reserving all legal rights in the premises pending adjustment by a new agreement, will, for the month of February, and thereafter pending existing conditions, advance $109,000 per month to the Santa Fé Company, for itself and for the receiver companies you name, until 55% of monthly gross earnings be ascertained, and a final adjustment reached on that basis."

On the same day the president of the Express Company sent to the plaintiff herein, as receiver of the Atlantic & Pacific Company, a copy of that letter. This was followed by other letters to the plaintiff upon the question of compensation, in which it was urged that the condition of the traffic did not justify the rates that were paid, which were followed by a reply from the plaintiff to the president of the Express Company, of date July 7, 1896, which concluded as follows:

"Regarding a fair and equitable understanding between your company and the receiver of the Atlantic & Pacific Railroad Company which shall prevail during my receivership, I have this suggestion to make, to which I do not believe that you can consistently take exceptions. It is this: The contract now in effect between your company and the Atchison, Topeka & Santa Fé Railway Company is practically the same as the agreement that prevailed during the receivership of that company. Now, what we want—and I make the demand predicated upon what I believe is absolute justice—is that this road be allowed the same express revenue per month it will be entitled to when it becomes a part of the Atchison System, as it probably will within the next six or eight months. Can you say nay to this?"

In the letter of July 31, 1896, from the president of the Express Company to the plaintiff as receiver of the Atlantic & Pacific Company, he said:

"In directing our cashier to-day to forward you $9,000 for the month of July, I do so subject to my notice relative to the remittances for May and June; adding that I will either discuss the matter with you by letter later on, or see you in person. Of course, you understand that the rental to the Santa Fé Company remains excessive; and therefore, from our standpoint, you should not expect for the A. & P. the rate that we are compelled to pay the Santa Fé, or that we would under our Santa Fé contract. In other words, the rate paid that company is excessive, and there is no good reason why we should on that account pay so high a one to the Atlantic & Pacific."

Again, on December 28, 1896, the president of the Express Company wrote to the plaintiff, as receiver of the Atlantic & Pacific Company, as follows:

"Referring to sundry correspondence between us,—mine of July 1st, 10th, and 31st, yours of July 7th,—I have to say that for some years past we have in general divided the business for Central California between Pueblo and Oregon and the Albuquerque and Mojave routes, but in the spring and summer months of this year almost the entire tonnage happened to be sent by the Atlantic & Pacific; hence a larger portion had necessarily to be sent during the later months via Ogden, and the earnings to A. & P. are and will be consequently appreciably less. Therefore, from and after December 1st, 1896, we will remit as an advance payment $7,000 per month. The business strictly local to the line (that is to say, business pertaining to points on the line) does not exceed 8 per cent. of the entire tonnage, so that for every dollar which must absolutely pass over the A. & P. line there are $12 of divertible business. Flanked on both sides as the Atlantic & Pacific road is by the highways from Ogden and Deming, we are justified in asking just terms. Moreover, the great damage by fire we have suffered for years past has almost all occurred on the Atlantic & Pacific lines, because of defective cars, tracks, inferior coal, etc. These are merely some of the reasons for asking and expecting a moderate percentage rate,—certainly not to exceed 50 per cent."

On January 30, 1897, the president of the Express Company wrote to the plaintiff, as receiver of the Atlantic & Pacific Company, as follows:

"Referring to my letter of December 28th, 1896, and to our discussion of matters of mutual interest between the Atlantic & Pacific and Wells, Fargo & Co. in my office the 13th inst., and confirming my former remarks: I find by reference to the matter that at 50 per cent. we have up to December 31st probably overpaid the A. & P. some $7,000, approximately. Hence we will not make any remittance for the present month of January, as the aggregate amount already paid the road from May to December inclusive, $70,000, will probably be 50 per cent. of the business transacted thereon for nine months, from May 1st, 1896, to January 31st, 1897,—the present month estimated."

To the last-mentioned letter the receiver of the Atlantic & Pacific Company replied on February 9, 1897, calling attention to an order made by the judge of the United States court for the territory of New Mexico on the 1st day of June, 1895, in the suit of the Mercantile Trust Company against the Atlantic & Pacific Railroad Company et al., authorizing the receivers therein appointed to unite with the receivers of the Atchison, Topeka & Santa Fé Railroad Company, and with the other constituent companies of the Santa Fé System, in carrying out the modified agreement of May 22, 1895, and authorizing the receivers of the Atlantic & Pacific Railroad Company "to make such agreement or contract with Wells, Fargo and Company as may be agreed upon by the receivers of the Atchison, Topeka and Santa Fé Railroad Company, the receivers of the St. Louis and San Francisco Railway Company, and other auxiliary railroad companies of the Atchison, Topeka and Santa Fé Railroad System." The letter last mentioned closed with the statement that, "as the contract in question with your company has never been disaffirmed by either my predecessors or by myself, the agreement must necessarily be considered as being still in full force and effect, and in our settlement with your company we cannot recognize any statements of accounts emanating from your office or from your accounting department that are not made up strictly in accordance with the contract that was in force when the above decree was promulgated by the court." To this letter of the receiver of the Atlantic & Pacific Company, the president of the Express Company replied, under date of February 27, 1897, as follows:

"The last original contract between Wells, Fargo & Company and the Santa Fé System (previous to the existing one of May, 1896) was made by that company, representing itself and controlled roads; including, among others, the Atlantic & Pacific. When the Santa Fé Company went into the hands of receivers, an application was made to Judge Caldwell to modify that contract, and an order was made to that effect, which is referred to in the copy of an order subsequently made by Judge Collier, and set forth in your letter. By virtue of the authority given by Judge Caldwell, the receivers of the Santa Fé Company modified that original contract; their action was approved by Judge Collier; and it is that proceeding which is invoked by you as authority for claiming compensation as provided for in the modified contract. But, after the Santa Fé System was reorganized and the receivers discharged, the president of that company gave notice that the Santa Fé R. R. Co. would no longer be responsible for the enforcement of that modified contract, and suggested that Wells, Fargo & Company should make arrangements severally with the controlled and auxiliary roads included in the former modified contract. The president of the Santa Fé having announced that his company would no longer

be responsible for the performance of the original contract as modified, Wells, Fargo & Company made separate arrangements with that company and several others of the former Santa Fé System for express facilities. I submit that the former existing arrangement was discontinued by the Santa Fé and other contracting parties; that the contract was an entirety, and became ineffectual whenever any company composing the system was eliminated from it, and was not held bound by the terms thereof. It was upon this theory that Judge Caldwell finally announced, at St. Paul, that he would not undertake to enforce the original contract against Wells, Fargo & Company, but authorized the receivers to enter into a modified contract. Now, that modified arrangement was made with the receivers of the Santa Fé Company, and lasted during the time of the receivership, but did not, it would seem, bind the Santa Fé Company as reorganized and relieved from the receivership. At least, this appears to have been the view taken by President Ripley, and to explain his action in the premises as the official representative of that company. Hence your theory that the ruling of the court upon a contract that expired of itself, because of the noncohesion of the original parties thereto, and because of the radical change of organization in the party of the first part, is still binding as between the Atlantic & Pacific Railroad and this company, seems not to have a reasonable foundation. Our auditor will remit you $7,000 for the month of February, as approximating the earnings of the line at 50%, which is a fair and reasonable rental, as shown in mine of January 30th."

There was a little more correspondence between the respective parties, of a similar nature. This correspondence, so far from showing that the Express Company demanded and received the services covered by the suit, under the contract of December 1, 1892, as modified by that of May 22, 1895, shows that it contended throughout the period here involved that the contract was at an end, and that it was not willing to pay for the services rendered by the Atlantic & Pacific Company the amount apportioned to it by the Atchison Company under the contract. I think it clear that the plaintiff has mistaken his remedy, and that the present suit, which is upon the contract, cannot be maintained. An order will be entered sustaining the demurrer to the amended complaint.

HOBBS v. NATIONAL BANK OF COMMERCE OF KANSAS CITY, MO.

(Circuit Court of Appeals, Second Circuit. July 18, 1899.)

No. 157.

1. CORPORATIONS—ACTION TO ENFORCE STATUTORY LIABILITY OF STOCKHOLDER —LIMITATIONS.

   Whether an action brought in another state to enforce the statutory liability of a stockholder of a Kansas corporation is governed as to limitation by the statutes of Kansas or of the lex fori, quære.

2. SAME—NEW YORK STATUTE.

   Code Civ. Proc. N. Y. § 394, as amended in 1877, providing that an action against a director or stockholder of a moneyed corporation to enforce a liability "created by law" must be brought within three years after the cause of action accrued, is applicable to an action against a stockholder of a corporation of another state to enforce a liability imposed by the statutes of such state.

   Wallace, Circuit Judge, dissenting.

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

The National Bank of Commerce of Kansas City, Mo., recovered a judgment in an action in the state court of Kansas, which had jurisdiction of the case, against the Western Farm Mortgage Company, a corporation of Lawrence, Kan. Upon this judgment an execution was issued, which was returned unsatisfied on April 17, 1893. On May 23, 1896, the plaintiff commenced an action at law in the circuit court for the Northern district of New York against the defendant, a resident within said district and citizen of New York, alleging that he was a stockholder of the Lawrence corporation, and was liable to the defendant under the provisions of the constitution and statutes of the state of Kansas. The action was tried by the court upon the written stipulation of the parties, and judgment was rendered for the plaintiff. To review that judgment this writ of error was brought.

Charles Van Kirk, for plaintiff in error.
Omar Powell, for defendant in error.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

SHIPMAN, Circuit Judge. The provisions of the constitution and statutes of Kansas which relate to the liability of the stockholders of a Kansas corporation to pay its debts were quoted in the opinion of this court in Whitman v. Bank, 28 C. C. A. 404, 83 Fed. 288. In that case it was held that a suit to enforce the liability was transitory in its character, and could be brought by an action at law in a court of another state against a single stockholder who was a resident of such state. It was further said that the liability was statutory because it did not exist at common law, and was contractual because "every one who becomes a member of the company by subscribing to its stock assumes this liability." Flash v. Conn, 109 U. S. 371, 3 Sup. Ct. 263. The Whitman Case is now under review by the supreme court, and has not been decided.

The other question in the case which is of general importance is in regard to the defense of the statute of limitations. The suit was brought under the provisions of section 32 to be found in Whitman v. Bank, supra, and the right of action against the defendant accrued on April 17, 1893, the date of the return of the unsatisfied execution, and more than three years before the commencement of this suit. In the Kansas statutes which created the liability of a stockholder, no time limit was established within which an action must be brought to enforce it. By the general statute of limitations of Kansas, an action upon a liability created by statute, other than a forfeiture or penalty, must be brought within three years after the cause of action accrued. This is the Kansas limitation upon a stockholder's liability, under section 32. Cottrell v. Manlove (Kan. Sup.) 49 Pac. 520. The general rule in regard to statutes of limitation which do not extinguish the claim, but merely prevent the remedy, is that the limitation of action is governed by the lex fori, and is controlled by the legislation of the state in which the claim is brought. Telegraph Co. v. Purdy, 162 U. S. 329-339, 16 Sup. Ct. 810; Scudder v. Bank, 91 U. S. 406; Pritchard v. Norton, 106 U. S. 124, 1 Sup. Ct. 102; Insurance Bank v. Eldred, 130 U. S. 693, 9 Sup. Ct. 690; Railway Co. v. Johnston, 26 U. S. App. 85, 9 C. C. A. 587, 61 Fed. 738. There is, however, force in the idea that, when an action is brought in another state to enforce this statutory liability, it is enforced with all the in-

cidents which belong to it in the state of its creation, unless they are against the public policy of the forum. The statutory form of remedy is exclusive, and a conformity to the statutory bar against a remedy carries into complete effect the principle that the "individual liability of stockholders in a corporation for the payment of its debts is always a creature of statute" (Pollard v. Bailey, 20 Wall. 520), and adds to it only the declaration that the state which created the liability and the remedy will control the extent of the remedy. It is claimed that this was stated in the opinion in Bank v. Francklyn, 120 U. S. 747, 7 Sup. Ct. 757, in which it was said that "suits either at law or in equity, in the circuit court, to enforce the liability of stockholders under a state statute, are governed by the statute of limitations of the state." The defense of the statute of limitations did not exist in that case, and it is not certain that the remark was not simply applicable to suits in the circuit court in the state which created the liability. The citations which were given were cases of that class.

If the general rule in regard to the lex fori is applicable, the defendant urges that by the statute of limitations of New York this suit was barred. The statutes applicable to this liability are contained in the chapter of the Code of Civil Procedure relating to limitations, and are as follows:

"Sec. 382. Actions barred in six years are an action upon a contract obligation or liability, express or implied, except a judgment or sealed instrument. An action to recover upon a liability created by statute, except a penalty or forfeiture."

"Sec. 394. This chapter does not affect an action against a director or stockholder of a moneyed corporation or banking association to recover a penalty or forfeiture imposed or to enforce a liability created by law, but such actions must be brought within three years after the cause of action accrued."

"Sec. 414. The provisions of this chapter apply and constitute the only rules of limitation applicable to a civil action or special proceeding, except in one of the following cases."

This case is not within the excepted provisions. A "moneyed corporation," spoken of in section 394, is defined in the statutes of New York to be "every corporation having banking powers, or having the power to make loan upon pledges or deposits, or authorized by law to make insurance." 2 Rev. St. (7th Ed.) p. 1371. The Western Farm Mortgage Company had power to make loan upon pledges or deposits. The plaintiff insists that the history of section 394 shows that it is only applicable to domestic corporations created by the statutes of the state of New York. The history is given in Brinckerhoff v. Bostwick, 99 N. Y. 185, 1 N. E. 663, and is substantially as follows: Section 109 of the Code of Procedure as amended in 1849 was formerly section 89 of the Code of 1848, which was taken from section 44, c. 4, pt. 3, of the Revised Statutes, which was as follows:

"None of the provisions of this chapter shall apply to suits against directors or stockholders of any moneyed corporations, to recover any penalty or forfeiture imposed, or to enforce any liability created by the second title of the first part of the Revised Statutes; but all such suits shall be brought within six years after the discovery, by the aggrieved party, of the facts upon which such penalty or forfeiture attached, or by which such liability was created."

The second title of the chapter of the statutes which was referred to imposed liabilities upon the directors and stockholders of the

moneyed corporations authorized by the chapter, and, if the statute of limitations had remained unaltered, it would have been limited by its terms to those liabilities or penalties, and would have been inapplicable to this case. In 1849 section 89 was amended so as to read as follows:

"This title shall not affect actions against directors or stockholders of a moneyed corporation or banking association, to recover a penalty or forfeiture imposed, or to enforce a liability created by law; but such actions must be brought within six years after the discovery, by the aggrieved party, of the facts upon which the penalty or forfeiture attached, or the liability was created."

By this amendment, the provisions became applicable to banking associations, a class of corporations authorized in 1838, and to which the provisions of the "second title," which had been referred to in the preceding statute, did not apply. Robinson v. Bank, 21 N. Y. 406. The limitation to the liabilities created by the Revised Statutes was omitted, and the words "liability created by law" were substituted. In Brinckerhoff v. Bostwick, supra, it was held that statutory liabilities were still intended, but that the new phrase comprehended "those created by other statutes and by the constitution of 1846." In 1877 the section was simplified and strengthened by striking out "six years after the discovery by the aggrieved party of the facts upon which the penalty or forfeiture attached, or the liability was created,"—language which adhered to the idea of a violation of local penal statutes,—and the words "three years after the cause of action accrued" were substituted, and, as thus amended, it appears in section 394 of the Code. Inasmuch as the court of appeals in the Brinckerhoff Case had decided that "a liability created by law" meant a statutory liability, the act was further amended by the legislature of New York in 1897, but after this suit was brought, so that the paragraph now includes a liability "created by common law or by statute." The history of the statute shows that the legislature intended to enlarge it, so that it should not be limited to liabilities created by one set of statutes, or imposed upon the officers of the class of corporations which were originally mentioned. It has become a different statute. Its terms are now so broad as to include every class of liabilities of stockholders of moneyed corporations, and, after the amendment of 1877, there seems to be no adequate reason why the statute should be limited to the liabilities of stockholders of domestic moneyed corporations, and should be construed to mean that the liability of stockholders in such corporations should be limited to three years, and that the liability of New York stockholders in foreign corporations of that class should run for six years.

The judgment of the circuit court is reversed, with costs.

WALLACE, Circuit Judge. I am unable to concur in the proposition that the statute of limitations, as amended after the present action was brought, affords a defense to the action.

In re ROY.

(District Court, D. Vermont. September 5, 1899.)

No. 101.

BANKRUPTCY—RIGHT TO DISCHARGE—FALSE OATH.

A bankrupt who, at the time of signing his petition and schedule, has in his possession money paid to him under a policy of accident insurance, but states therein that he has no cash in hand, and also files a poverty affidavit, makes a "false oath in a proceeding in bankruptcy," such as will forfeit his right to a discharge.

In Bankruptcy. On application for discharge.

Bates, May & Simonds, for petitioner.

WHEELER, District Judge. The bankrupt appears to have had, when making his petition and schedules, an accident insurance policy, on which dues had accrued and had been paid to him to the amount of $37.50, which he had after his petition and schedules were made, and just before signing them. In the schedule calling for cash on hand he said, "None," and in that calling for insurance policies he said, "None," and with the petition and schedule he filed an affidavit stating that he was without means to pay the fees, and could not obtain the money to pay the same. Such a policy, on which nothing had accrued, and which had no surrender value, probably, would not pass to the trustee, and a mere omission of it from the schedules might not be serious; but money in hand received from it would be cash on hand, and that which had accrued due an asset. The schedules appear to have been false, and also the affidavit, whether the money was due and unpaid, or had been paid and was on hand; and the making of them under oath is such an offense under the law as to, by the terms of the law, bar a discharge. This application for a discharge must therefore be denied.

In re SCHILLER.

(District Court, W. D. Virginia. August 26, 1899.)

1. BANKRUPTCY—REVIEW OF REFEREE'S DECISION—PETITION.

A party desiring to have the court of bankruptcy review an order made by the referee must file with the referee his petition for such review, as required by General Order No. 27 (18 Sup. Ct. viii). In default of such petition, the application for review will be dismissed.

2. SAME—MEETINGS OF CREDITORS—NOTICE.

An objection by an involuntary bankrupt to the regularity of a first meeting of his creditors, and to the validity of proceedings had thereat, on the ground that the notices of such meeting were prepared by the referee before the bankrupt's own list of creditors was filed, whereby it resulted that some of the creditors were not notified, will not be sustained when it appears that the bankrupt's list of creditors was not filed within the time limited by the law, and was incomplete and imperfect.

In Bankruptcy.

C. A. McHugh, for bankrupt.

Scott & Staples and A. L. Payne, for creditors.

PAUL, District Judge. In this case the judge of this court is asked to review the action of the referee, G. H. Penn, in overruling the objection of the attorney for the bankrupt to the referee holding the first meeting of creditors on the 15th day of August, 1899. The question certified is thus stated by the referee:

"I, G. H. Penn, one of the referees of said court in bankruptcy, do hereby certify that in the course of the proceedings of said cause before me the following question arose pertinent to said proceedings: Rebecca Schiller, by her counsel, C. A. McHugh, appeared on the 15th day of August, A. D. 1899, at the first meeting of creditors held in my office in the city of Roanoke, state of Virginia, and at the opening of said meeting, and before any business had been transacted, and, stating that he appeared only for that purpose, objected to the regularity and validity of that meeting, and to the election of a trustee, and any other proceedings that might be had thereat, on the ground that the meeting had not been called in accordance with the requirements of the act of congress, in that the notice to the creditors had not been prepared by the referee from the list of creditors supplied by the bankrupt, as provided by section 58 of the act, but had been prepared by the referee before the bankrupt had filed her list of creditors; and that, in consequence thereof, many of the creditors whose names appeared in the list furnished by the bankrupt received no notice of said meeting."

This application for a review of the decision of the referee should properly be dismissed on the ground that the bankrupt, the party objecting to the action of the referee, has not complied with the requirements of rule 27 of general orders and forms in bankruptcy, established by the supreme court (18 Sup. Ct. viii.). That rule is as follows:

"When a bankrupt, creditor, trustee, or other person shall desire a review by the judge of any order made by the referee, he shall file with the referee his petition therefor, setting out the error complained of; and the referee shall forthwith certify to the judge the question presented, a summary of the evidence relating thereto, and the finding and order of the referee thereon."

In considering the question certified, without filing with the referee the petition required by rule 27, it is not to be understood that this important requirement will not be strictly enforced in other cases. Its importance need not be pressed upon the attention of referees and attorneys. In view of the large interests involved, and the daily loss to creditors by delaying a sale of the property of the bankrupt estate, consisting of a very large stock of merchandise, the question certified will be passed upon and settled. In this case certain creditors of Rebecca Schiller, the bankrupt, on the 29th of June, 1899, filed their petition, praying that she be adjudged a bankrupt, and she was so adjudged on the 29th day of July, 1899. The order of reference was to August 15, 1899, and the first meeting of creditors was called for the same day. It was to the regularity and validity of this meeting that the bankrupt, by her counsel, objected, for the reason stated in the certificate of the referee. Section 7, clause 8, of the bankrupt law makes it the duty of an involuntary bankrupt to "prepare, make oath to, and file in court, within ten days, unless further time is granted, after the adjudication, if an involuntary bankrupt, and with the petition if a voluntary bankrupt, a schedule of his property, showing the amount and kind of property, the location thereof, its money value in detail, and a list of his creditors, showing their residence, if

known, if unknown, that fact to be stated, the amounts due each of them, the consideration thereof, the security held by them, if any." What purports to be a schedule made in pursuance of this requirement of the bankrupt law was not made until the 11th day of August, 1899, after the expiration of 10 days from the date of the order of adjudication, which was July 29, 1899, and no further time had been granted. Not only was what is termed a schedule not filed with the referee within the statutory limitation of 10 days, but the paper filed with the referee in scarcely any particular complies with the requirements of the statute. The description given of the property owned by the bankrupt is very general in its terms. Under the head of a list of her creditors, showing their residences, "the amounts due each of them, the consideration thereof, the security held by them, if any," nothing is stated but a list of the names of the bankrupt's creditors and their residences. Thus: "Argus Manufacturing Co., Richmond, Va. Armstrong, Cator & Co., Baltimore, Md. Baras & Rice, Philadelphia, Pa.," and so on, giving a list of more than 100 creditors, with no further compliance with the provisions of the statute than giving the names and residences of creditors. The referee was correct in his decision in overruling the objections of the attorney for the bankrupt on two grounds: First, the list of creditors was not filed within 10 days after the adjudication; and, second, the requirements of the statute were not complied with by giving the amount due each creditor, the consideration thereof, and the security held by them, if any. The decision of the referee is sustained.

In re SISLER.

(District Court, W. D. Virginia. August 25, 1899.)

1. BANKRUPTCY—HOMESTEAD EXEMPTION—EFFECT OF WAIVER.
   Under the laws of Virginia, a written waiver of the right to a homestead exemption, contained in a note or other evidence of debt, though not a specific lien on the debtor's property, is an incumbrance upon it; and a court of bankruptcy has jurisdiction to enforce, against property set apart to a bankrupt as his homestead exemption under the laws of that state, the rights of creditors who hold his notes containing such a waiver of exemption, though they have not reduced their claims to judgment.
2. SAME.
   Where the bankrupt claims a homestead exemption in property surrendered, but debts are proved as to which he has waived the benefit of the exemption laws, the trustee must sell the property claimed as a homestead, or so much thereof as may be necessary, and pay such debts as have the benefit of the waiver; and the residue of the property claimed as homestead, or of the proceeds of sale thereof, will be set apart to the bankrupt.

In Bankruptcy. On review of a decision of the referee in bankruptcy.

Hoge & Hoge, for bankrupt.
Berkeley & Bryan, for creditor.

PAUL, District Judge. In this case the question presented to the court is the right of the bankrupt to have set apart to him, under

the homestead exemption laws of Virginia, his homestead, free from a debt proved in a bankrupt court by a creditor holding notes containing a waiver of the homestead exemption; or, in other words, can such a debt be enforced in a court of bankruptcy against property claimed by the bankrupt as exempt to him as a homestead? The constitution of the state of Virginia (article 11, § 1, p. 48, Code 1887) contains the following homestead provision:

"Every householder or head of a family shall be entitled, in addition to the articles now exempt from levy or distress for rent, to hold exempt from levy, seizure, garnisheeing or sale, under any execution, order or other process, issued on any demand for any debt heretofore or hereafter contracted, his real or personal property or either, including money and debts due him, whether heretofore or hereafter acquired or contracted, to the value of not exceeding two thousand dollars, to be selected by him: provided that such exemption shall not extend to any execution, order or other process issued on any demand in the following cases."

The debt proved in this case by the creditor does not fall within any class of the excepted debts and obligations, and, were it not for the waiver contained in the notes evidencing the debt proved, the bankrupt would unquestionably be entitled to have the property surrendered by him, valued at $771, set apart to him as exempt under the homestead provision of the constitution of the state of Virginia. But section 3647 of the Code of Virginia of 1887 provides that the debtor may waive the benefit of the homestead exemption given by section 1, art. 11, of the state constitution:

"Sec. 3647. Waiver of Exemption; Its Effect; Form of Waiver.—If any person shall declare in a bond, bill, note, or other instrument, by which he is or may become liable for the payment of money to another or by a writing thereon or annexed thereto, that he waives, as to such obligation, the exemption from liability of the property or estate which he may be entitled to claim and hold exempt under the provisions of this chapter, the said property or estate, whether previously set apart or not, shall be liable to be subjected for said obligation, under legal process, in like manner and to the same extent as other property or estate of such person. * * * The following or equivalent words shall be sufficient to operate as the waiver hereinbefore provided for: 'I (or we) waive the benefit of my (or our) exemption as to this obligation.'"

Section 3631, Code Va. 1887, provides how exemption of homestead in real estate is secured, and section 3639 provides how a homestead shall be set apart in personal estate.

"Sec. 3639. How Set Apart in Personal Estate.—Such personal estate shall be selected by the householder and set apart in a writing signed by him. He shall in the writing designate and describe with reasonable certainty the estate so selected and set apart and each parcel or article, affixing to each his cash valuation thereof; and the said writing shall be admitted to record, to be recorded as deeds are recorded, in the county or corporation wherein such householder resides."

The homestead exemption claimed by the bankrupt is in personal property, and he complied with the requirements of section 3639 in designating the same as a homestead, and it is admitted that he is a householder and head of a family.

W. W. Berkeley, administrator of Alexander O'Connor, deceased, proved before the referee a debt for $1,480, the notes evidencing the same containing a waiver of the homestead exemption. The trustee demanded of the bankrupt that he surrender the personal property

claimed as a homestead exemption, but the bankrupt declined to surrender the same. The question as to the bankrupt's right to hold the property as a homestead against a debt containing a waiver of the homestead exemption was by proper proceedings brought before the referee having charge of the case. The referee decided "that as to such claims as have been or may be proved in this matter in which the said George W. Sisler has waived his homestead exemption as provided by the laws of the state of Virginia, that he, the said George W. Sisler, is not entitled to hold as exempt any of the said property set out and described in Schedule B, No. 5, of the petition in this case, therein claimed as exempt, except the one horse, and the tools pertaining to his trade." The referee directed that the property be turned over to the trustee, by him to be sold, and the proceeds deposited in court, to be disposed of as the court might direct. The bankrupt, desiring a review of the order of the referee, filed his petition therefor as provided by rule 27 of general orders in bankruptcy (89 Fed. xi.), and thus the question before the referee is presented to the judge of this court for decision.

The contention of the bankrupt is that a creditor holding a debt evidenced by a note containing a waiver of the benefit of the homestead exemption cannot enforce his debt in a court of bankruptcy against property which the bankrupt has claimed and set apart under the provisions of the homestead law. He bases this claim—

First, on the ground that the creditor at the time of the order of adjudication had obtained no lien on the property by judgment rendered, execution issued thereon, and levied on the specific property claimed to be exempt as a homestead. It is argued by counsel for the bankrupt that, if such a lien had been secured on the property, while a discharge of the bankrupt would have been a discharge of the debt as against him, the lien would survive the discharge, and could be enforced in the state courts, but, there being no such lien, the debt containing a waiver of the homestead exemption is only "a common debt"; that is, a debt in which the exemption is not waived. The position that a debt evidenced by a note containing a waiver of the homestead stands upon the same footing as an open account, or a non-waiver note, in the administration of an insolvent estate, where a homestead exemption is claimed, cannot be sustained. It is true that a note containing a waiver of the homestead exemption does not constitute a specific lien on the property which may be claimed as a homestead, but it does create an incumbrance upon such property. Section 3, art. 11, of the constitution provides:

"Nothing contained in this article shall be construed to interfere with the sale of the property aforesaid, or any portion thereof, by virtue of any mortgage, deed of trust, pledge or other security thereon."

In Re Solomon, 2 Hughes, 164, Fed. Cas. No. 13,166, a creditor held, as in this case, a note containing a waiver of the homestead exemption. Chief Justice Waite in that case said:

"But it is further provided that nothing in the article of the constitution referred to should be construed to interfere with the sale of the property, or any portion of it, by virtue of any mortgage, deed of trust, pledge, or other security thereon. Thus it is made expressly to appear that it was not the intention of

the framers of the constitution to prevent the householder from contracting for the sale or incumbrance of the property. He was not required to hold it absolutely for himself and family. It was to remain entirely under his personal control, to be dealt with in such manner as he saw fit. His right to sell and incumber is as distinctly given as his right to select. If he sells or incumbers before he selects, his power of selection as against such sale or incumbrance is gone. No particular form of incumbrance is specified; that is left to the discretion of the legislature. Now, a waiver of the right to select is, in effect, an incumbrance on the property which might be selected."

While there is not a lien on the property designated as a homestead, it comes into the bankrupt court incumbered by a waiver of the right of the bankrupt to claim the property as exempt.

In Re Solomon, supra, the facts, as stated in the opinion of Chief Justice Waite, were as follows:

"On the 31st of January, 1873, the bankrupt executed to Glazebrook and Thomas, at Richmond, Va., his note for the payment to them, or their order, of the sum of $234.50, at sixty days after date. It contained the following clause: 'I hereby waive the benefit of the homestead exemption as to this debt.' Glazebrook & Thomas indorsed this note to Gibson & Crilly. Solomon was adjudged a bankrupt, on his own petition, upon the 1st of May, 1873. Gibson & Crilly made proof of their claim against the estate on the 24th of May. An assignee was appointed, who, on the 16th of February, 1874, set off to the bankrupt his homestead exemption under the laws of Virginia, without regard to the waiver expressed in the note of Gibson & Crilly. They thereupon filed their petition in the district court, the object of which was to set aside this action of the assignee, so far as it operated to prevent their subjecting the property set off to the payment of their debt in case the remainder of the bankrupt's estate should prove insufficient for that purpose. Their claim for this relief is predicated entirely upon the waiver of the exemption which is contained in their note."

The facts in that case, which arose under the bankrupt act of 1867, and those in the case before us, are so very similar as to make the same principles applicable in both. In that case the court held that a note containing a waiver of exemption must be paid out of the property set apart by the assignee to the bankrupt as a homestead exemption. It is a complete answer to the position taken by counsel for the bankrupt in this case that a note containing a waiver of the homestead exemption is of no higher dignity than one in which the exemption is not waived. It has priority over nonwaiver debts, where the question of a homestead exemption is involved, and must be enforced as required by section 64 (5).

A second ground assigned in support of the position that this court cannot enforce the payment of a debt waiving the homestead against the property claimed by the bankrupt as a homestead is based on section 6 and on section 70 (a) of the bankrupt act of 1898. Section 6 is as follows:

"Sec. 6. Exemptions of Bankrupts.—a 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 in the state wherein they have had their domicile for the six months or the greater portion thereof immediately preceding the filing of the petition."

Section 70 (a) provides:

"Sec. 70. Title to Property.—a The trustee of the estate of a bankrupt, upon his appointment and qualification, and his successor or successors if he shall have one or more, upon his or their appointment and qualification, shall in

turn be vested by operation of law with the title of the bankrupt, as of the date he was adjudged a bankrupt, except in so far as it is to property which is exempt."

It is insisted that by these provisions of the bankrupt act no title to the property claimed by the bankrupt to be exempt under the Virginia homestead law passes to the trustee. That the title to property exempt by state laws does not pass to the trustee in bankruptcy cannot be questioned. Similar provisions to those just quoted from the bankrupt act of 1898 are found in the bankrupt law of 1867. Yet it was held in Re Solomon supra, that, where there was a waiver of the homestead exemption, the property claimed to be exempt as a homestead did pass to the assignee. The error in the argument which insists that the title to the property claimed by the bankrupt as a homestead does not pass to the trustee lies in the fact that such property is not, by the constitution and laws of Virginia, absolutely exempt from the payment of debts. The argument of counsel for the bankrupt applies to such specific property as is exempt under section 3650, Code Va., on which any deed of trust, mortgage, or other writing or pledge made by a householder to give a lien on such property is void as to such property. Section 3655, Id. The distinction between the character of exemption of property given by section 3650 and that of the homestead exemption allowed by the constitution is very clearly stated by the court of appeals of Virginia in Reed v. Bank, 29 Grat. 719. Christian, J., delivering the opinion of the court, says:

"The privilege given by the constitution is a personal privilege, to be exercised by him or not, as he may choose. The constitution does not declare, as does the poor debtors' law, that certain property 'shall be exempt' from levy, etc., but that the householder or head of a family shall be entitled to hold property, to be selected by him, to the value of $2,000. In the former case the law executes itself. It is a part of the public policy of the government to exempt that particular property absolutely from forced sale, and its provisions cannot be waived. But there is no such constitutional declaration that property to the amount of $2,000 'shall be exempt.' On the contrary, the very language used plainly shows that it may be exempt only when the privilege given to the householder or head of a family has been exercised, and the property selected and set apart by him."

The same court, in Linkenhoker's Heirs v. Detrick, in 81 Va. 44, followed the decision in Reed v. Bank. In the Case of Solomon, referred to above, Waite, C. J., says:

"The privilege, so far as it is given by the constitution, is personal to the householder. The language is, 'to be selected by him.' If he neglects to act, no one is authorized by the constitution to act in his place. The case is entirely different from what it would have been if it had been declared that certain specific property should not be sold under execution, etc. In that case the constitution, or a law containing similar provisions, would execute itself, and, as it would be a part of the public policy of the government to exempt that particular property absolutely from forced sale, its provisions could not be waived. It would be beyond the legal power of an officer to levy upon and sell such property."

These decisions firmly establish the distinction between property that, under the laws of the state, is exempt, the title to which remains in the bankrupt, and that which the debtor has the privilege of claiming as a homestead exemption. As to the former, the trustee takes

no title, while as to the latter he takes title where the bankrupt has, in contracting a debt, waived his right to the benefit of a homestead exemption.

Various decisions have been cited by counsel for the bankrupt in support of the position that property claimed as a homestead in Virginia does not pass to the trustee. These decisions have been rendered in construing the homestead laws of other states. The homestead laws of the different states differ so widely in their provisions that decisions interpreting them afford us little or no aid in arriving at a correct conclusion in construing the laws of Virginia pertaining to a homestead exemption. In this case we are guided by the decisions of both the state and the federal courts, so far as the questions under consideration have come before them. These decisions sustain the position of the creditor in this case that his debt, containing a waiver of the homestead exemption, can be enforced in this court against the property claimed by the bankrupt as exempt under the provisions of the homestead law. The court can find no reason for denying the right of the creditor to have the property surrendered by the bankrupt subjected to the payment of his debt. We have seen that this property is not exempt. The debt proved by the creditor is not a lien on this property, and therefore cannot follow it after the discharge of the bankrupt, and be enforced in a state court. The discharge of the bankrupt could be pleaded in the state court as a complete bar to its recovery. It is not a debt that can survive a discharge in bankruptcy. Section 17 (a) provides:

"A discharge in bankruptcy shall release a bankrupt from all of his provable debts, except such as (1) are due as a tax levied by the United States, the state, county, district or municipality in which he resides; (2) are judgments in actions for frauds, or obtaining property by false pretenses or false representations, or for wilful and malicious injuries to the person or property of another; (3) have not been duly scheduled in time for proof and allowance, with the name of the creditor if known to the bankrupt, unless such creditor had notice or actual knowledge of the proceedings in bankruptcy; or (4) were created by his fraud, embezzlement, misappropriation, or defalcation while acting as an officer or in any fiduciary capacity."

The debt in this case is a provable debt, has been duly proved before the referee, and does not fall within any of the excepted classes. It can no more survive a discharge, and be enforced in a state court, than if it were a debt due by open account. To hold otherwise would be to deny the creditor the only remedy he has against the property surrendered by the bankrupt, and which is liable to the payment of his debt. We would turn him out of this court, with no right to resort to any other, without being confronted by the order of adjudication or the bankrupt's discharge, either of which would unquestionably bar a recovery in any tribunal. A further effect of such a holding would be to allow the bankrupt to take out of this court, under a claim of homestead, property surrendered by him, to which he had waived his homestead exemption. The bankrupt would have the property, and the creditor lose his entire debt. In a case where the bankrupt claims a homestead in the property surrendered, and debts are proved, in which the benefit of the homestead exemption has been waived, it is the duty of the trustee to sell the property claimed as

a homestead, or so much thereof as may be necessary to pay debts proved, as to which the benefit of the homestead exemption has been waived. The residue of the property claimed as a homestead, if any, or the proceeds of the sale thereof, will be allowed the bankrupt under his claim of homestead.

The decision of the referee and the order made thereon were correct, and the same are sustained.

In re MEYERS (two cases).

(District Court, S. D. New York. August 24, 1899.)

1. BANKRUPTCY—PARTNERS—SEPARATE INDIVIDUAL PETITIONS—DISCHARGE.
Partners are not entitled to a discharge in bankruptcy, affecting the debts of the firm, when the partnership, as such, is not in bankruptcy, but only the individual partners on their separate voluntary petitions, and when there is evidence of the existence of firm assets not brought into the bankruptcy, or circumstances justifying the inference that there has been a fraudulent concealment of partnership assets.

2. SAME—OPPOSITION TO DISCHARGE—CONCEALMENT OF ASSETS—BURDEN OF PROOF.
On opposition to a bankrupt's application for discharge, where creditors have shown the existence of assets and their disappearance or large shrinkage within a short time before the bankruptcy, the burden is on the bankrupt to account for the diminution of his estate; and, if he fails to give a reasonable and credible explanation, the court will be justified in inferring a fraudulent concealment of assets, such as to forfeit his right to a discharge.

In Bankruptcy. On applications of two bankrupts, Amelia A. Meyers and George H. Meyers, respectively, for discharge.

Weed, Henry & Meyers and S. F. Kneeland, for petitioners.

Black, Olcott, Gruber & Bonynge, Platzch & Strock, and Blumensteil & Hirsch, opposed.

BROWN, District Judge. The above applications for discharge arise in two independent proceedings upon separate voluntary petitions filed respectively on February 11 and February 27, 1899, by the individuals comprising the firm of Meyer Bros. which was engaged for several years in the business of manufacturing and selling garments at 622 Broadway, New York City, and failed on November 27, 1896. The firm affairs were never settled. Nothing after the failure was paid upon the merchandise debts, which amounted to about $55,000. The business was conducted under the exclusive management and control of Abraham Meyers, an insolvent and the husband of Amelia A. Meyers, one of the partners. She herself gave no attention to the firm affairs and was not informed of the details of the business. George H. Meyers, the other partner, acted for a part of the time as salesman, and for part of the time as bookkeeper, but did not exercise any control in the conduct of the business. Abraham Meyers, as general manager, attended to all the finances also; and upon his own account he drew what he liked, not being employed upon any definite salary. In 1896 he drew on his personal account $6,681.53.

Early in February, Abraham Meyers made a statement of the firm's financial condition to Wood's Commercial Agency, showing a surplus of $73,180 on January 2, 1896. The testimony of the bankrupts' expert upon this hearing, is that their books show a surplus on that date of about $29,000, their assets at that time consisting of cash in bank $5,506, fixtures $2,246, merchandise on hand $22,013, and outstanding accounts, deemed good, $23,245, while their indebtedness was, for merchandise $12,886, and for other moneys owing, $11,163. Some further testimony made the goods on hand on January 2, 1896, about $3,200 less than appear on the books, and the cash about $1,800 less; thus reducing the apparent surplus on that date to about $24,000. Of the sum of $23,245, outstanding good accounts on January 2d, about $12,000 was collected prior to the failure on November 27th; so that even if the remaining $11,200 of those accounts were disregarded, there would still be a clear surplus of $13,000 on January 2d, and the indebtedness of about $65,000 without assets upon failure on November 27th, would make a loss of $77,000 between January 2d and November 27th to be accounted for. The deficiency calling for explanation is in reality over $10,000 more than this; that is, over $87,000; since, according to the testimony, the firm borrowed about $22,000 during 1896 from Charles Meyers, Mrs. E. B. Marks and L. Stein; and at the time of the failure the firm paid to them in checks received and in good accounts only about one half the amounts due to them, leaving unpaid the other half, which it is said was released by them, so that their names do not appear as creditors in the schedules.

At the time of the failure on November 27, 1896, a chattel mortgage was given upon whatever remained of the stock of goods on hand and on the fixtures, to one Henry Moss to secure $6,000, which had been borrowed of him on November 10th, and with which a firm note due on that day at the Chemical Bank for the same amount was taken up. That loan was guarantied by Abraham Meyers' brother, Charles Meyers, who has appeared as the attorney of the bankrupts on these proceedings. Soon after the failure, the chattel mortgage was foreclosed, the property was bid in by Charles Meyers for $3,200 or $3,300, and a deficiency judgment entered up for $3,000 in favor of Moss, which appears as a debt on the schedules. Afterwards Charles Meyers settled with Moss. Soon after the foreclosure, Charles Meyers organized a corporation, called the Meyers Bros. Clothing Company, for the sale of the goods bought in and turned over to that corporation, of which Charles Meyers was president, and Abraham Meyers was secretary, treasurer and manager, and George H. Meyers was salesman; the two latter thus holding nearly the same relative positions in the corporation that they held previously in the firm of Meyers Bros. These goods were sold out in the following six or eight months, and the corporation then went out of business, and in 1898 Abraham Meyers destroyed its books of accounts, so that no record evidence was available on this hearing of the amount, value or proceeds of the goods mortgaged and through the sale to Charles Meyers turned over to the corporation; nor could any satisfactory direct testimony on that point be extracted from the witnesses in these proceedings. From what can be gathered, however, from the books and

the expert's testimony, the fixtures and goods remaining at the time of the failure should have amounted to at least $40,000 in value, as will appear from the following items:

Fixtures	$ 2,200
Goods on hand Jan. 2, 1896 (corrected amount)	19,800
Merchandise thereafter bought in 1896	63,000
Cash expended in making up (alleged)	33,000
Store expenses, salaries and traveling	24,000
Total	$142,000
Less goods sold during 1896	62,000
	$ 80,000

Unless a business is conducted at a loss, all expenses must be made good out of sales, and the above items of expense, therefore, enter into the presumptive value and selling price of the goods. Abraham Meyers testifies in a general way that the business was conducted at a loss during 1896; but he says the firm was solvent in July, 1896, and he ascribes the failure to a run on the firm by its creditors in the early part of October. No previous losses or reverses of any kind are intimated; so that up to October the loss, if any, on the sale of about $30,000 of goods up to that time, must have been comparatively small. After that date, the testimony is that sales were somewhat pressed for cash, mostly at 10 per cent. discount, with a few larger discounts on the eve of failure. If however, half of the item of $24,000 for business and store expenses and salaries were deducted as lost, and $23,000 more for additional sacrifices on the sales, amounting to $32,000, in October and November, which is a considerably greater deduction than anything I can find in the testimony to justify, there should still have remained $45,000 in value at the time of failure to be covered by the chattel mortgage, and disposed of in the way above stated, leaving apparently nothing for the payment of $62,000 debts to the general creditors.

In the above estimate, $33,000 has been allowed for labor expended in making up goods during 1896, as that amount stands charged in the "Labor Account" in the firm books. The correctness of this amount has, however, been challenged. The absence of a cash book makes it impossible to verify the correctness of this item as well as others. The evidence is that the goods remaining at the time of failure were almost wholly piece goods, i. e. goods not made up; and if these amounted to $40,000 in value, the other evidence shows that $33,000 could not have been expended in making up the other goods purchased in 1896. Of this sum of $33,000 charged to "Labor Account," the extraordinary sum of $15,895.15 is charged up for the months of October and November. The ledger has apparent reference to some other account book not produced; the testimony is that no cash book was kept; and without a cash book the bankrupts' expert says that the books were not complete, nor proper books of account.

The above facts appear partly from the original examinations of the bankrupts and partly in the testimony taken before the different referees on the reference of the numerous specifications in opposi-

tion to the discharge. From all this testimony, and from the utter failure by the bankrupts to supply any adequate, credible, or intelligible explanation of their alleged loss of assets, and the circumstances and manner of the failure, the inferences which might reasonably and naturally be drawn, and which a jury would be justified in finding, would be that the business of 1896 was fraudulently conducted; that the failure was unnecessary and fraudulent, and designed to cheat the merchandise creditors; that the chattel mortgage given upon the fixtures and a large stock of piece goods remaining at the time of failure, its foreclosure, and the transfer of the goods to the Meyer Bros. Clothing Company, were not merely to secure the debt of $6,000 guarantied by Charles Meyers, but upon a secret trust for the benefit of the bankrupts as well; and that the new corporation carried on by the same hands as before, was but an attorney's device for closing out the firm's stock of goods for the firm's benefit as well as for securing the attorney's claim; that it was in substance a continuation of the firm's business, and was fraudulent as to creditors; and that the present withholding of all definite information in regard thereto, and of the value of the assets transferred or the proceeds derived therefrom, is a concealment of the firm's assets; and that the destruction of its books in 1898, were in presumptive contemplation of bankruptcy, and in order to prevent the true state of the firm's assets on its failure in November, 1896, from being ascertained.

It is not necessary that definite findings to the above effect should be here made; though, as I have said, I think they would be justified. But the general situation disclosed is such as makes it clearly improper to grant a discharge in either case, upon these independent and merely individual proceedings by the two partners. The petitions ask a discharge from individual and from co-partnership debts. No individual debts are stated; all the debts in each petition are stated to be firm debts only. No adjudication of the firm as a bankrupt is asked, nor could such an adjudication be made without a formal application therefor, and the presence of both partners in the same proceeding. Where there are absolutely no firm assets, separate proceedings may be valid, and a discharge of each partner separately may possibly be had, because the firm debts are several as well as joint. But where there are firm assets, they must be duly administered in bankruptcy in a single proceeding; and the right to a discharge is an incident to that single proceeding and to the administration of all the assets, whether firm or individual, according to the provision of law in such cases. Rule 1 of this court calls attention to this precaution, requiring all petitions like the present to state whether or not there are firm assets. The same caution has been frequently repeated from the bench. These petitions state that there are no firm assets. The regularity of these separate individual proceedings, and the authority of the court to grant a discharge from co-partnership debts on such separate proceeding, hinge upon the truth of that allegation. The proceedings are essentially independent. Different trustees have been appointed in them. But neither trustee represents the firm, or would have any authority to collect or to receive any firm assets. By section 29 of the bankrupt act, conceal-

ment of assets from the trustee is made an offense, and it would bar a discharge under section 14. But in individual proceedings like these, a concealment of firm assets would not fall within section 29, because firm assets do not belong to the individual estate; and the individual estate is all that either trustee in these proceedings represents. Where firm assets exist, the only discharge that could be granted in an individual proceeding would be from individual debts only; and here there are no such debts.

This branch of the case turns, therefore, upon the fact whether there are firm assets or not, or such a reasonable inference that there are firm assets as to require opportunity to be given to creditors to collect them through a firm trustee in bankruptcy. The evidence on this point shows (1) a small balance of $5 to the firm's credit in the Chemical Bank. If there were nothing else, possibly this might be deemed too insignificant to be regarded. But there are (2) about $11,000 of unpaid accounts, which were outstanding on January 2, 1896, and then deemed good; and also about $1,800 of unpaid accounts on sales in 1896, which were not paid up to November 27th, and according to the testimony, have not been since disturbed.

It is contrary to common experience that out of so considerable an amount of recent overdue credits, owed by three or four scores of debtors, nothing whatever should be afterwards collected. The presumption is that such accounts are of some value, and the burden of proof is upon the bankrupts, in maintaining the regularity of separate petitions like these, to show satisfactorily that these apparent assets are actually worthless. This may be difficult to prove; but in filing individual petitions only, the petitioners voluntarily undertook that burden, and must successfully support it. On the hearing in these cases no competent evidence on that point has been given. The expert's reference to the remarks of Abraham Meyers as to the value of these accounts, is not evidence, and is not entitled to any weight.

More important are (3) the assets of the firm, presumptively to a large amount, on hand at the time of the failure, and disposed of in the manner above described, in part at least presumptively in fraud of creditors. When, as in the case of this firm, a large shrinkage or disappearance of assets within a short period preceding failure cannot be explained in any rational or intelligible manner, the inference is justified of a fraudulent withdrawal and concealment of assets. The facts above referred to are abundant to call for explanation, and to throw the burden of proof upon the bankrupts to exculpate themselves from the reasonable inference and presumption of a fraudulent transfer and concealment; and, where the creditors have proved the existence of large assets, the burden then falls upon the bankrupts to account for their disappearance. Creditors have the undoubted right to ascertain the existence of such assets, and to collect them through an accounting by the persons in apparent possession of them, if proved to exist, through appropriate proceedings therefor by a trustee in bankruptcy. That trustee, as I have said, must be a firm trustee, appointed upon an adjudication of the firm as

bankrupt, in a joint proceeding to which both partners are parties, whether voluntary or involuntary.

Such proceedings to enforce the rights of creditors could not be had through either of the trustees in these individual proceedings; and if the bankrupts were to be now discharged from the firm debts as prayed for, no future firm trustee could be appointed to enforce the rights of creditors, because no further proceedings against the firm could be instituted, there being no longer either debtor or creditor. A discharge of the bankrupts now, would therefore be incompatible with the rights of creditors secured to them by the bankrupt act, to receive whatever may be obtained from the outstanding accounts, or rescued through a firm trustee from presumptive frauds.

The applications for discharge in these individual proceedings should, therefore, be denied. Under circumstances like the present showing presumptive assets, any such relief must be sought in a firm proceeding, and upon an adjudication of the co-partnership as bankrupt, in which a trustee of the firm assets may be appointed, through whom the rights of creditors may be preserved and enforced. Until then the questions of law under sections 14 and 29 do not properly arise.

ELLIPTICAL CARBON CO. v. SOLAR CARBON & MANUFACTURING CO. et al.

(Circuit Court, W. D. Pennsylvania. May 13, 1899.)

PATENTS—INFRINGEMENT—ELECTRIC ARC LAMPS.

The Parmly patent, No. 540,800, for an electric arc lamp, which covers pairs of carbon pencils possessing certain peculiar dimensions and capabilities, construed, and *held* not anticipated, valid, and infringed.

This was a suit in equity by the Elliptical Carbon Company against the Solar Carbon & Manufacturing Company and others for alleged infringement of a patent for an electric arc lamp.

Charles A. Brown & Cragg, for complainant.

Thomas B. Kerr, for defendants.

ACHESON, Circuit Judge. This suit is for the infringement of letters patent No. 540,800, dated June 11, 1895, granted to Samuel P. Parmly, upon an application filed October 26, 1891.

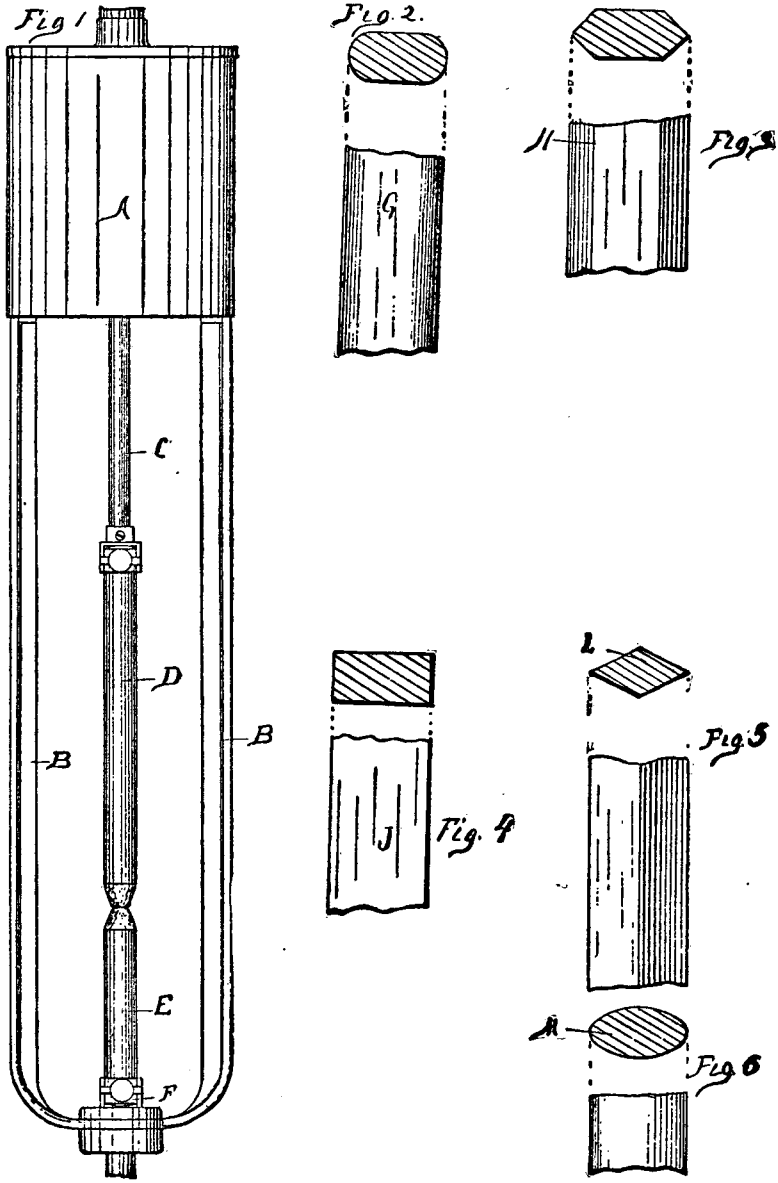
"The invention," the patent recites, "relates to arc lights, and has for its object to provide a double-service or long-burning arc lamp which shall contain but a single pair of electrodes, and shall possess certain advantages with reference to the establishment and maintenance of the arc and with regard to preventing shadows in the light, as hereinafter set out."

The specification, after referring to the attached drawings, states:

"The groups here illustrated are each of them in the general form of an ellipse in cross-section, or a plate having such a cross-section as would constitute a form having a width substantially one-half its length. The cross-sectional area of these groups is also substantially equal to twice the cross-sectional area of an ordinary round carbon having a diameter equal to the width of the cross-section of my proposed carbon."

The specification further states:

"The preferred form of carbon is substantially that shown in Figs. 1, 2, and 6; or, in other words, a carbon substantially elliptical in cross-section, and having a cross-section whose width is substantially one-half of its length, with rounded or flattened ends. The central transverse diameter may be extended or shortened; as, for example, in the two forms shown in Figs. 2 and 6.



"I have found by a long course of experiments that where a carbon formed substantially as suggested is employed in a lamp, and placed in opposition to a similar carbon, the tendency is to burn in something like the form indicated in Fig. 1, and also that both carbons or electrodes retain a continuously heated end, so that, as the arc travels along the opposed edges, which it must do, there is no occasion for it to attack cold material, and hence it is possible to keep a comparatively uniform arc, although the same travels back and forth across the edge of the opposed electrode. A satisfactory arc is obtained without material localization by a construction of electrodes in which the arc is permitted to travel back and forth."

The specification, after referring to different forms of carbon, states:

"Such change of form would not take a device out of the scope of my invention so long as such changed form of carbon permitted the arc to travel back and forth without material or substantial localization thereof." Again it is said: "Many other forms of carbons could easily be devised which would be, in effect, the same as those here illustrated. These several forms, however, when so used, keep the arc in motion for the most part and to a very great degree avoid localization of the arc."

The evidence, I think, shows the sale by the defendant company of pairs of carbons elliptical in cross-section, of the dimensions stated in the patent in suit, and possessing the advantages and operating in the manner therein described. The proofs, in my judgment, are sufficient to make out the charge of infringement, although it is not shown that the defendants make, or sell, or use arc lamps. The claims of the patent are for pairs of carbon pencils possessing certain peculiar dimensions and capabilities, for burning in electric arc lamps. Now, undoubtedly, the carbons manufactured and sold by the Solar Carbon & Manufacturing Company are intended for such use. There is not a particle of evidence to show that the defendants' carbons are intended for any other purpose, or that they are capable of any other use.

I am not able to discover in the prior patents or in the Dredge publication any anticipation or disclosure of the invention of the patent in suit. Nor am I persuaded that the Parmly invention here in question is lacking in patentable novelty or usefulness. Under all the proofs the court would not be justified in holding that the carbons of the patent in suit do not differ in arc action from the carbons of the prior art. The weight of the evidence, I think, requires the finding that the carbons of the patent in suit produce a satisfactory long-burning electric arc light in which the arc travels back and forth along the opposed edges of the two carbons continuously, without extinction, and without material localization.

The defense of prior use has received careful attention. The use at the Stanton street station, in the city of New York, by the United Electric Light & Power Company, has been most strongly urged as anticipatory. The evidence here comes nearest to showing prior use. My conclusion, however, upon this branch of the case, after the most serious reflection, is unfavorable to the defendants. The preliminary statement of Parmly in the interference between him and Hockhausen, which is one of the defendants' exhibits here, carries back the invention of the patent in suit to the 15th day of February,

1890. The earliest telegraphic order from the United Electric Light & Power Company to the Westinghouse Company for "half-width carbons" is dated February 14, 1890. The telegraphic order from the Westinghouse Company to the Washington Carbon Company is dated February 17, 1890. The description in this latter order is, "10,000 9 1/2 in. 1 in. carbons 7/16 in. thick, pointed same as wide carbon." No part of this order, it would seem, was filled until the succeeding month of April. Mr. Baker testifies that he and Mr. Walter, about February 9, 1890, used carbons one inch wide, made by splitting lengthwise carbons which were nine inches long, two inches wide, and seven-sixteenths of an inch thick. Baker and Walter differ as to the finished shape of the carbons they thus made. That they are both at fault in recollection is indicated by the order of February 17th to the Washington Carbon Company. Certainly the carbons furnished by that company were rectangular in cross-section, and were one inch in width by seven-sixteenths of an inch in thickness. Now, in one part of his testimony Mr. Baker states that "the carbons which were furnished by the Washington carbon factory were practically the identical carbons in shape as those made by me." The carbons so made and used by Baker and Walter did not give good results. They were unsatisfactory. They were not made with reference to the principle of Parmly's invention. If the proportions of his carbons were even present (which is not satisfactorily shown), it was without any intelligent appreciation of the fact, or of the advantages to be thereby secured. In fact, the advantages of the Parmly invention were not there realized. Upon the whole I am of opinion that no one of the defenses is sustained by the proofs, and that the plaintiff is entitled to relief. Let a decree be drawn in favor of the plaintiff.

WAY v. McCLARIN.

(Circuit Court of Appeals, Third Circuit. May 9, 1899.)

No. 25.

1. PATENTS—INVENTION.

Where a manufacturer of sweaters undertook to devise a substitute therefor, for use in bicycle riding, which should be free from the disadvantages of increased clothing over the shoulders, neck, arms, and trunk, *held*, that there was no invention, but merely the exercise of skill in the art, in devising a chest and neck protector, consisting of a collar fastening at the back, with a flap depending in front, and united to the lower edge of the collar for a portion only of the width of the flap.

2. SAME—CHEST PROTECTORS.

The Way patent, No. 593,954, for chest and neck protectors, is void for want of patentable invention.

91 Fed. 663, affirmed.

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

Joseph C. Fraley, for appellant.
E. H. Hunter, for appellee.

Before ACHESON, Circuit Judge, and BRADFORD and BUFFINGTON, District Judges.

BUFFINGTON, District Judge. In the court below John Howard Way, the appellant, filed a bill against George D. McClarin, charging infringement of the first and third claims of letters patent No. 593,954, granted to said Way on November 16, 1897, for a chest and neck protector. The court below was of opinion the patented device lacked patentability, and entered a decree dismissing the bill. 91 Fed. 663. The entry of such decree is here assigned for error.

Of such alleged error the appellant has not convinced us. Conceding the protector of the appellant was in itself novel, and also proved useful, yet to warrant the grant of a patent monopoly thereof, it must also involve invention. Does the device in question meet this requirement? It is to be observed that the idea of a combined neck and chest protector was not original with Way. What he did was to add a new member to a general class. Moreover, his protector was not the result of experiment, the final step which overcame recognized difficulties or filled a known want. There had been no especial, if, indeed, any, call whatever for such an article. The fact is that Mr. Way was a manufacturer of knitted goods, he found his sales of sweaters were diminishing, and he sought for some article to supply their place. The idea occurred to him of making a garment, adapted to be knitted, which would form a cheap and efficient substitute for sweaters. The originality was in the idea of appropriating and adapting chest and throat protectors in his line of work, rather than in inventing a device embodying such idea. The mere conception of the original idea at once suggested to him, as one skilled in his calling, the feasibility of, and the means for embodying it in, the device in question. It would seem to us, not only from Mr. Way's testimony, but from the nature of the device, and its relation to the particular industry involved, that if a customer had ordered the appellant, or any other person skilled in knitted work, to make a knitted chest and throat protector, and had given no further directions, there can be little, if any, doubt, that they would have produced in substantial form just what Mr. Way is said to have invented. When once such an article was called for, such a want made known, the ordinary, to be expected ability of one skilled in such line met the demand. The device, then, was the product of the skill, judgment, and adaptability incident to that art, and workers therein, rather than an original step outside the path of natural development. It is the mere adaptation by the art of skill already possessed to the mechanical and technical solution of a new draft on its resources. When existing skill meets such demand, there is no exercise of the higher faculty of original, creative invention. "It is," as was said in Hollister v. Manufacturing Co., 113 U. S. 59, 5 Sup. Ct. 717, "but the display of the expected skill of the calling, and involves only the exercise of the ordinary faculties of reasoning upon the materials supplied by a special knowledge, and the facility of manipulation which results from its habitual and intelligent practice, and is in no sense the creative work of that inventive faculty

which it is the purpose of the constitution and the patent laws to encourage and reward."

So regarding the decree before us, we are of opinion the decree below was rightly entered. The appeal is therefore dismissed, at the cost of the appellant.

SPRINGFIELD FURNACE CO. et al. v. MILLER DOWN-DRAFT FURNACE CO. et al.

(Circuit Court, E. D. Missouri, E. D. June 26, 1899.)

No. 4,075.

1. PATENTS—ANTICIPATION BY FOREIGN PATENT.
   If the description and drawings of a foreign patent are sufficiently full, clear, and exact to enable persons skilled in the art or science to which they relate to readily practice the invention of a subsequent United States patent, then the latter patent is void because of anticipation.
2. SAME—DOWNWARD AND UPWARD DRAFT FURNACES.
   The Hawley patent, No. 447,179, for an improvement in combined downward and upward draft furnaces, discloses no patentable invention, in view of the prior state of the art, except what may be involved in the zigzag arrangement of the bars of the upper grate, and as to this feature it was anticipated by the Barlow, Edmeston & Beeley English patent of 1868.

This was a suit in equity by the Springfield Furnace Company and another against the Miller Down-Draft Furnace Company and others for alleged infringement of a patent.

B. F. Rex and A. C. Fowler, for complainants.

Louis K. Gillson and Emil Starek, for defendants Miller Down-Draft Furnace Co. and W. H. Miller.

Bakewell & Cornwall, for defendants Richard Garstand and Shultz Belting Co.

ADAMS, District Judge. This is a suit for an alleged infringement of letters patent of the United States No. 447,179, dated February 24, 1891, granted to Melville C. Hawley, for a new and useful improvement in furnaces. There are three claims in the patent, the first of which only is in controversy here. That reads as follows:

"In a combined downward and upward draft furnace, the combination of the lower upward-burning grate, an upper downward-burning grate, an intermediate combustion chamber and escape flue leading from said combustion chamber, the bars in said upper grate being spaced widely apart as described, and at each end thereof connecting with the water chamber, in turn connected with the boiler, and the bars in said lower grate being spaced closer together than are the bars of said upper grate, substantially as described."

Claim 2 of the patent differs from claim 1 only in the addition of the element of having the bars in the upper grate spaced widely apart, and forming a series of zigzag spaces; in other words, the zigzag arrangement of the bars is the distinguishing difference between claim 2, which is not alleged to have been infringed in this case, and the first claim, which is alleged to have been infringed. The defendants have not employed the zigzag arrangement at all, and hence, if the first claim is limited to a zigzag arrangement of the bars of the upper grate, the defendants, not employing such arrangement, are clearly not guilty of infringement. It is contended that because the

words "as described" appear immediately after the element respecting the bars in the upper grate being spaced widely apart in the first claim, and because the drawings referred to show the zigzag arrangement, and the description of the patent deals with this zigzag arrangement, therefore the reference to the description and drawings in claim 1 necessarily makes the before-mentioned zigzag arrangement an element of that claim. A strong argument has been made, not only from the language of the specifications and claims, but also from a consideration of the contents of the file wrapper, that complainants' invention, as disclosed in the first claim, as well as the second, is limited to the zigzag arrangement of the bars of the upper grate, and it may be that such is the true construction, but I have reached so satisfactory a conclusion upon other phases of the case that I will not express any positive opinion as to whether the claim in controversy is limited as claimed. There are several patents and publications pleaded in this case as anticipations of the invention of the patent in suit, and among them is the English Barlow, Edmeston & Beeley patent of 1868, and it is contended that all the elements of claim 1 of the patent in suit are found in this English patent. A brief consideration, therefore, of this contention is necessary. Claim 1 of the patent in suit is for a combination of elements "in a combined downward and upward draft furnace," as follows: (1) A lower upward-burning grate; (2) an upper downward-burning grate; (3) an intermediate combustion chamber; (4) an escape flue, leading from the combustion chamber; (5) the bars in the upper grate spaced widely apart as described; (6) said upper grate connected at each end thereof with a water chamber, in turn connected with the boiler; (7) the bars in the lower grate spaced closer together than are the bars in the upper grate. After a careful scrutiny of the nature, description, and operation of the invention, as stated and shown in the English patent referred to, I am satisfied that all the elements of the claim involved in this suit are there found, operating substantially in the same way, and calculated to produce the same results. It was claimed in the argument for complainants that the particular novelty found in the patent in suit consisted in spacing the water bars of the grate "widely apart" so as to permit the partially burned fuel fed onto that grate to fall through the spaces, drop upon the lower grate, and thus feed the fire upon it, and that this particularly novel feature of complainants' patent is not found, or its invention described, in the English patent referred to. It seems to me that this feature, namely, the wide separation of the water bars in the upper grate, is fairly disclosed in the drawings of the English patent, and is also necessarily involved in the operation of the device as described in that patent. The function which might be discharged by the widely-separated bars of the English patent is obviously the same as that claimed to be performed by the widely-spaced bars of the patent in suit, and, if the same is not as specifically described in the English patent as it might be, it is obviously because the operation of the combination there disclosed was then well known to the art, and needed no description. It appears that in the Robinson patent in evidence—the same being an English patent of 1854—the importance of wide

spacing of the bars of the upper grate was fully appreciated, and its utility as a device for feeding the fire on a lower grate was then well known. It is true, the Robinson patent combined a plurality of downwardly-burning grates, and, of course, located the draft flue below them, while the patent in suit combines one down-draft with an up-draft grate, and locates the escape flue between them. This difference in construction involves but a duplicating of the downward-burning grates; otherwise it seems similar in principle to the invention of the patent in suit,—enough so, at any rate, to afford valuable information in ascertaining the state of the art. A portion of the specification in the Robinson patent reads as follows:

"The coal or other fuel is supplied to the top or upper tier, and the bars or tubes are so arranged that the spaces between them are wider than in the next tier, and that is also wider than the spaces in the tier below, so that the fire passing through the top or first set of grates will fall on and operate for the time on the second set, and then fall through to the third, and so on. The air necessary for combustion is also supplied at the top or upper part of the apparatus above the fire, instead of under it as heretofore. By which contrivance I obtain a downward draft or current through the whole series of gratings, which causes the smoke from the top or green fuel to pass through its own and also through the red fires of the succeeding tiers of grates where it will be consumed."

It thus appears that the thought which is claimed to have actuated the patentee of the patent in suit, and the description of the operation of the device, were public property many years before the Barlow, Edmeston & Beeley patent was granted, and for that reason it was unnecessary for the patentee in the last-mentioned patent to describe the operation of the device of his patent. In the Robinson patent it was made known to the world that coal would fall through the upper grate when the bars forming it were spaced widely apart, and that so falling upon the lower grate it would operate upon the grate underneath. In the light of the teaching of this Robinson patent, it cannot be said that the patentee in the Barlow, Edmeston & Beeley patent made a fatal omission in not describing the operation of the device, in so far as that device is involved, in the plea of anticipation in this case. Following the construction of the Barlow, Edmeston & Beeley patent, and certainly when the same is supplemented by the description of the invention of the Robinson patent, I have no doubt that any person skilled in the art could make and use the device of the complainants' patent. But these English patents are not all that is relied upon by the defendants in this case. There appeared in an English journal called the Practical Mechanics' Journal, published in London in 1857, a description of a furnace called "Robinson's Duplex Furnace." That part of the description which is apposite to the present inquiry is as follows:

"In it there are two separate grates, one above the other. The upper one is formed of a series of tubes opening at their inner ends into the boiler, and at their front ends into a water space, through which the boiler water continually and rapidly circulates. It is this upper grate only which is fired, and, a down draft of air being passed from the upper fire door, the gaseous matter from the green coal consumed on the upper bars is passed right through this mass of fuel. Whatever gases escape unconsumed are then burnt from the flame of the lower grate. The lower grate, formed of common rocking bars, is entirely fed by the half-consumed fuel falling from the upper grate, and, as the

flame from this source ascends, it meets the downward-burning fire from the upper grate, and the joint draft current passes through the flues in the usual way."

A cut is found in connection with this description illustrating the parts of the described device and their operation. From this description and cut it seems to me that the device of the patent in suit is not only obvious in a general sense, but is quite clearly pointed out in every material particular. They point out clearly and distinctly the use of the downward and upward burning grates, the intermediate combustion chamber, the feeding of the fire on the lower grate by the dropping of the half-consumed fuel from the upper grate. The cut clearly suggests the wider spacing of the bars of the upper grate than that of the lower grate; and the function to be discharged by the two, as particularly described, in my opinion, requires, as a physical necessity, the wider spacing of the bars of the upper grate. Without such spacing, manifestly the half-consumed fuel could not fall through the upper grate, and lodge for complete combustion on the lower grate. The description of the elements of the English patent of 1868, and the detailed explanation of their purpose, operation, and results found in the description and drawings of that patent, certainly when supplemented by the description found in the Robinson English patent of 1854, are, in my opinion, so full, clear, and exact as to enable any person skilled in the art or science to which they relate to readily practice the invention of the patent in suit. This is the criterion to determine whether a foreign patent is an anticipation of one granted by the United States. Hanifen v. Godshalk Co., 28 C. C. A. 507, 84 Fed. 649; Seymour v. Osborne, 11 Wall. 516; Simonds Rolling-Mach. Co. v. Hathorn Mfg. Co., 93 Fed. 958.

There are many patents and publications shown by the proof in this case, other than those already alluded to, which, with them, so illustrate the prior art, as, in my opinion, to clearly show that no patentable invention is involved in the device of the patent in suit, except that which may be involved in the zigzag arrangement already referred to. On the whole, I am of the opinion that the prior art shows that there is no patentable invention in complainants' device, unless the same is limited to the zigzag arrangement of the bars of the upper grate; and that, if there was any such invention, a complete anticipation has been shown. The bill must, accordingly, be dismissed.

JOHNSTON v. WOODBURY.

(Circuit Court, N. D. California. August 7, 1899.)

No. 11,935.

1. PATENTS—INVENTION—ORE CONCENTRATORS.

In ore concentrators of the type having an inclined endless belt, carried by, and having a longitudinal movement upon, a frame to which a lateral movement is imparted, it was but a slight and formal advance in the art, involving no patentable invention, to construct a machine with the supporting strips always at a slight inclination from the vertical, and capable of adjustment to change the inclination until the even distribution of the

pulp over the belt surface was secured, in place of an old machine having vertical supports susceptible of adjustment to the desired inclination.

2. SAME.

The Johnston patent, No. 490,849, for an improvement in ore concentrators, is void, in view of the prior state of the art, for want of patentable invention.

This was a suit in equity by George Johnston against George E. Woodbury for alleged infringement of a patent for an improvement in ore concentrators.

John H. Miller, for complainant.
Wheaton & Kalloch, for respondent.

MORROW, Circuit Judge. This is a suit for the infringement of letters patent of the United States No. 490,849, granted to the complainant, George Johnston, January 31, 1893, for an ore concentrator. Complainant claims to be the sole owner of said letters patent, and of all rights and privileges by them granted covering the United States and its territories, and alleges that great pecuniary benefit and advantage have accrued to him and his licensees from the exclusive possession and enjoyment of the privileges of said letters patent; that the respondent, George E. Woodbury, is making, using, and selling ore concentrators which embody plaintiff's patented invention, and are infringements thereof; that complainant has suffered great and irreparable injury by reason of said infringements, and therefore asks for an injunction restraining the respondent and his agents and employés from further acts of infringement. The class of ore concentrators to which complainant's invention, as contained in letters patent No. 490,849, relates, is of the type having an inclined endless belt, carried by, and having a longitudinal movement upon, a frame to which a lateral movement is imparted. Finely-crushed sulphurets, mixed with water until in the condition of a watery pulp, are fed to the surface of the belt, and carried up the incline to a point where a sufficient supply of water is met. The combined lateral and longitudinal movement of the belt and the agitation of the pulp and water thus produced cause a separation of the pulp, the sulphurets and heavier precious particles sinking to and contacting with the surface of the belt, while the water and waste material run down the incline, and escape at the lower end of the concentrator. The sulphurets are carried with the belt up the incline, around the guide roller at its upper end, and down through a water tank below, where they are washed off and deposited. Complainant specifies his improvement to consist in a novel manner of connecting the belt frame carrying the moving belt to the stationary main frame, so as to produce an oscillatory motion of the former; also, in means for changing the degree of oscillation given to such frame, in a flexible connection for the shaft which gives the belt its "uphill" motion, whereby a rigid shaft is enabled to impart motion to gearing which is carried by and oscillated with the belt frame, and in the construction of the water box, or distributor. The accompanying drawings illustrate the mechanism, and are described by complainant as follows:

(No Model.) 2 Sheets—Sheet 1.

G. JOHNSTON.

ORE CONCENTRATOR.

No. 490,849. Patented Jan. 31, 1893.

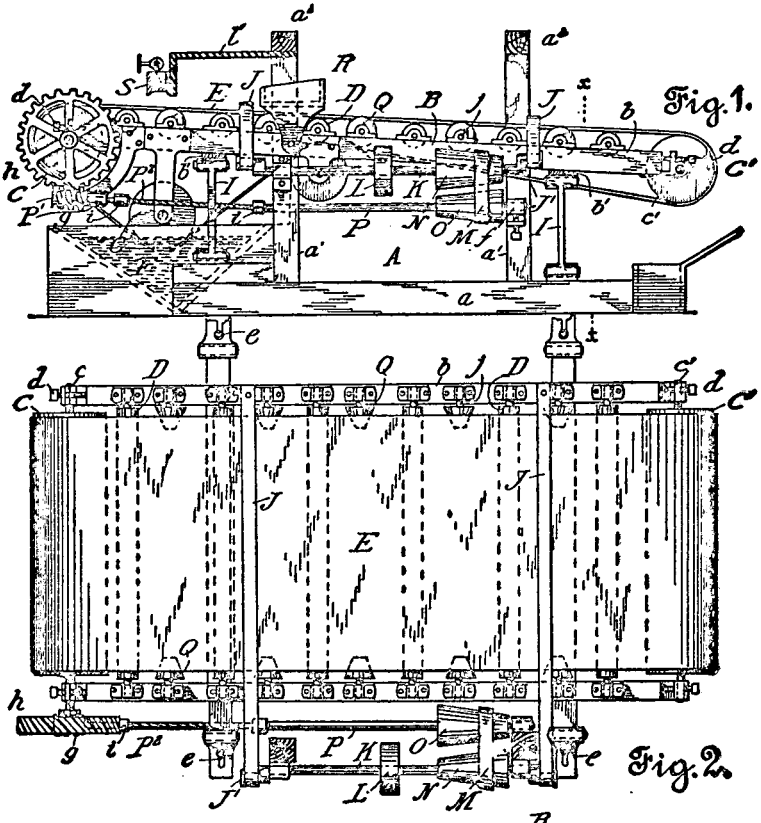


Fig. 1.

Fig. 2.

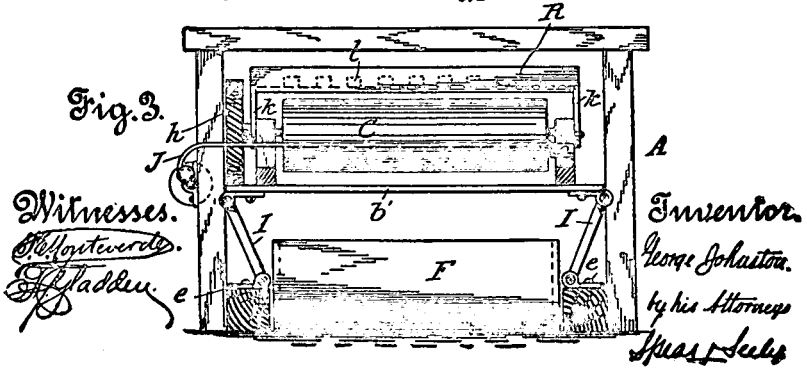


Fig. 3.

Witnesses.
E. Montgomery.
E. L. Madden.

Inventor.
George Johnston.
by his Attorneys
Thos. L. Sculy

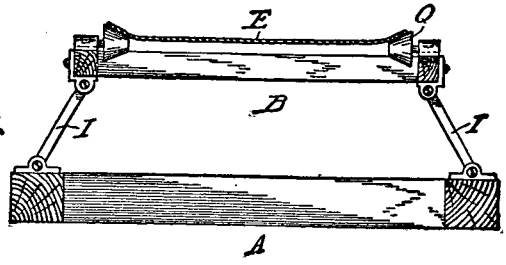
(No Model.) 2 Sheets—Sheet 2.

G. JOHNSTON.

ORE CONCENTRATOR.

No. 490,849. Patented Jan. 31, 1893.

Fig. 4.



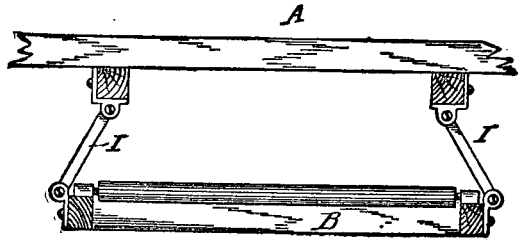


Fig. 5.

Fig. 6.

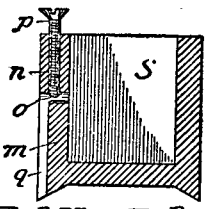
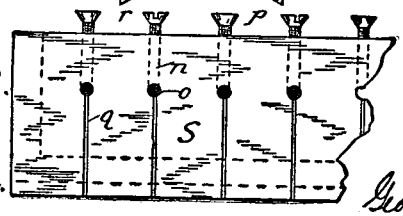


Fig. 7.



Witnesses.
H. Wontevenda.
A. Gladden

Inventor.
George Johnston
by his Attorneys.
Spear & Sibley

"Fig. 1 is a side elevation of my concentrator. Fig. 2 is a plan view, with the pulp and water boxes removed. Fig. 3 is a cross section on the line x, x of Fig. 1. Fig. 4 is a cross section to illustrate a modification in the manner of connecting the supporting links. Fig. 5 represents another modification. Fig. 6 is a cross section of the water box. Fig. 7 is a front elevation of the same. A represents a stationary supporting frame of any suitable construction, but shown here as consisting of longitudinal sills, a, a, uprights a^1, a^1, and transverse beams, a^2, a^2. B is the inclined oscillating belt frame composed of longitudinal side beams, b, b, connected by cross braces, b^1, b^1, and at the ends by the guide rollers, C, C^1, which are journaled in movable bearings, c, c^1, connected to the beams, b, b, and adjustable by means of screws, d, in order to tighten or loosen the ore belt, as may be required. A series of rollers, D, is journaled in the frame, B, over which, and around the rollers, C, C^1, passes the ore belt, E. There are some features in the construction of this belt which will be hereinafter described, but at this point it is sufficient to say that it is made of suitable flexible material, such as canvas, and may be provided with riffles on its surface, if desired. The water tank, F, is situated at one end of the main frame below the high end of the belt, and a guide roller, G, is journaled in hangers suspended from the belt frame, so that the roller will dip into the tank, and carry the belt with it. The belt, after leaving the tank, passes over another guide roller, H, which directs its course to the end roller, C^1. I have termed the lateral motion of the belt frame and belt an oscillatory motion, to distinguish it from the ordinary horizontal side shake, as well as from the movement produced by mounting the belt frame upon base rockers. The horizontal side shake is ordinarily produced by supporting or suspending the belt frame by vertical swinging rods, having a parallel motion, by means of which the surface of the belt maintains a constant horizontal plane as it shakes. I support or suspend my belt frame by links, I, which may be either rigid bars or wooden or metal springs. These links are pivoted to the main frame and to the belt frame, and are placed at an angle to one another (Fig. 3), so as to swing with a nonparallel motion. Either or both the pivot bearings for these links may be made adjustable, as shown at e, in order that the angle may be changed, and a greater or less variation from the horizontal plane be given the belt. In Fig. 3 I have shown these links as tending to converge downwardly. The effect of their side swing is to give the belt a swinging motion on an upward curve. But in Fig. 4 I have shown the links as tending to diverge downwardly, in which case the swing of the belt is on a downward curve. In other words, any one point on the surface of the belt moves in an arc, the direction of whose curvature relatively to the horizontal depends upon the convergence or divergence of the links, the amount of movement depending upon the angle at which the links are placed. The modification shown in Fig. 5 will be readily understood without detailed explanation. It consists simply in suspending the links from the upper part of the main frame, instead of supporting them upon its lower part. The angular relations of each pair of oppositely placed links are preserved, and the results obtained thereby are precisely similar to those just described.

"The movement of the upper part of the belt, when the links are arranged as shown in Fig. 3, is like that of a belt supported upon rockers working upon a base; but there are important advantages attending my construction. Where rockers are employed, the amount of transverse movement out of the horizontal given to the belt is constant and unchanging, because it depends upon the curvature of the rockers and the throw of the crank which operates them, and these are fixed at the time of construction. In my device, the adjustment of the links to different angles enables me to change, increase, or diminish the vertical movement of the belt within limits only fixed by the amount of slide that can be given at the pivotal connection of the links. Another advantage is that the amount of lateral swing on a curve, given to the roller suspended in the water tank, is very much greater than can be given such a roller by means of a rocker which works upon a pin at its contact point, where the motion is very slight. I am thus enabled to more thoroughly wash the belt in the tank, and more effectually to clear it from the sulphurets, some

of which might otherwise escape, and be washed off by the water flowing down the incline, and lost. The lateral oscillation of the belt frame is imparted by pitmen, J, connected to cranks, J^1, upon the driving shaft, K, which is journaled in bearings upon the stationary main frame. The pitmen extend across the belt, and are connected to the side beam of the belt frame. The shaft, K, which carries the driving pulley, L, is connected by a belt, M, running on two cone pulleys, N, O, to the counter shaft, P, which is the driving shaft for giving the longitudinal or 'uphill' movement to the belt. By using these cone pulleys, I am enabled, by shifting the belt, M, to change the speed of the shaft, P; and to accomplish this easily, and at the same time provide a belt tightener, I journal the shaft, P, in adjustable boxes, f (Fig. 1), by means of which the strain on the belt may be increased or diminished, as required. The shaft which gives the longitudinal motion to the belt is composed of two parts, P, P^1, the latter being journaled in a bearing in the belt frame, and having a worm, g, engaging with a screw gear wheel, h, on the journal of the driving roller, C. As the main part, P, of the shaft is journaled in the stationary main frame, while the part P^1, driving roller, and gearing must swing with the belt frame, a length of flexible shafting is interposed, and connected by couplings, i, i, to the two parts of the shaft, P. Any kind of flexible shafting may be used, but I prefer to employ a sufficiently stiff piece of wire rope or cable, which is well fitted for the purpose. Journaled in the sides of the belt frame, and alternating with the rollers, D, is a series of cones, Q, mounted upon short stub axles, j. (See Fig. 4.) The purpose of these is to turn up the edge of the belt as it passes over the rollers, D, and thus form a continuous flange to retain the pulp, and prevent overflow at the sides. Such cones have been used before for the same purpose, but have always been formed with the rollers, D. The result was that the difference in speed, produced by the difference between the diameters of the roller and the cone, would cause a drag on the belt, and its consequent wear. By making the cones separate and independent, both cones and rollers take simply the speed of the belt, and there is no unequal strain upon the latter. R represents the pulp box supported by standards, k, on the belt frame, and shown as provided with a series of orifices, l, in front, to distribute the pulp to the belt.

"I have heretofore referred to the belt as composed of canvas or like textile material. In order to preserve the belt from wear and the liability to decay, I boil or soak the canvas in a weak solution of glue, gelatine, or other animal fiber, which thoroughly permeates it. I then boil it in tan-bark water, which converts the gelatine into tannate of gelatine, and produces a textile fabric of great durability, and which also resists decay. S (see Figs. 6 and 7) represents the water box situated in front of the pulp box, and supported by an arm, l^1, connected to the main frame. The front board, m, of the box has its upper edge perforated a sufficient distance with a series of vertical holes or passages, n. At the bottom of this series, and intersecting the holes composing it, is a series of horizontal holes or passages, o, extending entirely through the board, so as to let water pass from the interior of the box. Each of the vertical holes, n, is provided with a screw or plug, p, by means of which the water may be entirely shut off from each passage, o, or allowed to run freely therefrom, and otherwise regulated. The water escaping from the holes, o, is conducted to the belt by vertical grooves or 'saw cuts,' q, extending down to the lower edge of the front board; the latter being beveled to a sharp edge, r, to prevent the water from finding its way backward along the bottom of the box. This is an exceedingly cheap, simple, and effective way of constructing the water box, and of regulating not only the amount of water supplied to the belt, but its proper distribution over the surface."

Claims 1 and 2, said by complainant to be infringed by respondent, are as follows:

"(1) In combination, a belt frame, means for sustaining the same, consisting of links, I, at its opposite sides, pivoted to the belt frame and the main frame, to have movement laterally thereof only, said links being permanently set at an angle to each other, and means for moving the frame on the angularly ar-

ranged supporting links, substantially as described. (2) In combination, a belt frame, means for supporting and directing the movement of the same, consisting of the links, I, having movement transversely of the frame only, said links being set permanently at an angle to each other, and being capable of adjustment to vary the said angle, and the means for moving the frame, substantially as described."

The respondent, in his amended answer, sets up the defenses of want of invention and anticipation, and denies the charge of infringement. In support of the defense of anticipation, reliance is made upon the following prior patents: No. 325,129, dated August 25, 1885, granted by the United States to E. W. Stephens, for improvements in ore concentrators, and No. 285,110, dated September 18, 1883, to John M. Adams and William F. Carter, for improvements in ore concentrators; also upon the printed pamphlets published and put in general circulation by the said Adams and Carter for the purpose of advertising and selling their patented machines under the name of the "Frue Concentrators." A list of mines is also set forth at which the said Frue concentrators are alleged to have been used prior to complainant's patent.

The primary question to be determined is the validity of complainant's patent. What is the essential idea or conception embodied therein? As stated in the specification, the improvements consist in a novel manner of connecting the belt frame carrying the moving belt to the stationary main frame, so as to produce an oscillatory motion of the former, and means for changing the degree of such oscillation. The method of operation is the following: The supporting strips pivotally connecting the belt frame with the stationary frame at the four corners are angularly inclined. Mechanism is provided for giving a lateral motion to the belt frame, and the surface of the belt is given an oscillatory motion by the swinging of the supporting strips, the degree of oscillation depending upon the divergence or convergence of the links or supporting strips. The state of the art at the time complainant applied for his patent discloses ore concentrators having a lateral movement of the belt frame, effected by various mechanical devices. The greatest reliance is placed by respondent upon the Carter and Adams patent as anticipating the patent in suit. The Frue Company now own the Carter and Adams patent, and all machines manufactured in accordance with that patent are commonly known as "Frue Concentrators." The accompanying drawings illustrate the device, and are explained as follows:

(Model.) 4 Sheets—Sheet 1

W. F. CARTER & J. M. ADAMS.

ORE CONCENTRATOR.

No. 285,110. Patented Sept. 18, 1883.

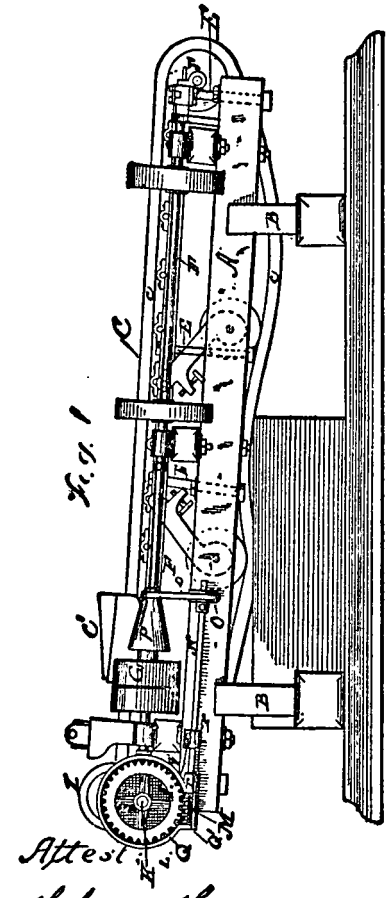


Fig. 1

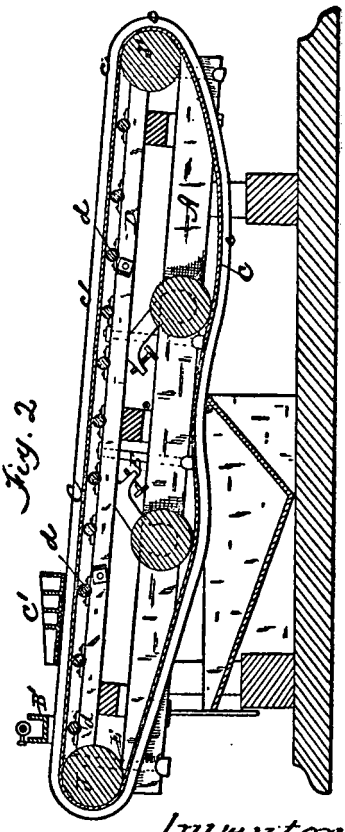


Fig. 2

Attest:
S. Walter Fowler.
N. L. Collamer.

Inventors:
Wm F Carter
Jno. M. Adams
by Dewey & Co
and A. A. Evans & Co attys

(Model.) 4 Sheets—Sheet 2.

W. F. CARTER & J. M. ADAMS.

ORE CONCENTRATOR.

No. 285,110. Patented Sept. 18, 1883.

Fig 7

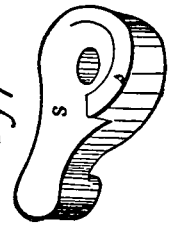


Fig 8

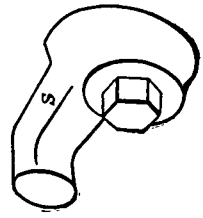
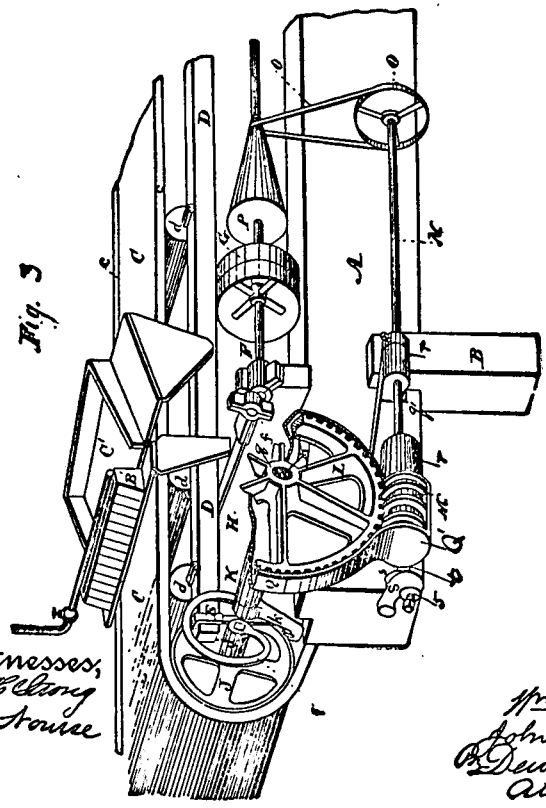


Fig. 3



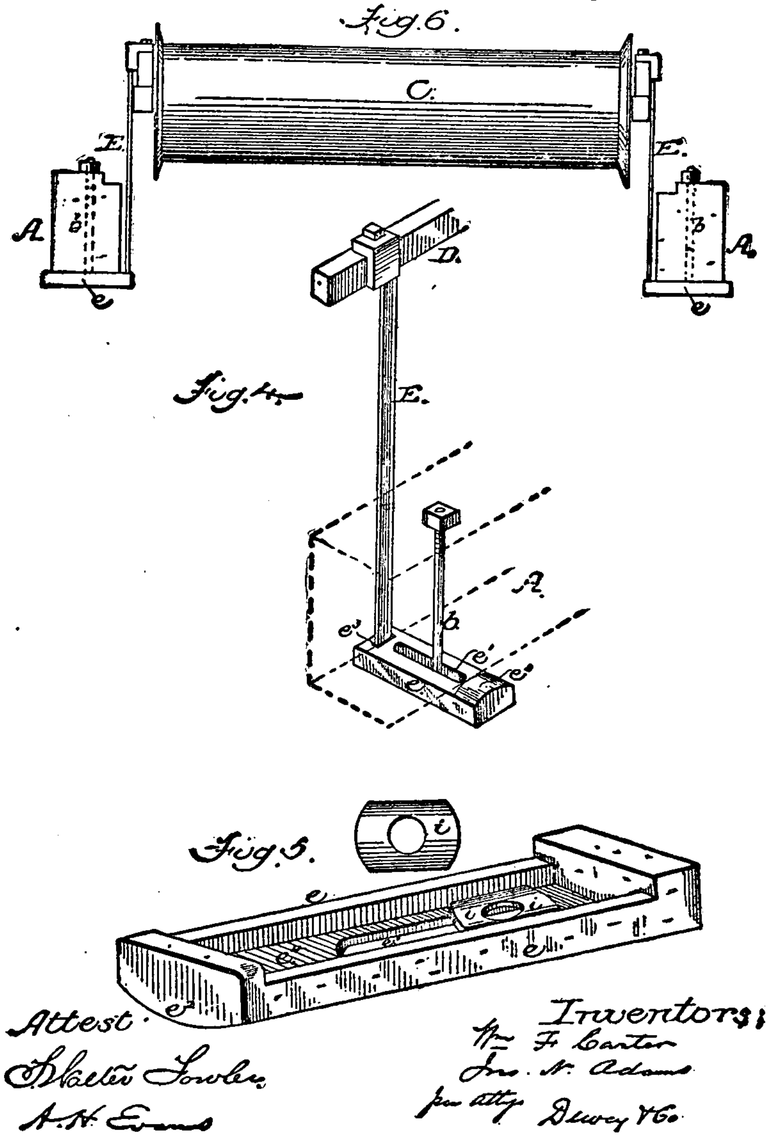
Inventors
Wm. F. Carter
John M. Adams
By Dewey & Co.
Attorneys

(Model.) 4 Sheets—Sheet 2.

W. F. CARTER & J. M. ADAMS.

ORE CONCENTRATOR.

No. 285,110. Patented Sept. 18, 1883.



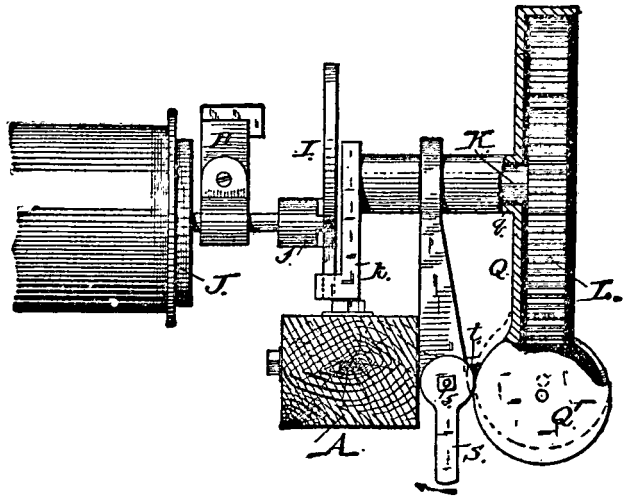
(Model.) 4 Sheets—Sheet 4.

W. F. CARTER & J. M. ADAMS.

ORE CONCENTRATOR.

No. 285,110. Patented Sept. 18, 1883.

Fig. 9.



Attest;
C. Walter Fowler
R. K. Evans

Inventors;
Wm F. Carter
Jno. M. Adams.
by Dewey Co
and A. H. Evans Co.
attys.

"Fig. 1 is a side elevation of our improved concentrator. Fig. 2 is a vertical longitudinal section of the same. Fig. 3 is an enlarged view of the principal operating devices. Fig. 4 is an enlarged detail, illustrating the yielding supports which sustain the apron frame, and the fastenings of said supports. Fig. 5 is an enlarged view of the under side of the lower support of the yielding supports. Fig. 6 is a front elevation of one of the apron drums. Figs. 7 and 8 are views of the cam to stop the feed of the apron. Fig. 9 is a detail showing the stop mechanism enlarged. A represents the main side timbers of the machine, supported upon legs, B. C represents the endless belt or blanket, having the side flanges, c. This belt travels over a frame, a side piece of which is shown by D, in which are journaled rollers, d, d, upon which the belt passes. J is a large roller or drum at the upper end or head of the machine, over which and by means of which the belt travels. The other end of the machine has a similar drum, J^1, around which the belt passes at the lower end. B^1 represents the water distributer, and C^1 the ore distributer, from

which the ore is delivered upon the belt. The frame, D, is supported by elastic or spring straps, E, adapted to yield sufficiently to allow the frame to swing. The lower ends of these straps, E, pass down inside of the main side timbers, A, and are supported by them through the medium of blocks, e, in a manner hereinafter explained. F is a shaft carrying the driving pulley, G. The end of shaft, F, is provided with a short crank, f, to which is connected a pitman, H, extending to and secured to frame, D. Power applied to pulley, G, causes the pitman, H, to move the frame, D, with its belt, C, forward and backward, swinging upon supporting straps, E, thus giving to said belt the side shake.

"In order to obtain the uphill travel of the belt, and make provision for its side shake, as just explained, we have the following: The drum, J, has a gudgeon, j. To this gudgeon is rigidly secured a strong spring, I, having a spiral shape, as shown, and adapted to yield laterally. Journaled in the frame is a shaft, K, carrying upon one end a larger gear wheel, L. To the other end of this shaft is secured a crank, k, the end of which engages the free end of spiral spring, I. The gear wheel, L, meshes with a worm gear, M, below. This worm gear is upon one end of a shaft, N, the other end of which carries a pulley, O, from which a belt, o, extends to a cone pulley, P, upon the shaft, F, above described. When power is applied to shaft, F, it is transmitted, as before described, to cause the side shake of the belt, and at the same time, through pulleys, P and O, shaft, N, and worm, M, it is transmitted to gear, L, and shaft, K. This shaft, revolving, causes its crank, k, to revolve the drum, J, by means of the spiral spring, I, which, though rigid for this pressure, yields laterally, and allows the drum, J, to move sidewise with the frame, D, and the belt. It is sometimes desirable to stop the uphill travel of the belt immediately. To do this we provide a circular casing or rim, Q, the hub, q, of which fits loosely, as a sleeve, upon shaft, K, or upon its bearing. This casing surrounds the gear, L, except at the bottom, where it extends downwardly, and forms a casing, as shown at Q^1, for the worm gear, M, and has a projection, q^1, supporting boxes, r, r, for bearings for shaft, N. Under certain circumstances it is highly desirable to instantly stop the movement of the belt, C, and, in order to accomplish this, the pulley, O, must be suddenly relieved from the effects of the driving belt, o, which we accomplish as follows: The pulley, O, shaft, N, boxes, r, r, worm gear, M, and casing, Q, Q^1, being all supported from one point, namely, the hub, q, of the casing surrounding shaft, K, they have a common rotary movement around said shaft, the preponderance of the weight, obviously, on the side towards the pulley, O, on shaft, N, tending to depress pulley, O, and keep the belt, o, stretched, so as to rotate pulley, O. By moving all the elements just previously recited so as to elevate the large pulley, O, the effect of the belt, o, ceases. From the rear of the portion Q^1 of the casing projects a stud, t, and moving on a spindle, 5, conveniently located on the machine, is a cam, S, rotating in a plane, at right angles to the shaft, N, and provided with the face, s, adapted to come in contact with the stud, t, and force it in the direction of the pulley, O. This movement rotates the casing, Q, Q^1, to a limited degree around shaft, K, and thereby raises worm gear, M, boxes, r, r, shaft, N, and pulley, O, the pulley moving through the longest arc, and being relieved from the effect of belt, o."

The particular mechanism of this patent to be considered in connection with complainant's patent is described by the patentee in the following language:

"It has been found by experience that, despite the greatest care and uniformity in making the class of machines, results will differ in machines of the same construction. In some the ore will bank or collect at one side of the belt against the flange, and in others it will bank in another place, without any apparent cause, as the belts all run smoothly and easily, and are, to all appearances, nicely adjusted. We have discovered that by changing to a limited degree the inclination of the supporting strips, E, the belt is affected in such manner as to remedy this fault, and to distribute the ore evenly over its surface. We accomplish this adjustment by means of a rocking nut, which

enables the operator to change the position of the faces of the supports of straps, E. The said supports are constructed as follows: Bolts, b, passing vertically through the timbers, A, hold beneath said timbers blocks, e, having their upper surfaces, where they bear against the timbers, rounded, as shown at e^2, and having longitudinal slots, e^1, to receive the bolts, and sockets, e^3, to receive the lower ends of the straps, E. The lower surface of each block has a longitudinal depression, e^4, in which rests a washer, i, having a curvilinear face, against which rests the head of the bolt when in position. A blow or a series of blows upon the block, e, will cause it to change position by rocking on the curved face, e^2, against the timber, A, and the curved face of washer, i, against the head of the bolt, so as to vary the position of strap, E, as to a vertical line. We do not confine ourselves to this particular construction or means for adjusting these strips, as there are many ways in which it can be accomplished. We consider, however, the way here shown as being a good one, as it secures the strips firmly, and yet allows their adjustment when necessary."

As represented in the drawings, the supporting strips, E, are exactly parallel to each other. The upper portion of the strips is almost flush against the side of the shaking frame, while the lower portion is in a similar position to the timbers of the stationary frame, not permitting of lateral adjustment to any marked degree. But it is asserted by the respondent that in the machines in actual use provision was made for the lateral inclination of the supporting strips to an extent not indicated in the patent, and that this use anticipated complainant's patent. It appears from the testimony that all ore concentrators are sensitive machines, and the operation of saving sulphurets and material of different specific gravities is a particularly delicate one. In the working of the machines the pulp is often unevenly distributed over the surface of the belt. This may result from irregularities in castings, unevenness of the floor upon which the machine stands, sagging of some parts of the framework, inaccuracies in fittings, or other causes incident to the violent shaking motion. To remedy this banking of the pulp in the Frue concentrators, it was found necessary to alter the inclination of the supporting strips, thus varying the level of the belt surface. Sometimes the proper adjustment was secured by blows upon the block, e, described in the specification; sometimes inclining but one supporting strip from the vertical, and sometimes altering the inclination of all. This naturally led to the construction of machines permitting the needed lateral adjustment of the supporting strips, and the testimony of many witnesses conclusively shows that the Frue machines in use for some time prior to the issuance of complainant's patent contained supporting strips having various degrees of inclination, often to the extent of $1\frac{1}{4}$ inches; that this inclination in a strip $17\frac{1}{4}$ inches long would not be noticeable to the casual observer, but that it did, as a fact, exist, and performed the functions of the improvement claimed by complainant in his patent. That complainant was the first to crystallize this idea into a machine having the inclined supporting strips or hangers as its chief improvement, and apply for a patent therefor, is undisputed. But was it not, at most, a very slight and formal advance in the art beyond what was known, and of very easy production to one skilled in the art, to construct a machine with the

supporting strips always at a slight inclination from the vertical, and capable of adjustment to change the inclination until the even distribution of the pulp over the belt surface was secured, instead of a machine with vertical supports susceptible of adjustment to the desired inclination? The exact counterpart of complainant's patent has not been found in the prior art, it is true. But all the elements are old, and in ore concentrators have been in familiar use, in similar relations to each other, and performing the same functions as in the patent in controversy. Under the rule declared in Thompson v. Boisselier, 114 U. S. 1, 5 Sup. Ct. 1042, and often reaffirmed by federal and state authorities, "it is not enough that a thing shall be new, in the sense that the shape or form in which it is produced shall not have been before known, and that it shall be useful, but it must, under the constitution and statute, amount to an invention or discovery." Kelly v. Clow, 32 C. C. A. 205, 89 Fed. 297; Lumber Co. v. Perkins, 25 C. C. A. 613, 80 Fed. 528; Adams v. Stamping Co., 141 U. S. 539, 12 Sup. Ct. 66. In Capital Sheet-Metal Co. v. Kinnear & Gager Co., 31 C. C. A. 3, 87 Fed. 333, the court, in stating the requirements of invention, says:

"Long practice and observation naturally lead those familiar with the arts to the perception of new adaptations. Mechanical education and skill, fostered and promoted by the public, are rapidly advancing in every direction, and there is a constant and universal endeavor in handicraft to utilize that which is known, and press it into service in the practical arts. But the steps of this normal progress and improvement are not invention, nor the subject of monopoly to one who, in the exercise of the 'skill of his calling,' has put an old thing to a new use."

The intrinsic novelty and utility of the invention are also important considerations in determining the validity of a patent. That the patent in controversy does not possess the former attribute must be conceded, and it is not shown by the proofs that in its use and sale it was sought after and employed by the public to an extent indicating great, if any, utility, or that it was relatively superior to prior inventions. In the claims in controversy it is not possible to find anything of a mechanical or functional character which did not exist before in similar relations and combinations, nor evidence of invention or discovery. The conception of the combinations claimed involves "only the exercise of the ordinary faculties of reasoning upon the materials supplied by a special knowledge, and is in no sense the creative work of that inventive faculty which it is the purpose of the constitution and the patent laws to encourage and reward." Hollister v. Manufacturing Co., 113 U. S. 59, 5 Sup. Ct. 717. Let a decree be entered in favor of the respondent.

HANIFEN v. PRICE et al.

(Circuit Court, S. D. New York. August 4, 1893.)

1. PATENTS—VALIDITY—INVENTION IN FOREIGN COUNTRY.
   One who has made an invention in a foreign country, and has obtained a patent in this country after the introduction of the article into commercial use, but before the granting of any foreign patent or the description of the invention in any publication, may, for the purpose of overcoming the defense of prior use in this country, carry back the date of his invention to the actual time of making such invention in the foreign country.
2. SAME—KNITTED FABRICS—ASTRAKHAN CLOTH.
   The Bywater patent, No. 374,888, for improvements in knitted fabrics, whereby a cloth is produced having the appearance of Astrakhan cloth, *held* not anticipated by the prior Booth British patent, No. 756, of 1881, nor shown to be invalidated by abandonment or prior use in this country; and also *held* infringed. Hanifen v. E. H. Godshalk Co., 28 C. C. A. 507, 84 Fed. 649, followed.

This was a suit in equity by John E. Hanifen, trading as John E. Hanifen & Co., against Edward A. Price, Francis H. Inloes, and Petera B. Worrall, trading as Fred Butterfield & Co., for alleged infringement of a patent for a knitted fabric.

W. P. Preble, Jr., for complainant.
Boardman & Boardman and Wetmore & Jenner, for defendants.

TOWNSEND, District Judge. The questions herein are presented at final hearing on a bill alleging infringement of patent No. 374,888, issued December 13, 1887, to complainant's assignor, Levi Bywater, for a knitted fabric. The inventor states as follows:

"My invention consists of a new and improved textile fabric having the face yarn thereof looped on the stitches of the back yarn, as hereinafter set forth, the said face, which is formed of mohair, worsted, or other yarn, being beat up so as to present a wavy or curly surface, and the back, which is formed of woolen or other yarn, brushed, so as to present a smooth surface, the fabric having the appearance of looped or Astrakhan cloth."

Prior to this suit, other suits for infringement of this patent were brought by this complainant in the Second and Third circuits. The suit in the Third circuit against E. H. Godshalk et al., hereafter referred to as the "Godshalk Case," was heard on bill, answer, and proofs by Judge Dallas. The defenses therein interposed were: (1) Anticipation; (2) public use and sale in the United States more than two years prior to the application; (3) abandonment; (4) noninfringement. The learned judge, upon an elaborate investigation and discussion, ordered a decree in favor of complainant on the ground that the patent was valid, and had been infringed, and that the proofs of prior use or sale and of abandonment were insufficient. Thereafter, upon a rehearing and reargument, Judge Dallas reconsidered his conclusions upon the issue of anticipation, and dismissed the bill on the ground that the patent in suit was anticipated by the British patent to James Booth. 78 Fed. 811. An appeal from this decision was heard in the circuit court of appeals by Mr. Justice Shiras and Judges Acheson and Butler. A majority of said court reversed the decree

of the circuit court, Judge Butler dissenting. 28 C. C. A. 507, 84 Fed. 651. In a prior suit in this circuit against one Vietor considerable testimony was taken. A motion for a preliminary injunction was denied by Judge Lacombe, and thereafter all the pending cases were settled. Much of the testimony taken in the Godshalk and Vietor Cases has been stipulated into the present case, and additional testimony has been taken on both sides. It is unnecessary, in this opinion, to discuss infringement, which is not denied, or abandonment, which is not proved. The only claim in suit is the second, which is as follows:

"A knitted fabric composed of face and back yarns of different materials, the face yarn being looped at regular intervals and on alternate stitches of adjacent rows of the back yarn, and being matted and curly, and having a smooth back, whereby the said fabric has the appearance of looped or Astrakhan cloth, as described."

The fact that the learned judge who originally heard the Godshalk Case allowed a reargument and thereafter reversed his first opinion, and that one of the judges in the court of appeals dissented from the opinion of a majority of the court in reversing Judge Dallas, shows that the question of patentable novelty presented by the Godshalk record was a very close one. It is not claimed that Bywater, the patentee of the patent in suit, invented either a new machine, or a new art of knitting, or Astrakhan cloth. Counsel for complainant says:

"We find Bywater does not claim any novel mechanism, or any novel process, but does claim to be the first to make a new and improved textile fabric by such a wise choice of parts and yarns as to produce a knitted fabric which has the appearance of looped or Astrakhan cloth. What a knitter had to do to carry out the Bywater idea was to buy a piece of looped or Astrakhan cloth, or, lacking that, real Astrakhan, and, with that before him, set up his circular knitting frame with a view to having the mohair or worsted yarn which forms the face show a wavy or curly appearance such as the knitter found on the face of the Astrakhan cloth or the Astrakhan skin. This had never been done before."

These statements are denied, and it is further contended that, even if they were true, such changes would be immaterial, because the selection of a well-known thread to produce a well-known woven Astrakhan effect on a well-known knitting machine could not involve invention. The prior Booth patent and the Bywater patent in suit are each for an improvement in fabrics knitted in each case on the same kind of machine, and by the use of the same wool yarn for the back of the fabric. Bywater describes his face yarn as "mohair, worsted, or other yarn." Booth's face yarn is described as "worsted, or long fiber yarn, which will not felt with back or body." Bywater produces a looped material which has "the appearance of looped or Astrakhan cloth." Booth produces a material which projects from the "fabric in the form of loops, thereby producing a very ornamental appearance." Each material is afterwards fulled and dyed and finished in the same way. The Booth patent antedated the patent in suit some six years, and the Booth fabrics had been on the market for two years before Bywater came to this country, in 1883. Coarse,

wiry, curly yarn, like mohair or luster, had been used for various purposes, including the making of woven Astrakhan cloth, prior to Bywater. As complainant's counsel says:

"If the second claim of the patent in suit had left out the words 'matted and curly' and 'Astrakhan,' the claim would have set forth nothing except what was common in large varieties of knitted fabrics which had been made on circular knitting machines for a great many years. It is only the use of those words which makes the Bywater patent differ from all older patents."

The question now to be considered is whether, upon the newly-introduced evidence, the court of appeals would have reached a different conclusion as to the anticipation of Bywater by Booth. Judge Dallas, in the case against Godshalk, stated his conclusions as follows:

"The 'ornamental appearance' produced by Booth is not the Astrakhan-like appearance created by Bywater; and that Booth did not suppose it to be so is evident upon the face of his patent, and from the fact that neither he nor any one else had ever made any material having the curly and matted features which pertain to Astrakhan cloth prior to the application of Bywater. It cannot be said that either Kent and Leeson or Booth described the peculiar fabric in question so as to enable those skilled in the art to make it, for neither of them described it at all, and that they may have come near doing so is not enough. Knitted Astrakhan was created by Bywater, and this he accomplished, not by merely applying the skill of the knitter to effect a change in either of their products, but by the exercise of his own inventive faculty."

After rehearing he stated that this conclusion was erroneous, because the question whether the Booth patent on its face disclosed the Bywater invention was "one which can safely be determined only upon the testimony of those familiar with the art," and that the uncontradicted expert testimony of the defendants established the identity of the fabric disclosed by the Booth patent with that of the patent sued on. The following citation from the language of Judge Acheson, delivering the opinion of the court of appeals, shows the grounds on which that court reversed the decision of Judge Dallas:

"The contrary conclusion, which the able judge of the court below reached, was based upon the effect which he felt constrained to give to the testimony of the defendants' professional expert, their foreman, and two knitters. We have examined that testimony with the utmost care, and we are obliged to say that, in our opinion, it does not justify a decree adverse to the patent in suit. This testimony strikes us as very meager. It consists of little more than the bare opinions of the witnesses that Booth's patent discloses the Bywater fabric. The witnesses really give no reason for their conclusions. No detailed analysis of Booth's specifications is made by any of them. None of them pretend that any of the terms employed in Booth's patent require explanation by an expert. No such elucidation is attempted by any of them. These witnesses called the Booth fabric 'Astrakhan cloth,' and say that, by following the directions of Booth's patent, without more, Astrakhan cloth can be produced; and one of them states that he has done this. This is the whole substance of their testimony. Ought it to be controlling? We think not. Testifying in 1896, it was impossible for these witnesses to devest their minds of their then knowledge respecting the Bywater fabric and the mode of its production, even if they had been unbiased. But what a willing witness in 1896 might read into the Booth patent is no fair test. The true question is, what did that patent disclose to the public in 1881? We are well satisfied that the expert testimony of the defendants' witnesses furnishes no safe aid in the solution of that question. The Booth patent speaks for itself, and its meaning is to be determined by the court."

Defendants' additional testimony on this point consists of the Bywater deposition,—which counsel states was cited and referred to in the Godshalk Case, but which, so far as the record shows, was not before the court,—the testimony of Bywater, the patentee, and of one Lupton, and certain new testimony of Martin and Appleton, who are the defendants' professional expert and one of their knitters, respectively, referred to in the opinion of the circuit court of appeals. The substance of the testimony of Appleton and Martin in the Godshalk Case, like that of McGuire, another knitter, whose testimony for defendants in the Godshalk Case was not introduced herein, was to the effect that there was no difference between the fabric described in the Bywater patent and stockinet fabric of Kent and Leeson, except in appearance, due to the employment of a curly or crinkly wool in place of a soft, fine yarn; and that the Booth patent described the Bywater fabric; and that by following the instructions given by Booth they either could construct or had constructed cloth precisely the same as that covered by the Bywater patent, and one such piece of cloth was produced by Martin. Judge Dallas, in his opinion, states that in support of this contention "such a feat seemed to be proved during the argument." These witnesses were not cross-examined, and Judge Dallas reversed his original decision on their uncontradicted statements. The additional evidence of Martin, who, by the way, was the foreman of the defendant Godshalk, consists chiefly in the introduction of various samples alleged to have been made in accordance with the Booth and Bywater patents, in addition to the one sample produced on the former hearing,—an assertion to be hereafter referred to,—that he never used a worsted or long-fibered yarn that would not felt with the back, which, if used in accordance with the Booth patent, would fail to produce the effect of Astrakhan cloth; and a statement that in fulling and felting the specimens of the Booth and Bywater patents he followed the same process, and that he did not use a different adjustment of the wheel in making said specimens from that which he would have used if making stockinet, and that it would be impossible, by any adjustment of the wheel, to make the floats, or loose surface, so short as to prevent unfeltable worsted yarn from giving an Astrakhan appearance in making a fabric according to the Booth patent. The additional testimony of Appleton, who, as examiner, had passed favorably upon the application for the Bywater patent, is now to the effect that there is nothing new therein, and that the ordinary knitting machine is adapted to be used with yarns ordinarily employed in the production of knitted Astrakhan, and that the capacity of adjustment of such machine and its adaptability for use with different yarns was known prior to the date of the Booth patent. He also explains that fulling and felting means a certain boiling of the material in hot water with soap. Bywater, the patentee, a new witness, says that he did not get a patent in England because Booth anticipated him, and that he understood that Booth's patent was for Astrakhan. Lupton, also a new witness, testifies that by following the directions of the Booth patent he made Astrakhan in England in 1885, and that, if the manufacturer follows said direc-

tions, unless he willfully spoils the cloth, he will produce Astrakhan, and, if he is a man of good judgment, he will produce a very ornamental effect, as claimed by Booth. Much of this testimony is cumulative in its character. It is chiefly furnished by the hostile witnesses in the Godshalk Case, and is to the same effect as the positive uncontradicted testimony in the face of which the court, in said case, found that the Booth patent did not describe the Bywater invention. Much stress has been laid upon the statement of Bywater that Booth's patent stopped him from making Astrakhan. It is to be borne in mind that he is not the complainant herein. He was in the employ of the English firm of Hargrave & Nussey. It does not appear that he ever saw the Booth patent, and Nussey, his employer, says that the reason why they did not get Bywater to take out a patent was because they preferred to keep the method of manufacture secret. Lupton's testimony is no stronger than that of Martin, Osborne, and Appleton in the Godshalk Case. It is contended that the court in the Godshalk Case would not have reached a different conclusion if the new testimony for the defendants herein had stood, as did the testimony in the Godshalk Case, without cross-examination. Upon the cross-examination, however, the following facts were shown by defendants' witnesses, namely: (1) That the Booth patent does not disclose how to make knitted Astrakhan, because it fails to distinguish between those long-fibered unfelting yarns which are not curly and crinkly and yarns which are curly and crinkly, while it is clear from the whole testimony that there is a vital distinction between the two. (2) That the Booth patent failed to show that, in order to make Astrakhan, the face yarn must be put in under different conditions from those which obtained in the stockinet process, and that an adjustment of the loop was necessary in order to produce longer floats. These points are established by the cross-examination of Martin and Appleton. (3) Lupton admits that the fabric produced by following the Booth specification would not be recognized by the ordinary individual as Astrakhan. The argument of complainant that Booth, by the description in his patent of a fabric in which the yarn projected "in the form of loops, thereby producing a very ornamental appearance," did not understand or refer to any cloth which looked like Astrakhan, and that the "long-fibered yarn which will not felt" was not a curly yarn, is covered by the opinion of the court in the Godshalk Case. The new testimony is to the effect that the sole features of novelty in the Bywater patent are the use of a kind of yarn which had never before been used on a knitting machine, in new lengths or floats on one of the surfaces, either by changing the adjustment of the machine, or by accomplishing a change of tension in some other way, whereby an entirely new fabric was produced. The circuit court originally, and the court of appeals afterwards, found that these changes involved invention. The conclusion reached, with great hesitation, upon a careful review of the whole testimony, is that, in view of said findings, the new evidence is not of such a character that it would probably have caused the court to reach a different conclusion in the former case. Upon this ques-

tion, therefore, the decision of the court of appeals sustaining the validity of the patent will be followed. The opinion of the circuit court of appeals in the Godshalk Case as to the defense of prior public use or sale was as follows:

"The defense of two years' prior use and public sale in the United States rests upon the importation by H. Herrman, Sternbach & Co., at the port of New York, in May, 1881, of certain pieces of 'kyrle' cloakings. We agree, however, with the learned judge of the court below, that there is 'room for very grave doubt' whether those goods were the knitted Astrakhan of this patent; and we also concur in his view that there is a failure of satisfactory evidence to show that they passed into public use, or were put on sale. The evidence of prior use or sale did not reach the standard of certain proof required to sustain such defense."

The additional evidence shows that this invoice consisted of six pieces, and that all of said pieces were on sale, and, with one exception, were actually sold, more than two years prior to the filing of Bywater's application on December 22, 1883.

The remaining question is as to the identity of the Sternbach and Bywater fabrics. The courts in the Third circuit thought there was "room for very grave doubt" on this point. The new evidence comprises the following statements by the witness Appleton:

"A. I have examined the samples, and find that they are identical in all respects with the fabric described in the Bywater patent, and referred to in the second claim thereof, with the exception that, instead of the face and back yarn being made of different materials, they appear to be made of the same material. Q. Is there any difference in the mode of manufacture, whether the face and front [back] are the same or of different material? A. There is not; the mode of manufacture being the same in both cases."

This evidence is not sufficient to resolve the grave doubt in favor of the defendants. The small samples are scarcely sufficient to satisfactorily show their mode of construction. They do not look like Astrakhan skin, and they have not the matted and curly appearance which gives the cloth the appearance of Astrakhan cloth. Finally, inasmuch as the new evidence is that the face and back yarn "appear to be made of the same material," while the claim in suit is for a "fabric composed of face and back yarns of different materials," it does not strengthen defendants' case. The essence of the Bywater invention was that the front and back should be of different materials, in order that the back yarn might shrink, while the face yarn did not shrink. This fabric, therefore, would not disclose to the public a knowledge of the Bywater fabric.

The defendants have proved an importation by Strauss, Kupfer & Co. of Astrakhan cloth with a longer curl than the Sternbach pieces, and sales thereof in May, 1883, prior to the filing of the Bywater application, but subsequent to the invention and commercial introduction of the Bywater fabric in England. If it be assumed that this fabric differs only in degree from that of Bywater, the question is presented whether Bywater can carry the date of his invention back to what was done by him in England prior to his arrival in this country. Judge Dallas discussed this question at length, and expressed an opinion in the affirmative, but found that the evidence

was insufficient to establish the earlier invention. It appears that the precise question has never been judicially determined. In interference cases, a foreign inventor can only carry back the date of his invention in a foreign country by a patent or a publication, or, in this country, by the date of the arrival in this country of knowledge of said invention. Hurlbut v. Schillinger, 130 U. S. 456, 471, 9 Sup. Ct. 584; Brush Electric Co. v. Julien Electric Co., 41 Fed. 679; Thomas v. Reese, 17 O. G. 195; Hovey v. Hufeland, 2 O. G. 493; Landler v. Crowell, 16 O. G. 405. There is, however, a distinction between the provisions of section 4923, which provides for the protection of the patentee against proof of prior knowledge, or use of his invention without publication in a foreign country, and the general grant by section 4886 of the right to a patent to any person who has made an invention not known or used by others in this country, and nowhere patented or described in any printed publication. Section 4886 provides that "any person who has invented * * * any new * * * manufacture * * * not known or used by others in this country, and not patented or described in any printed publication in this or any foreign country before his invention thereof," etc., may obtain a patent. The natural interpretation of this language would indicate an intention to confer the benefit of the patent law upon any individual who could show a prior completed inventive conception, regardless of the place where the invention was conceived. The patent is a contract between the public and the duly diligent patentee to the effect that he shall be protected therein, provided he has furnished the consideration; that is, the original creative conception. There is no expressed limitation as to time or place of invention, or of citizenship of the inventor, so far as his rights under section 4886 are concerned. The sole question is whether or not the American public received the benefit of his invention. The provision as to the effect of a patent or description in a printed publication in a foreign country is in harmony with the theory of protection to the public, because what is not so known abroad as to be within the reach of the American public does not affect the consideration of knowledge imparted here. It is immaterial whether or not the consideration received by the American public proceeds from a foreigner to an American citizen, or whether or not it was conceived abroad or at home. If the inventor elects to give to the American people the benefit of his invention, and if he has complied with the requirements of the statute, he ought not to be deprived of its privileges under the existing law by judicial legislation. As the supreme court has said in Refrigerating Co. v. Sulzberger, 157 U. S. 37, 15 Sup. Ct. 516, citing Hadden v. Collector, 5 Wall. 107: "Where the language of the act is explicit, there is great danger in departing from the words used, to give an effect to the law which may be supposed to have been designed by the legislature." The provisions of section 4923 show the same intention to protect the rights of the American public by the provision that if it (the public) gets the benefit of an invention from one who in good faith believes himself to be the first inventor, it shall not refuse to him the grant of a patent because he was not, in fact, the first in-

ventor, provided the foreign knowledge and use were not in such form as to permit it to be known to the American public.

The arguments based upon a consideration of other sections of the statute have been so fully discussed by Judge Dallas that it is unnecessary to state them here. It is not claimed by defendants that the cases decided in the Second circuit, and referred to by Judge Dallas in his opinion, are at variance with his conclusions. I recognize the force of the contentions so clearly presented in the brief of the able counsel for defendants herein, but, after full consideration, I feel constrained to concur in the result reached by Judge Dallas. A decree may be entered for an injunction and accounting.

INTERNATIONAL TOOTH-CROWN CO. v. KYLE.

(Circuit Court, S. D. New York. July 31, 1899.)

PATENTS—ANTICIPATION AND INFRINGEMENT—IMPROVEMENTS IN DENTISTRY.

The Low patent, No. 238,940, for an improvement in dentistry, consisting in attaching artificial teeth to continuous bands fitted to adjoining natural teeth, so that the artificial teeth are supported by the natural teeth without dependence on the gum, construed, and *held* not anticipated, valid, and infringed.

This was a suit in equity by the International Tooth-Crown Company against James Orr Kyle for alleged infringement of a patent for an improvement in dentistry.

Dickerson & Brown and James C. Chapin, for complainant.

Andrew Comstock, for defendant.

TOWNSEND, District Judge. Final hearing on bill and answer raising questions of validity and infringement of complainant's patent, No. 238,940, issued March 15, 1881, to James E. Low, its assignor, for an improvement in dentistry. This patent has already been before this court in the suit of this complainant against Richmond (30 Fed. 775), where the patent was sustained, and in its suit against Bennet (23 C. C. A. 179, 77 Fed. 313), where the circuit court and court of appeals held that the patent was anticipated. The opinions in said suits show the character of the patented invention, and discuss the issues involved. On the argument of this case the two defenses presented were denial of infringement and anticipation. The claims alleged to be infringed are the following:

"(1) The herein-described method of inserting and supporting artificial teeth, which consists in attaching said artificial teeth to continuous bands fitted and cemented to the adjoining permanent teeth, whereby said artificial teeth are supported by said permanent teeth without dependence upon the gum beneath. (2) An artificial tooth cut away at the back so as not to present any contact with the gum, except along its front lower edge, and supported by rigid attachment to one or more adjoining permanent teeth, substantially as and for the purpose set forth."

The admission of defendant as to infringement is as follows:

"It is admitted by defendant that within the period of two years last past, and prior to the commencement of this suit, in the city of New York, N. Y.,

in the regular course of his professional work, he performed an operation in dentistry in all respects similar to that illustrated by the model marked 'Model of Infringing Operation,' of which the following is a description: 'Inserting and supporting artificial teeth in the mouth of a patient by attaching said artificial teeth to continuous bands fitted and cemented to the adjoining permanent teeth, whereby said artificial teeth were supported by said permanent teeth without dependence upon the gum beneath. Each of these artificial teeth in this operation was cut away at the back, so as not to present any contact with the gum, except along its front lower edge.' "

The exhibit which illustrates said operation clearly shows infringement, especially as such described method and completed structure come within the specification and claim of the patent in suit as construed by Judges Wallace and Shipman in the Richmond Case. The following extract from said opinion sufficiently establishes this point.

"By the method of the patent a plate is dispensed with when some natural teeth remain, and, instead of the artificial teeth being loosely clasped to the adjacent natural teeth, they are attached with strength and permanency, and are not forced into contact with the gum during the strain of mastication. * * * When the artificial teeth employed have their surface adjacent to the gum cut away at the back, and only descend to contact with the gum along the front edge, another advantage results, because the small area covered by the bases of the teeth precludes such an accumulation of food or other foreign matter between the gum and the denture as cannot be readily removed. The second claim includes with the elements of the first claim the features of a tooth cut away at the back. Thus construed, defendants infringe both claims of the patent."

The first contention in support of the defense of anticipation is that there were two applications for two distinct inventions, and that the later invention, not conceived until after May, 1880, was anticipated. Counsel for defendant says:

"Low's first application was simply a wall over a space, having and resting upon the jaw for a foundation. His second application, upon which patent in suit was granted, was a bridge thrown across a space, not only held in place, but supported, by the abutment or abutments, without gaining any support otherwise,—an entirely different principle."

But this precise question was before the judges in the Richmond Case, and was exhaustively discussed, and finally disposed of as appears from the following citation:

"The defense is relied on that the invention had been in public use for more than two years before the application for the patent. The proofs show that operations were performed by Low during the latter part of the year 1877, in which he inserted the dentures of the patent in the mouths of patients. As the application upon which the patent was granted was not filed until December 20, 1880, the defense would be established were it not for the fact that Low had made an application, which was filed in the patent office January 6, 1879, which had never been abandoned, for substantially the same invention. That application contained some matters foreign to the subject of the second application, but, so far as it related to the inventions covered by the claim of the patent, it did not differ from the second application, except in a single particular. The specification of the patent states that noncontact of the artificial tooth or denture carried by the bridge with the gum, or the absence of pressure on the gum, is one of the advantages of the invention; while it was stated in the first application to be necessary 'to carefully fit the base of the tooth or block to be inserted to the jaw, and when secured it should be so pressed down as to leave no space beneath it for the admission of food.' The statement in the first application is not inconsistent with the method of the patent, which

consists in attaching the artificial tooth, or the denture, to bands, and supporting them by the adjoining permanent teeth, 'without dependence upon the gum beneath.' So long as this essential feature of the invention is retained, it is quite immaterial whether the artificial dentition 'is so pressed down as to leave no space beneath it for the admission of food,' in the language of the specification, or whether it is in positive noncontact with the gum. When the artificial denture is in noncontact with the gum, cleanliness is facilitated, and the suggestion which was first made in the second application was, therefore, a useful one. But it did not change the invention in essentials. Although the tooth or denture is pressed down so close to the jaw that food cannot lodge between it and the gum, it is still supported by the adjoining tooth or teeth, and not by the gum. As was stated in the first application, 'the yielding surface on which it rests will readily conform to the tooth or block, and any pain at first induced by the pressure will disappear.' There is nothing to indicate that Low intended to abandon his first application."

To further support the defense of anticipation, the defendant has introduced the same witnesses who, and the same exhibits which, were before the court in the Bennet Case. The inexplicable contrast between the statements of the same persons in the two cases is either an object lesson as to the fallibility of human memory and the uncertainty of human testimony, or is forcibly suggestive of perjury and fraud. The only question discussed in the Bennet Case was anticipation. Upon that point the opinion of the circuit court of appeals contained, inter alia, the following statement:

"If the patent were valid, the insertion of a single artificial tooth firmly secured to a band of gold accurately fitted and cemented to a natural tooth adjacent to the vacant space to be filled with such artificial tooth, and wholly supported by its attachment to such adjacent natural tooth, without dependence on the gum beneath said artificial tooth, would be an infringement. If this were done before the application for the patent, it would be an anticipation. The evidence that this is what was done in the case of Mrs. Martz is, to our minds, clear and convincing. The date is established beyond a doubt, and it is equally certain that the artificial tooth thus attached was used for years. We concur, therefore, with the judge who heard the cause in the circuit court, that the so-called 'Beardslee-Martz 1877 Permanent Bridge' is an anticipation of the device of the patent."

The evidence in support of this finding is stated by Judge Wheeler as follows:

"Dr. Beardslee testifies to making a similar cap of gold, and attaching it to the natural tooth of a patient, wife of a clergyman, and to attaching at first an artificial tooth to one side of the cap, and afterwards another on the other side, which were worn, and gave satisfaction, several years. In this he is corroborated by an assistant, also learning the profession, and by the patient, her two daughters, and one of her Sunday school scholars. There is nothing so improbable about this testimony, which is left wholly undisputed, as to leave any fair doubt as to the occurrences, or their date, both of which preceded Low's invention. The method of either seems to be the method of the patent, and either seems to well have anticipated it."

In the present suit not one of these witnesses is able positively to identify said exhibit, and the "wife of a clergyman and her two daughters" now testify, after an examination of church records, etc., that they were mistaken in their former testimony, and that the cap was not put into Mrs. Martz's mouth until 1878, or until after the Low invention was completed, as found in the Richmond Case, and further proved herein. Even Dr. Beardslee now says that he

cannot now testify that said work was done any earlier than the year 1878, and that, so far as he knows, the testimony of the Martzes as to the date when it was done is correct. And further, as if to cap the climax of these contradictions, an apparently disinterested witness—Dr. Palmer—testified that he himself made the Beardslee-Martz exhibit, and was told at the time that "whatever of the kind I did was for use in defending the suit of the International Crown Company." It is unnecessary to further discuss this branch of the case.

At the conclusion of the first day's argument, counsel for complainant for the first time learned that the defendant herein was related to one of the officers of the complainant corporation, and that one of its stockholders had contributed to the defense herein, without the knowledge of counsel for defendant. Counsel for complainant at once fully and frankly brought this matter to the attention of the court, and asked to be advised thereon. The questions thereby suggested have been borne in mind in consideration of the evidence herein. These circumstances, however, cannot relieve the court from its obligation to pass upon the question of fact presented by the evidence herein. The commendable frankness of counsel in the disclosure of these conditions has put the court on its guard against anything which might suggest collusion. The defense of anticipation herein is overwhelmingly disproved by disinterested witnesses. The methods by which the Beardslee-Martz evidence of anticipation was secured by Dr. Beardslee in the Bennet Case appear to have been questionable and reckless, and it is hoped such practices are unusual. The contradictions in his own testimony are so direct and material as to disentitle him to any consideration. The Martz witnesses appear to have testified incorrectly as to the date when the work was done, because, as they say, "we were taken at such short notice we hadn't time to look accurately," or because "Dr. Beardslee was so sure that we came in 1877 that I thought it must be so," because they thought he had a record of such dates. By reason of other contradictions in Beardslee's testimony, it appears that, even if the Beardslee-Martz device had been prior to the patent in suit, it would not have anticipated it, because it was supported on a root which was not taken out. Day's testimony has not been discussed because his veracity is attacked, his testimony is contradicted, and the facts stated by him, if true, would be insufficient for various reasons. A decree may be entered for complainant for an accounting, but not for an injunction, as the patent has expired.

THE ETHELRED.

(District Court, E. D. Pennsylvania. September 11, 1899.)

1. MASTER AND SERVANT—INJURY TO SEAMAN—UNSAFE APPLIANCES—NEGLIGENCE OF MATE.

Libelant, a seaman, who had just signed and reported for duty on board a steamer, fell, and was injured, by reason of the breaking of a rope which he was directed by the mate in charge to use to support him while washing down the mast. The rope had been in use for a number of voyages, and had been in a position where it was exposed to injury from heat and smoke, but during the preceding voyage had been subjected to no strain to test its strength. *Held* that, in failing to test it before directing its use, the mate was guilty of negligence for which the vessel was liable.

2. SAME—CONTRIBUTORY NEGLIGENCE.

As the appearance of the rope did not indicate its weakness, and libelant had no knowledge of the length of time it had been in use, he was not negligent in obeying the mate's orders without question.

In Admiralty.

J. Warren Coulston and Alfred Driver, for libelant.
Thomas Leaming and Henry R. Edmunds, for respondent.

McPHERSON, District Judge. This is a libel in rem to recover damages for personal injuries caused by the alleged negligence of the master of the steamship Ethelred. The facts are as follows: The libelant, who is an able seaman, 28 years of age, signed articles on August 15, 1898, for a voyage from the port of Philadelphia to Jamaica and return. The Ethelred is a British steamship, and upon the day named had just arrived from Jamaica, and was moored to a dock at the foot of Race street. The libelant went on board about noon, with his cousin, Taylor, who had shipped at the same time, and reported for duty to the first mate, who was then the master of the vessel, the captain being on shore. Within an hour afterwards the mate ordered the mainmast to be washed down by one of the two men, and Arbery undertook the work, Taylor being thereupon assigned to another duty. In order to wash the mast down, it was necessary to hoist the libelant to the proper position by means of a rope, to be rove through a block that was fastened to the mast about 30 feet from the deck. The mate testifies that a gantline with a boatswain's chair is ordinarily used for such a purpose,—a gantline being a loose rope kept in the lazarette. This may be the usual practice, but it was not followed upon the day in question. The mate ordered Arbery to use the staysail halyard, a three-inch rope belonging to the vessel's running rigging, which is made fast at the forward end to the head of the sail, passes through the block already referred to, and at the other end is fastened to a belaying pin at the side of the shrouds. In obedience to this order, Arbery unbent the halyard from the sail, and fastened a boatswain's chair to the free end. He was then hoisted to the proper position by a seaman named Collins, who had been ordered by the mate to attend upon Arbery, and to lower him from time to time as the work should progress. The libelant began his task, washed about three feet of the mast, was lowered

by Collins, washed about three feet more, and was again lowered, the rope being safely fastened to the pin. The libelant had scarcely begun to clean this third section, when the rope broke between him and the block, and he fell to the deck, sustaining the injuries complained of. Thus far no negligence of the master appears, and negligence is ordinarily not to be inferred merely from the fact of injury. It is alleged, however, that the halyard had become unfit for the use to which it was put; and that, while its unfitness may not have been apparent upon a casual inspection, the master is nevertheless chargeable with knowledge that it was not safe. This is the point of the case, for, if the defect was latent, and if such inspection and test as the ship was bound to make under the circumstances presently to be stated would not have disclosed the defect, the breaking of the rope must be held to have been an accident, for which the libelant cannot recover. The respondent has offered no evidence about the age of the rope, and it may therefore safely be assumed that it was not new. It had certainly been in use upon the round voyage between Philadelphia and Jamaica that immediately preceded the voyage just completed, and (considering the respondent's failure to throw light upon its age) had probably been used for a longer time. The position of the halyard was just aft of the funnel, where it was exposed to smoke and heat, and occasionally to sparks or flame, especially when the wind was ahead. In such a situation the life of a rope may be very short. At the best it can hardly be long, and the plain duty of the ship was to exercise a reasonable inspection, in order to be sure that the rope continued to be safe. If the staysail had been in frequent use, and the rope had shown no sign of giving way under the strain of hoisting the sail, the test of ordinary use would probably have been sufficient. But no such test had recently been applied; the staysail had not been set during the round voyage just finished from Philadelphia to Jamaica and return, and no trial of the rope's strength had been made since the voyage preceding. Upon that voyage an adequate test had been made. The sail had been hoisted, and two men, weighing together more than 400 pounds, had swayed on the rope to take in the slack, thus affording convincing proof that it was then capable of sustaining much more weight than the body of the libelant, even if he had been heavier than the testimony shows. Since then, however, no test had been made. The sail had not been set; the vessel had had "a good deal of head winds—northerly winds"—as she was coming from the south to the north, and the rope had therefore been unusually exposed to the heat and smoke from the funnel. In consequence, it was "covered with smoke," as the libelant says, or "appeared to be smoke-burned," in the language of the mate, and, as the event proved, was unsafe for the use to which it was put.

Upon these facts, I think the master was negligent in failing to have the halyard tested before the libelant used it. I agree that the appearance of the rope did not suggest that it was obviously dangerous. The color would not arrest attention, for the ropes on a ship are usually much discolored, and to the ordinary observer there was

nothing else to suggest danger. Arbery had no reason to suspect weakness. He had just come on board. He knew nothing about the age of the rope, or the tests to which it had been put, or the degree of exposure that had just been undergone. He was not put upon guard by obvious defects, and was not bound, even in port, to decline to obey the mate's order until he had seen the rope tried sufficiently to convince him of its strength. He was, therefore, not negligent in obeying orders without hesitation or question. But the mate was under a different obligation. He was bound to exercise reasonable care to furnish a safe rope, and I think that reasonable care, under the facts already detailed, required him to test the rope in controversy before the libelant used it. Having failed to do so, the ship must be held liable. This is not the case of a latent defect, undiscoverable by reasonable inspection; it is the case of a defect that might fairly be anticipated in the usual course of events, and a defect that was susceptible of discovery by an easy test. Failure to test was negligence, and the result was that the master negligently furnished his servant with an unsafe appliance.

One—perhaps more than one—of the small bones in the libelant's right foot was broken and some of the ligaments of the left foot were severely strained, probably being torn loose from the bone. He suffered severe pain for a considerable time, was in a hospital for several months, and had not fully recovered in April, 1899, when the testimony of Dr. Northrop was taken. His right foot is well, but the left foot has not yet regained its strength. At best it is likely to be months, probably a year or two, before he can do the full ordinary work of a man of his age, and he may be unfitted to follow the sea hereafter. His wages as a seaman were $20 per month. I do not think the testimony justifies me in finding that he has been permanently disabled, but I am satisfied that there will be some degree of disability for a considerable time, and that he may be obliged either to give up the sea, or to follow it in some other capacity than as an able seaman.

My conclusion is that the libelant is entitled to recover damages for the vessel's negligence, and that the amount of the decree should be $1,200.

PRESIDENT, ETC., OF COLBY UNIVERSITY et al. v. VILLAGE OF CANANDAIGUA et al.

(Circuit Court, N. D. New York. September 13, 1899.)

MUNICIPAL CORPORATIONS — RIGHT TO CONSTRUCT WATERWORKS — EFFECT OF FRANCHISE GRANTED TO WATER COMPANY.

The granting by a village in New York of a franchise to a water company pursuant to the provision of Laws 1873, c. 737, merely authorizing the company to lay its pipes in the streets, and the exercise by the company of such franchise by the erection of a water plant, do not affect the legal right of the village at any time thereafter to construct waterworks of its own, as authorized by Laws 1875, c. 181, and it is not required in such event to acquire by purchase or condemnation the property of the company, the provision of the act of 1875 authorizing such acquisition having been construed by the state courts as permissive only, and not mandatory.

This was a suit in equity by bondholders of a water company to enjoin the village of Canandaigua from constructing municipal waterworks. On final hearing.

The complainants are owners of $12,000, face value, of the first mortgage bonds of the Canandaigua Waterworks Company, a domestic corporation, engaged in supplying water, for the last 15 years, to the inhabitants of the village of Canandaigua, N. Y. In the latter part of 1883 the waterworks company pursuant to the provisions of the statutes of the state of New York (chapter 737, Laws 1873) received from the trustees of the village and the supervisors of the town of Canandaigua a franchise granting permission to lay pipes in the village streets upon the following conditions: First. The streets to be left in as good condition as before excavating. Second. The water to be taken from Canandaigua Lake, at a point not less than 2,000 feet from the shores, and distributed by steam power. Third. The charge to citizens not to exceed the price paid by citizens of other villages in the state. Fourth. Two miles of mains to be laid within a year. Fifth. The company to execute an indemnity bond to save the village harmless from injuries resulting from excavations. Sixth. In case of failure of the water company to comply with any of the above provisions the privileges granted were to become null and void. It will be noticed that this franchise simply gives permission to the company to proceed and lay its pipes; it grants nothing more. There is no affirmative covenant of any kind on the part of the village. The bonds held by the complainants were issued in aid of the construction of the said system of waterworks which now extends over 14 miles and cost about the sum of $150,000. Contracts were made at various times with the village for supplying water for public use. The last contract expired September 1, 1895, being executed September 5, 1894. These contracts were all of like purport varying only in time and in the amount to be paid annually. The only material covenant on the part of the village was to pay for water furnished, the amount varying from $3.000 to $4,750 per annum. The business of the company gradually increased and in 1894 it was supplying a large number of the inhabitants of the village with water. One-fourth of the buildings within the corporate limits—including the principal buildings—were subscribers. During the year 1894 its gross income was $15,000, which enabled it to pay operating expenses and nearly 6 per cent. interest on its bonds. The defendants offered evidence tending to show that the water supplied by the company was impure, its rates exorbitant and the pressure insufficient. It is unnecessary to state this testimony in detail for the reason that the court is convinced that the accusations are unfounded in fact, unavailable in law and immaterial in any view. The rates charged the municipality were agreed to by it and the water was taken from Canandaigua Lake, which is also the source of the village system. Had there been any just ground of complaint in the particulars referred to, the defects could have been, and doubtless would have been, cured had the attention of the company been legally called thereto.

In short, it is thought that the record shows that the company performed all the conditions of the franchise and of the contracts on its part and that the subsequent acts of the defendants cannot be justified by any breach of these conditions. In December, 1894, the village, through its board of water commissioners, resolved to construct a new system of waterworks to be owned and operated by the municipality. Proceedings were taken under chapter 181 of the Laws of 1875 and a new plant was constructed at an expense approximating $133,000. The pipes of the new system were laid substantially parallel with those of the water company, the water being taken in each instance from the same source,—Canandaigua Lake. Some attempts were made to purchase the property of the water company which proved abortive, but no proceeding to take the same by condemnation was commenced. On the 30th of September, 1895, the village formally accepted the new system and has been operating it since that date. Without setting out the facts in detail it may be stated without contradiction that the result of building the new works has been greatly to impair the value of the old works. The complainants' bonds are, practically, worthless. Soon after the complainants became aware of the situation they began this action asking for an injunction restraining the erection of the new plant. This motion was denied (69 Fed. 671), the court holding that the state statute (section 22, c. 181, Laws 1875) authorizing a municipality to acquire the property of existing corporations organized under the laws of the state for the purpose of supplying water to the inhabitants of villages, was permissible merely and not mandatory. A similar decision was made in the state court in an action brought by the water company against the village. An elaborate opinion (unreported) was delivered at special term. The decision was affirmed at general term (90 Hun, 605, 35 N. Y. Supp. 1104) and in the court of appeals the appeal was dismissed (149 N. Y. 619, 44 N. E. 1121). The bill was verified June 29, 1895, and process was issued thereon July 11, 1895.

William A. Underwood and J. H. Metcalf, for complainants.
James C. Smith and T. H. Bennett, for defendants.

COXE, District Judge (after stating the facts). It is thought that the decision must turn upon the answer to a single question, namely, has a village corporation, after having granted a franchise to a water company, the right, pursuant to the law of 1875, to construct a water system of its own without taking, by purchase or condemnation, the property of the existing company? Chapter 181 of the Laws of 1875 is a comprehensive enactment to enable "the villages of the state to furnish pure and wholesome water to the inhabitants thereof." It is not confined to those villages where there is no general water supply. It contemplates and expressly provides for the precise situation existing at Canandaigua in 1894. The proper construction of section 22 of the act is no longer in doubt. It is permissive and not mandatory. This is established by uncontradicted authority and was conceded at the argument and in the complainants' brief. In case of an existing water company, therefore, the village authorities can take it or let it alone as they like. Their right to construct their own works does not depend in the slightest degree upon their acquiring the works of the company. If, in their judgment, it is not wise or necessary to take the company's property they may proceed and erect their own plant precisely as if the company had never been organized. This proposition seems too plain for debate. But, say the counsel for the complainants:

"We do not contend that the language of section 22 is mandatory in compelling a condemnation of the property, but what we contend is that the

village could not act with regard to acquiring waterworks under the Laws of 1875, where there was an existing company with a franchise under the Laws of 1873, unless it did purchase or condemn the works."

The distinction here drawn seems too metaphysical and refined for practical application. Having conceded that the section is permissive merely, a construction is placed thereon which, in effect, makes it mandatory. To the mind of the court it appears inconsistent to contend that the acquisition of existing works is an absolute condition precedent to village ownership after having admitted that, by the terms of the statute, it is entirely optional with the village whether it takes the existing works or not.

It is argued that the act of 1875 must be treated in pari materia with the act of 1873, and that the two should be construed to mean that a village may provide for a water supply either by means of a private corporation or public ownership. That it may adopt either of these courses but not both, and, having chosen to obtain a supply of water through a private corporation, its power is exhausted in that regard. This position would be plausible were there any room for construction, but there is not. The act of 1875 recognizes the existence of corporations organized under the prior act and expressly provides, as before stated, that the village may take the property of such corporation if it deems such action advisable; if not, it may proceed and build entirely new works of its own. The complainants interpret section 22 as if it read as follows:

"Whenever any corporation shall have been organized under the laws of this state for the purpose of supplying the inhabitants of any village with water, the rights, privileges, grants and properties of such corporation must be reclaimed by purchase or condemnation before said board of water commissioners shall proceed to construct the waterworks as hereinbefore provided."

No canon of construction is familiar to the court which transforms plain and unambiguous language permitting an act to be done into a positive command to do the act. So far as the written law is concerned there can be little doubt that villages in this state may build and own their own water supply notwithstanding the fact that private corporations are in the field, provided the village authorities have done nothing more than permit the corporation to lay its pipes in the village streets. In the present instance the village simply granted a naked permission to do this to the water company. It was a license and nothing more. Indeed, under the provisions of section 4 of the act of 1873 it is doubtful if any additional rights could have been granted. But it is enough that none were granted. The village is not hampered by any covenant on its part not to grant additional franchises to others. There is no agreement that it will not build its own works and no stipulation that it will for an indefinite period purchase water of the company. The controversy is, therefore, free from the complications which existed in several reported cases.

All of the salient propositions here involved were determined adversely to the complainants' contention in the case of Syracuse Water Co. v. City of Syracuse, 116 N. Y. 167, 22 N. E. 381. It was there asserted by the plaintiff, upon facts closely analogous to those in the

case at bar, that the water company possessed an exclusive right to furnish water to the city and its inhabitants and, consequently, that the city was powerless to obtain a supply from other sources. The decision establishes the following propositions: First. For the purpose of ascertaining the powers and privileges possessed by the water company recourse can only be had to the terms of the grant which must be strictly construed against the grantee who takes nothing by inference. Second. Powers and privileges not expressly and exclusively granted are reserved and may subsequently be conveyed to a competitor of the grantee though the result may be injurious and practically destructive of the value of the prior franchise. Third. A charter which does not expressly declare that the right to supply water to the city is exclusive cannot be construed as an exclusive grant because of a provision requiring the company, on request, to furnish water to the municipality. Fourth. A municipal corporation can bind itself by contract only so far as authorized by statute. It cannot grant exclusive privileges to lay pipes in its streets or curtail by contract the right to exercise the powers vested in its legislative board. Fifth. By the grant to it the water company was given the privilege of supplying all the water the city or its inhabitants may wish to take, "but not the right to supply them with all the water they may be permitted to use." Sixth. The right reserved to the city to take the property of the water company was a privilege merely which it might or might not exercise at its pleasure, it was not a legal duty upon the performance of which depended the right of the city to procure water from sources other than the water company. These propositions are fortified by a wealth of authority which it is not necessary to reproduce. The only distinction pointed out by counsel is that in the Syracuse Case the injury was not inflicted directly by the municipality, as in the case in hand, but through the medium of a rival corporation to which a franchise was given by the city. The difference does not seem to the court material. If the village of Canandaigua be not precluded by reason of its franchise to the water company, if it still retains the right to obtain water from other sources it can make no difference, from a legal point of view, whether it delegates that right to others or exercises the right itself. The complainants contend that the village has granted an exclusive and inviolable franchise to the water company and has thus exhausted its powers. If this contention be well founded the complainants are entitled to a decree, but if, on the other hand, the doctrine of the Syracuse Case be correct, there is no estoppel, and the village, being free to act, may either grant a new franchise or exercise the unquestioned right to construct its own works, vested in it by the statute. In other words, it is free to act and may adopt either course as its interests dictate. Doctrine similar to that enunciated in the Syracuse Case will be found in the following authorities: In re City of Brooklyn, 143 N. Y. 596, 38 N. E. 983; Warsaw Waterworks Co. v. Village of Warsaw, 16 App. Div. 502, 44 N. Y. Supp. 876.

The authorities relied upon by the defendants are clearly distinguishable upon the facts. In the Walla Walla Case, 172 U. S. 1, 19 Sup. Ct. 77, there was an express agreement on the part of the city

not to build waterworks of its own during a period of 25 years,—the term of the contract. The provision being that, while the contract was in force, "the city of Walla Walla shall not erect, maintain or become interested in any waterworks except the ones herein referred to." The court decided that this stipulation was not ultra vires and that it was a palpable violation of its provisions for the city to construct a system of waterworks of its own while its contract with the company had 19 years to run. If the village of Canandaigua had covenanted with the waterworks company that in no event would it erect waterworks of its own until after the year 1909 the two cases would be analogous. The case of White v. City of Meadville, 177 Pa. St. 643, 35 Atl. 695, arose under the laws of Pennsylvania, which differ in several important particulars from the laws of New York here in controversy. The court does not, however, seek to disguise the fact that the reasoning of that decision is in conformity with the complainants' contention. Indeed, it may as well be conceded that were this controversy before the Pennsylvania court consistency would require a decree for the relief demanded in the bill. The Meadville decision states the argument for the water company as succinctly as possible and points out the injustice of permitting the sovereign authority, which gives life to the corporation, to destroy its property by indirection. Were the question an open one, this view would have great weight though modified somewhat by a contemplation of the inequitable results which might ensue were the Pennsylvania doctrine pushed to its logical conclusion. Might it not follow that instances will be more numerous than at present where a community is held in the grasp of a selfish and unyielding monopoly which condescends, for an exorbitant reward, to deal out liquid filth in parsimonious doses to the parched but helpless inhabitants? Admitting that the Meadville decision cannot be reconciled with the decisions of the courts of New York, it is clearly the duty of this court to follow the latter.

The latest exposition of the law upon this subject will be found in Bienville Water-Supply Co. v. City of Mobile, 95 Fed. 539. The cases cited by the complainants' counsel, and several others of similar import, are there commented upon and their inapplicability to a case like the one at bar is clearly pointed out. The court states its conclusion in language, equally applicable here, as follows:

"Thus we have seen that the contract, in every case to which our attention has been called, either provided for an exclusive right in the water company to supply water to the city and its inhabitants, granted or contracted for by the city, or contained a covenant by the city that it would not erect waterworks of its own, and would abstain from granting the right to do so to a competing company, during the life of the contract. We have seen that the contract under consideration in this case contains no such stipulation or agreement. We have seen that it does not attempt to grant any exclusive right to the complainant, and that it contains no provision that the complainant shall furnish water to the inhabitants of the city of Mobile, and no covenant by the city that it will not build or acquire waterworks of its own, or abstain from supplying water to its inhabitants, during the continuance of the contract. * * * My conclusion, then, is that the complainant has shown no valid or legal grounds on which to grant it the injunction prayed for in the bill."

Several of the complainants' arguments are addressed to the ethical rather than the legal aspects of the controversy. It may be, in view of existing relations, that the defendants' conduct was not actuated by the purest morality or the most exalted altruism. It may be that, having granted a franchise to the water company, good faith required that they should not construct a system of their own, at least until they had condemned and paid for the property of the company. But these are considerations which the court is not called upon to determine. The golden rule is not a rule in equity and until the courts are given jurisdiction to enforce the principles of the decalogue their duty will be accomplished when they have ascertained and enforced the legal rights of the parties. The court has no doubt as to what those rights are under the statutes of this state as interpreted by tribunals whose judgments this court is bound to respect, but it may not be amiss to suggest that a provision of law safeguarding the rights of existing corporations would be in accordance with natural justice and would prevent the destruction of property in the hands of innocent parties who are powerless to protect themselves. The bill must be dismissed.

WILLIAMS v. GOLD HILL MIN. CO. et al.

(Circuit Court, N. D. California. August 28, 1899.)

No. 12,531.

1. FOREIGN CORPORATIONS—SUBJECTION TO POLICY AND LAWS OF STATE.
   The right of a foreign corporation to engage in business in another state depends upon the comity of that state, and this comity is again limited by the public policy of the state, which may be inferred from its general attitude with regard to such corporations, or may be positively declared by statute.

2. MORTGAGE OF MINING PROPERTY IN CALIFORNIA.
   The state of California having declared its public policy by its constitution (article 12, § 15), which provides that "no corporation organized outside the limits of this state shall be allowed to transact business in this state on more favorable conditions than are prescribed by law to similar corporations organized under the laws of this state," and having provided by statute (St. 1880, p. 131), applicable by its terms to all mining corporations, that "it shall not be lawful for the directors of any mining corporation to sell, lease, mortgage or otherwise dispose of the whole or any part of the mining ground owned or held by such corporation * * * unless such act be ratified by the holders of at least two-thirds of the capital stock of such corporation," and prescribed the manner in which such ratification must be shown, a corporation of another state, holding mining ground in California, is governed as to its conveyance or incumbrance by such statute, and a mortgage thereon, not ratified by its stockholders in the manner prescribed, is void.

3. FEDERAL COURTS—AUTHORITY OF STATE DECISIONS.
   The decisions of the supreme court of California holding that judgment creditors of a mining corporation may question the validity of a mortgage given by the corporation on the ground that it was not ratified by the stockholders, as required by the state statute, do not relate to any question of commercial or general law, but are local in their effect, and are binding on a federal court.[1]

---

[1] As to state laws as rules of decision in federal courts, see note to Wilson v. Perrin, 11 C. C. A. 71, and, supplementary thereto, note to Hill v. Hite, 29 C. C. A. 553.

This is a suit to foreclose a mortgage given by a mining corporation on its mining property. The answering defendants are judgment creditors of the mortgagor. On final hearing.

Thomas S. Ford, C. Walter Artz, and E. J. McCutchen, for complainant.

J. M. Walling, for respondents.

MORROW, Circuit Judge. This is an action to foreclose a mortgage upon certain mining property situated in Nevada county, in this state. The mortgage was executed by the Gold Hill Mining Company on July 1, 1890, and conveyed the property mortgaged to G. Livingston Morse, of the city of New York, as trustee, to secure the payment of 100 bonds of $500 each, making $50,000 in all, payable at five years from date, with interest, payable semiannually, at the rate of 10 per cent. per annum. The respondents George C. Gaylord, Charles E. Maddrell, and Dwight T. Rolfe are judgment creditors of the respondent corporation. It is alleged in the bill that a default has been made by the respondent the Gold Hill Mining Company in the payment of the principal and interest of the bonds, and thereby default has occurred in the performance of the conditions of the mortgage. It is alleged that the persons or parties other than said mining company named as respondents in the bill of complaint have or claim to have some interest in or lien upon the premises covered by the mortgage, which interest or lien, if any, accrued subsequently to the lien of said mortgage, and is subject and subordinate thereto. The respondent the Gold Hill Mining Company has been served with a subpœna, and has defaulted. The respondents Gaylord, Maddrell, and Rolfe have appeared and answered the bill. The respondent Gaylord denies that the Gold Hill Mining Company was authorized to issue the bonds, or to execute the mortgage; alleges that at the date of said mortgage and bonds respondent corporation had its principal place of business in the city of New York, and that said bonds and mortgage are payable in the state of New York; that, according to the by-laws of said corporation, no person was, on July 1, 1890, eligible for election as a director thereof, unless he was a bona fide owner of 100 shares of capital stock in the company at the time of his election; alleges that none of the parties acting as directors at the date of the mortgage and bonds were the owners of such shares; that by the provisions of the laws of West Virginia (Code, c. 53, § 49) a director of a corporation must be a stockholder in the corporation; denies that the said corporation had any board of directors at the date of the adoption of the resolution authorizing the execution of the mortgage and bonds mentioned in the bill; that there were any stockholders or any directors of said corporation, or any persons authorized to vote for directors, or persons authorized to represent said corporation at the date of the alleged authorization of the said bonds and mortgage; alleges that the said corporation was not indebted at the date of said mortgage and bonds, but that the mortgage and bonds were attempted to be authorized and executed solely for the benefit of persons who pretended to represent said corporation as stockholders

and directors; that no consideration had been received by said corporation from any of the persons in whose interests said mortgage and bonds were issued; that the execution and delivery of said mortgage and bonds were authorized, if at all, only by the votes of pretended stockholders of said corporation, each of whom was directly, personally, and financially interested therein, and received the full benefit thereof, and hence said mortgage and bonds are fraudulent and void; alleges that the respondent corporation is organized for working the mining claims described in the bill; that the mortgage or trust deed set out in the bill, and alleged to have been executed by said corporation, was not ratified by the holders of at least two-thirds of the capital stock of said corporation, as required by an act of the legislature of the state of California approved April 23, 1880, entitled "An act for the further protection of stockholders in mining companies"; alleges that M. J. Shoecraft and C. Littlefield, whose names appear signed to the mortgage or trust deed, were not respectively president and secretary of the said corporation at the time of the execution of said mortgage; denies that said mortgage was executed by the president and secretary of said corporation, or either of them, and that the premises described in the bill were conveyed to G. Livingston Morse, trustee of the plaintiff, and that by virtue of said mortgage any lien was created upon said mining claim and premises in favor of said G. Livingston Morse; that said mortgage was authorized, made, executed, or delivered in conformity with law; denies that said 100 bonds have been disposed of to bona fide holders for value; that respondent mining company is indebted in the sum of $2,500 semiannual interest on account of said bonds for each or any half year since July 1, 1893, or prior thereto; that on July 1, 1895, the sum of $50,000 principal, or said principal sum and interest thereon, became due and payable; that respondents' claim has arisen subsequently to the lien of said mortgage, and is subject thereto; alleges that respondent Gaylord recorded in the superior court of the county of Nevada, state of California, a judgment for the sum of $12,439.26, together with $8 costs, which judgment has not been appealed from, modified, vacated, or set aside, but still remains in full force; that, subsequent to the entry of the above judgment, said respondent caused an execution to issue, and that said mining claims were sold by the sheriff on October 30, 1897; that at this sale respondent Gaylord, being the highest bidder, became the purchaser thereof for the sum of $13,331.82, whereupon the sheriff issued a certificate of sale to said respondent, which he now holds, no redemption having been made; that on October 29, 1897, in the superior court of the county of Nevada, state of California, respondent recovered a second judgment against said Gold Hill Mining Company for the sum of $4,504.87 and $6.75 costs, which judgment constitutes a lien upon the mining claims described in the bill, but which is wholly unsatisfied since respondent is the owner and holder of said claims; denies that said mortgage was given to secure the purchase price of the property; alleges that the property had been purchased and paid for before the execution of said mortgage or bonds; denies that any considerable portion of the money was used and appropriated as working capital

to start said mine. Respondent asks for a decree that complainant have no lien upon the premises described in the bill; that respondent's claims of lien are paramount to those of complainant; that the amount due and to become due on account of said bonds and interest be determined, and that respondent have such further relief as is agreeable to equity. Respondents Maddrell and Rolfe have filed a joint answer, in which the same allegations and denials are made as in the answer of Gaylord, except that said respondents allege that a judgment was recovered in the superior court of the county of Nevada, state of California, by Charles Maddrell, against said Gold Hill Mining Company, for the sum of $603.55 and costs amounting to $5.90; that upon an order of sale the property described in the bill was sold by the sheriff to satisfy said judgment, and at said sale respondents became the purchasers of the property for the sum of $675.25, whereupon the sheriff issued to them a certificate of sale, and respondents are now the owners and holders of said certificate of sale, no redemption having been made. The prayer of these respondents is identical with that of the respondent Gaylord.

The Gold Hill Mining Company is a corporation organized under the laws of West Virginia on June 23, 1890, and consequently a corporation foreign to the state of California. The recognition of its existence, therefore, and the enforcement of its contracts in this state, depend upon the comity and consent of the state. Corporations chartered by one sovereignty have no authority to exercise their franchises in another, except as the latter shall permit; but by comity they are suffered to do so where it will not contravene any principle of local policy, or any general statute. As was said in Runyan v. Coster's Lessee, 14 Pet. 122:

"Every power which a corporation exercises in another state depends for its validity upon the laws of the sovereignty in which it is exercised, and a corporation can make no valid contract without the sanction, express or implied, of such sovereignty."

In the case of Paul v. Virginia, 8 Wall. 168, Justice Field, delivering the opinion of the court, said:

"The corporation, being the mere creation of local law, can have no legal existence beyond the limits of the sovereignty where created. As said by this court in Bank v. Earle, 13 Pet. 588, 'it must dwell in the place of its creation, and cannot migrate to another sovereignty.' The recognition of its existence even by other states, and the enforcement of its contracts made therein, depend purely upon the comity of those states,—a comity which is never extended where the existence of the corporation or the exercise of its powers are prejudicial to their interests, or repugnant to their policy. Having no absolute right of recognition in other states, but depending for such recognition and the enforcement of its contracts upon their assent, it follows, as a matter of course, that such assent may be granted upon such terms and conditions as those states may think proper to impose. They may exclude the foreign corporation entirely. They may restrict its business to particular localities, or they may exact such security for the performance of its contracts with their citizens as in their judgment will best promote the public interest. The whole matter rests in their discretion."

The constitution of the state of California declares the public policy of this state with regard to foreign corporations in article 12, § 15, as follows:

"No corporation organized outside the limits of this state shall be allowed to transact business in this state on more favorable conditions than are prescribed by law to similar corporations organized under the laws of this state."

Respondents deny the validity of the mortgage set up in the bill, as it was not executed in accordance with the provisions of an act of the legislature of the state of California approved April 23, 1880, and entitled "An act for the further protection of stockholders in mining companies," section 1 of which reads:

"It shall not be lawful for the directors of any mining corporation to sell, lease, mortgage, or otherwise dispose of the whole or any part of the mining ground owned or held by such corporation, nor to purchase or obtain in any way any additional mining ground unless such act be ratified by the holders of at least two-thirds of the capital stock of such corporation. Such ratification may be made either in writing, signed and acknowledged by such stockholders, or by resolution duly passed at a stockholders' meeting called for that purpose." St. Cal. 1880, p. 131.

The mortgage in question was not ratified by the stockholders, as provided in the statute quoted.

In the case of McShane v. Carter, 80 Cal. 310, 22 Pac. 178, the supreme court of this state said, with regard to the section above quoted:

"We think that the provision of said act goes to the power or authority of the directors. It cannot be construed to relate merely to their personal liability, for no penalty is imposed upon them, and to so construe it would be to practically nullify the act. In our opinion, the directors of mining corporations have no power or authority to convey the mining ground without the consent of the holders of two-thirds of the stock given, as prescribed by the act; and it follows, without such consent, the title does not pass; and, if this be so, the question can be raised by any one who connects himself with the title of the corporation which owned the property, as well as by the stockholders thereof."

To the same effect is Milling Co. v. Kennedy, 81 Cal. 356, 22 Pac. 679.

The terms of the act and the decisions of the supreme court plainly declare the law with regard to the mortgaging of mining property by a corporation in this state under the statutes of 1880. On April 23, 1880, another statute was approved, entitled "An act amendatory of an act entitled 'An act for the better protection of the stockholders in corporations formed under the laws of the state of California, for the purpose of carrying on and conducting the business of mining,' approved March 30, 1874." St. Cal. 1880, p. 134. Section 1 of this statute reads:

"Section 1. It shall be the duty of the secretary of every corporation formed under the laws of this state for the purpose of mining to keep a complete set of books," etc.

Then follow certain provisions regarding the balance sheet, the duty of the superintendent, etc. In the case of Miles v. Woodward, 115 Cal. 308, 46 Pac. 1076, plaintiff contended that the act above referred to was unconstitutional, because it allowed corporations organized beyond the state limits to transact business within the state upon more favorable conditions than similar corporations organized under the laws of this state. The supreme court, through Justice Henshaw, said:

"It is first contended that the act in question is unconstitutional, for the reason that it operates only upon domestic corporations, and thereby allows foreign corporations to transact business within this state upon more favorable conditions than are prescribed by law to similar corporations organized under the laws of this state, in violation of section 15, art. 12, of the constitution. But the act, as its title declares, is an act designed for the 'better protection of the stockholders in corporations formed under the laws of the state of California for the purpose of carrying on and conducting the business of mining.' The statute is, in its nature, both penal and remedial. It is directed to the internal affairs of the corporation, and not to its outside dealings, or to the conduct of its business. The constitution was not designed to limit the powers of the legislature when dealing with the organization and government of corporations which are created by its own will and act. Over such corporations it has and may exercise full powers of control. Over the organization and internal government of foreign corporations it has no such powers. The laws of the state do not have extraterritorial force. It would be meaningless for this state to try to legislate upon the internal affairs of such foreign corporations, and it has not attempted to do so. The law is designed to protect stockholders of domestic corporations, and to that end has declared that the directors of those corporations, the conduct of whose internal affairs is subject to the control of the legislature, shall do specific acts, under a prescribed penalty for their failure and refusal. It does not, therefore, relate to the business of the corporation, nor impose burdens or restrictions upon domestic corporations in the conduct of their business, from which foreign corporations are relieved, but pertains as exclusively to corporate management as do the Code provisions relating to the organization and conduct of savings and loan corporations, and all corporations whose internal affairs are more or less carefully regulated by the laws of the state."

Complainant contends that the acts (St. Cal. 1880, p. 134, and Id. p. 131) constitute but one statute, relating only to domestic corporations, and that, consequently, a foreign corporation, such as the respondent corporation, is not bound by it. But an examination of the statutes in question by no means supports complainant's position. In the first place, the titles show very clearly the scope of the two acts, which were both passed upon the same day. The title of St. Cal. 1880, p. 131, is "An act for the further protection of stockholders in mining companies"; that of Id. p. 134, is "An act amendatory of an act entitled 'An act for the better protection of stockholders and corporations formed under the laws of the state of California, for the purpose of carrying on and conducting the business of mining,' approved March 30, 1874." The general terms of the first of these titles, as contrasted with the specific declarations comprised in the second, must be apparent at first sight. The one is an act for the protection of stockholders in mining corporations, the other amends an act for the better protection of stockholders in mining corporations formed under the laws of California. A comparison of the text of these two statutes goes still further to show the distinctive features which mark them as separate statutes dealing with different subjects. St. Cal. 1880, p. 131, explicitly enjoins, as quoted above, that the directors of a mining corporation shall not sell, lease, mortgage, or otherwise dispose of mining ground without the ratification of two-thirds of the stockholders, which ratification must be evidenced by writing, or by a resolution of a meeting of stockholders called for that purpose. It prescribes further that the stock shall be in the name of the real owner or trustee, and directs when the books are to be closed, and how the stock is to be voted. Id. p. 134, lays down explicit directions for

the keeping of books, the making of a balance sheet, the duty of the superintendent, and the examination of grounds, and imposes certain penalties. The act of which this act is an amendment (St. Cal. 1873–74, p. 866) deals precisely with these same matters, and refers evidently and exclusively to domestic corporations. A comparison of the two statutes passed on April 23, 1880, leads, therefore, to the following conclusion: The first act (St. Cal. 1880, p. 131) applies to all mining corporations doing business in this state, and regulates the actions of such corporations in selling, leasing, mortgaging, or otherwise disposing of mining ground owned by corporations in this state. The second act (Id. p. 134) applies only to domestic corporations in the conduct of their internal affairs. The former is a general law, affecting all mining corporations transacting business in this state, foreign corporations equally with domestic, and is in pursuance of the requirements of the constitution of the state expressly providing that foreign corporations shall not transact their business at an advantage over domestic corporations. Against this construction of the first statute the complainant contends that all the powers possessed by the mining company as a corporation, and all its relations with its stockholders, depend upon the sovereignty creating the corporation, and that this sovereignty alone has visitatorial powers. Thus, while the state of California has full power to regulate the form of instruments creating a lien, it has no power to dictate in what manner corporate action shall be evidenced, or to interfere with the internal management of a foreign corporation in any way. Since there is no express provision that foreign corporations must take certain prescribed corporate action, it cannot be assumed that the legislature intended any such action to be taken. In support of this contention counsel cite Saltmarsh v. Spaulding, 147 Mass. 224, 17 N. E. 316. In this case a mortgage deed had been made by a foreign corporation organized in New Hampshire of land in Massachusetts. This corporation was authorized, under the laws of New Hampshire, to make contracts to purchase and convey necessary real estate, and to adopt by-laws regulating the powers and duties of its officers. The Massachusetts statute required that a vote of stockholders was necessary to a conveyance of real estate by a corporation. Pub. St. Mass. c. 106, § 23. The court held that this statute did not apply to foreign corporations, and Devens, J., in the course of his opinion, said:

"While the general principle undoubtedly is that the law of the place where real property is situate exclusively governs as to the title of parties therein, the disposition and mode of transfer thereof, and the solemnity attending such transfers, and while we do not doubt that it would be possible to provide by legislation that foreign corporations permitted to own real property situate in this state should only transfer the same by authority of its stockholders, no such provision has been made. Atty. Gen. v. Mining Co., 99 Mass. 148. While they must comply in their forms of conveyance with those here required, they derive their authority to make them from the rules imposed upon them by the states where they are created."

In this state, however, the procedure necessary to the validity of a mortgage made by a mining corporation has been expressly declared by statute, and the intention of the legislature that such pro-

cedure should be incumbent upon all mining corporations doing business in this state is further evidenced by the fact that another statute upon another subject was passed upon the same day, referring specifically to domestic corporations.

In the case of Vanderpoel v. Gorman, 140 N. Y. 563, 35 N. E. 932, cited by complainant's counsel, it was held that an assignment for the benefit of creditors, made by an insolvent foreign corporation, valid under the law of its domicile, will be recognized as valid in New York, and that the statute of New York (section 48, c. 564, Laws 1890) prohibiting an assignment by a corporation in contemplation of insolvency does not apply to foreign corporations. Counsel quote a portion of the opinion of Peckham, J., on this case. The learned judge discusses at length the reason why foreign and domestic corporations do not necessarily stand upon the same footing in the matter of assignments, but running through his opinion are expressions such as the following:

"As the prohibition is not contained in any statute of the state, we are unable to discover any public policy of the state which would stand in lieu of a positive statute, and prohibit our recognition of the validity of this transfer." And again: "It is thus seen that there are differences of a marked character between a domestic and a foreign corporation in relation to this subject. The differences are so marked that the statute regarding domestic corporations can furnish no proof as to the existence of a public policy which, in the case of foreign corporations, should stand in the place of, and be equivalent to, that statute."

The constitution of this state, however, does furnish precisely such proof of the existence of a public policy as the learned judge declares himself unable to discover in the statutes of New York applicable to the case under his consideration; and that public policy is declared to be that, in this state, there shall be no discrimination in favor of a foreign corporation. In the case of Demarest v. Flack, 128 N. Y. 205, 28 N. E. 645, cited by complainant, Peckham, J., dealt with the question as to whether the defendant in that action was entitled to recognition as a corporation in the state of New York. Defendant had incorporated under the laws of West Virginia. The corporators were citizens of New York, and they had formed a corporation for the sole purpose of doing business in the state of New York, and it was contended by complainant that therefore, and on that account, they were not entitled to be recognized as forming a valid corporation in the state of New York. This contention was disallowed. But this is by no means the question here. If the corporation under consideration has been duly organized according to the laws of West Virginia, it will be recognized as a valid corporation in this state. But the point under discussion is that the respondent corporation,—admitting that it is a duly-organized foreign corporation,—in the matter of executing a valid mortgage of mining property, is governed and controlled by the law laid down by the statutes of the state of California for the mortgaging of such mining property by a corporation. In the course of this opinion occur the following with regard to foreign corporations:

"When they come to our state to do business, they must conform to our laws relating to foreign corporations, and comply with the terms laid down by us

as conditions of allowing them to transact business here." And again: "The supervision of a foreign corporation by this state may easily be exercised by imposing terms as a condition of permitting it to do business here."

Another case cited by complainant in the same connection is American Waterworks Co. v. Farmers' Loan & Trust Co., 20 C. C. A. 133, 73 Fed. 956. This was an appeal from the circuit court of the United States for the district of Nebraska. The suit out of which the appeal arose was brought by the Farmers' Loan & Trust Company, the appellee, to foreclose an original and a supplemental mortgage on certain waterworks situated in the city of Omaha, Neb., which were given to secure the payment of an issue of negotiable bonds to the amount of four millions of dollars that were executed by the American Waterworks Company, a corporation of the state of Illinois. Thayer, J., in delivering the opinion of the court, said:

"The powers thus conferred on the Illinois company by the laws of Illinois it carried with it into the state of Nebraska, and was privileged to there exercise, unless it was prohibited so doing by the provisions of some local law or the public policy of that state. Cowell v. Springs Co., 100 U. S. 55, 59; Academy v. Sullivan, 116 Ill. 375, 6 N. E. 183. And no law of the state of Nebraska has been cited which, in our judgment, deprived the Illinois company of its right to exercise within the state of Nebraska its charter power to mortgage real estate by it owned and there situated."

In the present controversy, however, there is no question of the right of the respondent corporation to mortgage the mining property. The only question is, did the corporation comply with the requirements of the state laws regarding the procedure to be adopted by corporations in the mortgaging of mining property? The personnel and the internal management of foreign corporations are subject to the laws of the state under which they are organized, and by virtue of which they are entitled to exist as corporations. But when such foreign corporations come to do business in the state of California they are restrained by the public policy of the state from the enjoyment of privileges not participated in by the domestic corporations organized under and existing by virtue of the laws of this state. What are the formalities which attend the conveyance or the mortgaging of property by a mining corporation in this state under the act of 1880? They are detailed in the first section of that act, as it has been quoted above. The act of selling, leasing, mortgaging, or any other of the acts therein enumerated, must "be ratified by the holders of at least two-thirds of the capital stock of such corporation. Such ratification may be made either in writing, signed and acknowledged by such stockholders, or by resolution duly passed at a stockholders' meeting called for that purpose." Here the law distinctly lays down the mode of procedure to be followed by mining corporations. No exceptions are made, and the public policy of the state is plainly declared to be that foreign corporations shall enjoy no superiority over domestic, under the state laws.

In 2 Mor. Priv. Corp. § 965, we find:

"It is not necessary in all cases that a state should, by statute, expressly exclude foreign corporations, in order to indicate that they shall not be allowed to act within its jurisdiction. The will of the state may be implied from its general policy and legislation. Chief Justice Taney said: 'Whenever a state

sufficiently indicates that contracts which derive their validity from its comity are repugnant to its policy, or are considered injurious to its interests, the presumption in favor of its adoption can no longer be made.' Bank v. Earle. 13 Pet. 592. Accordingly it has been held that foreign corporations have no right, by the law of comity, to do acts within a state which are prohibited by the laws of that state to its own citizens, or corporations engaged in a similar business."

In the case of Falls v. Building Co., 97 Ala. 417, 13 South. 25, the court said:

"When a corporation of foreign creation not only attempts to enforce rights before our tribunals, but goes further, and actually performs corporate acts within our jurisdiction, it can claim no exceptional rights or privileges which may have been conferred by the law of its creation, if such enforcement involves a breach of our own public policy or statutory system. The legislature of one state cannot confer rights and authorize their exercise beyond its own boundaries, unless they be in harmony with the general policy of the state or country in which their exercise is attempted."

In Manufacturing Co. v. Wetzel (Tenn. Ch. App., Feb. 8, 1896) 35 S. W. 896, the Southern Mutual Building & Loan Association, a foreign corporation, held three mortgages or trust deeds which had been executed to it in Tennessee, and under which the trustee proposed to sell certain property. The bill asked for an injunction to prevent the trustee from selling the property in question, and that the trust deeds and the contracts thereunder be declared illegal and void, on the ground of noncompliance with statutory requirements regarding building and loan associations. One ground of demurrer to the bill claimed that "a contract made by a foreign corporation before it has complied with statutory prerequisites is not void, because the act does not expressly so declare." This ground of demurrer was disallowed.

In the case of Union v. Yount, 101 U. S. 352, Justice Harlan says:

"For, besides the admitted incapacity of a corporation of one state to exercise its powers in another state, except with the assent or permission, express or implied, of the latter, it is a principle 'as inviolable as it is fundamental and conservative that the right to hold land and the mode of acquiring title to land must depend altogether on the local law of the territorial sovereign,' "—in connection with which are cited Runyan v. Coster's Lessee, 14 Pet. 122, and Lathrop v. Bank, 8 Dana. 114.

See, also, Mortgage Co. v. Gross, 93 Ill. 483, 493; People v. Howard, 50 Mich. 239, 15 N. W. 101.

From a consideration of the law and the various authorities, it appears that the right of a foreign corporation to engage in business in another state depends upon the comity of that state, and that this comity again is limited by the public policy of the state, which public policy may be inferred from the general attitude of the state with regard to such corporations, or may be positively declared by statutory enactment. In the case in question the state has declared its public policy in the state constitution, and has prescribed by statute a certain mode of procedure to be followed by all mining corporations in the mortgaging of mining lands. It was the duty of the foreign corporation to comply with those requirements. It came into this state to do business. It should have done its business in accordance with the law of this state.

Complainant maintains that respondents, as judgment creditors, cannot question the authority of the corporate action authorizing the execution of the mortgage and the issue of the bonds, to which respondents reply that they do not question the issue of the bonds, but the lien of the mortgage, which lien, they maintain, is of no value for noncompliance with statutory requirements. It was held in the case of McShane v. Carter, 80 Cal. 310, 22 Pac. 178, cited above, that the "question [of title] can be raised by any one who connects himself with the title of the corporation which owned the property, as well as by the stockholders thereof." See, also, Milling Co. v. Kennedy, 81 Cal. 356, 22 Pac. 679. Complainant endeavors to meet these decisions of the supreme court of this state with the claim that the ruling of the state court in the above cases must be disregarded by the federal court on the grounds that this particular point does not involve the construction of a statute, but is a question of commercial law, and, such being the case, the court must follow the independent rulings of other federal tribunals. What is commercial law? In the case of Railroad Co. v. National Bank, 102 U. S. 14, 31, the supreme court said:

"It is a law not peculiar to one state or dependent upon local authority, but one arising out of the usages of the commercial world."

Mr. Justice Clifford, in a concurring opinion, on page 55, refers to Bouvier's definition of "Commercial Law," as follows:

"Commercial law is a phrase employed to denote the branch of the law which relates to the rights of property and the relations of persons engaged in commerce. Persons engaged in commercial adventures, wherever they may have their domicile, have business relations throughout the civilized world, from which it results that commercial law is less local and more international than any other system of law except the law of nations."

It appears to be clear that the parties to this action cannot be described as persons engaged in commercial adventures, in the sense in which that term is ordinarily employed.

In the case of Swift v. Tyson, 16 Pet. 1, Story, J., in delivering the opinion of the court, said, referring to the thirty-fourth section of the judiciary act of 1789 (1 Stat. 92):

"It never has been supposed by us that the section did apply, or was designed to apply, to questions of a more general nature, not at all dependent upon local statutes or local usages of a fixed and permanent operation; as, for example, to the construction of ordinary contracts or other written instruments, and especially to questions of general commercial law where the state tribunals are called upon to perform the like functions as ourselves,—that is, to ascertain, upon general reasoning and legal analogies, what is the true exposition of the contract or instrument, or what is the just rule furnished by the principles of commercial law to govern the case. And we have not now the slightest difficulty in holding that this section, upon its true intendment and construction, is strictly limited to local statutes and local usages of the character before stated, and does not extend to contracts and other instruments of a commercial nature, the true interpretation and effect whereof are to be sought, not in the decisions of the local tribunals, but in the general principles and doctrines of commercial jurisprudence. * * * The law respecting negotiable instruments may be truly declared, in the language of Cicero, adopted by Lord Mansfield in Luke v. Lyde, 2 Burrows, 882, 887, to be in a great measure not the law of a single country, but of the commercial world. 'Non erit alia lex Romæ, alia Athenis, alia nunc, alia post hac, sed et apud gentes, et omni tempore, una eademque lex obtinebit.'"

It is evident that even with this liberal definition of commercial law complainant's argument in this regard cannot prevail. There is, on the contrary, every reason to consider this as a case in which the decisions of the state court carry the weight of authority. In cases which depend upon the statutes of a state, and particularly in such cases as relate to the title to land, the United States supreme court will adopt the construction of the state courts whenever it is possible to ascertain this construction. Polk v. Wendall, 9 Cranch, 87.

In Gardner v. Collins, 2 Pet. 58, the case depended upon the construction of the statute of descent of Rhode Island of 1822. The court said:

"If this question had been settled by any judicial decision in the states where the land lies, we should, upon the uniform principles adopted by this court, recognize that decision as a part of the local law."

See, also, Elmendorf v. Taylor, 10 Wheat. 152.

Again, in the case of Shelby v. Guy, 11 Wheat. 361, the court held:

"That the statute law of the states must furnish a rule of decision to this court as far as they comport with the constitution of the United States in all cases arising within the respective states, is a position that no one doubts. Nor is it questionable that a fixed and received construction of their respective statute laws in their own courts makes, in fact, a part of the statute law of the country, however we may doubt the propriety of that construction."

The decision, then, of the supreme court of this state must, for every reason, prevail in this case. The construction placed upon the statute in question by the state court becomes statute law, and this court can do nothing but accept it. The decisions in the cases of McShane v. Carter and Milling Co. v. Kennedy declare that respondents, as judgment creditors, have the right to question the validity of the mortgage in this case, and there is no merit in the contention of complainant that this right can be denied by this court. The mortgage being invalid by reason of the noncompliance of the directors of the respondent corporation with the statutory requirements of this state, it will not be necessary to consider the other objections relating to its execution and the organization of the respondent corporation. A decree will be entered in favor of the respondents, in accordance with this opinion.

POPP v. CINCINNATI, H. & D. RY. CO.

(Circuit Court, S. D. Ohio, W. D. May 22, 1899.)

No. 5,281.

1. ACTION BY FOREIGN ADMINISTRATOR—DEATH BY WRONGFUL ACT.
   Under Rev. St. Ohio, § 6133, providing that a foreign administrator may prosecute an action in that state in his capacity of administrator in like manner as a nonresident may sue, a foreign administrator may maintain an action for death of the decedent by wrongful act, as authorized by sections 6134, 6134a, 6135, allowing an action for death by wrongful act, and permitting an administrator to sue on behalf of the beneficiaries.

2. SAME—PARTIES IN INTEREST—FEDERAL JURISDICTION.
   Under Rev. St. Ohio, § 6135, authorizing an action for death by wrongful act to be brought by the administrator for the benefit of the next of kin,

the administrator is not a nominal party merely, but is the real party, and has control of, and is responsible for, the conduct of the case; and consequently, if a foreign administrator, he may bring the action in the federal court, although the beneficiaries reside in the state where the death occurred.

Action for death by wrongful act by Minnie Popp, as administratrix of John L. Popp, deceased, against the Cincinnati, Hamilton & Dayton Railway Company. Defendant demurs to complainant's petition. Complainant's petition is as follows:

Plaintiff is a citizen of the state of Indiana, and is the duly appointed and qualified administratrix of the estate of her husband, John L. Popp, deceased. The defendant is a corporation organized under the laws of Ohio, and is a citizen of Ohio and resident of this district, and was on the 21st day of September, 1898, operating a railroad between Cincinnati, Ohio, and Toledo, Ohio, and other points. On said 21st day of September, 1898, plaintiff's decedent was in the employ of defendant as a locomotive engineer, and while riding upon an engine in the discharge of his duty near Leipsic, Ohio, on the line of said railroad, said engine became derailed, and plaintiff's decedent was caught in the wreck which followed, and was killed. The said derailment and death of plaintiff's decedent was caused wholly by the negligence of defendant, its agents and employés, in maintaining, at and about the place where said derailment occurred, its roadbed, ties, track, frog, and other appliances in a defective and dangerous condition, and unfit for running trains thereon, which was known to defendant, or could by due care on its part have become known, and was unknown to said decedent, John L. Popp, and could not by due care on his part have been known to him. The said John L. Popp left surviving him a widow, Minnie Popp, who, as administratrix, is plaintiff herein, and one child, a boy aged 10 years, who have been damaged by reason of the premises in the sum of $10,000, for which plaintiff asks judgment.

C. M. & E. W. Cist, for plaintiff.
Maxwell & Ramsey, for defendant.

THOMPSON, District Judge. This cause is submitted to the court upon a demurrer to the petition upon the ground that it does not appear therefrom that the court has jurisdiction of the action.

1. It is said that, for aught that appears in the petition, the plaintiff may have been appointed administratrix in a foreign country, or in some state of the Union other than Ohio, and that under section 6133 of the Revised Statutes of Ohio a foreign administrator cannot maintain an action "for death caused by wrongful act" under sections 6134, 6134a, and 6135 of said statutes. This claim is based upon a construction of section 6133 which would exclude actions for wrongful death as not being brought by the foreign executor or administrator "in his capacity of executor or administrator," because any damages recovered in such action would not become assets of the estate, but would be apportioned among the wife, husband, children, or next of kin of the deceased. I do not think this construction sound. I think the manifest intention of the legislature was to allow foreign executors and administrators to prosecute any action which might be prosecuted by an executor or administrator appointed in this state, "in like manner and under like restrictions as a nonresident may be permitted to sue." Duchesse D'Auxy v. Porter, 41 Fed. 68; Noonan v. Bradley, 9 Wall. 394, 403.

2. It is said that the beneficiaries under the statute are the real

parties in interest, and that federal jurisdiction, based upon diverse citizenship, has relation to the citizenship of the real parties in interest, and not to that of mere nominal parties; that the plaintiff is a mere nominal party, and, for aught that appears in the petition, the other beneficiary may be a citizen of Ohio, and therefore, jurisdiction not appearing upon the face of the petition, the action must be dismissed. The plaintiff, in the opinion of the court, is not a mere nominal party. She is a real party, so far as the prosecution of the suit is concerned. It is not a case where the suit is being prosecuted in the name of somebody else, where the party actively conducting the litigation is doing it in the name of the state, in the name of a next friend, or the like, but it is a case where the administratrix is the active party in the prosecution of the suit, who institutes it, carries it on, and, with the sanction of the court, may compromise or dismiss it. She has absolute control of, and is responsible for, the conduct of the case. Harper v. Railroad Co., 36 Fed. 102; Coal Co. v. Blatchford, 11 Wall. 172; Knapp v. Railroad Co., 20 Wall. 117; Chappedelaine v. Dechenaux, 4 Cranch, 306; Childress v. Emory, 8 Wheat. 642; Clarke v. Mathewson, 12 Pet. 164; Bonnafee v. Williams, 3 How. 574; Osborn v. Bank, 9 Wheat. 738; Irvine v. Lowry, 14 Pet. 298; Rice v. Houston, 13 Wall. 66; Davis v. Gray, 16 Wall. 220; Florida v. Anderson, 91 U. S. 676; Walden v. Skinner, 101 U. S. 589; Davies v. Lathrop, 12 Fed. 353; Shirk v. City of La Fayette, 52 Fed. 857; Reinach v. Railroad Co., 58 Fed. 33; Morris v. Lindauer, 4 C. C. A. 162, 54 Fed. 23; Bangs v. Loveridge, 60 Fed. 963; Pennington v. Smith, 24 C. C. A. 145, 78 Fed. 399. In the Stewart Case, 168 U. S. 445, 18 Sup. Ct. 105, the question was whether a cause of action, arising in Maryland, could be sued upon in the District of Columbia, owing to the peculiarities of the Maryland statute requiring suits to be brought in the name of the state. It was not a question of federal jurisdiction, and the court held that, the state of Maryland not being the beneficiary of the fruits of the litigation, the suit might be brought in the District of Columbia by the personal representative of the deceased. The case is thus stated in the digest:

"An action for death caused by negligence in Maryland, where the statute provides for an action in the name of the state as nominal plaintiff, but for the benefit of certain prescribed heirs, is not such a special remedy for a purely statutory right of action as will prevent the maintenance of an action by the administrator in the District of Columbia, where the statutes provide for actions by personal representatives in such cases for the benefit of certain prescribed heirs, although the beneficiaries may not be exactly the same under the two statutes." 4 L. Co-op. U. S. Dig. p. 59.

In suits by the state on relation of A. B., or by a next friend, the state and the next friend are not real parties, in the sense that they have an interest in the result of the litigation, nor in the sense that they control the litigation; but executors, administrators, trustees, etc., although they have no personal interest in the fruits of the litigation, yet are real parties in the sense that they control, and are responsible for, the litigation. The demurrer will be overruled.

In re HIRSCH.

(District Court, W. D. Tennessee. August 16, 1899.)

No. 1,773.

1. BANKRUPTCY—DISCHARGE—SPECIFICATIONS IN OPPOSITION.
Specifications in opposition to a bankrupt's application for discharge must be as specific as a criminal information or indictment, so as to notify the bankrupt of the particular acts or conduct on his part on which the opposition is based; and to this end they must distinctly allege the facts relied on, and not mere conclusions of fact.

2. SAME—SUFFICIENCY OF SPECIFICATIONS.
In specifications in opposition to the discharge of a bankrupt, an allegation that he has "not offered to surrender all his property for the benefit of his creditors," and that he is "withholding property from his creditors," is not sufficient as an attempt to charge the offense of knowingly and fraudulently concealing property from his trustee, or that of making a false oath in a proceeding in bankruptcy.

3. SAME—KEEPING BOOKS.
It is no ground of opposition to the discharge of a bankrupt that he failed to keep proper books of account in his business, or destroyed his books, at a time prior to the enactment of the bankruptcy law; for, no bankruptcy law being in existence, such acts or conduct could not have been "in contemplation of bankruptcy," within the meaning of section 14 of the act (30 Stat. 550).

4. SAME—CONTEMPLATION OF BANKRUPTCY.
The phrase "in contemplation of bankruptcy," as used in the act of 1898, means contemplation on the part of a debtor of filing his voluntary petition in bankruptcy, or of involuntary proceedings being taken against him by his creditors for some act which the statute makes an act of bankruptcy. It does not mean contemplation merely of a state of insolvency.

5. SAME.
A debtor cannot be said to be "in contemplation of bankruptcy" at a time when no bankruptcy law is in existence, although a bill for a bankruptcy statute is then pending before congress, and the debtor expects to take the benefit of it if it should become a law.

6. SAME—DESTROYING OR CONCEALING BOOKS.
Where a debtor has kept books of account or records of his business carried on before the enactment of the bankruptcy law, their destruction or concealment after the passage of the act will be ground for refusing his discharge in bankruptcy, if done with the fraudulent intent denounced by the statute.

7. SAME—EVIDENCE.
A bankrupt, on his examination before the referee, admitted that he had certain books of account relating to a business which he had formerly carried on, and in which he had failed and made a general assignment, and promised to produce such books. As an explanation of his failure to keep this promise, he said that he could not now find the books; that at the time of his failure, thinking they were of no value, and having no place to keep them, he had left them lying in the store, and supposed they had been lost or mislaid in some way unknown to him. *Held* no sufficient evidence of a fraudulent destruction or concealment of the books to warrant the court in refusing to discharge the bankrupt.

8. SAME—CONCEALING PROPERTY.
The mere fact that a bankrupt has not listed certain property on his schedule is no ground for refusing his discharge. It must further appear that the omission of property from the schedule was of such a character as to make his oath to the schedule a false oath, or of such a character as to amount to a knowing and fraudulent concealment of property from his trustee.

9. SAME.

Corporate stock standing in the name of a bankrupt should be included in his schedule, although hypothecated for its full value; but if he omits to list it, not with any fraudulent intention, but under the honest belief that, being so pledged, it is no longer his, or is not worth including, this is no reason for refusing his discharge.

10. SAME—EVIDENCE.

A merchant having failed in business, his brother-in-law furnished capital to re-establish him. A corporation was formed, and all the stock was taken in the name of the brother-in-law and other relatives of the merchant, with the expectation that the money should be repaid to them when the business justified it. The merchant conducted the business as manager, and received a salary; no dividends being paid, although the business was profitable. There was no evidence to show that the capital was really furnished by the merchant himself, or received as a gift or loan from his relatives, or that the transaction was fraudulent or simulated. The merchant became bankrupt, and, having failed to list the stock of goods belonging to said corporation in his schedule, *held*, that there was no such fraudulent concealment of property from his trustee as would forfeit his right to a discharge.

11. SAME.

The right of creditors to oppose a bankrupt's discharge on the ground of an alleged fraudulent transaction does not depend on their having taken any legal proceedings, through a trustee or otherwise, to recover the property affected; but if the evidence, on the bankrupt's application for discharge, is doubtful and conflicting, the fact that creditors have made no such effort may be taken into consideration, and, in an evenly-balanced condition of the proof, will warrant a decision in favor of the bankrupt.

12. SAME—GRANTING DISCHARGE—TIME FOR APPEAL.

Where specifications in opposition to the discharge of a bankrupt have been overruled, and the discharge ordered, the bankrupt's certificate of discharge will not issue until the expiration of 10 days after the order, or until the expiration of any extension of the time allowed to creditors to appeal from such order.

In Bankruptcy. On application of bankrupt for discharge.

Hunsdon Carey and John H. Watkins, for opposing creditors.
T. K. Riddick, for bankrupt.

HAMMOND, J. The first specification, as originally filed, in opposition to the bankrupt's discharge, set out that he "had not offered to surrender all his property for the benefit of his creditors; that he is now the real owner of the stock of goods, business, and property of the Jacob Hirsch Company, a corporation located and doing business at Somerville, Tennessee; and that he is now withholding that property from his creditors." The second specification charged that, with the fraudulent intent to conceal his true financial condition, and in contemplation of bankruptcy, he destroyed, concealed, or failed to keep books of account or records from which his true condition might be ascertained, in this: that he has destroyed or concealed the book where he kept the account of the cash taken in by him in his business at Somerville, Tenn., during the year 1896, and prior thereto, from which the original entries of his business were copied in the ledger. A motion to strike out these specifications, as insufficient, was granted upon the ground that specifications in opposition to a discharge must distinctly aver the facts of the case, and not mere conclusions of fact. Substantially, the plead-

ing must be as specific as a criminal information or indictment; the purpose being that the bankrupt shall have notice of that particular conduct of his which is challenged as an objection to his discharge. This is particularly so under the act of 1898, because by the fourteenth section it is provided that most of the grounds of the opposition to the discharge shall be based upon some offense committed by the bankrupt which is made punishable with imprisonment by the act itself. The other grounds of opposition mentioned in the fourteenth section need not be criminal in their nature, necessarily; but they likewise fall within the ordinary rule that, where the language of a statute does not of itself serve the purpose of giving notice to the offender of the particular conduct which is charged against him as an offense, the pleader must aver the facts with sufficient fullness to accomplish that object. The specifications, as originally drawn, do not do this.

It was also objected to the specifications, in their original form, that the alleged destruction of the books, or failure to keep them, had not been charged to have occurred since the passage of the act of 1898, but, upon the contrary, that it appeared upon the face of the specifications that they related to the business done in 1896. This objection is probably covered by the one just disposed of, but it is not improper to say that in the statute itself there is no indication of any intention to withhold a discharge because of any destruction or failure to keep books occurring before the passage of the act. Undoubtedly congress might have extended the grounds of opposition in that manner, but, by the statute itself, the act complained of "must have been in contemplation of bankruptcy." It was ruled in Re Holman, 92 Fed. 512, that this phrase necessarily implies that it must have been done after the passage of the bankruptcy statute, since, before that time, there could have been no bankruptcy in contemplation, and it seems to me that there is no answer to that proposition; but of this more will be said presently, in considering the amended specifications. Indeed, it has been argued for the bankrupt that this provision of the fourteenth section cannot, in the nature of the case, apply to any books or records of a business carried on prior to the passage of the bankruptcy statute. But this is not, in my judgment, altogether sound, and I wish to guard against any misunderstanding on that point of the ruling that has been made. Whatever may be said of "keeping" books of account or records, in respect of that, certainly if one has kept records of his business carried on before the passage of the bankruptcy statute, and these were destroyed or concealed after the passage of the act, the offense would fall within the provisions of the second class of offenses denounced, as a cause for withholding a discharge, by the fourteenth section.

Another reason urged for striking out the first specification is that it does not charge any ground for denying a discharge which is recognized by the fourteenth section of the statute. The act of 1898 nowhere requires the bankrupt to "offer to surrender his property," nor does it provide any penalty for "withholding the same from his creditors." If we turn to section 29, which designates the offenses punishable by imprisonment under the statute, we find that what is

described as an offense is to "knowingly and fraudulently conceal from his trustee any property belonging to his estate in bankruptcy." Also, it is an offense punishable by imprisonment to make any false oath in relation to any proceeding in bankruptcy. If a bankrupt willfully leaves off any property which he should disclose by his schedules, he certainly makes a false oath to the same, and his discharge may be denied on that ground. Again, if he knowingly and fraudulently conceals his property, no matter how, he cannot be discharged, but the fact that he left the property off the schedule is only an evidence in the one case of concealment, and in the other of the falsity of the oath; but as the statute nowhere denounces as a ground for denying the discharge the mere failure to put the property upon the schedules or to surrender it to the trustee, and inasmuch as these accusations are penal in their character, as before stated, nothing can be implied from or based upon such language in a specification opposing a discharge. There must be a distinct averment of the facts bringing the case within the specific denunciations of the statute, and nothing less will do. Failure to schedule or surrender property to the trustee is not per se, or ipso facto, to "knowingly and fraudulently conceal" it.

The amended specifications upon which issues have been taken now present the following grounds of opposition to the discharge: First. That the bankrupt knowingly and fraudulently concealed from the referee, from his creditors, and from the trustee, while a bankrupt, certain property; that is to say, that he was, on the day on which he filed his petition in bankruptcy, the sole owner of the stock of goods, wares, and merchandise with which he is now doing business in the town of Somerville under the name and style of the Jacob Hirsch Company, and he has not returned this property upon any sworn schedule filed by him, showing its location or value. Second. That he has likewise concealed one share of stock, of which he was and is the owner at the time of the filing of his petition in bankruptcy, in the corporation known as the Jacob Hirsch Company, of the value of $50, which he did not return upon his schedules, and which he has not made known to his creditors by any sworn return in the bankruptcy proceedings. Third. That, with the fraudulent intent to conceal his true financial condition, he had failed to keep books of account from which his true financial condition might be ascertained, in that on the 24th of December, 1896, he was engaged in business as a merchant, and made a general assignment for the benefit of his creditors on December 5, 1896, at which time he kept and had on hand a full set of books, consisting of two ledgers, a cotton book, a blotter, and a cash book; that he had filed with the referee his ledgers and his cotton book, but not his cash book and blotter from which the original entries were made, but pretends that he has lost those two books, when, as a matter of fact, he has destroyed or concealed them in contemplation of bankruptcy. Fourth. That he has, with like fraudulent intent and in like contemplation of bankruptcy, destroyed or concealed the cash book and the blotter, where he kept the original records of his receipts of cash and other entries, pretending that he has lost the same, when in fact he has

destroyed them to prevent their being used in evidence against him.

No objection is taken to the form of these specifications as amended, but the bankrupt files a general plea of not guilty, and special pleas explaining his conduct in relation to the books and the share of stock. The court shall not, of its own motion, take any exceptions to the form of the amended specifications, but desires it to be understood that it is not to be thereby implied that they are, in their form, within the requirements of the law for specific pleading. They do not yet set out how the property has been concealed from the creditors or trustee, nor how the books have been concealed or destroyed, unless it may be said that the pleading goes upon the ground that the mere fact that the property was not put upon the schedules is, of itself, conclusive evidence of such concealment as is denounced by the statute, both criminally, and as a ground for withholding the discharge, and that the mere nonproduction of the books on demand is conclusive of their destruction or concealment. It is well enough to notify attorneys that, where objection is made, the court will insist that the specifications in opposition to a discharge shall notify the bankrupt of the conduct on his part which is relied upon for denying the discharge to him, and mere general charges or "fishing" specifications will not suffice. The law affords ample opportunity, by examination of the bankrupt and otherwise, to enable the creditors to disclose the actual facts; and, while it will not be required that the evidence shall be put in the pleadings, it should be required, in all justice, and in accordance with the ordinary rules of penal or criminal as well as of civil procedure of that kind which charges fraud, that the facts must be stated, and not mere epithetical conclusions of fact, as is too common in pleadings of this character. A sufficient pleading by averring the facts would disclose the character of the transaction, without any use at all of the denunciatory words, and yet be completely within the impeachment of the statute. To say that a bankrupt has knowingly and fraudulently concealed a thing is only to accuse by calling names, and is not pleading a fact. On the face of these specifications nothing appears. It is said that the bankrupt is the sole owner of a certain stock of goods described in the specifications. But how has he concealed it? The specification does not inform us. We can see from the proof what the creditors probably mean, but the pleading should require no such aid from the proof. The evidence should support the averments of the plea by proving them, but it cannot supply the necessary averments of a pleading.

Briefly, the proof in this case shows that the bankrupt was in former times a prosperous merchant in the town of Somerville; that, to enlarge his business, he removed to the city of Memphis, where he failed, and subsequently returned to Somerville and went into business, and again failed, and in 1896 made a general assignment. Some six months after this last failure he again appeared in the town of Somerville, doing business under the corporate name of the Jacob Hirsch Company. He was so carrying on business at the time of the filing of his petition in bankruptcy, and is now carrying on business in that manner. He was, and is yet, the owner of one

share of the stock of the Jacob Hirsch Company, and is its secretary and general manager. The evidence conclusively shows that this corporation was organized according to the laws of Tennessee as a trading corporation, and that the stock was subscribed wholly by the immediate family of the bankrupt, except one share to his lawyer. The principal shareholder was his brother-in-law, who frankly testifies that he furnished the money (some $1,800 or $2,000) to establish this corporation, for the purpose of setting his brother up in business, as a family affair; that the stock was distributed among the relatives for the purpose of having the amount of money repaid to the brother-in-law, or to those shareholders to whom he gave it, whenever the business would justify it. He testified that he expected and hoped, and still expects and hopes, that at some time his brother-in-law, through the profits of the business, would be able to repay the money, but that he and the other relatives are still the bona fide holders of the stock. There is not a particle of evidence to show to the contrary of this statement,—such as that it was a mere device, and that the capital stock of the company was really furnished by the bankrupt, directly or indirectly. It is contended by counsel in argument that this was a loan by the brother-in-law to the bankrupt, and that the organization of the corporation was an ingenious device to cover up the real transaction; but this is only an inference, and there is no reason why the brother-in-law who furnished the money might not secure himself in the advances made, in the form of stock in a corporation, as well as in the form of a loan and chattel mortgage on the goods, or in any other way. The only question is whether it is or not a bona fide transaction, and it does not appear to the court, however suspicious it may seem, that upon the evidence it can be fairly said that it was a device or fraudulent transaction, and not a legitimate and honest way to help a broken-down relative. He is paid a salary of $1,500, and he testifies that the business has been prosperous enough to enable him, if desired, to pay as much as 15 per cent. dividend on the amount of the capital stock; but no dividends have been paid, no meetings of stockholders or directors have been held, and the brother-in-law who made the advances frankly testifies that he has had nothing to do with the business, except in the manner above stated. If there were any proof tending to show that the money actually came from the bankrupt himself, or that it was an out and out gift to him by his brother-in-law, there would be some foundation for the alleged fraudulent transaction; but it is not even pretended that there is any proof of that kind in this case.

As to the $50 share of stock owned by the bankrupt in the corporation, it appears that long before his bankruptcy—some nine months, say—he hypothecated that share of stock with his brother-in-law for a loan of $50, which has not been paid, and that the brother-in-law had, in addition to that, loaned the concern, in cash, $100, for which he is still a creditor. Nothing else appears about the ownership of the stock, and the bankrupt testifies that he forgot to put it in the schedules because he supposed that, being pledged for its value, it was not his property.

On the issue as to the destruction or concealment of the books, it appears that soon after the assignment, in 1896, one of the creditors investigated the bankrupt's affairs, and, among other things, the attorney went to Somerville, and asked to see the books, and did examine them, including the blotter and the cash book. When the bankrupt was examined by the referee, he was asked about these books, and said he supposed that the cash book and blotter were at Somerville, and that he would produce them; but he never did. He now explains by his testimony that when he returned, and searched for the books, he could not find them; that, not deeming them of any particular value, and having no convenient place to keep them, he left them lying around in the store, and he supposed that they had been lost or mislaid in some way unknown to him. It does not appear in the proof that after the general assignment of 1896, and the organization of the corporation and resumption of the business at Somerville, any of the creditors undertook to attack that assignment, or to recover the corporate property as fraudulently held by Hirsch for the purpose of hindering, delaying, or defrauding his creditors. It appears by the records of the bankruptcy proceedings that the creditors have appointed no trustee, and, by the referee's report, that they do not desire one appointed, wherefore it is plain that they do not intend to sue for the recovery of the property. It is undoubtedly true that the right of the creditors to specify an alleged fraudulent transaction in opposition to a discharge does not depend upon their having taken any legal proceedings, through a trustee or otherwise, to recover the property itself, and, if it appear by proof that there has been a fraudulent transaction denounced by the statute as a sufficient ground for withholding the discharge, that fact should have no influence whatever; but, when the case is doubtful or inconclusive, the fact that the creditors have not proceeded for the substantial benefit of recovering the property is quite suggestive to the court trying the issue of the discharge that the creditors themselves do not deem the proof of fraud very strong. The machinery of the bankruptcy statute is designed to furnish creditors with every opportunity to recover the fraudulently concealed property of a bankrupt, and, where they do not resort to that method of redress, they do not stand in the same attitude in opposition to the discharge that they otherwise would. In an evenly balanced condition of the proof, it is a fact which should turn the scale in favor of the bankrupt's discharge upon the ground that the creditors themselves had been either not very diligent about the proof, or else regarded it as not very formidable, as, indeed, it appears here not to be. Here is a stock of goods lying for a long time in open sight, under circumstances that are certainly suspicious. Examinations and investigations have been made, with the results we see in the above-stated evidence. The courts do not proceed upon suspicion, but only upon evidence that satisfactorily shows that frauds have been committed. If the court here could have seen that the creditors of this bankrupt were diligent, and earnestly pursuing their remedies at law, through a trustee in bankruptcy, to recover this property, it would undoubtedly at least suspend the further hearing

of the application for a discharge until the creditors had had an opportunity of testing in a court of competent jurisdiction the question of fraud in the most direct and beneficial way; but, in the absence of such proceedings, the court can only look upon the proof as inconclusive, as it undoubtedly appears to be as presented here.

It has been very earnestly and forcibly argued that section 7 of the act of 1898 makes it the duty of the bankrupt to prepare, make out, and file in court a schedule of his property, the location thereof, and testimony of the value in detail, and that a failure to discharge this duty is of itself a sufficient ground for the court to deny the discharge. As already intimated, the statute does not present the grounds of opposition to a discharge in that way. It is specific and definite in prescribing that conduct of a bankrupt which shall defeat him of his discharge, and the courts can incorporate into the statute no other grounds of opposition. Indeed, the general scheme of this act seems very narrowly to limit the grounds for withholding a discharge, and, on the other hand, to declare that it shall have no effect as against creditors who have certain rights and equities against the bankrupt as prescribed in the statute, some of which were, under former acts, prescribed as grounds for denying the discharge. It is unnecessary, however, to go into this feature of the act, for it is too plain for any argument that the mere fact that a bankrupt has not disclosed his property upon the schedules is not of itself a ground for denying the discharge. If the withholding from the schedules be of such a character as makes his oath to the schedules false, upon a proper specification, not found here, the falsity of that oath would be a good ground for withholding his discharge. So, if the withholding be of such a character as to amount, on the facts of the particular case, to knowingly and fraudulently concealing his property from the trustee, it is not only a good ground for withholding the discharge, but a criminal offense, punishable by imprisonment. As stated to counsel in the argument, it is my judgment that, in the absence of all other facts, if it should appear only that the bankrupt had willfully left his property off the schedules, that fact would be conclusive as a matter of evidence both of the false oath and of the concealment of his property from the trustee, but it is only as a matter of evidence that it could have that effect. If, however, it should appear from the proof that the fact of withholding the property from the schedules was satisfactorily explained by circumstances consistent with an honest belief that it did not belong to the bankrupt, it would be no ground either for a criminal prosecution or for withholding the discharge. Here the bankrupt conclusively shows that he is not engaged in the ordinary processes of concealment, because he had been for a long time and was openly engaged in doing business when he filed his petition; and he continues, as before he filed his petition, openly to conduct that business through the method of an organized corporation. It was and is his opinion that the corporate property has no place upon his schedules, and does not belong to his creditors; and, if he and his brother-in-law tell the truth about it,—and there is nothing but suspicion to the contrary,—it does not, in fact or law, belong to his creditors, and therefore has no place upon

his schedules. It would have been wise, however, to have noted his connection with this property on the schedules, by way of honest explanation of a suggestive circumstance, and a suspicious one. There is no denying the force of the fact that this was a family affair, and that he was receiving, through the processes mentioned, the benefits of this business, but it is not at all inconsistent with the most honest intentions and the utmost good faith that a business should be conducted in that way. If a bank, or other capitalist, or other friends than his relatives, had done for him just what his relatives have done, in the absence of any proof to show that it was a simulated transaction and that he was the real owner of the stock or corporate property, there could be no objection taken to the transaction. It would be giving undue weight to the circumstance that those who came to his relief were relatives, to pronounce the whole transaction fraudulent upon that circumstance alone. There is also a strong suspicion in this case that these relatives are unusually indulgent to this bankrupt, and treat the property as entirely his, and not theirs, as owners of the stock in the corporation, because they have not done as shareholders usually do,—looked after their dividends and profits. Still, if the money actually belonged to the brother-in-law who advanced it, and not to the bankrupt, in the absence of any proof showing that he definitely and distinctly abandoned his ownership as a shareholder and donated or gave the property to the bankrupt, it does not become his. As to the share of stock, it is just as apparent that, under the circumstances, the most honest of men might have thought that it was not worth while to put it upon the schedule. It ought to have gone there, undoubtedly, but the neglect to put it there is pardonable, under the circumstances. It does not fall within the condemnatory words of the twenty-ninth section of the statute, "knowingly and fraudulently concealed." Therefore I am of the opinion that no sufficient evidence has been produced to show, either as to the merchandise or as to the share of stock in the corporation, that there has been any concealment such as the statute requires as a ground for denying the discharge.

The case equally fails on the proof as to the destruction of the books. There is no proof whatever to show that he did not keep proper books of account, but, even if there were, it would fall distinctly within the ruling in Re Holman, supra, as to the charge of not keeping books or records at a time anterior to the bankruptcy statute of 1898. Also, it seems to me, on the proof, that a fair and reasonable explanation is given for the nonproduction of the blotter and cash book. What happened to this bankrupt, as shown by experience, is liable to happen to any merchant. The creditors have produced no proof to show that he has concealed or destroyed the books. The charge all hinges upon their nonproduction, and whatever implication may be drawn from the fact that he said on his examination that he had the books, and afterwards did not produce them. He gives a reasonable explanation of this, by saying that at the time of his examination he supposed they were in the store, but when he came to look for them he could not find them, and does not know where they are. Unless his testimony on this point is to be

wholly discredited, there is no evidence against him. It is true that he is discredited as a witness by his interest, yet the statute allowing his testimony would be nugatory, if it is to be discarded absolutely because of his interest. We must take it subject to the discredit along with the other proof, and, so taken, it affords a satisfactory explanation. The creditors have not taken the trouble to make any search for the books, or to produce evidence of any circumstance tending to show that his explanation is not true. We are asked to disbelieve, and refuse his discharge only because the books are not in fact produced, and, as before, upon mere suspicion that he has destroyed them.

But, apart from all this, there is nothing to show that the books were in existence at the time the bankruptcy act was passed, or that they have been lost or mislaid, and thereby concealed, since that time. In an old case, under the act of 1841, the supreme court of the United States considered the meaning of the phrase "in contemplation of bankruptcy" when used in a bankruptcy statute. Attention was called to the conflict of authority on the point as to whether it meant in contemplation of insolvency, or in contemplation of some act of bankruptcy under the statute; and it was held that, under our legislation, it means that the debtor must be acting in view of filing his own petition in bankruptcy, as provided by the statute, or of proceedings which might be taken against him by his creditors for some act declared by the statute to be an act of bankruptcy. Buckingham v. McLean, 13 How. 150. It is to be presumed that congress used the phrase in view of this definition, as established under the act of 1841. The act of 1898 does not use the words "in contemplation of bankruptcy or insolvency,"—a phrase found in the act of 1867,—and the omission of the added word "insolvency" is therefore quite significant. Taking the two phrases together, as found in the act of 1841 and that of 1867, and the interpretations given to each by the adjudicated cases, and we can have no doubt of the meaning of the words as used in the fourteenth section of the act of 1898. In re Black, 2 Ben. 196, Fed. Cas. No. 1,457; In re Craft, 6 Blatchf. 177, Fed. Cas. No. 3,317; Id., 2 Ben. 214, Fed. Cas. No. 3,316; Carr v. Hilton, 1 Curt. 230, Fed. Cas. No. 2,436; Rison v. Knapp, 1 Dill. 187, Fed. Cas. No. 11,861; In re Wolfskill, 5 Sawy. 385, Fed. Cas. No. 17,930; In re Jones, 2 Low. 451, Fed. Cas. No. 7,446. In the last-cited case the court seems to express the opinion that under the act of 1867 a fraud committed before the act was passed could not be set up in opposition to a discharge. And in Re Waite, 1 Low. 207, Fed. Cas. No. 17,044, the same learned judge held that the fact of one being in contemplation of bankruptcy might be proven by circumstances.

It is in proof here that after the bankrupt's failure, in 1896, and some time in the latter part of 1897, while the bankruptcy legislation was pending in congress, he went to one of his creditors, named Bernhold, for the purpose of negotiating a settlement at 20 cents on the dollar. He urged Bernhold to accept it, upon the ground that congress was about to pass a bankruptcy law, and that, if he did not, he would surely go into bankruptcy. From this circumstance it is argued by counsel for the creditors that it is conclusively proved that

his concealment of the books was "in contemplation of bankruptcy." But it does not appear by any proof that that which was done for the purpose of concealing the books was done after the bankruptcy act of 1898 was passed, and, under the foregoing decisions, unless that fact appear, it could not be held that he was acting "in contemplation of bankruptcy." It is not sufficient that he should be concealing the books in contemplation of some bankruptcy bill then pending in congress, that might or might not be passed. Hence, if we might regard this proof as showing that the bankrupt has in fact concealed the books, it would not appear that it was done in contemplation of bankruptcy, by what he said to the witness Bernhold, because that conversation took place before the act of 1898 was passed,—unless it should further appear that the act of concealment or destruction took place after the bankruptcy statute was passed; and of this there is no proof whatever.

On the whole case, suspicious as the circumstances may be considered, I am of the opinion that the creditors have entirely failed to show by proof that there exists any ground prescribed by the statute for withholding the discharge. Discharge granted.

Additional Opinion.

HAMMOND, J. Since the foregoing judgment was rendered, the bankrupt has asked to have his certificate of discharge issued immediately, and the creditors ask time to consider whether they shall appeal. It is not worth while now to consider the circumstances under which an appeal would operate as a supersedeas of the order overruling specifications and directing a discharge of the bankrupt, nor whether, if a certificate should be issued, a subsequent appeal would annul the discharge. It is always competent for a court temporarily to suspend the execution of its orders to give the adverse party a reasonable time to consider the next step to be taken by him; and, inasmuch as the twenty-fifth section of the act of 1898 allows only 10 days within which to appeal from a judgment granting or denying a discharge, it is fair to all parties to await the expiration of that time before issuing the certificate. Therefore it will be established as a general rule of the practice of this court that, in any case where specifications have been filed in opposition to the discharge of the bankrupt, the certificate on form No. 59 of the official forms in bankruptcy shall not issue until 10 days after the order granting the discharge has been entered, nor until any extension of the 10 days allowed by the twenty-fifth section of the act of 1898 for an appeal from the order has expired.

UNITED STATES v. TWO BARRELS WHISKY et al.

(Circuit Court of Appeals, Fourth Circuit. August 11, 1899.)

No. 294.

INTERNAL REVENUE—FORFEITURES—CONVEYANCE USED FOR REMOVAL OF UNSTAMPED LIQUORS.

It is not the purpose of the internal revenue laws to work the forfeiture of the property of any owner unless he knowingly or negligently contributes to their violation, and, where a team and wagon were used for the conveyance of unstamped barrels of whisky being removed with intent to defraud the government of the tax thereon, in violation of Rev. St. § 3450, without the knowledge or consent of a mortgagee, who, by reason of condition broken, was the legal owner of such team and wagon under the laws of the state, and had taken proper steps to obtain possession thereof, the property is not subject to forfeiture as against him.

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

Spencer Blackburn, Asst. U. S. Atty. (A. E. Holton, U. S. Atty., on the brief), for the United States.

Z. V. Taylor (Bynum, Bynum & Taylor, on the brief), for defendant in error.

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

BRAWLEY, District Judge. This is a libel of information, which sets forth the seizure of a horse, mule, and wagon, the property of Harvey Latham, July 17, 1896, charging him with an attempt to defraud the United States of a tax on two barrels of unstamped whisky found in the wagon, and praying a decree of forfeiture for violation of sections 3289, 3450, 3453, of the Revised Statutes. The facts agreed on are that P. G. Deaton borrowed from Harvey Latham, March 9, 1895, $135, and gave a note due March 9, 1896, and chattel mortgage to secure the same, which mortgage was duly registered; that on July 6, 1896, Harvey Latham had given his chattel mortgage to the sheriff of Montgomery county, with instructions to seize the property for debt, but before the sheriff had taken possession a deputy collector found the horse, mule, and wagon in the possession of Oliver Deaton, son of P. G. Deaton, in Randolph county, who was hauling two barrels of unstamped whisky, which has been forfeited. Harvey Latham had no interest in this whisky, had no knowledge of its removal, and had not assented to the use of the horse, mule, and wagon for that purpose, and no indictment has been laid against him. Section 3289 of the Revised Statutes provides that "all distilled spirits found in any cask or package containing five gallons or more, without having thereon each mark and stamp required by law, shall be forfeited to the United States." Section 3450 provides that "whenever any goods or commodities, for or in respect whereof any tax is or shall be imposed, * * * are removed, or are deposited or concealed in any place, with intent to defraud the United States of such tax, or any

part thereof, such goods or commodities * * * shall be forfeited; and in every such case all the casks * * * containing * * * such goods or commodities, respectively, and every vessel, boat, cart, carriage, or other conveyance whatsoever, and all horses or other animals, and all things used in the removal, or for the deposit or concealment thereof, respectively, shall be forfeited; and every person who removes, deposits, or conceals * * * any goods or commodities, for or in respect whereof any tax is or shall be imposed, with intent to defraud the United States of such tax, or any part thereof, shall be liable to a fine or penalty of not more than $500." Section 3453 authorizes the collector or deputy collector to seize all the goods, etc., which are in possession of any person for the purpose of being concealed or removed in fraud of the internal revenue law. Under the law of North Carolina the mortgagor has the right of possession of personal property before condition broken, but after condition broken the mortgagee is entitled to have the possession of the property, and the legal title is in him. And in this case the sheriff, under the usual process, had been directed to seize the property, but, as it appears that the property was beyond the limits of his county, he had not actually taken it into possession.

The high tax on distilled spirits offers extraordinary temptation to fraud, and the habits of the people of certain sections and the geographical configuration of the country afford unusual facilities for its perpetration. The government, by successive enactments and impositions of penalties, punishments, and forfeitures, is engaged in a constant struggle to prevent violations of the law, and protect its revenues. Some of these laws in relation to distillers, distilleries, and distilled spirits may appear to be harsh, but the court cannot refuse to carry them into effect, or allow itself to be controlled by consideration of the supposed or real hardship of these enactments, nor open the door to opportunities of perpetual evasion. It is admitted that Harvey Latham is innocent of any intention to violate the revenue law, and that his property was in the possession of Oliver Deaton without his knowledge or consent, and the question is whether the mere accident of its situation can give it a criminal character independent of its owner's fault, and thus subject it to the extreme penalty of forfeiture. Guilty knowledge or evil intent is not a necessary ingredient in statutory offenses, and the maxim that crime proceeds only from a criminal mind has no controlling effect in limiting the operation of statutory penalties to those only who consciously violate the law. There being an undoubted competency in the lawmaker to declare certain acts criminal irrespective of the motive, these investigations are limited to a judicial ascertainment of the mind of the legislature without inquiry into the mind or motive of the doer of the thing inhibited. Says Mr. Justice Gray in U. S. v. Stowell, 133 U. S. 12, 10 Sup. Ct. 245:

"By the now settled doctrine of our court, statutes to prevent frauds upon the revenue are considered as enacted for the public good, and to suppress the public wrong, and therefore, although they impose penalties and forfeitures, not to be construed like penal laws generally in favor of the defendant, but they are to be fairly and reasonably construed, so as to carry out the intention of the legislature."

Penalties and forfeitures, although generally the consequences of crime or guilt, do not necessarily imply the one or the other. As the forfeiture of a man's property is one of the severest punishments that the law can inflict, the mind is naturally perplexed by two considerations of directly opposing tendency,—the one being the principle of natural justice, which revolts at the punishment of the innocent; the other the apparent necessity of doing that very thing, in view of public policy, in order to prevent those shifts and subterfuges by which the revenue laws are evaded. The statute must be clear and unequivocal which imposes upon a court the duty of punishing one man for the fault of another. The object of section 3450 is to punish all persons who, with intent to defraud the government of the tax, remove or conceal goods upon which the tax has not been paid, and, in addition to the punishment of such persons, it provides that all conveyances and animals used in the accomplishment of this unlawful purpose shall be forfeited. Undoubtedly, there is a presumption against any one whose property is found employed in this unlawful business that it is so engaged with his consent, but can it be that this presumption is irrebuttable? The contention of the government is that, this being a proceeding in rem, it is the guilty thing that has offended, and that this is to be forfeited, irrespective of any participation of its owner. If this team and wagon had been stolen from the owner, it would be clearly unjust, unreasonable, and preposterous to forfeit it because it was used by the wrongdoer in the transportation of illicit liquor. If this exception is admitted, it would follow that property has no guilty character, except as connected with persons who have charge of it, and the result is that it is the duty of the court to inquire into the facts; and, if it appears clearly that the owner has not hired or loaned it to another for an unlawful purpose, or knowingly permitted it to be in the possession of a party likely to engage in an unlawful business, or negligently suffered it to be controlled by a stranger, whose character gave no assurance that it would not be unlawfully employed, or is in some way justly chargeable with blame or negligence, he ought not to suffer the sweeping condemnation that justly falls upon those who consciously violate the law, and upon those upon whom is laid the duty of vigilance, and who negligently or otherwise fail in that duty.

The case of Lilienthal's Tobacco v. U. S., 97 U. S. 237, cited in behalf of the government, seems to assume that the fact that the property is found in the actual violation of the law makes out only a prima facie case for forfeiture, and that it is the duty of the court to inquire into facts; Mr. Justice Clifford using the following language:

"High authorities support the proposition that when a presumption of fact exists against a party in case of seizure in rem, the court may instruct the jury that the burden is on such party to remove the presumption, and that, if he does not, the case must, in an issue in a civil case, go against him on such a point."

The object of the statute is to force the payment of the tax upon all liquors manufactured. It endeavors to accomplish this by inflicting punishments, fines, imprisonments, and forfeitures upon all actually guilty of attempting to defraud the government, and by re-

quiring vigilance upon the part of all in any way concerned in the business and property to prevent and disclose any illegal acts, under penalty of forfeiture of their goods. It imposes upon all those whose property is in danger the duty of watchfulness. It requires all those whose property is engaged or employed in a regulated business to be vigilant, to see that the persons using that property should not devote it to any unlawful purpose. Where premises are leased for the purpose of a distillery, the person so leasing is presumed to know that there is opportunity and danger of the property being used in furtherance of some inhibited purpose; but in U. S. v. Stowell, 133 U. S. 1, 10 Sup. Ct. 244, it would seem that, if one did not know that the premises were to be used as a distillery, he should not be made to suffer forfeiture; for in that case the owner of the land upon which the illicit distillery had been set up had previously made a mortgage to one who did not permit or connive at an illicit distillery, and the court held:

"It being admitted that the business of a distiller was not carried on with the mortgagee's permission or connivance, and that he did not even know until after the seizure that a still had been set up on the premises, the mortgage is valid as against the United States, and, so far as concerns the real estate, the judgment of condemnation must be against the equity of redemption only."

Boyd v. U. S., 116 U. S. 616, 6 Sup. Ct. 524, was a proceeding in rem to establish the forfeiture of certain goods alleged to have been fraudulently imported without paying the duties thereon. There had been an order of the court requiring the claimants of the goods to produce their invoices for the inspection of the government attorney, and it was held to be an unconstitutional exercise of authority. Mr. Justice Bradley uses this language:

"We are also clearly of opinion that proceedings instituted for the purpose of declaring the forfeiture of a man's property by reason of an offense committed by him, though they may be civil in form, are in their nature criminal. If the indictment has been presented against the claimants, upon conviction the forfeiture of the goods would have been included in the judgment. If the government attorney elects to waive the indictment, and to file a civil information against claimants,—that is, civil in form,—can he, by this device, take from the proceeding its criminal aspect, and deprive the claimants of their immunities as citizens? This cannot be. The information, though technically a civil proceeding, is, in substance and effect, a criminal one. It is his breach of the law which has to be proved to establish the forfeiture, and it is his property which is sought to be forfeited;" and he quotes the words of a great judge: "Goods, as goods, cannot offend, forfeit, unlade, pay duties, or the like, but men whose goods they are."

One of the earliest cases of forfeiture reported is that of Mitchell v. Torup, Parker, 227, which was a proceeding in 1766 against a ship for having aboard some tea in violation of St. 12 Car. II. c. 4; and Chief Baron Parker, repelling the argument against forfeiture because of the apparent harshness of the law, says:

"But the owners of the ships are to take care what master they employ, and the master what marines; and here negligence is plainly imputable to the master, for he is to report the cargo of the ship, and, if he had searched and examined the ship with proper care, according to his duty, he would have found the tea, as the officer did, and so might have prevented forfeiture."

In Peisch v. Ware, 4 Cranch, 347, which is a revenue case, Chief Justice Marshall says:

"The court is also of opinion that the removal for which the act punishes the owner with forfeiture of the goods must be made with his consent or connivance, or of that of some person employed or trusted by him." And again: "The law is not understood to forfeit the property of owners or consignees on account of the misconduct of mere strangers, over whom such owners or consignees can have no control."

In 651 Chests of Tea v. U. S., 1 Paine, 499, Fed. Cas. No. 12,916, Circuit Justice Thompson says:

"Whilst, on the one hand, security to the revenue of the country may require rigid laws to guard against frauds, yet, on the other, the rights of the innocent ought to be protected. I am not aware of a single instance where, by any positive provision in the revenue laws, a forfeiture is incurred that does not grow out of some fraud, misconduct, or negligence of the party on whom the penalty is visited."

And in The Lady Essex, 39 Fed. 767, Judge Brown says:

"The authorities are direct to the proposition that a forfeiture of goods for a violation of the revenue laws should not be imposed unless the owner of such goods, or his agent, has been guilty of an infraction of such laws. It is clear that, if the goods be stolen from the owner, or if a person has obtained possession of them fraudulently, or without authority, no act of his can forfeit them as against the true owner."

The two cases most apposite to that now under consideration are U. S. v. Two Horses, Fed. Cas. No. 16,578, and U. S. v. Two Bay Mules, 36 Fed. 84. In Case No. 16,578, Judge Benedict held that two horses and a truck, which were used in conveying certain distilled spirits, which had been condemned by default as forfeited to the United States by reason of having been removed with intent to defraud, were subject to forfeiture. The driver of the horses and truck in that case was the owner, and evidence was offered to show that he had no knowledge of the fraudulent character of the spirits, or of any fraudulent intent in connection with the removal thereof, which evidence was excluded, and verdict for the government directed. He uses this language:

"The reason why this express provision was made in respect to the forfeiture of things used in removing spirits contrary to law was to link the fate of the vehicle with that of the articles conveyed, in order to deter parties from putting their vehicles at the disposal of those who would be likely to use them for purposes of fraud;" and quotes the remark of Judge Woodruff: "It is expected that the owner of property will see to the uses made of it at his peril."

In the Case of Two Bay Mules, the owner and claimant, one W. H. York, had hired the offending property to Nick York for the purpose of hauling a load of produce to market, and while in his possession they were seized, being in the act of transporting whisky upon which the tax had not been paid.

In the first case the owner was himself engaged in hauling the whisky; in the latter he knowingly permitted another to use his team, who perverted it to the unlawful purpose. While in neither case was there a conscious violation of the law, in both negligence might be fairly attributable, and the thing really punishable was their carelessness in putting their vehicles at the service of those likely to violate the law, and who actually did violate it. In the case at bar it is admitted that this property was in possession of the wrongdoer "without the consent and knowledge of the claimant." The attorney

for the government contends, in the argument before us, that it was the duty of claimant to show, also, that the possession of Oliver Deaton was without the knowledge and consent of P. G. Deaton, the mortgagor. If there remained in P. G. Deaton, after condition broken, any right of possession or right of property, this inquiry would be pertinent, but it appears from the agreed statement of facts that the property was sold for less than the mortgage debt. The information is against Harvey Latham, who is alleged to be the owner, and, as we understand the law of North Carolina, he had the right of possession and the right of property; and it would be pressing the implication of negligence further than justice demands, and administering a harsh law too harshly, if, under all the circumstances of the case, in the absence of any suspicion of fraud or connivance or proof of negligence, the innocent owner should be made to suffer from the wrongdoing of one who got possession of his property without his knowledge or consent. It is not to be assumed that the government desires to take the property of a citizen charged with no crime without some proof that he has knowingly or negligently contributed to its commission, and undoubtedly the secretary of the treasury, upon the facts of this case agreed upon, and as found by the trial court, would, in the exercise of his discretion, remit the forfeiture; but, if this man has rights, a court of justice is the place to maintain them, and he should not be compelled to ask them of executive officers as a favor. The judgment of the court below is affirmed.

In re WAY TAI.

(Circuit Court, D. Oregon. August 24, 1899.)

No. 2,565.

1. ALIENS—CHINESE MERCHANT—ORDER OF EXCLUSION.
   Under Act March 3, 1891, as amended by Act Aug. 18, 1894, an immigration officer is given plenary power to exclude an alien from admission to the United States, subject to review only by the secretary of the treasury. He is not required to hear evidence under oath, or to make written findings, but it is sufficient if he makes an examination and a decision. His order of exclusion constitutes due process of law, and the evidence upon which he acted cannot be re-examined by the courts.

2. SAME—APPEAL TO SECRETARY OF TREASURY.
   The fact that an appeal taken to the secretary of the treasury by an alien from an order of exclusion was determined adversely to the appellant by an assistant secretary does not entitle the appellant to release on habeas corpus. If the assistant secretary had no authority to act on the appeal, it is still pending.

3. SAME—EFFECT OF REMOVAL FROM VESSEL.
   Under Act March 3, 1891, § 8, which provides that the removal of an alien from the vessel on which he arrived by order of the inspection officer shall not be considered a landing during the pendency of the examination, the fact that an alien has been removed from the vessel, and committed by the collector to the custody of a sheriff, does not affect his rights.

This was an application by Way Tai for a writ of habeas corpus.

Charles J. Schnabel and J. H. Woodward, for petitioner.
John H. Hall, U. S. Atty.

GILBERT, Circuit Judge. The petitioner applies for a writ of habeas corpus, alleging that he is a Chinese merchant, and that as such, on his return from China, he was entitled to land at the port of Portland, Or., but that he was denied landing by the collector of said port, and that he is now detained and deprived of his liberty by William Frazier, the sheriff of Multnomah county, Or., under oral directions from the collector ordering the petitioner to be removed from the port of Portland, and to be returned to China, by the master of the steamer Lennox. The petitioner further alleges that he appealed from the decision of the collector of customs to the secretary of the treasury, and that he has been informed that one O. L. Spaulding, assistant secretary, claiming to act for the secretary of the treasury, has heard and decided the said appeal, and has affirmed the decision of the collector, and ordered the deportation of the petitioner to some port in China unknown to the petitioner. It is alleged that the decision of the collector is void for the reason that, after hearing the evidence for the petitioner, consisting of the testimony of two white witnesses, showing prima facie his right to land, the collector, without notice to the petitioner, and without his knowledge, took statements of persons not under oath, and received the same as evidence, and acted thereon; that he made no written findings in said matter, but by oral direction ordered the petitioner to be removed and deported, as aforesaid. It is further alleged that the decision on the appeal to the secretary of the treasury is void for the reason that O. L. Spaulding, assistant secretary, was not an officer to whom was given by law the power to pass upon the same. It is also alleged that the detention of the petitioner by the sheriff of Multnomah county is unlawful, for the reason that by virtue of the removal of the petitioner from the vessel on which he arrived, and the surrender of his person to the custody of said Frazier, his landing in the United States has been effected.

So far as the first point is concerned, the precise question involved was decided by the supreme court in Nishimura Ekiu's Case, 142 U. S. 651, 12 Sup. Ct. 336. The court had under consideration the act of March 3, 1891, which established the office of superintendent of immigration. By section 8 of that act the proper inspection officers were given "power to administer oaths, and to take and consider testimony touching the right of any such aliens to enter the United States, all of which shall be entered of record." It was contended that the proceedings in that case did not conform to section 8, because it did not appear that the inspection officer took testimony on oath, and because there was no record of any testimony or of his decision. The court thus disposed of the contention:

"But the statute does not require inspectors to take any testimony at all, and allows them to decide on their own inspection and examination the question of the right of any alien immigrant to land. The provision relied on merely empowers inspectors to administer oaths, and to take and consider testimony, and requires only testimony so taken to be entered of record."

The statute of August 18, 1894, amends the former law by enacting in plain terms that:

"In every case where an alien is excluded from admission into the United States under any law or treaty now existing or hereafter made, the decision of the appropriate immigration or customs officers, if adverse to the admission of such alien, shall be final, unless reversed on appeal to the secretary of the treasury."

In Fong Yue Ting v. U. S., 149 U. S. 698, 713, 13 Sup. Ct. 1016, 1022, the court said that the purport of the decision in Nishimura Ekiu's Case was that the decision of an executive officer to whom congress had seen fit to intrust the final determination of the facts upon which an alien's right to land depended was conclusive, and that "his order was due process of law, and no other tribunal, unless expressly authorized by law to do so, was at liberty to re-examine the evidence on which he acted, or to controvert its sufficiency."

In the light of these adjudications it must be held that the decision of the collector in the present case, and his order denying the petitioner the right to land, is not subject to review upon the facts alleged in the petition. Plenary power has been given to the collector to exclude an alien if, upon examination of his case, it is found upon the evidence, as a conclusion of fact, that he is not one of those who are entitled to enter the United States. The power of congress to so exclude aliens, and to intrust the decision of such a question of fact to an executive officer, is not disputed. It is urged, however, that the collector must follow a due and orderly course, must hear evidence under oath, and must make findings of fact which shall appear of record. These points, as we have seen, have all been expressly decided against the petitioner's contention. The collector is not required to conform his proceedings to what is known as "due process of law." He is not required to make written findings. It is enough if he make an examination and a decision. "His order is due process of law."

It is urged that the power to hear and determine appeals from decisions of the collectors is confided to the secretary of the treasury alone, and that the jurisdiction cannot be exercised by an assistant secretary. Section 245 of the Revised Statutes provides as follows:

"The assistant secretaries of the treasury shall examine letters, contracts, and warrants prepared for the signature of the secretary of the treasury, and perform such other duties in the office of the secretary of the treasury as may be prescribed by the secretary or by law."

It may be assumed that the secretary has conferred upon the assistant secretary who acted in the present case the authority to act in the matter of the appeal of the petitioner's case, and it would seem that, under the statute above quoted, the authority is one that may be delegated. But that question is not necessarily involved in the present case. If the assistant secretary had not the authority to hear and determine the appeal, the appeal has not been disposed of, but is still pending, and the detention of the petitioner by the officer to whom he was intrusted until the disposition of his case on appeal is not unlawful. Neither can it be said that the petitioner, while in the custody of such officer, or by reason of the fact that he has been de-

livered to such officer, has been landed in the United States, so as to be entitled to his liberty. Section 8 of the act of March 3, 1891, providing for the removal of an alien from the vessel on which he arrived by order of the inspection officer, declares that "such removal shall not be considered a landing during the pendency of such examination." In Nishimura Ekiu's Case the petitioner had been placed in a mission house pending the decision of the question of her right to land. The court said she was left "in the same position, so far as regarded her right to land in the United States, as if she had never been removed from the steamship."

Upon the case made on the petition no ground is presented for issuing a writ of habeas corpus, and the writ will be denied.

In re OTA.

(District Court, N. D. California. September 1, 1899.)

No. 11,917.

1. ALIENS—EXCLUSION OF IMMIGRANTS—CONSTRUCTION OF STATUTE.
The provisions of the act of March 3, 1891 (26 Stat. 1084), excluding certain classes of aliens from admission to the United States, and requiring their deportation, do not apply to aliens domiciled in this country, and who are returning thereto after a temporary absence.

2. SAME—CONCLUSIVENESS OF DECISION OF IMMIGRATION OFFICERS.
Under the act of August 18, 1894 (28 Stat. 390), the decision of the secretary of the treasury affirming the action of immigration officers in refusing an alien admission to the United States under a law of congress, though clearly erroneous, cannot be reviewed by the courts.

This was a habeas corpus proceeding to review the action of the secretary of the treasury in denying the petitioner, an alien, the right to enter the United States.

W. H. L. Barnes, for petitioner.
E. J. Banning, Asst. U. S. Atty.

DE HAVEN, District Judge. This is a proceeding arising upon a writ of habeas corpus issued in behalf of one S. Ota, and the case was submitted to the court for its decision upon the petition for the writ, the return thereto, and certain admissions made by counsel during the argument, from which I find the following facts: That Ota is a native and subject of the empire of Japan, and for more than eight years has been a resident of the state of California, and is now a merchant, and member of the firm of Ota & Sanada, San Francisco; that said firm deals in Japanese fancy goods, teas, and coffee, and imports, manufactures, and sells all kinds of bamboo furniture; that in March of the present year Ota went to Japan for the purpose of buying goods for his firm, and, after having made purchases to the amount in value of more than $5,000, he returned to San Francisco on the steamship Hongkong Maru, arriving at that port on or about August 5, 1899; and thereafter, on the 10th day

of August, 1899, after a special inquiry by the immigration officials at the port of San Francisco, he was found to be suffering from a loathsome and contagious disease, and was ordered by H. H. North, the commissioner of immigration at that port, to be returned to Japan. This order was, on appeal to the secretary of the treasury, affirmed, and Ota is now in the custody of the steamship company operating the Hongkong Maru, for the purpose of being returned to the country whence he came. It appears very clearly from these facts that Ota is not an alien immigrant, and the commissioner of immigration and the secretary of the treasury, if the same facts were before those officers, erred in ordering him to be returned to Japan as such. The act of March 3, 1891 (26 Stat. 1024), under which the order for the deportation of Ota is attempted to be justified, does not apply to aliens domiciled in this country, and who are returning thereto after a temporary absence. In re Panzara, 51 Fed. 275; In re Maiola, 67 Fed. 114; In re Martorelli, 63 Fed. 437. But under the act of August 18, 1894 (28 Stat. 390), the decision of the secretary of the treasury to the contrary cannot be reversed or set aside by the court in this proceeding. That act provides:

"In every case where an alien is excluded from admission into the United States under any law or treaty now existing or hereafter made, the decision of the appropriate immigration or customs officer, if adverse to the admission of such alien, shall be final, unless reversed on appeal to the secretary of the treasury."

Under this statute, when the executive officers of the government, upon a hearing such as is contemplated by the law, have decided that an alien is not entitled to enter the United States, the courts are without jurisdiction to review that determination upon questions either of law or of fact. The finding of these officers that an alien seeking to land is an immigrant is as conclusive upon the court, in a proceeding like this, as their finding in relation to any other fact affecting the right of the alien to land. This seems to have been the view taken by the supreme court in the case of Lem Moon Sing v. U. S., 158 U. S. 538, 15 Sup. Ct. 967. And see, also, In re Moses, 83 Fed. 995; U. S. v. Rogers, 65 Fed. 787; In re Monaco, 86 Fed. 117. The writ will be discharged.

BALL & SOCKET FASTENER CO. v. C. A. EDGARTON MFG. CO.

(Circuit Court of Appeals, First Circuit. May 26, 1899.)

No. 262.

PATENTS—CONSTRUCTION AND INFRINGEMENT—GLOVE FASTENERS.

The Richardson patent, No. 412,296, for improvements in fastenings for gloves and other articles, if it involves any patentable novelty or invention, must, especially in view of the fact that it has never been put to practical use, be limited to the precise form shown and described, and is therefore not infringed by the fastener of the Adams patent, No. 566,731.

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

This was a suit in equity by the Ball & Socket Fastener Company against the C. A. Edgarton Manufacturing Company for alleged infringement of letters patent No. 412,296, issued October 8, 1889, to W. S. Richardson, for improvements in fastenings for gloves and other articles. The circuit court dismissed the bill, and the complainant has appealed.

George O. G. Coale and Frederick P. Fish (Clarke, Raymond & Coale, on the brief), for appellant.

Charles E. Mitchell and John P. Bartlett (Mitchell, Bartlett & Brownell, on the brief), for appellee.

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

PUTNAM, Circuit Judge. This suit relates to a patent, of October 18, 1889, to William Streeter Richardson, for improvements in fastenings for gloves and other articles. The specification describes the invention as relating to constructing the ball and socket members of the device, and to fastening the same in place. We must apprehend that, though some of the advances in this art are, on their face, trivial, yet a careful examination will show that the art is a difficult and important one. Fastenings of this character are in extensive demand for various purposes,—gloves, corsets, clothing, and, as is shown in this case, suspenders. It is necessary that the fastening should be light, attractive, quick and easy to open and close, inexpensive, and yet so firmly constructed as to resist a constant and relatively great transverse pull, without tearing the light material with which it is used. It was only after a long time that success was achieved, and this by small steps. The art is divided into two lines, one known as that of ball and socket fasteners, and the other buttonhole or cap fasteners. The patent in issue relates especially to the latter class. The claims in issue would not be understood without first giving references to the specification. This says, in substance, that the cap and yielding sides, necessary in order to close over and hold the stud, are made integral; and the drawings attached represent a blank which, when struck into shape, provides the cap, two

yielding sides, and two fastening arms. The fastening arms are designed, as the specification shows, to pass through the material of the glove and a washer on the other side of the material, so as to hold the whole firmly together. For an alternative form the specification makes the fastening arms integral with the washer. The cap is shown with an "inclined shoulder," which, operating as a flat surface, may lie closely against the material on the other side from the washer, thus contributing to firmness of hold. The drawings which show the blank indicate the fastening arms as resulting from two opposing projections, and the yielding sides from two other opposing projections. Nothing in the patent suggests that there are more than two fastening arms or more than two yielding sides. The drawings also show the blank in various forms to the completion of the cap, and the specification has a full description of the various processes in producing the cap from the blank.

The claims in issue are as follows:

"1. The fastening comprising the cap, a^3, having the yielding sides, a^1, washer, b, and the connecting arms, a^2, all substantially as and for the purposes described.

"2. The combination of the cap, a^3, having the inclined shoulder, a^4, with the washer, b, inclined as described, and fastening arms, a^2, all substantially as and for the purposes described.

"3. The combination, in a fastening device, of a capped socket comprising the cap, a^3, the yielding sides, a^1, integral with the said cap, and bent in relation to the same to form the shoulder, a^4, as specified, and to extend downwardly from said shoulder, with fastening arms for attaching the cap to the material, all substantially as and for the purposes described."

The alleged infringing device is shown in a patent issued to one George E. Adams, dated September 1, 1896. This also is made up from a single blank, star-shaped, as shown in the drawings attached, and having eight points. This is developed into a cap with eight projections, turned back on the washer in such way that they all of them answer as fastening arms. It is claimed in defense that this device has no "yielding sides," as called for by the patent in issue. Nevertheless, the specification of the Adams patent describes the projections as "resilient arms," and points out that they may be bent to afford a good bearing, and at the same time allow sufficient movement to permit of the ready passage of the stud member. It also, at various points, calls these projections "resilient fingers." It is evident that the projections in the alleged infringing device perform the functions of the "yielding sides" and "fastening arms" of the patented device, so that the projections of the alleged infringing device are both fastening arms and yielding sides, and would clearly infringe the claims in issue if the latter could have breadth of construction. The construction of the patent is not free from difficulty. It contains much which requires that we should hold that the invention consisted in producing the cap from a single blank, so as to be of the nature of the invention in issue in Krementz v. S. Cottle Co., 148 U. S. 556, 13 Sup. Ct. 719. That patent was granted on May 6, 1884. The

specification described a collar button built up from a single, continuous plate of sheet metal. It also described the method of making the button. It was shown in that case that other articles had previously been made in a similar manner, but they were in other arts. The court held, at page 559, 148 U. S., and page 720, 13 Sup. Ct., that the button was "a new and useful article, with obvious advantages over previous structures of the kind." It was claimed that any ordinary mechanic could have adapted the previous devices to a collar button, but, at page 560, 148 U. S., and page 720, 13 Sup. Ct., the court observed upon the fact that the president of the infringing company, although skilled in the art, and having had his attention specially turned to the subject-matter, failed to see for a long period of time what the inventor afterwards saw. It is also evident that forming the collar button from a single blank, as shown in the case cited, involved very much ingenuity. The patent in issue in Krementz v. S. Cottle Co. antedated the application for the patent at bar, so that what it disclosed must now be commonly regarded as a part of the prior art; and it is an old rule that we may read the decisions of courts of high authority for the purpose of ascertaining facts of general interest. In this particular art of fasteners, the patent issued to Kraetzer on September 28, 1884, antedating that in suit, speaks of forming a cap, with arms and elastic jaws, from a single blank, as though it were a well-known matter. Also, a prior patent, issued to Mr. Richardson on May 1, 1883, shows a socket made up of a single metal blank, which included a cap with a resilient base. That patent concerned more especially what are known as "ball and socket fasteners," but, so far as the use of a blank is concerned, it involved the same problem as the claims in issue. Similar blanks for similar purposes are found elsewhere in the record. Therefore, if the patent is to receive this construction, it is extremely doubtful whether it covers any inventive idea. Assuming, on the other hand, that the patent is for the device, and that producing it from a single blank is only an alternative method, the same doubt as to patentability arises in view of the state of the art, notwithstanding what we have said to the effect that, in this particular art, improvements which, on their face, seem trivial, have at times been regarded as meritorious. We need, for this purpose, to look only at the Kraetzer patent, already referred to. As already said, the patent in suit describes a hood with four projections,—two the fastening arms, and two the yielding sides,—and the specification states that it is not essential that the fastening arms be made integral with the cap, and it describes an alternative construction in which the fastening arms run up from the washer. Claim 2 shows the cap overhanging at its base, so as to make what we have already called an "inclined shoulder." This shoulder, however, is of no consequence in this case, as it is not found in the alleged infringing device in the form shown by the patent in issue; and, since flanges are of all forms of construction, and as common in the arts as anything can be, every manufacturer has,

ordinarily, a right to construct them in his own method. The result is that, in this case, all which the patent in issue demands is a cap integral with the yielding sides, and a washer, with arms intended to secure the washer to the cap, built either upon the washer or the cap. The Kraetzer device had all these, although the parts were somewhat differently related. Its fastening arms were always a part of the cap, and the yielding sides always a part of the washer. The arms projected from the cap, as in the patent in suit. The yielding sides were made by cutting away and turning down two portions of the disk from which the washer was formed. The practical result in use is, in all respects, the same in each device. The complainant maintains that one advantage of the device in suit is in the capacity of varying the dimensions of the blank. It refers to what it calls the "spring jaws," meaning, probably, the "yielding sides." It is claimed that, in the device in issue, the "spring jaws" may be of any length, while, in the Kraetzer device, they are necessarily cut from the middle of a disk, so that their length is limited. This, however, so far as the "yielding sides" are spoken of, is based on a mistake. There is nothing in the device in issue which calls for their unlimited lengthening, and the same is true as to the Kraetzer device. The patent in issue shows that the inventor had in mind the indefinite lengthening of the fastening arms only, and this is practicable in the Kraetzer device. Also the complainant maintains that its device reduced the number of the parts in a spring buttonhole cap, which, it says, had never before been made in less than two parts in addition to the washer. This is a mistake, even if it covered anything patentable; because, in the Kraetzer device, there are only two parts, including the washer, as his patent provided that the cap and fastening arms should be integral. It is therefore difficult to perceive that there was any real advance in the art from the Kraetzer patent, unless it was with reference to the inclined shoulder, which is not involved here. The difficulty of determining whether or not the patented device shows any substantial advance in the art is increased by the fact that complainant's expert, who undertakes to set out its advantages, never saw it in use; and he therefore speaks of it only theoretically, and can have no knowledge of its practical disadvantages. The patent was applied for in 1884, so that the device was known for over 12 years before this bill was filed; and yet during the whole of that period it never has been put to practical use. If the case had been otherwise, the practical result might have enabled us to give the patent the support which might have come therefrom. Boston & R. Electric St. Ry. Co. v. Bemis Car-Box Co., 25 C. C. A. 420, 80 Fed. 287, 288. This use might have developed advantages which we are not able to gather from the device itself, or from anything which the record discloses to us in any satisfactory manner. Taking, therefore, the case as a whole, whether there is any patentability or not, we are unable to give the claims in issue any broader construction than was given the patent to Masten for

an alleged invention with reference to firecrackers, which was under consideration by this court in Masten v. Hunt, 5 C. C. A. 42, 55 Fed. 78. In that case it was held that infringement was not proved, the opinion of the court stating that it agreed with the circuit court in the reasons given in its opinion in the same case, which it adopted. The opinion of the circuit court is found in 51 Fed. 216. The patentee did not show the court what were the real advantages and extent of his alleged improvement, and therefore the court was unable to find infringement in anything which did not respond precisely to the form and letter of the patent. Considering the facts which we have pointed out in the case at bar, especially the fact that the complainant's improvements were, at the most, so slight as to leave grave doubts as to their patentability, we cannot, on the question of infringement, safely hold that the claims in issue cover anything more than mere form. Therefore, in view of the marked changes in form between the sheet-metal blank and device of the respondent from the blank and device of the complainant, and in view, also, of the fact that there is some change in the way in which the device of the respondent performs its functions, we cannot find that there has been any infringement. The decree of the court below is affirmed, and the costs of appeal are awarded to the appellee.

JEFFRIES et al. v. DE HART.

(District Court, E. D. Pennsylvania. September 11, 1899.)

MASTER AND SERVANT—DEATH OF STEVEDORE—LIABILITY OF OWNERS OF SHIP.

Where a ship was not bound to furnish tackle to hold up a chute used by contractors in loading the vessel with grain, and that used was rigged up by the stevedores employed by the contractors, the mere fact that the mate in charge did not object to the manner in which it was secured would not render the owners liable for the death of a stevedore, caused by the breaking of such tackle and the falling of the chute, the mate having no better means than others of judging of its safety.[1]

In Admiralty.

William Colton and J. Warren Coulston, for libelants.
Convers & Kirlin and Henry R. Edmunds, for respondent.

McPHERSON, District Judge. This is an action in personam against the owner of the British steamship Henriette H. to recover damages for the death of Thomas Jeffries, the husband and father of the libelants, who was killed upon the vessel while at work as a stevedore. The injury was done under the following circumstances: On December 2, 1896, the steamship arrived at Elevator C, Locust Point, Baltimore, and took on board a small quantity of grain. The next day the work of loading was resumed, and continued until noon, when the vessel was moved to an elevator at Canton. On December 4th she returned to Elevator C about 8 o'clock in the morning, and began to receive oats in bulk at No. 2 hatch. The operation was conducted as follows: A heavy wooden chute, about 30 feet long, made of 1½ or 2 inch planking, lined with sheet iron, and attached to the elevator by an iron gooseneck, ran to the hatch, and was there suspended over the opening by tackle rigged to the foremast of the vessel. "This tackle [repeating the libelants' description] consisted of a chain which was made fast to the cringle or eye of the sail, the sail being furled to the foremast, and thence passed along the gaff on the foremast almost to the end of the gaff, where it passed through an opening in the gaff, called a 'score,' over a sheave, and thence back to the foremast, passing through a block, and thence downward to a point near the deck of the vessel, where a block and tackle were attached to it, and made fast to a ring or bolt in the deck of the vessel." The respondent's description adds some further details: "This is a

[1] As to liability of owners of vessels for injuries to servants generally, see Transport Co. v. Coneys, 28 C. C. A. 388, 82 Fed. 177; Jensen v. The Joseph B. Thomas (D. C.) 81 Fed. 578; Baccus v. The Manhanset (D. C.) 69 Fed. 471; Ferguson v. The Terrier (D. C.) 73 Fed. 265; The Elton, 31 C. C. A. 496, 83 Fed. 519; The Joseph John, 30 C. C. A. 199, 86 Fed. 471; The Joseph B. Thomas, 30 C. C. A. 333, 86 Fed. 658; The City of Norfolk (D. C.) 55 Fed. 98; Boden v. Demwolf (D. C.) 56 Fed. 846; Steel v. McNeil, 8 C. C. A. 512, 60 Fed. 105; Unitus v. The Dresden (D. C.) 62 Fed. 438; Olen v. The Antonio Zambrana (D. C.) 89 Fed. 60; McGough v. Ropner (D. C.) 87 Fed. 534; The Anaces, Id. 565; Grasso v. The Lisnacrieve, Id. 570; The Kensington (D. C.) 91 Fed. 681; The Magdaline, Id. 798.

permanent tackle, used in hauling out the fore trysail, and is arranged as follows: Where the head rope of the sail (which follows the line of the gaff) and the leech rope join, a cringle or eye is made, which consists of a round iron thimble or ring, around which the rope is spliced. To this cringle there is attached, by means of a shackle and bolt, a chain. The tackle then passes through a sheave in the end of the gaff; thence through a block on the foremast down to the deck. The sail, not being in use at the time, was, of course, furled in to the mast. The weight upon the outhaul tackle, to which the chute was suspended, was supported, therefore, by the strength of its place of final attachment, to wit, the cringle in the head of the sail." About 2 o'clock in the afternoon the tackle suddenly gave way, the chute (which weighed more than 500 pounds) fell several feet, and struck the decedent, who was trimming the grain as it fell into the hold, killing him almost instantly.

What happened to the tackle is in dispute. The libelants contend that, although the shackle should have been fastened to the cringle by an iron pin or bolt, it was improperly fastened by marline or spun yarn, and that the marline broke under the strain; the result being that the shackle slid along the gaff until it stopped at the score (through which it could not pass), and that the loosening of the tackle occasioned by this sudden sliding caused the chute to drop. The negligence complained of is the use of marline, instead of an iron bolt, to fasten the shackle to the cringle. This, it is argued, was a plainly inadequate fastening, known by the master to be in use, and was, therefore, an obviously defective appliance, furnished by him to the laborers that were employed to load the cargo. If these two averments of fact were true, the defendant's negligence would be established, but I do not think that either averment is proved. In my opinion, the testimony shows that the shackle was properly fastened by an iron bolt, and that the injury was caused by the breaking of the ropes around the head of the sail, and the tearing out of the corner to which the cringle was attached.

Moreover, even if these facts would support the inference that the appliance was defective,—a point I do not decide,—I am also of opinion that the appliance was not furnished to the stevedores by the ship, but was chosen by the stevedores themselves without asking any questions of the ship's officers, and, further, was chosen when a tackle obviously safe and better fitted to suspend the chute was rigged to the same mast, and was almost as conveniently at the stevedores' disposal. I think it is true that on the evening of December 2d the foreman of the stevedores, in reply to a question by the mate (who had command of the vessel in the captain's absence) when the work of loading would begin on the following morning, named an hour, and added a request to the mate to have steam on the winches, and gear up. But there is no evidence whatever, except the bare fact that the mate allowed the trysail tackle to be used without objection, that this particular gear, or any other gear, was furnished by the ship in compliance with the foreman's request. In this instance the vessel was not bound thus to comply. She was being loaded under a

contract with the Geo. P. Cronise Company, by whom the foreman, the decedent, and the other laborers were employed; and under the contract the ship was only to furnish "all necessary steam, slings, and rope for falls." The company was to furnish "all other gear," and it was, therefore, their duty to provide the necessary tackle to suspend the chute. To my mind it is clear that the ship did not undertake to furnish it on the morning of December 3d, or afterwards. Upon the morning just named the stevedores came on board, and immediately, without asking for tackle, or to be advised what gear was to be used, unfastened the down haul of the trysail, attached it to the chute, and began to work. Upon the same mast much stronger tackle was attached for the purpose of hoisting a derrick, and if a man had been sent up the mast about 30 feet this tackle could have been unfastened and used without difficulty.

Under these circumstances I do not see upon what ground the libelants can recover. The mere failure of the mate to object to the use of the trysail tackle, even if he believed such tackle to be ordinarily inadequate, was not a breach of legal duty for which the master is liable. The ship was not bound to furnish tackle to suspend the chute, and I see no evidence to warrant the conclusion that the mate had any knowledge that the stevedores did not also possess concerning the strength or weakness of such an appliance. That it was not plainly unfit for the work is apparent from the fact that it had been used during two half days without misadventure, and that it may have broken for some reason that does not clearly appear from the testimony is perhaps a reasonable inference from the fact that it gave way at a time when the strain due to the position of the chute was less than the strain had previously been.

Without further elaboration, my conclusion is that the respondent has not been shown to be at fault. He was not bound to furnish the gear in question, and did not furnish it. If it lacked the necessary strength, neither he nor the mate had such peculiar knowledge of its weakness as imposed upon either a legal duty to object to its use. It was chosen by the decedent's fellow servants for their own convenience, and at their own risk, and liability for the unfortunate accident that followed is therefore not chargeable to the owner of the ship.

The libel must be dismissed, but without costs.

HENUY v. LA COMPAGNIE GENERALE TRANSATLANTIQUE ETC.

(Circuit Court, S. D. New York. April 15, 1899.)

JURISDICTION OF FEDERAL COURTS—FEDERAL QUESTION—PLEADINGS.

A federal question, to give a circuit court of the United States jurisdiction, either original or by removal from a state court, must appear by the plaintiff's statement to be a necessary part of his claim.[1]

On Motion for Reargument.

Edward K. Jones, for the motion.
M. C. Fleming, opposed.

LACOMBE, Circuit Judge. "It is thoroughly settled that under the act of August 13, 1888, the circuit court of the United States has no jurisdiction, either original or by removal from a state court, of a suit as one arising under the constitution, laws, or treaties of the United States, unless that appears by the plaintiff's statement to be a necessary part of his claim." Railway Co. v. Lewis (March 20, 1899) 19 Sup. Ct. 451. A careful re-examination of the complaint wholly fails to disclose any provision of constitution, statute, or treaty which is made by such complaint a necessary part of plaintiff's claim. The former decision, remanding the cause, will not be disturbed.

VOORHEIS et al. v. BLANTON et al.

(Circuit Court, W. D. North Carolina. September 15, 1899.)

RES JUDICATA—DECREE DETERMINING RIGHTS OF ONE NOT A PARTY—EFFECT OF AFFIRMANCE ON APPEAL.

Where, in a creditors' suit, the circuit court decreed that a conveyance of property by the debtor to a co-defendant be set aside as in fraud of complainants' rights, subject to a lien on the property by a third person for money advanced towards the erection of a building thereon after the conveyance, which decree was affirmed by the circuit court of appeals, the question of the right of such third person to a lien is res judicata in the suit, and cannot be reopened by a supplemental bill, though such third person was not a party to the original bill or the decree.

Hearing on Supplemental Bill.

Merrimon & Merrimon, for complainants.
E. J. Justice and P. J. Sinclair, for respondents.

EWART, District Judge. This is a supplemental bill brought by the plaintiffs above named against the defendants. The complainants allege:

"That the said above-entitled case, except as to Minnie Blanton, came on to be heard, and was heard and disposed of by a final decree of the court filed herein, on the 21st day of December, 1897, in which said decree, among other things, it was decreed as follows: " 'That the conveyance of the tanyard prop-

[1] As to jurisdiction of cases involving federal questions, see note to Bailey v. Mosher, 11 C. C. A. 308, and, supplementary thereto, note to Montana Ore-Purchasing Co. v. Boston & M. Consol. Copper & Silver Min. Co., 35 C. C. A. 7.

erty, mentioned and described in the bill of complaint, to J. L. Morgan, was made in fraud of the creditors of the said William M. Blanton, to the said J. L. Morgan; and it is ordered, adjudged, and decreed that said conveyance be, and the same is hereby, set aside, and held null and void, as against the creditors of the said William M. Blanton, and especially against the plaintiffs in this cause; but inasmuch as it appears that the said Morgan, as a part of the purchase money, has paid certain debts of the said defendant Blanton, it is adjudged that he, the said Morgan, be reimbursed from the proceeds of the sale of the tanyard property so much money as he has actually paid out on the debts of the said William M. Blanton, if the proceeds of the sale be sufficient for such purpose, the amount so paid by the said Morgan to be ascertained by a reference to the clerk of this court.' Complainants allege that the said William M. Blanton and J. L. Morgan were partners in the tanning business at the time of the conveyance by the said William M. Blanton of his interest in the same to the said Morgan, and the moneys paid out by the said Morgan upon the debts of the said William M. Blanton, if any, were the moneys of the said partnership of the said Blanton and Morgan, and the amount so paid out upon the said debts was not as much as the pro rata share of the said William M. Blanton in the said partnership funds; that the said Morgan paid out nothing of his own money upon the said debts of the said William M. Blanton, but, on the contrary, was and is indebted to the said William M. Blanton for as large a sum as said William M. Blanton's proportion of the said partnership funds, unless he has settled the same with said Blanton since said conveyance was made; that, upon a fair settlement and adjustment of the partnership account between the said William M. Blanton and the said Morgan, it will be found that said Morgan has paid nothing upon said Blanton's debts which he would be entitled to have refunded to him under the decree aforesaid. Complainants allege that it was decreed further as follows: 'That the conveyance of the storehouse and lot by the said William M. Blanton to the said J. D. Blanton, mentioned and described in the bill of complaint, was made in fraud of the creditors of the said William M. Blanton, the said J. D. Blanton having knowledge, prior to and at the date of the execution of the said conveyance, of the fraudulent intent and purpose of the said William M. Blanton in making the said conveyance, and participating in the same, and it is therefore ordered that said last-named conveyance be, and the same is hereby, set aside, and held null and void; but as the testimony shows that the buildings on the lot have been destroyed by fire, and a new building erected on the premises in part with moneys advanced by the widow of W. P. Blanton, it is adjudged that the said widow have a lien on the said premises to the amount of the moneys expended out of her estate in the erection of the building now standing thereon; and it further appearing from the testimony that the plaintiffs in this action became the purchasers of said storehouse and lot at an execution sale made by the United States marshal for the Western district of North Carolina, under an execution in his hands issued upon the judgment of the plaintiffs in this cause against the said William M. Blanton, and having the marshal's deed for the same duly executed and registered, it is ordered, adjudged, and decreed that the said defendant J. D. Blanton surrender the possession of the said storehouse and lot to the plaintiffs in this cause, subject to the lien of W. P. Blanton, deceased, and account to them for the rents and profits of the said premises from the date of the conveyance to these plaintiffs by the said United States marshal.' Complainants allege that the only evidence in the cause that the building now upon the said premises was erected 'in part with moneys advanced by the widow of W. P. Blanton' was the testimony of the defendant John D. Blanton, and was as follows: 'I have five hundred dollars insurance on the building, and borrowed five hundred dollars from Mrs. Minnie Blanton, and gave her my note, without security, for it. She got this money from the insurance on her husband's life, and I had saved up about five or six hundred dollars out of my business in Asheville.' That the said five hundred dollars of the moneys of the said Minnie Blanton, so borrowed by the said John D. Blanton, was repaid to the said Minnie Blanton, as the complainants are informed and believe, long prior to the entry of the decree in this case, and that at the date of the making and filing of said decree there was nothing due from the said John D. Blanton to the said Min-

nie Blanton for any moneys of the said Minnie that were put into the said building, and the complainants are advised and believe that the said Minnie, under the said decree, is not entitled to a lien for any sum whatever; and the complainants are further informed and believe that said Minnie Blanton did not advance any moneys whatever for the building of said house, but merely made a loan of the said five hundred dollars to the said John D. Blanton, to be used by the said Blanton at his own will and pleasure, and that there was no understanding between the said Minnie and the said John D. that said sum was advanced to be used in building the said house. Complainants deny that the amount of money loaned by the said Minnie Blanton to the said John D. Blanton was five hundred dollars, but demand a production of the note and full proof of the said amount. Complainants further allege that the defendant John D. Blanton has not surrendered possession of the said house and premises to the plaintiffs, as by the said decree he was required to do, nor has he accounted 'to them for the rents and profits of the said premises from the date of the said conveyance to these plaintiffs by the said United States marshal,' as he was also required by said decree to do; that the deed of conveyance of the said marshal to these plaintiffs was executed and delivered to them on the 13th day of November, 1895, and under the said decree the plaintiffs are entitled to an account of the rents and profits of the said premises from the said date; that the said John D. Blanton has been in possession of the said premises ever since the said date, and receiving the rents and profits; that the rents and profits are of the value of $350 per annum, and more. Complainants further show that by the decree aforesaid it was decreed as follows: 'And it is further ordered, adjudged, and decreed that the said defendant William M. Blanton file with the clerk of this court the note against W. McD. Burgin, to be collected under the direction of the solicitor of the plaintiffs in this cause, the proceeds of which will be held for the further orders of the court.' That the said defendant William M. Blanton has not filed the said note with the clerk of this court in obedience to the said decree, nor have the proceeds of the said note been paid into the office of the clerk of the said court, or to the solicitor for the plaintiffs. That the amount of the said note, as the complainants are informed and believe, is five hundred dollars, with interest from its date. Complainants further show that from the said final decree of this court [83 Fed. 234] an appeal was taken by both parties to the United States circuit court of appeals for the Fourth circuit, which said last-named court, on the 25th day of November, 1898, affirmed the said decree [32 C. C. A. 384, 89 Fed. 885], and remanded the cause to the said circuit court, and directed the said circuit court to bring before it, if necessary, such other parties as might be required to carry out the said decree. Complainants further show that, as to the part of said decree in relation to the allowance to be made to the said defendant Morgan of so much as said Morgan had paid of the debts of the said William M. Blanton, it has been referred to the clerk of this court to ascertain the amounts so to be paid to the said Morgan, but, in relation to the defendant Minnie Blanton's interest, no reference has been made, nor any reference been made to ascertain the amount of rents and profits due complainants from the said defendant John D. Blanton, or in regard to the note of the said William McD. Burgin."

The defendants named, in answer to the supplemental bill filed as above set out, say:

"That it is not true that any of the questions, matters, or things arising in the said suit between the above-named plaintiffs and the above-named defendants were left open and undetermined by decree of Judge Brawley filed on the 2d day of November, 1897, except the following, to wit: (1) The amount of money paid by J. L. Morgan on account of the debts of Minnie Blanton, and which said amount of money so paid was decreed should be a lien in favor of said J. L. Morgan on the tanyard property. (The said amount of money was directed to be ascertained by the clerk of this court.) (2) As to what disposition should be made of the note executed by W. McD. Burgin to William M. Blanton. (3) The value of the rents of the storehouse and lot

in the town of Marion, N. C., and the length of time which J. D. Blanton should account for the rent thereof."

The defendants insist that under no possible construction of this decree was Morgan required to account for any profits which he might have made in the tanyard business, but that the entire matter in dispute and controversy between the plaintiffs and defendant Morgan was settled and determined by the decree. It is further insisted by the defendants that the said Morgan has not made any profits whatsoever out of the tanyard business since conveyance to him by William M. Blanton of his interest therein, but that, on the contrary, he has lost money in the said business. It is further insisted by the said defendants that the question as to whether a charge upon the storehouse and lot in the town of Marion, for the amount of $500 and interest thereon, the amount of money received from Mrs. Minnie Blanton, is a lien, is not an open question; that this matter was fully adjudicated by Judge Brawley; and that, the decision of Judge Brawley having been affirmed by the circuit court of appeals for the Fourth circuit, the matter is now res judicata. The defendants deny that Blanton has failed to surrender possession of the storehouse and lot in the town of Marion to plaintiffs, but, on the contrary, insist that since the said decree the tenant of Blanton, by and with the consent and under the direction of the defendant J. D. Blanton, has attorned to J. H. Merrimon, agent for the plaintiffs, and since the date of November 1, 1897, the said defendant J. D. Blanton is in no way liable for rent, use, or occupation of the said property. The defendants further insist that there is no requirement in the decree that the proceeds of the note of W. McD. Burgin shall be turned over to the plaintiffs' solicitors; that the suit for the recovery upon this note is now pending in the superior court of McDowell county; and that, as soon as the judgment can be had, the money collected from the same will be paid in the court, to be disposed of in a further decree. And the defendant J. D. Blanton avers that he is entitled to have set apart to him his personal property exemptions out of the proceeds of the Burgin note, the same never having been set apart to him, which he is entitled to have done under the laws of North Carolina. The defendants therefore pray that, as all matters at issue in this suit have been determined except the three matters alleged in this answer to have been left open, the clerk of this court proceed to take an account of the money paid by J. L. Morgan on the debts of William M. Blanton, and the value of the storehouse and lot for rental purposes from the time of the filing of Judge Brawley's decree, on November 2, 1897, until plaintiffs took charge of said property (if any time elapsed). The defendants further pray that it be ordered by the court what disposition shall be made of the McD. Burgin note, or money arising therefrom, and such other and further orders as equity may demand.

The court of appeals having affirmed the judgment rendered by Judge Brawley, and the decree in the case reciting "that the amount to be paid by said Morgan shall be ascertained by a reference to the clerk of this court," nothing now remains to be done except that the clerk shall at once take this account, and report the same to this court.

In conducting this inquiry, the clerk, in order to ascertain the amount of money actually paid out on the debts of the said William M. Blanton, must ascertain whether Morgan paid the money out of the proceeds of the tanyard business, or whether he paid it out of his own individual money. As to whether Mrs. Minnie Blanton has now any lien upon the Blanton storehouse and lot in the town of Marion, N. C., Judge Brawley said in his opinion:

"But as the testimony shows that the building upon the lot has been destroyed by fire, and a new building erected on the premises in part with moneys advanced by the widow of W. P. Blanton, with whom J. D. Blanton became associated in business subsequently (the transaction herein condemned), and as the said widow was in no wise implicated in the same, it is adjudged that she have a lien on the premises to the amount of the money expended out of her estate for the erection of the building now standing thereon."

The only evidence upon this subject is found upon page 146, printed reports, under question 36. J. D. Blanton said: "I borrowed $500 from Mrs. Blanton, and gave her my note, without security, for it. I paid all this money in to the building." Judge Brawley evidently referred to the testimony just quoted when he adjudged in his decree "that she [that is, Mrs. Minnie Blanton] have a lien on the premises to the amount of the money expended out of her estate for the construction of the building now standing thereon."

In the assignment of errors filed by plaintiffs the sixth was:

"Because that in said decree, in respect of the deed from William M. Blanton to J. D. Blanton, after declaring said deed void, it is further ordered and decreed as follows: 'But as the testimony shows that the building on the lot had been destroyed by fire, and a new building erected on the premises in part with moneys advanced by the widow, Mrs. Blanton, it is adjudged that the said widow have a lien on the said premises to the amount of the moneys expended out of the estate in the erection of the building now standing thereon.' "

Upon the hearing of the appeal all the assignments of error, including the above (the sixth), were urged by the solicitors for the plaintiffs; but the circuit court of appeals, in an opinion delivered by Judge Goff, affirmed the ruling of Judge Brawley and the decree quoted, filed in this cause November 2, 1897, in full, as the opinion of the court.

I am constrained to consider this question as res judicata. I do not feel at liberty to reopen the question by a further reference to the clerk.

It is urged by the counsel for the plaintiffs that Mrs Blanton was not a party to the cause, and that the court had no jurisdiction of her person, and could have made no order as affecting her interest; but it would seem from the mandate of the circuit court of appeals that the opinion of the district court in assuming jurisdiction, and declaring that she have a lien on the premises in question to the amount borrowed by her husband, and invested by him in part in the erection of a storehouse in Marion, was fully confirmed and approved by that court. There can be no question as to the amount advanced. It was fixed by the testimony of J. D. Blanton at $500, and the decree, in effect, so declares. It is now insisted by the plaintiffs that, if the matter is reopened, they will be able to show that the debt alleged to

be due for borrowed money from J. D. Blanton to Mrs. Minnie Blanton, and used in part in the construction of the storehouse in Marion, has long since been paid. Conceding this to be true, this court can have no power to reopen or modify a mandate from the circuit court of appeals.

Counsel for the plaintiffs further insist that, as Mrs. Blanton was not a party to this proceeding, no reference could be made as to her, and therefore it was that Judge Goff, in delivering the opinion of the circuit court of appeals, said:

"The court below, to which this case will be remanded for such further proceedings as may be proper in its opinion, will see that such intention is carried out, and, in order to do so, will, when necessary, bring before it such other parties as may be required."

This, counsel for plaintiffs insist, referred to no one except Mrs. Blanton, as every other party interested in the suit was then a party of record. Had the court been impressed with this assignment of errors (in which the direct question was raised as to whether the court below erred in making reference to Mrs. Minnie Blanton, she not being a party to the cause, as to the validity of her claim or lien on the storehouse and lot in Marion, N. C.), it would seem that the mandate would have expressed it, and the cause would have been remanded for the purpose of making Mrs. Blanton a party to the suit, so that inquiry might be made if she had loaned $500, or any other amount, to her husband, whether it had been invested by him in part in the building of a storehouse, as alleged, and especially whether the debt in question had ever been paid; but there is no such recital in the mandate. In adopting the decree of Judge Brawley, it is manifest that the court of appeals fully concurred in the findings and conclusions of his honor. Judge Brawley in his decree says "that Mrs. Blanton has a lien on the said premises in question to the amount of the moneys expended out of her estate in the erection of the building standing thereon." It appeared from the evidence that $500 was the exact amount advanced by her to her husband, J. D. Blanton, and invested by him in part in the construction of a storehouse in Marion, N. C. The mandate of the circuit court of appeals further directed that the money collected from the note given by W. McD. Burgin to William M. Blanton should be turned over to the clerk of this court, and the proceeds held for further orders. It is insisted by counsel for Blanton that the defendant, not having had his exemptions (allowed under the laws of this state) set apart to him, is entitled to the same out of the proceeds of the Burgin note when collected. In defendants' assignment of errors the first assignment was:

"Because the decree and opinion filed November 2, 1897, provides that the note received by Blanton as a consideration should be turned over to the clerk of this court for collection under the direction of the solicitors in this cause, and the proceeds held for further orders, referring thereby to the note given by W. McD. Burgin to William M. Blanton, when there is no relief sought in plaintiffs' bill justifying this order, and when the transaction between William M. Blanton and W. McD. Burgin is sustained by said decree, and should be."

This assignment of errors was overruled by the circuit court of appeals, and the decree affirmed. By this decree the court has abso-

lute control of the proceeds realized from the Blanton note when collected and paid over to the clerk. The claim for homestead exemptions on the part of J. D. Blanton out of this note cannot be allowed at this time. When the fund is collected and paid into the hands of the clerk, upon proper application on the part of J. D. Blanton for his exemptions allowed by law to be set apart from the fund deposited with the clerk, realized from the collection of the Burgin note, the same will be considered by this court. In respect to the amount of rents, the parties having reached an agreement since the filing of the supplemental bill by complainants, it becomes unnecessary to make any other order in the premises, in so far as rents are concerned. In the opinion of the court, all matters at issue in this suit having been determined, with the exception of the matters especially named in the decree, it is ordered and adjudged that the clerk proceed to hear said matters, to take accounts referred to in said decree, and report his findings to this court; and this cause is retained for further orders.

GREAT WESTERN MIN. & MFG. CO. v. HARRIS.

(Circuit Court, D. Vermont. September 11, 1899.)

REVIVAL—ACTION FOR INJURY TO PROPERTY—VERMONT STATUTE.

A suit by the receiver of an insolvent corporation to recover money alleged to have been wrongfully obtained from the corporation when insolvent is in the nature of an action on the case for damages to property, which survives, under V. S. § 2446, and on the death of the defendant it may be revived against his executors.

On Motion to Dismiss Proceedings for Revivor.

William P. Dillingham, for plaintiff.
Eleazer L. Waterman, for defendant.

WHEELER, District Judge. This suit is brought by the receiver of the corporation to recover back money paid to the defendant for capital stock issued upon supposed improvements of the property, without other consideration, and while the corporation is alleged to have been insolvent, and bought back to float mortgage, bonds sold, and for assets lost by abstraction of the manager through alleged negligence of the defendant as director. The answer denies the insolvency and the negligence, and sets up the payment of all then existing debts. Proceedings for revivor have been brought against the executors of the defendant, which they have moved to have dismissed, because, they say, the suit does not survive. This motion has now been heard. The assets of an insolvent corporation are trust property for payment of its debts, and may be followed for that purpose, and recovered back. The question now is not whether the plaintiff had a valid right to recover these assets of the defendant, but whether he has the same right to try to recover them of the estate in the hands of the executors that he had to recover them of the defendant. By the laws of this state, under which these executors are administering this estate, "actions of trespass, and trespass on the case for

damages done to real and personal estate," survive. V. S. § 2446. Generally, everywhere, causes of action at law or in equity which relate to property are made to survive. This suit is in the nature of an action on the case for damages to property, and would seem by this law of the state to survive. Dana v. Lull, 21 Vt. 383; Bellows v. Allen, 22 Vt. 108. The transaction complained of would lessen the property of the corporation, increase that of the defendant, and affect the assets of the estate in the hands of the executors. The survival turns upon the distinction whether property and assets are affected, or a mere personal liability is created, as shown by Hall, J., Id. 113. Generally, the statutes of the state where the suit is pending govern as to survival and the liability of assets in the hands of executors and administrators, but this is not always so. In the federal courts assets in the hands of executors or administrators may sometimes be reached in a different manner from what they can be in the state courts. In Suydam v. Broadnax, 14 Pet. 67, Mr. Justice Wayne said: "It was certainly intended to give to suitors having a right to sue in the circuit court remedies co-extensive with those rights. These remedies would not be so if any proceedings under an act of a state legislature to which a plaintiff was not a party, exempting a person of such state from suit, could be pleaded to abate a suit in the circuit court." Union Bank v. Jolly's Adm'rs, 18 How. 503; Green's Adm'x v. Creighton, 23 How. 90; Brown v. Ellis, 86 Fed. 357. The assets of this estate might, if the case could be made out, be followed by independent suit into the hands of the executors, and a suit might as well be revived as brought to reach them. Motion to dismiss revivor denied.

SMITH v. NEW YORK, N. H. & H. R. CO.

(Circuit Court, D. Massachusetts. September 15, 1899.)

No. 772.

1. RAILROADS—JOINT LIABILITY FOR TORTS.

Railroad corporations created by concurrent legislation of two or more states, having a joint interest in the operation of the entire line of road extending through or into such several states, are jointly liable for a tort committed in its operation in either state.

2. JURISDICTION OF FEDERAL COURTS—CITIZENSHIP OF CORPORATION—CONSOLIDATION.

The legislature of Massachusetts, in 1839, incorporated from natural persons the Hartford & Springfield Railroad Corporation, authorized to build a road to the north line of Connecticut, "with a view to unite the said railroad" with one authorized by the legislature of Connecticut to be built from Hartford to the state line, and which was built by the Hartford & New Haven Railroad Company, a Connecticut corporation. These two companies were afterwards consolidated by concurrent legislation of the two states, under the name of the Hartford & New Haven Railroad Company. Still later, by concurrent acts of the two states, such company was authorized to consolidate with the New York & New Haven Railroad Company; the Massachusetts act providing that, on the completion of certain required acts, "said companies shall become and be merged and consolidated into one corporation, under the name of the New York, New Haven & Hartford Railroad Company, and shall become and be a body politic and corporate, and shall possess, hold and enjoy all the rights, pow-

ers, franchises and privileges, theretofore vested in either of said corporations." Laws 1872–73, c. 171, § 3. *Held*, that under such legislation the New York, New Haven & Hartford Railroad Company became the successor in law of the Hartford & Springfield Railroad Corporation, and, as such lawful successor, a corporation of Massachusetts and a citizen of that state for the purposes of the jurisdiction of a federal court.[1]

This was an action to recover damages for an alleged tort, and the present hearing is on a motion to dismiss for want of jurisdiction.

Richard M. Saltonstall, for plaintiff.
Charles F. Choate, Jr., for defendant.

PUTNAM, Circuit Judge. This case was assigned for trial by a jury, the court, at the time the assignment was made, not having been informed of the fact that a jurisdictional question was involved. On opening the pleadings at the time the jury was impaneled, it was made known to the court that the issue covered by this opinion was raised by the defendant. It was also found that the issue involved too much investigation to be properly disposed of with the expedition which the necessities of a jury trial call for, and that the cause must either be continued, or the practice which was approved in Wetmore v. Rymer, 169 U. S. 115, 18 Sup. Ct. 293, followed, as nearly as might be, reserving the rights of both parties to except to the final rulings on the question of jurisdiction, and to sue out the proper writ of error based on such exceptions, so far as it was in our power to give effect to such reservation. Thereupon, after the verdict of the jury had been rendered against the defendant, it again brought this issue to the attention of the court by a formal motion to dismiss for want of jurisdiction, reaffirming the allegations relating thereto found in its answer to the plaintiff's declaration, and the motion has now been heard by us and carefully considered.

The issue before us resolves itself into two fundamental questions, that is to say: Whether the case falls within the class to which Nashua & L. R. Corp. v. Boston & L. R. Corp., 136 U. S. 356, 10 Sup. Ct. 1004, relates, or within that class covered by Railway Co. v. James, 161 U. S. 545, 16 Sup. Ct. 621, and Louisville, N. A. & C. Ry. Co. v. Louisville Trust Co., 174 U. S. 552, 19 Sup. Ct. 817, or whether, by possibility, the case is so exceptional that it does not fall within either of these classes.

The line of railroad to which this case relates is continuous, and is operated continuously, extending into or through New York, Connecticut, Rhode Island, and Massachusetts. At the trial by the jury, the court was satisfied that, while the mere injury for which the plaintiff sued occurred in Connecticut, the relations between the parties by virtue of which the injury afforded a right of action arose in Rhode Island. The defendant, in arguing this motion to dismiss for want of jurisdiction, submitted the following proposition:

"That if it should be held, for purposes of jurisdiction in this case, the defendant is a citizen of Massachusetts only, yet that the Massachusetts corporation, which is made the defendant in this case, is not liable to this

[1] As to citizenship of corporations for purposes of federal jurisdiction, see note to Mason v. Dullagham, 27 C. C. A. 301.

plaintiff, because it could not, and did not, commit or permit the act of negligence upon which the plaintiff relies to recover."

This, however, under the existing circumstances, relates entirely to the merits of the case, and it was disposed of by the rulings during the trial so far as the proposition was then brought to the attention of the court. There is ordinarily no difficulty growing out of this proposition with reference to corporations organized by concurrent legislation of several legislatures, as were the Nashua & Lowell Railroad Corporation and the Boston & Lowell Railroad Corporation, referred to in the case already cited; because, in such instances, each has a joint interest in the operation of the entire line of railroad through the several states whose legislatures have acted, and may be therefore liable jointly, whatever may be the locus of the tort. This is evident on principle, and is also in harmony with the line of reasoning in Railway Co. v. James, where it appears, on pages 546, 554, 161 U. S., and page 621, 16 Sup. Ct., that, while the suit was brought in the Arkansas district, the cause of action arose in Missouri. Yet no point was made by the supreme court on this account, although, except for the principle to which we have referred, of the joint liability of corporations created by concurrent legislation and jointly operating a line of road extending through several states, this fact would have stood at the threshold of the case, and would have disposed of it. The view of Judge Lowell was the same in Horne v. Railroad Co., 18 Fed. 50, 52. Therefore, if there is in fact a corporation created by the legislature of Massachusetts, under the circumstances required by the decisions of the supreme court to which we have referred, and known as the New York, New Haven & Hartford Railroad Company, the proposition of the defendant which we have cited, and all other propositions touching the liability of that corporation, are aside from any question of jurisdiction which we now have before us, and cannot be considered with reference to it.

In the case at bar, the defendant is described in the record as the New York, New Haven & Hartford Railroad Company, and is alleged to be a corporation created by the laws of Massachusetts; and, in accordance with the rule established by the supreme court, it is therefore presumed to be a citizen of that state, and it is so described in the writ. No question has been made before us with reference to the legislation of any state, except Massachusetts and Connecticut; and therefore the principal issue is whether the allegation that the New York, New Haven & Hartford Railroad Company, defendant in this case, can, under the legislation of the two states named, which has been brought to our notice, be held to be a corporation of the state of Massachusetts, or whether, in this respect, the allegation that it is such is contrary to law, and therefore to be so determined, whether brought to our attention on a motion, plea, demurrer, or in any other way suitable to raise an issue of that kind, wherever an allegation is legally impossible.

Apparently, we can dispose without difficulty of the question whether or not this case is in the class covered by Railway Co. v. James, ubi supra. It seems that, in some of the Western states, either the constitution or general legislation provides that no corporation

except a domestic one shall exercise the right of eminent domain. Therefore it is not uncommon to find legislation with reference to foreign railroad corporations desiring to extend their lines into or through a particular state, whereby the legislature of the latter state, instead of enacting that the foreign corporation may exercise its franchises within the state, which would not meet the constitutional or general statute provisions to which we have referred, declares the foreign corporation a domestic corporation. It seems now to be established by the supreme court that when a foreign corporation, as such, is declared to be a corporation by the legislature of another state, it does not, for federal jurisdictional purposes, become a citizen of the latter state, and that, for such purposes, no corporation can be a citizen of any particular state unless created by its legislature, or under its authority, of natural persons, as was the case with the corporations in Nashua & L. R. Corp. v. Boston & L. R. Corp., ubi supra. We so understand the expression in the opinion in Railway Co. v. James, 161 U. S., at page 565, 16 Sup. Ct. 628:

"In order to bring such an artificial body as a corporation within the spirit and letter of that constitution [meaning the constitution of the United States], as construed by the decisions of this court, it would be necessary to create it out of natural persons, whose citizenship of the state creating it could be imputed to the corporation itself."

This rule and phraseology are both reaffirmed in Louisville, N. A. & C. Ry. Co. v. Louisville Trust Co., 174 U. S., at pages 565, 566, 19 Sup. Ct. 817. It is to be observed that in Memphis & C. R. Co. v. Alabama, 107 U. S. 581, 2 Sup. Ct. 432, it was held that an action could not be brought by a citizen of Alabama against a corporation made by the statutes of that state an Alabama corporation, previously incorporated in Tennessee, and not constituted in Alabama of natural persons. This case was cited, and not disapproved, in Railway Co. v. James, 161 U. S., at page 559, 16 Sup. Ct. 621; so that the rule which we have given with reference to corporations which are not organized from natural persons stands limited to the extent of the rule of Memphis & C. R. Co. v. Alabama, although this limitation is not of consequence in the case at bar.

When we explain the statutes out of which the corporation in issue in the present case arose, we think it will be clear that Massachusetts has not attempted to create a Connecticut corporation, as such, into a corporation within its own jurisdiction. Therefore we have nothing left except to consider whether the New York, New Haven & Hartford Railroad Company is a corporation within Massachusetts, as were the corporations in Nashua & L. R. Corp. v. Boston & L. R. Corp., ubi supra. In determining this question, we think that, with reference to cases of the class of that last referred to, we ought not to go a step beyond what has been actually decided. Our reasons for this are that the underlying rule with reference to the jurisdiction of federal courts over corporations is somewhat artificial, and, with reference to corporations created by concurring legislation, it is so to such a degree that it was declared by Judge Lowell, in Horne v. Railroad Co., already cited, at page 51, as a "useful fiction." We have also to remember that in Farnum v. Canal Corp., 1 Sumn. 46, 62,

Fed. Cas. No. 4,675, cited with approval in the opinion of Mr. Justice Field, rendered in behalf of the court in Nashua & L. R. Corp. v. Boston & L. R. Corp., 136 U. S., at page 376, 10 Sup. Ct. 1008, Mr. Justice Story, in stating the rule, said: "Neither [that is, neither corporation] was merged in the other. If it were otherwise, which became merged? The acts of incorporation create no merger, and neither is pointed out as survivor or successor." In other words, this expression sounds the keynote, in that it intimates that the rule applied in cases of the class of Nashua & L. R. Corp. v. Boston & L. R. Corp. is one of necessity. Indeed, that the rule is not to be extended was positively stated in the opinion rendered by Mr. Justice Harlan in behalf of the court, in Railway Co. v. James, 161 U. S., at page 563, 16 Sup. Ct. 621, and on this point it might have been sufficient to have referred to that expression alone.

We should also bear in mind the observation of Mr. Justice Harlan in his opinion in behalf of the court in Goodlett v. Railroad Co., 122 U. S. 391, 7 Sup. Ct. 1254, in which he said, at page 401, 122 U. S., and page 1255, 7 Sup. Ct.: "Whether a corporation created by the laws of one state is also a corporation of another state within whose limits it is permitted, under legislative sanction, to exert its corporate powers, is often difficult to determine." We also note his more important observation in the same opinion at page 406, 122 U. S., and page 1257, 7 Sup. Ct.: "The solution of this question [meaning the same issue which we have at bar] depends upon the intent of the legislature of Tennessee, as gathered from the words used in the statutes now to be examined." We also refer to the application to this class of cases of the well-known rule made in Memphis & C. R. Co. v. Alabama, 107 U. S., at page 584, 2 Sup. Ct. 432, that the whole legislation must be taken together,—a rule which is also applied to the same class of cases in Goodlett v. Railroad Co., 122 U. S., at page 404, 7 Sup. Ct. 1254. In each of the cases referred to, the legislation contained inconsistent expressions, but some leading fact necessarily brought the court to the conclusions which were reached, and such, we think, will be found to be the condition in the case at bar.

We have now nothing remaining except to apply these principles to those portions of the legislation of Massachusetts and Connecticut which have been brought to our attention. The first act which we need consider is the statute of Massachusetts approved April 5, 1839, creating a corporation from natural persons by the name of Hartford & Springfield Railroad Corporation, with authority to construct and operate a railroad from Springfield to the north line of the state of Connecticut, "with a view," as stated in the act, "to unite the said railroad with a railroad authorized by the legislature of Connecticut, from Hartford to the line of the state of Massachusetts." With some intervening legislation which we need not consider, the legislature of Massachusetts, by an act approved February 23, 1844, provided that "the persons who now are, or may hereafter be, stockholders of the Hartford & New Haven Railroad Company, a corporation established by an act of the legislature of the state of Connecticut, shall be stockholders of this corporation [meaning thereby the Hart-

ford & Springfield Railroad Corporation], together with such persons as now are, or may hereafter become, stockholders of this corporation." This act contained the customary provisions for consolidating the two corporations, similar in effect to those found with reference to the corporations under consideration in Nashua & L. R. Corp. v. Boston & L. R. Corp., already referred to; and there can be no question that the original corporations which were merged in the consolidated corporation authorized by the act last cited, and by concurring legislation of Connecticut, the details of which we need not point out, stood, so far as the jurisdiction of the federal courts is concerned, in the same position as the corporations in that case. The act of February 23, 1844, provided, however, as follows: "The said corporation, so far as their road is situated in Massachusetts, shall be subject to the general laws of this state to the same extent as if their road were wholly therein." It also provided that one or more officers of the consolidated corporation should be resident in Massachusetts, and one or more in Connecticut, on whom processes against the corporation might legally be served in either state; and it added: "And said corporation shall be held to answer within the jurisdiction where such service shall be made and the process is returnable." These provisions, and some others which appear in the statute of February 23, 1844, would, standing alone, carry the implication that the consolidated corporation was foreign to Massachusetts; but, applying the rules of construction to which we have referred, the result of the legislation is of so positive a character that these expressions must be held to have been inserted as a matter of greater caution, and not as contravening the clear effect of the statute with reference to the class of questions which we have under consideration. Afterwards, by an act approved April 23, 1847, the legislature of Massachusetts provided that, when the Hartford & Springfield Railroad Corporation should have been united with the Connecticut corporation, according to the terms of the act approved February 23, 1844, and according to the similar provisions of laws enacted in Connecticut, the united corporation should be called the Hartford & New Haven Railroad Company; and again, out of greater caution, it reiterated the provision that the road of the consolidated corporation, so far as it was situated in Massachusetts, should be subject to the laws of that state to the same extent as if wholly therein. Meanwhile, the legislature of Connecticut had incorporated the New York & New Haven Railroad Company, which, so far as we comprehend the legislation, was never authorized to construct or operate any portion of any railroad within Massachusetts over the line of the Hartford & Springfield Railroad Corporation prior to the legislation to which we will next refer, although, whether it was so authorized or not, would not, so far as we can perceive, have a preponderating effect on the issue now before us. By an act approved July 26, 1871, the legislature of Connecticut authorized a consolidation of the Hartford & New Haven Railroad Company with the New York & New Haven Railroad Company, under the name of the New York, New Haven & Hartford Railroad Company, which is that given the defendant by the writ in this case. This act contained similar provisions to those usual in

legislation authorizing the consolidation of corporations controlling railroads. By a concurring act approved April 5, 1872, the legislature of Massachusetts provided, in section 1, as follows:

"The Hartford & New Haven Railroad Company may sell, transfer, merge and consolidate its corporate rights, powers and estate to, into and with the New York & New Haven Railroad Company, upon such considerations, terms, stipulations and conditions as may be agreed upon between said corporations and as are authorized by the provisions of this act."

It next provided, in section 2, for the execution of an agreement "for the sale, transfer, purchase and merger hereby authorized," specifying the details of what might enter into the agreement, and, further, that a copy of it, "together with a certificate of the adoption thereof," should be filed in the office of the secretary of state.

The next provision, which is found in section 3, is as follows:

"Upon the filing of such certificate said companies shall become and be merged and consolidated into one corporation, under the name of the New York, New Haven & Hartford Railroad Company, and shall become and be a body politic and corporate, and shall possess, hold and enjoy all the rights, powers, franchises and privileges, theretofore vested in either of said corporations, and all property, real and personal, of said companies, shall be deemed to be vested in said consolidated corporation."

The first provision found in this act contains the words we have cited, "sell, transfer, merge and consolidate," followed by the words, "its corporate rights, powers and estate." This phraseology is, of course, subject to several different constructions, and, standing alone, it might be held to contemplate an election among different modes of procedure by the corporations to which the legislation relates. The words, "rights, powers and estate," might well be construed as limited to property and franchises necessary to the construction and operation of the railroads which the corporations controlled, and as not including that class of franchises which relate merely to the entity and perpetuation of corporate existence; and, with this construction, the words which precede them might well be held as limited strictly to a sale or transfer,—that is, to an acquisition by one corporation of the property and the franchises to construct and operate a railroad of the other,—leaving the corporate existence to stand, though, of course, as a mere name and useless personality. In many of the cases which the supreme court has been required to consider, the condition has been substantially that in which the case at bar would have been left on this hypothetical construction and action by the corporations in accordance therewith; that is to say, a foreign corporation, with a right to construct and operate a railroad within the state to which it is foreign. Some expressions in the act would give color to this construction; among the rest, like provisions to those which we have already given as existing in the act of February 23, 1844, which carry an implication that the legislature of Massachusetts was dealing with a foreign corporation. But these expressions, as the history of the legislation shows, were undoubtedly inserted in the last act for the same reasons for which they were inserted in the earlier ones, and they must be regarded as indicating only greater caution. They certainly cannot control the positive declaration of the legislature that, on the completion of the agreement between

the corporations and the filing of the certificate to which we have referred, the two should become "one corporation." It seems to us that this provision necessarily compels us to hold that, even as against the doubtful expressions to which we have referred, with, perhaps, some others which can be found, the intention of the legislature, which we must gather from the whole act, was the creation of a so-called "consolidated corporation" by so-called "merger," on the same rules applied in Nashua & L. R. Corp. v. Boston & L. R. Corp., ubi supra, and that the act did not provide for a mere transfer of property and franchises of constructing and operating railroads.

Section 2 of the act of April 5, 1872, in enumerating the details of the agreement to which we have referred, enacts that it shall prescribe the manner of converting the capital stock of the original corporations into the capital stock of the consolidated corporation. It is true it may be said that this is only an alternative provision, in the event the corporations should actually consolidate, instead of proceeding to "sell" and "transfer"; but, inasmuch as they did in fact convert their capital stocks into that of the new corporation, they thus elected to consolidate, and thus definitely determined the status, and put it beyond all question.

The attorney general of Massachusetts, in an interesting and thorough opinion which involved the issue here, found in Public Documents 1895, No. 12, at page 43, reached the conclusion that the New York, New Haven & Hartford Railroad Company must be held to be a corporation created by Massachusetts, within the meaning of the statute which was there under consideration by him. His opinion contains a much more detailed and elaborate examination of the legislation out of which the defendant corporation arose, and of the principles involved, than we find now necessary, in view of the late decisions of the supreme court to which we have referred.

Under the circumstances, we feel that we are compelled to find that the Hartford & Springfield Railroad Corporation was created a corporation from natural persons by Massachusetts; that the Hartford & New Haven Railroad Company became, within that state, its successor, and impressed, for all federal jurisdictional purposes, with its characteristics; and that, in turn, the New York, New Haven & Hartford Railroad Company became, in like manner, the true successor in law of the Hartford & New Haven Railroad Company, and so of the Springfield & Hartford Railroad Corporation; so that, within Massachusetts, the New York, New Haven & Hartford Railroad Company is, by lawful succession, a corporation created by the legislature of Massachusetts from natural persons, and must be held, for all purposes of federal jurisdiction, a citizen of that state. The motion to dismiss is denied.

In re ALLEN.

(District Court, N. D. California. September 11, 1899.)

No. 2,888.

1. BANKRUPTCY—PRIORITY OF CLAIMS—COSTS OF ATTACHMENT.
Where the lien of an attachment levied on personal property is dissolved by the adjudication of the debtor as a bankrupt within four months after the commencement of the attachment suit, the creditor's claim for the costs incurred in the attachment proceedings prior to the filing of the petition in bankruptcy is a provable debt, but is not entitled to priority of payment, nor is it a lien on the proceeds of the trustee's sale of the property which was attached.

2. SAME.
Expenses defrayed by an attaching creditor of the bankrupt, after the dissolution of his lien by the adjudication in bankruptcy, in storage of the attached property and the pay of a keeper, will be entitled to priority of payment out of the estate, but only to the extent of the "actual and necessary cost of preserving" the property (Bankruptcy Act, § 64); and the court is not bound to allow the full sum actually expended by the creditor, but only so much as it shall find to have been reasonably necessary for the purpose.

In Bankruptcy. On review of ruling of referee in bankruptcy.

L. T. Hatfield, for creditor.
Wm. P. Johnson, for bankrupt.

DE HAVEN, District Judge. The Sullivan-Kelley Company presented its claim to the referee in the sum of $106.45 on account of costs incurred by it as plaintiff in an attachment suit pending against the bankrupt at the date of the adjudication, and commenced within four months prior to the date of filing the petition in bankruptcy, and asked that the same might be allowed and paid in full as a debt entitled to priority of payment out of the proceeds arising from the sale of the property attached. A portion of this claim—$34.38—was for costs which accrued prior to the filing of the petition in bankruptcy, and included storage and fees of keeper of the attached property up to that date, and the balance of $72.07 was for fees of keeper and other expenses in relation to the property subsequent thereto and prior to the qualification of the trustee. The referee disallowed that portion of the claim relating to costs, storage, and fees of keeper incurred prior to the filing of the petition in bankruptcy, and allowed only $45.07 for fees of keeper and other expenses on account of the property subsequent to that date. The ruling of the referee in relation to each portion of the claim was excepted to by the Sullivan-Kelley Company, and is now before the court for review.

1. The referee erred in refusing to allow that portion of the claim which included the costs incurred in the attachment suit prior to the filing of the petition in bankruptcy. Under subdivision 3 of section 63 of the bankruptcy act, "a claim for taxable costs incurred in good faith by a creditor before the filing of the petition in an action to recover a provable debt" may be proved and allowed as a debt against the bankrupt, but is not entitled to priority of payment over unsecured claims. The debts entitled to priority of payment are enu-

merated in section 64 of the same act, and a claim for costs incurred by a creditor in attachment proceedings prior to the adjudication in bankruptcy is not included; nor is the claim for such costs a lien upon the proceeds arising from the trustee's sale of the attached property. It is true that, under the laws of the state of California, the Sullivan-Kelley Company acquired a lien upon the property attached in its suit against the bankrupt for the satisfaction of any judgment which it might recover in that action, and which judgment would, of course, include the costs of the action; but this lien was dissolved by the adjudication in bankruptcy (subdivisions c, f, § 67, Id.; In re Ward, 9 N. B. R. 349, Fed. Cas. No. 17,145), leaving to that company only the right to prove the debt sued for, and the costs incurred in good faith prior to the filing of the petition in bankruptcy, as an unsecured claim against the estate of the bankrupt.

2. The remaining exception relates to the action of the referee in reducing the creditor's claim for expenses incurred in caring for the attached property subsequent to the adjudication. The fact was undisputed that, in addition to the amount paid for the storage of the property, the Sullivan-Kelley Company paid to the keeper in possession under the sheriff two dollars per day. The referee allowed the amount paid for storage, and only one dollar per day for the keeper. Was the referee justified in thus reducing the claim? Under subdivision 1 of section 64 of the bankruptcy act, "the actual and necessary cost of preserving the estate subsequent to filing the petition" is a charge against the estate in bankruptcy, and is classed among the claims entitled to priority of payment. The referee was therefore authorized to allow so much of the claim for expenses in relation to the attached property as was reasonably incurred in caring for and preserving it for the benefit of the estate, but no more; and, in so far as the claim was excessive in amount, it was his duty to reject it. The right to pass upon the reasonableness of a claim of this character is vested in the court of bankruptcy. The fact that the creditor may, as in this case, have paid to the sheriff for storage and keeper's fees the full amount claimed, does not deprive such court of its power to determine the question whether the expenditure was reasonable in amount, and also necessary for the preservation of the property. It is to be remembered that an attaching creditor is not under any legal compulsion to keep the sheriff or other officer in possession after the dissolution of the attachment by the adjudication in bankruptcy; on the contrary, unless the court has appointed a receiver, or directed the marshal to take charge of the estate, the property attached should, upon the dissolution of the attachment, be forthwith restored to the possession of the bankrupt, to be by him held in trust for the benefit of his creditors until the qualification of a trustee; and, if this is not done, the estate in bankruptcy cannot properly be called upon to pay more for caring for the property while it continues in the possession of the attaching officer than if possession had been restored to the bankrupt upon the dissolution of the attachment. In either case the estate will be liable for the "actual and necessary cost" of preserving the property, and no more. It is only necessary to add upon this point that the amount allowed by the referee in this case

is amply sufficient to cover all reasonable and necessary expenses, in relation to the property attached, subsequent to the adjudication. In accordance with these views, the claim of the Sullivan-Kelley Company against the estate of the bankrupt is allowed in the sum of $79.45, of which $45.07 is entitled to priority of payment, under subdivision 1 of section 64 of the bankruptcy act, and the balance of $34.38 is allowed as an unsecured claim not entitled to preference in its payment. This opinion will be certified to the referee.

SOUTHERN LOAN & TRUST CO. v. BENBOW et al.

(District Court, W. D. North Carolina. September 5, 1899.)

1. BANKRUPTCY—COLLECTION OF ASSETS—PROPERTY IN POSSESSION OF STATE COURT.
   Where property of an estate in bankruptcy is in the actual custody and control of a state court of competent jurisdiction, through its officers, its possession of the property will not be interfered with, nor its disposition of the same restrained, by process from a court of bankruptcy.

2. SAME—ENJOINING SALE UNDER DECREE PROCURED BY FRAUD.
   Certain judgment creditors brought an action in a state court against their debtor and against an assignee to whom he had made a deed of assignment with preferences, and procured a decree adjudging the assignment to be null and void, as being intended to defraud creditors, establishing the liens of the plaintiffs on the property affected as prior to all others, and ordering the property to be sold. This decree was made by consent, without any opposition or contest on the part of the debtor or the assignee, and the court was not informed of the fact that the debtor had already been adjudged bankrupt and a trustee of his estate appointed, nor of the fact that all the judgments had been bought by a son of the bankrupt (and it was alleged with funds furnished by the latter) and he was the only real plaintiff. *Held*, that the court of bankruptcy, on petition of the trustee, would enjoin the state court's officer, the bankrupt, and all others concerned from selling the property under the decree, and instead would order it sold by the trustee free of incumbrances.

3. SAME.
   The jurisdiction of the court of bankruptcy, in such a case, to issue its injunction as prayed, is not affected by the fact that the bankrupt has already received his discharge.

4. SAME—RECEIVER OF STATE COURT—SUPERIOR TITLE OF TRUSTEE.
   A receiver appointed by a state court in proceedings supplementary to execution, and empowered to sue for and collect the property of the debtor previously passed to a third person by a fraudulent assignment, but who has not reduced the same to his possession nor taken any steps to do so, is not vested with such a title or right of possession of the property as will prevent a court of bankruptcy, on the adjudication of the debtor, from taking possession of it through the trustee.

5. SAME—SALE OF BANKRUPT'S PROPERTY FREE OF LIENS.
   A court of bankruptcy may, in its discretion, order the trustee to sell property of the estate free from liens and incumbrances, preserving and transferring bona fide and valid liens on the property to the proceeds of the sale.

6. SAME—CONSTRUCTION OF STATUTE.
   The bankruptcy act is a remedial statute, and should be interpreted reasonably and according to the fair import of its terms, with a view to effect its objects and promote justice.

In Bankruptcy. On petition for restraining order.

This is a petition on the part of the Southern Loan & Trust Company for an order restraining and enjoining C. P. Frazier, a commissioner appointed by the superior court of Guilford county, N. C., from selling certain described property of D. W. C. Benbow, who had filed a petition in bankruptcy, and had been duly adjudged a bankrupt on the 5th day of April, 1899. Charles D. Benbow, assignee of the said D. W. C. Benbow, and all agents and attorneys of any of the said parties, from making sale of the said property, or in any way interfering with, or disposing of, the estate of the said bankrupt. It appears from the record in the case, the affidavits filed, and the testimony of the bankrupt, D. W. C. Benbow, taken before the referee in bankruptcy on the 19th day of August, 1899, that the bankrupt, D. W. C. Benbow, was an indorser on the notes of the North State Improvement Company, an insolvent corporation in this state, to the extent of $367,000. On the 23d day of January, 1894, he executed to one J. S. Cox, of High Point, N. C., a deed of assignment to secure certain alleged creditors to the amount of $37,383.33, naming especially in the said deed, as preferred creditors, his wife, Mrs. Mary E. Benbow, his son, Charles D. Benbow, and his wards, Oliver C. and William C. Benbow. Immediately following this assignment, and between February 1, 1894, and May 11, 1896, 24 separate judgments, aggregating upwards of $400,000, were docketed against the said D. W. C. Benbow in the superior court of Guilford county. In proceedings supplementary to execution instituted by the National Bank of Greensboro, one of the judgment creditors, on the 12th day of April, 1894, against J. S. Cox, trustee, D. W. C. Benbow, Mary E. Benbow, and Charles D. Benbow, before the clerk of the superior court of Guilford county, one W. H. Reagan, a director in the National Bank of Greensboro, was appointed receiver of all the property, real and personal, including the choses in action, of the said D. W. C. Benbow, upon his executing bond in the penalty of $1,000. This order was made on the 2d day of May, 1894. The trust was accepted, and the bond filed by the said Reagan. The order appointing Reagan vested the receiver with all the powers of receivers in cases supplementary to execution, and empowered him to bring suits in his own name as such receiver, or in the names of the plaintiffs, for the recovery of the property of the defendant, real and personal. The order further forbade D. W. C. Benbow and his wife, Mary E. Benbow, from interfering with, or in any way disposing of, any of the property of the judgment debtor, D. W. C. Benbow, not exempt from execution, and especially enjoined them from collecting or interfering with the collection of a certain note due by one B. J. Fisher to D. W. C. Benbow, for the sum of $17,235, and certain other notes executed by one Ross to the said D. W. C. Benbow, for the sum of $4,500. It further appears that Reagan was a personal friend of D. W. C. Benbow, and that he was appointed receiver at the suggestion of the said D. W. C. Benbow. Upon his appointment as receiver, and as such receiver, he instituted, on the 15th day of May, 1894, in the superior court of Guilford county, a suit against J. S. Cox, trustee, Mary E. Benbow and D. W. C. Benbow, her husband, and B. J. Fisher, for the recovery and payment directly to him, the said receiver, of the sum of $17,235, the amount due by the said B. J. Fisher to the said D. W. C. Benbow. This action by Reagan, receiver, was pending in the superior court, May term, 1899, when the judgment of the plaintiff, the National Bank of Greensboro, having been sold and assigned to Charles D. Benbow, the son of D. W. C. Benbow, and who, with his father, was a defendant in the action (all issues having been found by the jury in behalf of the defendant Charles D. Benbow), a decree of the said court was entered declaring the said Charles D. Benbow, the son of the bankrupt, the owner of the said Ross notes, and declaring the said Charles D. Benbow, as executor of the estate of his mother, Mary E. Benbow, the owner of the Fisher note, and by said decree costs of said action were taxed against the receiver, and in favor of said defendants. It further appears that, in the year 1894 and subsequent thereto, the National Bank of Greensboro and Roe Wiggins, the Atlantic Bank of Wilmington, the Wilmington Savings & Trust Company, the People's National Bank of Lynchburg, the National Bank of Greensboro and I. Davenport, Jr., and the First National

Bank of Richmond, Va., and the Union Bank of Richmond, Va., brought five separate actions in the nature of creditors' bills, in the order named, and at different times, in the superior court of Guilford county, against D. W. C. Benbow and others, for the purpose of setting aside, and having declared void, the deed of assignment made by the said D. W. C. Benbow to said J. S. Cox, assignee, on the 23d day of January, 1894, as being made for the purpose of hindering, delaying, and defrauding certain of the bankrupt's creditors, and for the purpose of giving fraudulent preferences to others. These actions remained on the calendar of the superior court of Guilford county for the five years following, and up to the June term, 1899, of the said superior court. At that term the said cases were consolidated, and a decree entered by consent of all parties interested. After a statement of facts, the decree recites: "That the object and purpose, among other things, in each and all of said actions, was to have declared void a deed of assignment made by the defendant D. W. C. Benbow to J. S. Cox, assignee, on the 23d day of January, 1894, and to assert, by reason of the character of said actions, liens on the property mentioned in said deed of assignment, in priority over all other creditors, not suing before the filing of the complaint in each of the above-styled several and respective actions, and the plaintiffs in the said several actions now claiming priority over every other creditor not suing before his or its suit was brought, and asks that a lien be declared upon the property described in the said deed of assignment in priority, as hereinbefore stated. Now, on motion of G. S. Bradshaw, counsel for the plaintiffs, it is held, adjudged, and declared by the court that the said deed of assignment, by the said D. W. C. Benbow to J. S. Cox, assignee, is null and void, and was made by the said D. W. C. Benbow to hinder, delay, and defraud his creditors, and the same is hereby in all respects set aside. It is further adjudged by the court that the plaintiffs in these several suits, by the reason of the bringing of their said actions, and the nature of the same, have priority of lien on the property described in the said deed of assignment over all other creditors, and the priorities of these said several plaintiffs, as among themselves, is waived. And it is now, by consent of parties plaintiff and their assignees, ordered and adjudged that the proceeds received from the sale of the property in said assignment mentioned, and hereinafter ordered to be sold, shall be distributed ratably, without priority one over the other, but among the plaintiffs in the hereinbefore first above styled cases and their assignees. It is further ordered and adjudged by the court that, to satisfy, pay off, and discharge the said several judgments referred to in the pleadings, * * * it will be necessary to sell the property described in the said deed of assignment, and for that purpose C. P. Frazier is hereby appointed a commissioner, with power and duty to advertise the said property * * * for cash, which is hereby fixed as the terms of sale, except as hereafter set out; that is to say, any and all persons, other than the plaintiffs in the above-entitled actions, or the assignees of the said plaintiffs, who shall become a purchaser of any of the above-mentioned property, under the sale by the aforementioned commissioner, shall pay cash as above described, but in the event that either of the above plaintiffs, if such plaintiff has not assigned his judgment, or their assignees, shall become a purchaser of any of said property, then, in such case, such purchaser shall be required to pay to the said commissioner only $—— on his bid, which is intended to cover costs, and as to the balance he shall either give credit on his said claim, or pay in whole his bid, or such part thereof as the court may hereafter order, to meet and settle the priorities as hereinbefore established and fixed."

At the time of the rendition of this decree in the superior court of Guilford county, it appears that none of the plaintiff judgment creditors had any interest whatsoever in the judgments sued on, but that they had been purchased, and were absolutely owned and controlled, by Charles D. Benbow, and, as the petitioner in this case alleges, purchased with funds belonging to D. W. C. Benbow, and advanced by him to Charles D. Benbow, his son, for the express purpose of purchasing said judgments. It does not appear that Benbow, bankrupt, made any effort to sustain the deed of trust made by him to J. S. Cox, assignee, on the 23d day of January, 1894, or that he took any exceptions to the entry of the consent decree at the June term, 1899, of the

superior court of Guilford county, declaring his deed to Cox as fraudulent and void as to creditors, or that Cox, the trustee, excepted to the said decree or appealed therefrom. On the contrary, Mr. Bradshaw appeared in the suit at the June term, 1899, of the superior court of Guilford county, when the consent decree was entered, as the attorney of Charles D. Benbow, at the suggestion of D. W. C. Benbow, his father, and both Messrs. Morehead and Bynum & Bynum, the attorneys of D. W. C. Benbow, and J. S. Cox, assignee, were present when the said decree was signed, and assented to the signing of the said decree, declaring the deed of assignment made by Benbow, on the 23d day of January, 1894, to Cox, trustee, null and void, as being made in fraud of the creditors of the said D. W. C. Benbow. Nor does it appear that any suggestion of the bankruptcy of Benbow (who had filed his petition in bankruptcy, and had been adjudicated a bankrupt, on the 25th day of April, 1899) was made to the superior court at the time this decree was entered. Nor does it appear that Reagan, receiver, appointed May 2, 1894, by the clerk of the superior court of the county of Guilford, manifested any interest in the matter when the consent decree was made, or that he then set up, or attempted to set up, any claim or right that he had to the possession of the property of the said Benbow, by reason of his office as receiver. On the contrary, it appears from the evidence of Benbow himself that Reagan was, prior to June term, 1899, active in his efforts to secure, by purchase, certain of these judgment liens for the said Benbow, and for the five years following his appointment he had taken no steps whatever to recover any of the property, or any of the choses in action, of the said D. W. C. Benbow, saving and excepting the Fisher and Ross notes, where there was a judgment adverse to him in the superior court of Guilford county, as appears from the record in the case. It further appears that it was through the instrumentality of Reagan that the Fisher and Ross notes were hypothecated to the National Bank of Greensboro, of which bank Reagan was a director, for large sums of money, which sums were placed in the bank to the individual credit of the said D. W. C. Benbow, bankrupt, and by him used in the purchase of the above-named judgments, as alleged by the petitioner in this proceeding. It further appears that the consent decree appointed one C. P. Frazier commissioner to sell the said property of the said Benbow, and that this appointment of Frazier was not only made at the suggestion of Benbow, bankrupt, but that he (Benbow) had an agreement with the said Frazier whereby he was to be entitled to all the commissions allowed by the court to the said Frazier for conducting the sale of the said property. It further appears that the property described in the deed of assignment made by Benbow to Cox, assignee, on the 23d day of January, 1894, and declared null and void as to creditors in June, 1899, was fully set out by the bankrupt, D. W. C. Benbow, in his petition and schedules marked "B," with the following memoranda attached, to wit: "The exhibit hereto attached, marked 'A,' contains description of property conveyed to J. S. Cox, trustee, Greensboro, N. C., by deed dated January 23, 1894." "None of said property has been disposed of by the trustee owing to the fact that certain creditors have attacked said assignment, and the litigation still continues." It further appears that Cox, trustee, as aforesaid, has continuously collected the rents and profits from the estate of D. W. C. Benbow, bankrupt, from the date of the assignment to Cox, January 23, 1894, to June term, 1899, of the superior court of Guilford county, at which time the said deed was declared null and void. It is conceded by the bankrupt that he inadvertently omitted to schedule three small tracts of land that were of little value, and that these tracts were not included in his deed of assignment to Cox, but have been advertised for sale by Frazier, the commissioner appointed by the superior court of Guilford county. The petitioner in this case is the trustee of the bankrupt, duly appointed by the referee in bankruptcy, and it has accepted the trust and filed its bond as such trustee.

Upon the above statement of facts, it is insisted by the petitioner in this cause that as the deed of assignment executed by D. W. C. Benbow to J. S. Cox, trustee, on the 23d day of January, 1894, was declared to be null and void as to creditors by the superior court of Guilford county, June term, 1899, the legal title to all property of the said D. W. C. Benbow, described in

said deed of assignment, as well as all other property scheduled by the bankrupt in his petition and schedules filed April 5, 1899, or in which he had title, and had failed to schedule, either by design or inadvertence, vested in him, the said trustee, as of the date when the said Benbow was adjudged a bankrupt; that the consent decree made at the June term, 1899, of the superior court of Guilford county, was procured by collusion and connivance of the said Benbow, who obtained the said decree by practicing a fraud upon the superior court, withholding, as he did, from the said court, the facts that he, the said Benbow, had been adjudicated a bankrupt on the 5th day of April, 1899, and that the said D. W. C. Benbow had actually purchased, and was the actual and absolute owner of, the said judgments described in the pleadings in the suits instituted by the five creditors, and were special liens over other creditors not suing; that, although the said D. W. C. Benbow is the actual owner of the said judgments, they are claimed to be the property of the son of the bankrupt, Charles D. Benbow, who, acting for the bankrupt, will, at the sale, as a judgment creditor having priority in the distribution of the proceeds of the sale, and the privilege of bidding to the amount of his judgments without paying any cash, purchase the said property at a price far below its actual value, thereby defeating the claims of other creditors holding large claims against the bankrupt's estate. Upon the part of the respondent D. W. C. Benbow, it is insisted that the liens of the judgment creditors above named, who filed creditors' bills in 1894 and 1895, were executed years before the enactment of the bankruptcy act of 1898, and that, therefore, this court cannot interfere by injunction; that the proceeds realized from the sale of the property of the bankrupt will not be more than sufficient to pay off and discharge the liens of complainants in said creditors' bills; that the superior court of Guilford county is in possession of the said property; that the bankruptcy of Benbow cannot devest the jurisdiction of said court, it having concurrent jurisdiction with that of courts in bankruptcy; that the decree obtained in the superior court of Guilford county in June, 1899, was not procured by any connivance or preconcerted arrangement with the respondent D. W. C. Benbow; that Charles D. Benbow had not purchased any of the judgments referred to, for him or his benefit, and that he has no personal interest in the sale of the property advertised to be sold by Frazier, commissioner. The respondent Charles D. Benbow, in answering the rule served upon him, avers that he does not hold the assignment of the judgments above described as agent or trustee for his father, D. W. C. Benbow, but that he is the actual and bona fide holder of the same; that the decree obtained in the superior court of Guilford county was not secured by connivance or collusion on his part with D. W. C. Benbow, bankrupt, or any other party, nor is it his purpose to bid in the property at the said sale for the benefit of his father, D. W. C. Benbow. The commissioner, C. P. Frazier, avers, in answer to the rule, that it is his purpose to sell the property described in the decree of the said court in such manner and in such lots as, in his opinion, will be most conducive to obtain the highest prices for the same. It is further insisted by respondents that, as this bankrupt was discharged on the 31st day of May, 1899, no injunction or restraining order can be issued in the cause. It is further insisted by respondents that Reagan, the receiver appointed May 2, 1894, by the clerk of the superior court of Guilford county, holds all the property of the said Benbow under and by virtue of an order of the superior court of Guilford county.

J. T. Morehead and R. R. King, for bankrupt.

John S. Hill and E. K. Bryan, for trustee in bankruptcy and certain creditors.

J. C. Pritchard, John N. Wilson, and Levi M. Scott, for Murchinson & Co., judgment creditors.

EWART, District Judge (after stating the facts as above). An interesting question always arises with respect to how far the jurisdiction of a court of bankruptcy extends to obtain possession of the assets of a bankrupt. In cases of property voluntarily surrendered to

the trustee, there can be no controversy; but where the property is in the actual possession of another court, or an officer thereof, the remedy is not so plain. The rule which has been regarded by the federal courts generally is that, where property is in the actual possession of one court of competent jurisdiction, such possession cannot be disturbed by process issued from another court. Shields v. Coleman, 157 U. S. 168, 15 Sup. Ct. 570; Moran v. Sturges, 154 U. S. 274, 14 Sup. Ct. 1019; The Lotta, 65 Fed. 319.

In Compton v. Jesup, 15 C. C. A. 397, 412, 68 Fed. 263, 279, Judge Taft said:

"Necessity and comity both require that where, by its officers acting under color of its orders and processes, a court has taken into its custody property of any kind, another court, though of equal and co-ordinate jurisdiction, should not be permitted either to oust the possession of the first court, or in any way to interfere with its complete control and disposition of the property for the purpose of the cause in which its action has been invoked. This principle has been laid down by the supreme court of the United States in a long line of cases. Hagan v. Lucas, 10 Pet. 400; Williams v. Benedict, 8 How. 107; Freeman v. Howe, 24 How. 450; Bank v. Calhoun, 102 U. S. 256; Gumbel v. Pitkin, 124 U. S. 131, 8 Sup. Ct. 379; In re Tyler, 149 U. S. 181, 13 Sup. Ct. 793; Byers v. McAuley, 149 U. S. 608, 13 Sup. Ct. 906. In Riggs v. Johnson Co., 6 Wall. 196, the court, speaking of the state and federal courts, said: 'The process issued by one court is as far beyond the reach of the other as if the line of division between them was traced by landmarks and monuments visible to the eye.'"

In a more recent case (In re Abraham, 93 Fed. 774), Judge McCormick, of the circuit court of appeals, Fifth circuit, in a most learned and elaborate opinion, says:

"Immediately upon the taking effect of the bankruptcy act of 1867, the dockets of the courts of bankruptcy became crowded. The most able and careful judges of the district court, pressed by urgent conditions and argument, with little call or time to doubt, began to extend summary process and proceedings so as to meet all individual cases presented. The growing weight of precedent thus nourished by their own practicably unreviewable, or actually unreviewed, decisions, carried their jurisdiction to that point where, a few years later, it became burdensome and dangerous to all persons engaged in agriculture, manufacturing, or commercial purposes, and dealing to any considerable extent on credit. However, after the lapse of some years, cases began to reach the dockets of the supreme court; and, after the substantial final settlement by the subordinate courts of the great bulk of business that arose under the act, the supreme court began to reach the cases on its dockets which involved the construction of the act, and announce decisions marking the boundaries of the jurisdiction it conferred, and the manner of procedure in its exercise. These decisions settled that most matters and proceedings in bankruptcy were to be heard and adjudicated in a summary way, but that the general jurisdiction thus to proceed did not extend to controversies by an assignee in bankruptcy against any person claiming an adverse interest, or by such person against such assignee, touching any property or rights of property of the bankrupt transferred to, or vested in, the assignee; that such controversies, where they could not be settled otherwise than by legal proceedings, could be prosecuted only by plenary suits at law or in equity."

In Eyster v. Gaff, 91 U. S. 521, it was held that the jurisdiction conferred upon the federal courts for the benefit of an assignee in bankruptcy was concurrent with and does not devest that of the state courts in suits in which they had full cognizance. As highly instruct-

ive and pertinent to our own inquiry, we quote some of the language of the opinion in the case last cited:

"The opinion seems to have been quite prevalent in many quarters at one time, the moment a man is declared a bankrupt the district court, which has adjudged, draws to itself, by that act, not only all control of the bankrupt's property and credits, but that no one can litigate with the assignee or contest rights in another court, except in so far as the circuit court took concurrent jurisdiction, and all other courts can proceed no further in suits of which they had, at that time, full cognizance, and it was a prevalent practice to bring any person who contracted with the assignee any matter growing out of disputed rights of property or of contracts into the bankrupt courts by the service of a rule to show cause, and to dispose of their rights in a summary way. This court has steadily set its face against this view. The debtor of a bankrupt, or the man who contests the right to real and personal property with him, loses none of these rights by the bankruptcy of his adversary. The same courts remain open to him in such contests, and the statute has not devested those courts of jurisdiction in such actions. If it has, for certain classes of actions, concurrent jurisdiction for the benefit of the assignee in the circuit and district courts of the United States, it is concurrent with and does not devest that of the state courts."

In the case just cited (In re Abraham), Abraham, the bankrupt, had executed, under the laws of Alabama, a deed of assignment to one Davidson, covering a certain stock of goods. Davidson immediately took possession of the said stock, and filed his inventory of the same in the proper state court. Appraisers were duly appointed, and filed their report in the said state court; whereupon Davidson, as assignee, sold the goods, for cash, to one Bernheimer, who immediately went into possession of the same, and was disposing of the said stock from day to day, when, under a special warrant issued out of the court of bankruptcy, the marshal seized the remainder of the said stock. Pending the action of the assignee in disposing of this stock, proceedings in involuntary bankruptcy were filed against Abraham by certain creditors, and he was duly adjudged a bankrupt. The circuit court of appeals, Fifth circuit (Judge Parlange dissenting as to the intimation in the opinion of the court that the court of bankruptcy could not have taken possession of the bankrupt's estate prior to the sale and while it was in the hands of the assignee), held that the application and issuance of the writ, directing the marshal to seize the whole of the stock of goods in the possession of Bernheimer, was totally unwarranted and unlawful, and that the possession thereof must be restored to the adverse claimant. The court, referring to the proceedings, said:

"It is our duty to prevent the springing up of a practice that will extend summary process in proceedings in bankruptcy to controversies between trustees or other parties to the bankruptcy proceedings and adverse claimants. Under the act of 1867, such a practice was prevalent in many quarters at certain times, but it rested on opinions taking a view of the provisions of the act, against which, as we have seen, the supreme court steadily set its face. As we construe the provisions of the present law, they not only do not admit of such a view or authorize such a practice, but carefully guard against it and forbid it."

In Ex parte Chetwood, 165 U. S. 443, 17 Sup. Ct. 385, it is said:

"Where the jurisdiction of a court, and the right of a plaintiff to prosecute his suit in it, have once attached, that right cannot be arrested or taken away by proceedings in another court. Where property is in the possession of a

court of competent jurisdiction, that possession cannot be disturbed by process out of another court of concurrent jurisdiction."

See, also, Kimberling v. Hartly, 1 Fed. 571; Carr v. Fearington, 63 N. C. 560; Erwin v. Lowry, 7 How. 172; Miller v. Sherry, 2 Wall. 237; In re Easley, 93 Fed. 419; Sedgwick v. Menck, 1 N. B. R. 675, Fed. Cas. No. 12,616; Beach, Rec. 38.

It will be observed that in Eyster v. Gaff, and in all other cases above cited, the property of the bankrupt was in the actual possession of the state courts or adverse claimants. Where the property in question is not covered by litigation, or is not in the possession of the state courts, the jurisdiction of the bankruptcy courts will not be ousted. It is the interference with the possession of another court, that would ensue if jurisdiction was taken, and the existence of a receivership, if a receiver has taken the property in controversy into his own possession. Andrews v. Smith, 5 Fed. 833; 20 Am. & Eng. Enc. Law, p. 67; Eyster v. Gaff, 91 U. S. 521.

A careful comparison of the provisions of the bankruptcy acts of 1841 and 1867 with similar provisions of the act of 1898 shows that the power and jurisdiction of the United States district court under the act of 1898 is as complete and extensive as under the acts of 1841 and 1867.

In the absence of any decisions of the United States supreme court construing the act of 1898, it may be of interest to note the leading case upon the powers and jurisdiction of the district courts under the act of 1841. The case referred to is In re Christy, 3 How. 292. Chief Justice Story, in delivering the opinion of the court, says:

"We entertain no doubt that, under the provisions of the sixth section of the provisions of the act of 1841, the district court possesses full jurisdiction to suspend or control such proceedings [proceedings to enforce liens] in the state courts, not by acting on the courts, over which it possesses no authority, but by acting on the parties through the instrumentality of an injunction or other remedial proceedings in equity, upon due application made by the assignee, and a proper case being laid before the court requiring such interference. * * * But because the district court does possess such a jurisdiction under the act there is nothing in the act which requires that it should, in all cases, be absolutely exercised. On the contrary, where suits are pending in the state courts, and there is nothing in them which requires the equitable interference of the district court to prevent any mischief or wrong to other creditors under the bankruptcy, or any waste or misapplication of the assets, the parties may still be permitted to proceed in such suits, and consummate them by proper decree and judgments, especially where there is no suggestion of any fraud or injustice on the part of the plaintiffs in those suits."

Continuing (page 319), Justice Story says:

"It would be easier to put cases in which the exercise of this authority may be indispensable on the part of the district court to prevent irreparable injury or loss or waste of the assets without adverting to the case at bar, where, upon the allegation in the petition and supplemental petition, the creditors of the bankrupt are attempting to enforce a mortgage asserted to be illegal and invalid, and to procure a forced sale of the property by the sheriff in an illegal and irregular manner, thereby sacrificing the interests of the other creditors under the bankruptcy."

Justice Story further says:

"If we are told that resort may be had to the state courts for redress, one answer is that in some of the states no adequate jurisdiction exists in the

state courts, since they are not clothed with general jurisdiction in equity; but a stronger and more conclusive answer is that congress did not intend to trust the working of the bankrupt system solely to the state courts of twenty-six states, which were independent of any control by the general government, and were under no obligations to carry the system into effect. The judicial power of the United States is, by the constitution, competent to all such purposes, and congress, by the act, intended to secure the complete administration of the whole system in its own courts, as it constitutionally might do." "The truth is [says Justice Story on page 321] that in no other way could the bankrupt system be put into operation without interminable doubts, controversies, embarrassments, and difficulties, or in such a manner as to achieve the true end and design thereof. Its success was dependent upon the national machinery being made adequate to all the exigencies of the act."

The principles established in this case were reviewed at length in Nugent v. Boyd, 3 How. 426, and confirmed. In delivering the opinion, Chief Justice Taney says:

"Where a creditor, by virtue of a special mortgage, elects to foreclose that mortgage before a state tribunal, the federal court is not called upon to interpose, except in cases where, from the nature of the case, wrong or injustice may be done to other creditors in interest, or where the mortgage itself may be contested. I wish it, however, to be distinctly understood that I am fully of the opinion that the district court of the United States is vested with jurisdiction over mortgaged property belonging to the bankrupt; that, when a proper cause is shown, it has power to foreclose the mortgage, and to do all other acts necessary to bring about a final distribution and settlement of the bankrupt estate. I am also of the opinion that, in a case where a creditor calls in question the validity of a mortgage held by another creditor, it is the duty of the said court (the district court) to exercise jurisdiction over the question involved, and, if necessary, to declare the mortgage null and void."

Collier on Bankruptcy (pages 12–17) says:

"The opinion in Re Christy is reviewed and followed by Baker, District Judge, in the case of Carter v. Hobbs, 92 Fed. 594, a case arising under the existing act. The bankruptcy court has complete original jurisdiction over the bankrupt, or of his assets and all of his creditors. In Re Winn, 30 Fed. Cas. 303, the object of the bankruptcy act is declared to be 'to establish a uniform system of bankruptcy throughout the United States.' The fundamental element in other systems of bankruptcy has been to provide for and regulate the distribution of the bankrupt's property among his creditors, and to do this by means of agencies created by the act. The very moment an act of congress, establishing a uniform system for the administration of an insolvent estate, takes effect, every local and private system for the administration of same estates is necessarily superseded. Both systems cannot operate side by side as respects the same estates. The one must necessarily supersede the other, and the state and voluntary systems must yield to the system established by congress."

See In re Gutwillig, 90 Fed. 475.

This decision, confirmed by the circuit court of appeals, Second circuit (34 C. C. A. 377, 92 Fed. 337), as is also In re Sievers, 34 C. C. A. 372, 92 Fed. 325, confirmed by the circuit court of appeals, Eighth circuit, under the changed title of Davis v. Bohle, is in conflict with the decision of the circuit court of appeals, Fifth circuit, in Re Abraham. See, also, in support of the proposition, as laid down in Re Gutwillig, 90 Fed. 475: In re Francis-Valentine Co., 93 Fed. 953; In re John A. Etheridge Furniture Co., 92 Fed. 331; In re Smith, Id. 135; Lea v. George M. West Co., 91 Fed. 237; In re Brown, Id. 358; In

re Pittelkow, 92 Fed. 901; Carpenter v. O'Connor, 16 Ohio Cir. Ct. R. 526.

The above summary of cases, reported during the first year of the present bankruptcy law, makes it possible to deduce some generalizations which should control the court's decision in the case at bar. An injunction after adjudication is always discretionary, provided the cause of action is dischargeable in bankruptcy, and should surely be granted (1) if the bankrupt is threatened with arrest; (2) if the suit is not yet in judgment, and even after judgment, if the rights of the general creditors, not parties to the suit, will be jeopardized by further proceedings in the state courts; (3) or if the judgment is founded on the transaction, which is an act of bankruptcy, or a fraud on creditors, or the law. It should never be granted after the judgment has ripened into an execution sale, provided the state court has, or can be given, jurisdiction of all parties interested in the distribution, including the general creditors represented by the trustee in bankruptcy. See Black, Bankr. pp. 8–10; Branden. Bankr. pp. 26, 194, 415; Coll. Bankr. pp. 12–17; Bush, Bankr. pp. 33–38; Bump, Bankr. p. 283; Loveland, Bankr. p. 75. Courts of the United States are forbidden "to stay proceedings in any court of a state except in such cases where such injunctions may be authorized by any law relating to proceedings in bankruptcy." Rev. St. U. S. § 720; Haines v. Carpenter, 91 U. S. 254; Dial v. Reynolds, 96 U. S. 340; Peck v. Jenness, 7 How. 625. The act of 1898 (section 2, subsec. 15) expressly authorizes "the court of bankruptcy to make such orders, issue such process and enter such judgments, in addition to those specifically provided for * * * the enforcement of the provisions of this act." "To bring in and substitute additional persons, or parties, in proceedings in bankruptcy, when necessary for the complete determination of a matter in controversy." Id. subsec. 6. "To cause the estates of bankrupts to be collected, reduced to money, and distributed, and determine controversies in relation thereto, except as herein otherwise provided." Id. subsec. 7.

Applying the above-cited authorities to the facts in the case at bar, I am clearly of the opinion that when the superior court of Guilford county declared the deed of assignment made by Benbow, the bankrupt, to Cox, assignee, on the 23d day of January, 1894, null and void, as being in fraud of his creditors, the property attempted to be conveyed by Benbow to Cox, assignee, eo instante vested, by operation of the bankruptcy law, in the Southern Loan & Trust Company, the trustee of the said bankrupt.

It cannot be successfully maintained that the decree entered by the superior court of Guilford county was procured in good faith. All the evidence and the circumstances surrounding the proceedings point to the fact that it was a collusive judgment. It is manifest that, if the court had been apprised of the fact that Benbow had been adjudicated a bankrupt in the month of April preceding the rendition of this decree; that a trustee of his estate had been appointed, who was empowered, under the act, to take charge of the property and estate of the bankrupt; and that Charles D. Benbow, son of the bankrupt, and one of the beneficiaries under the deed of assignment to

Cox, was actually, at the time of the signing of this decree, the sole and only plaintiff in the pending cause, and that as a matter of fact there were "no several plaintiffs" among which priorities of liens were to be waived, as erroneously stated in the decree, but only the one plaintiff,—the court would not for one moment have entertained jurisdiction.

It is significant, in this connection, to note that the two wards of Benbow, Oliver C. and William C. Benbow, also beneficiaries under the Cox assignment, appear to have had no representative in this proceeding to protect their interests; and that Cox, the assignee, at the hearing of the matter, June term, 1899, of the superior court of Guilford county, made no effort to protect their interests, under the deed of assignment, as it was most certainly his legal duty to have done, but, on the contrary, assents to the judgment declaring the deed made to him in trust for the said wards null and void, and a fraud upon the creditors of Benbow. In the undue haste exhibited to procure this decree, the interests of these wards appear to have been entirely lost sight of by Cox and D. W. C. Benbow, the bankrupt. While there is no direct evidence that the bankrupt is the actual owner of the judgments taken by the five creditors who filed the five separate creditors' bills, there is sufficient evidence to make out a prima facie case for the petitioner,—the trustee of the bankrupt, Benbow,—and this court most certainly has the jurisdiction and power to inquire into this matter, with a view of ascertaining whether fraud has been perpetrated upon the creditors of the said Benbow. On that day, the 23d day of January, 1894, the title passed from D. W. C. Benbow, bankrupt, to J. S. Cox, his trustee, by deed of assignment, and at the same time possession of that property was transferred to said Cox, as appears from the evidence, and the title and possession remained in the said Cox, trustee, until the decree of the June term of the superior court of Guilford county was made, when the deed of assignment was set aside, as being a fraud on the creditors of the said D. W. C. Benbow. That the decree directed that the property be sold to satisfy certain alleged prior liens has no bearing on the question of title. The decree of the court at June term, 1899, declares that the title of J. S. Cox, trustee, was void ab initio. That being so, it is clear that the title to the property alleged to have been assigned remained in Benbow at the date of his adjudication in bankruptcy, on April 5, 1899, when, by operation of law, the title to the property in question passed to the Southern Loan & Trust Company, his trustee in bankruptcy. This title is held by the trustee in bankruptcy, subject, of course, to any equitable and valid liens that existed against the property in the hands of the bankrupt.

In Eyster v. Gaff, 91 U. S. 521, which the able counsel for Charles D. Benbow and D. W. C. Benbow insists fully sustains their contention, Justice Miller says:

"It may be conceded, for the purpose of the present case, that the strict legal title to the land did not pass to the assignee upon his appointment."

Again, on page 525, Justice Miller says:

"It is the duty of that court to proceed to a decree as between the parties before it, until, by some proper pleadings in the case, it was informed of the

changed relations of any of those parties to the subject-matter of the suit. * * * It is almost certain that if, at any stage of the proceedings before a final confirmation, the assignee [in bankruptcy] had intervened, he would have been heard to assert any right, or set up any defense, to the suit."

The facts in the case of Eyster v. Gaff are unlike those in the case at bar. In the case of Eyster v. Gaff, the property had been sold to Gaff, and a master's deed to him had been confirmed by a court of competent jurisdiction; while in the case at bar the sale of the property in question had only been ordered, and in a decree rendered in the state court, manifestly procured by collusion, as between Benbow, the bankrupt, and Charles D. Benbow, one of the defendants in the case when the decree was entered.

Chief Justice Taney, in Nugent v. Boyd, 3 How. 426, says:

"I am of the opinion that in a case where a creditor calls in question the validity of a mortgage held by another creditor it is the duty of the said court to exercise discretion over the question involved."

The contention of the respondents that Reagan, the receiver appointed by the clerk of the superior court of Guilford county, in proceedings supplementary to execution instituted by the National Bank of Greensboro, of which bank he was a director at the time, is entitled to the custody of this property by virtue of his appointment as receiver, May 2, 1894, is not tenable. The legal effect of granting a restraining order and the appointment of a receiver in proceedings supplemental to execution is ordinarily to vest the receiver with the property and effects of the judgment debtor from the time of the filing of such order, and disables the debtor from transferring the title thereto. Code N. C. § 494; Rose v. Baker, 99 N. C. 323, 5 S. E. 919; Mayer v. Hellman, 91 U. S. 497; Coates v. Wilkes, 94 N. C. 180.

In the case last cited (Coates v. Wilkes) the court says:

"The general principles of law applicable to receivers apply to receivers appointed under supplemental proceedings. It is the duty of such receivers to take possession of the property of the debtor at once, and to bring actions to recover any property belonging to him which may be in the hands of third persons, and particularly to recover property conveyed to third parties fraudulently as to creditors." Bank v. Stevens, 169 U. S. 459, 18 Sup. Ct. 403.

When Reagan was appointed receiver in the proceedings supplementary to execution, by the clerk of the superior court of Guilford county, May 2, 1894, the property described in the deed of assignment to Cox was in the possession of said Cox. Reagan had neither active nor constructive possession. It appears that under the order appointing him he was vested with nothing more than the right to bring action to reduce to possession certain notes alleged to have been transferred by D. W. C. Benbow to his son Charles D. Benbow the day before his assignment, and to reduce to possession the property assigned to Cox, assignee, which was at all times in the possession of the said Cox. He appears to have been a mere receiver, without power and without title. 20 Am. & Eng. Enc. Law, p. 67. For five years following his appointment as receiver it appears that he took no steps to reduce the property of Benbow, and assigned by Benbow to Cox, to possession, except his suit for the possession of the Fisher and Ross notes; the last-named party, Cox, continuing, as the evi-

dence shows, to manage the property and collect rents and profits from the same.

In Olney v. Tanner, 10 Fed. 101, Judge Brown held that the receiver had no title as against the trustee of the bankrupt, because, after his qualification, he had for six months taken no steps to set aside the fraudulent transfer, and meanwhile bankruptcy had intervened. In Andrews v. Smith, 5 Fed. 833, in a suit in the United States circuit court by the first mortgage bondholders of the Vermont Central Railroad against the mortgage trustees, it was held that the receivership in the state court had practically ceased prior to the period covered by the accounting claimed in this case, and that the state court had so determined, and, as the parties themselves had brought the receivership to a close by their own acts, no formal entry in court of such discharge was necessary, and that the pendency of such proceedings would be no bar to this suit. In this case it was also held that the rule of comity towards the state court could not operate to deprive this court of its own rightful jurisdiction. The United States court of this district, sitting in bankruptcy, is charged with the protection of the interests of creditors of the bankrupt throughout the whole country. Its discharge of the bankrupt here is operative in all the states, and, as the interests with which the court is charged with protecting are not local, but national, there would seem to be no good reason why a United States court in bankruptcy, sitting in this state, should be bound to aid an officer of a state court in securing a preference over other creditors owning same, any more than if the bankruptcy proceedings happened to be in a similar court charged with the same duties, and in favor of the same creditors, sitting in a state adjoining, or in the District of Columbia. We quote from the opinion (Olney v. Tanner, supra):

"The essential point in the decision of Booth v. Clark, 17 How. 322, is that a receiver holding the property not reduced to possession, and not supported by any assignment from the debtor, is not such a title as will prevail in independent tribunals against the interests of the creditors entitled to its equal protection, and, if this doctrine is applied as regards the undisputed property of the debtor, it would still seem to be more applicable to cases where a fraudulent assignment stands in the receiver's way." "Such a receiver represents his judgment creditor only, and, like a receiver in a judgment creditors' bill, does not become vested with the title to such property, except through an action to which the fraudulent assignee is a party. Upon the authority of Booth v. Clark; Id., I think there is much doubt whether the appointment as receiver and officer of a state court has any such standing in a court of the United States, sitting in bankruptcy, as entitles him to its aid in a case like this, seeking a preference in contravention of the intent and policy of the bankrupt act."

Moreover, it appears that in Reagan's suit, to recover the Fisher and Ross notes, there was a judgment adverse to him, and he was taxed with the costs, which judgment, while it may not have wholly discharged him as receiver, certainly terminated his duties and functions as such. 20 Am. & Eng. Enc. Law, p. 217. The appointment of Reagan, made, as it was, at the suggestion of the bankrupt, Benbow, and made while Reagan was acting as director in the bank,—the National Bank of Greensboro,—the judgment creditor, which instituted the proceedings supplementary to execution, the sale of the judgment pending

the receivership to the son of the bankrupt, Charles D. Benbow, and the activity displayed by Reagan in purchasing claims against the bankrupt for the benefit of the bankrupt and his son Charles D. Benbow, indicate very strongly that Reagan was acting with Benbow in his efforts to secure absolute control of certain judgments against the estate. It is significant that his appointment as receiver appears to have been entirely ignored when the "consent decree" was made by the superior court of Guilford county, June term, 1899; nor does the court now understand that the said Reagan has asserted any claim to the custody or title to the estate of the bankrupt by virtue of his appointment as receiver, May 2, 1894, or is now asserting the same. It appears to be the contention of the bankrupt and Charles D. Benbow, one of the respondents in this case. Clearly, in my opinion, Reagan, as receiver, has no right or title to the custody or possession of the property described in the schedules in bankruptcy of D. W. C. Benbow; and it is equally clear that the trustee in bankruptcy cannot be compelled to go into a state court, and petition for the possession and control of property that vested in him by operation of the bankruptcy law, and especially in proceedings when a fraud was practiced upon the state court in procuring its decree. Nor can there be any question but that the bankruptcy court, in the exercise of its discretion, may authorize a bankrupt's trustee to sell all property of the bankrupt free from liens and incumbrances, and may preserve and transfer bona fide liens to the fund arising from the same.

In the case of Houston v. Bank, 6 How. 504, it was held that, under the bankrupt act of 1841, the district courts have power to order the sale of the property of the bankrupts under mortgage, and make title free from the mortgage, marshaling and disposing of the proceeds according to the priorities of those interested. Chief Justice Taney says:

"The power of the district court over mortgages in cases of bankruptcy was fully argued and considered in the two cases reported in 3 How. 292 and 426 (In re Christy, and Nugent v. Boyd), as appears by the opinions delivered by the court, and the chief justice, who dissented. But whatever differences of opinion existed as to some of the propositions maintained in these cases by the majority of the court, there has been no division of opinion upon the question like the one presented in this record; and the courts are unanimously of opinion that the sale made by the assignee of property in question is valid, and that the purchasers are entitled to hold it free and discharged of the mortgage of the City Bank, and free of all other incumbrances mentioned in the proceedings."

In the case of In re Kirtland, 10 Blatchf. 515, Fed Cas. No. 7,851, before the district court in the Southern district of New York, Woodruff, J., in the course of the opinion (page 516), says:

"There is no doubt of the power of the court to order a sale of land free of the incumbrances thereon, and the proceeds will stand as a substitute for the lands themselves, for the benefit of those holding liens to the extent of their interests therein, and, as to the surplus, for the benefit of the general creditors."

Black, in his work on Bankruptcy, is of the opinion that such sale can be made free of incumbrances. See notes on page 161. Bump,

in his work on Bankruptcy (11th Ed.), edited by Williams, is of the same opinion. See notes and authorities cited on pages 514–517.

Under the act of 1898, so far as I have been able to examine, the decisions are uniform to the effect that the district courts are invested with such jurisdiction, at law and equity, as will enable them to exercise jurisdiction in bankruptcy proceedings, and that the bankruptcy act is remedial, and should be interpreted reasonably, and according to a fair import of its terms, with a view to effect its objects and to promote justice. In re Bruss-Ritter Co., 90 Fed. 651; In re Christy, 3 How. 292; Nugent v. Boyd, Id. 426; Houston v. Bank, 6 How. 504.

It is insisted by the able counsel for the respondents that D. W. C. Benbow, having been discharged by proceedings in bankruptcy, cannot now be enjoined. This position cannot be sustained. Loveland on Bankruptcy (page 612) says: "A discharge in bankruptcy is in the nature of a personal privilege granted to a debtor, in consideration of his yielding up all of his property for distribution among his creditors." A bankruptcy proceeding is a proceeding in rem, and all persons interested in the res are regarded as parties to the bankruptcy proceedings. These include the bankrupt and the trustee, as well as creditors of the bankrupt, both secured and unsecured. Carter v. Hobbs, 92 Fed. 594. The case of Herzberg, cited for counsel for respondents in support of this position, and reported in 25 Fed. 699, is not, in the opinion of the court, applicable to this case.

It is therefore ordered that D. W. C. Benbow, the bankrupt, and all persons acting at his instance, at once comply with the written demands of the trustee, the Southern Loan & Trust Company, made on the 17th day of August, 1899, and the 19th day of August, 1899. It is further ordered and adjudged that the said Southern Loan & Trust Company, trustee of the said D. W. C. Benbow, bankrupt, is hereby authorized and empowered to sell the property of the said bankrupt, D. W. C. Benbow, free from all incumbrances (first having set apart to him the exemptions allowed by law), for cash, to the highest bidder, after having advertised the same in each county where said property may be located, in some newspaper published in the said county, for four successive weeks preceding said sale. It is further ordered and adjudged that the proceeds realized from the said sale stand as a substitute for the lands and property sold, and be held by the trustee for the benefit of those holding bona fide claims and liens, to the extent of their interest therein, and as may hereafter be established. It is further ordered that the Southern Loan & Trust Company, trustee as aforesaid, file a bond, in lieu of the one now on file, in the sum of $25,000, which said bond shall be approved by the clerk of this court at Greensboro, N. C. And this cause is retained for further orders.

In re GRIMES et al.

(District Court, W. D. North Carolina. August 25, 1899.)

1. BANKRUPTCY—EXEMPTIONS—SETTING APART.
The provisions of the bankruptcy law requiring the trustee to set apart the bankrupt's exemptions, and report the items and estimated value thereof to the court, are mandatory, and these duties cannot be performed by any one else; and an agreement between a bankrupt and his creditors that the exemptions shall be valued and allotted by three appraisers, whose decision shall be final, and not subject to exception, is void; and an order made by the referee, by consent of parties, in the terms of such agreement, will be set aside.

2. SAME—APPRAISEMENT.
There is no provision of the bankruptcy law authorizing the valuation by appraisers of the property claimed by the bankrupt as exempt. Where the appraisers value the entire estate of the bankrupt, as provided by law, their inventory is not binding on the trustee, as respects the exempt property, nor can he adopt it as his own.

3. SAME—BANKRUPT'S RIGHT OF SELECTION.
Where the law of the state exempts to a debtor personal property to a certain value, "to be selected by him," the debtor, on being adjudged bankrupt, has the right to select specific personal property, to that value, from the estate in the hands of his trustee; and although his personal estate consists of a stock of goods not divisible without loss, nor salable except as a whole, yet the court cannot order the trustee to sell the whole stock and pay the bankrupt the value of his exemptions out of the proceeds.

4. SAME—RENT—PAYMENT OUT OF EXEMPTION.
The court cannot order a trustee in bankruptcy to pay rent, overdue at the time of the adjudication, out of the property to be set apart to the bankrupt as exempt, although the bankrupt had so agreed with the landlord before the commencement of the proceedings.

5. SAME—JURISDICTION OVER EXEMPT PROPERTY.
When the bankrupt's exempt property has been designated and set apart to him by the trustee, it has been administered, so far as the proceedings in bankruptcy are concerned; and thereafter the court has no jurisdiction either to defend such property from adverse claims or liens or to enforce liens upon it.

6. SAME—COSTS OF ADMINISTRATION—STORAGE CHARGES.
If a trustee in bankruptcy continues to occupy premises leased by the bankrupt, using them for the storage of the goods of the estate until the same can be sold, the landlord is entitled to compensation for the use of his property by the trustee, the amount thereof being chargeable as part of the cost of administering the estate.

7. SAME—PAYMENT BY TRUSTEE.
If the trustee has no cash in hand with which to pay storage charges to a landlord whose property he has occupied for the storage of the bankrupt's goods, he may be ordered to sell sufficient personal property for that purpose; and this will take precedence of the bankrupt's claim to have his exemptions set apart out of such personalty.

In Bankruptcy. On review of decision of referee in bankruptcy.

Glenn & Manly, for bankrupts.

L. M. Swink, A. H. Eller, Jones & Patterson, and Watson, Buxton & Watson, for creditors.

EWART, District Judge. On the 30th day of May, 1899, the referee acting in the above-entitled cause directed the trustee of the above-named bankrupts to set aside the bankrupts' exemptions, and

report the items and estimated value thereof to the referee in bankruptcy as soon as practicable. Before the allotment of the said exemptions, a demand for their property exemptions in kind was made by both bankrupts, T. W. and E. E. Grimes. Pending the setting apart of these exemptions, and after due advertisement to all creditors of the time and place of meeting, there was held on July 4, 1899, a general meeting of the creditors of the bankrupts, and at said meeting a majority of all the creditors, representing about $2,900 of a total indebtedness of $3,100, were present, and took part in the proceedings then had. At said meeting, with a full knowledge of all the facts in the case, all the creditors present, representing over $^{13}/_{14}$ of all the debts, entered into an agreement, and a consent order was entered by the court, that E. E. Grimes should receive his exemptions in money, and that T. W. Grimes should receive his exemptions in kind, to be laid off and alloted by appraisers, their allotment being final, and not subject to exception. The consent order thus made was approved by the referee, and in compliance therewith the trustee was directed to carry out the terms of the said order, and, in order to do this to the entire satisfaction of all parties, he chose three appraisers to value the goods selected, allowing the creditors to name two of the appraisers, to wit, J. C. Bessent, a justice of the peace, and E. T. Kapp, the sheriff of the county, while he named ——— Cox, a man of good business qualifications. The appraisers thus selected set apart T. W. Grimes' exemptions in kind, and the trustee approved and adopted their appraisement, and so reported to the court. The trustee was proceeding to carry out the order of the court when he was enjoined from further action under said order, upon the petition of certain creditors, representing about $200 of debts, and who were notified, but not present at the meeting of July 4th. The restraining order was served July 15th. In this petition said creditors represented: (1) That they were not present when said consent order was made, and that the same was not binding upon them; (2) that the exemption set aside to T. W. Grimes was excessive; (3) that it would be unjust and inequitable to set aside to the bankrupts, or either of them, their exemptions in kind, but that the property should be sold as a whole and their exemption paid in money; (4) that, as a matter of law, a drug business was incapable of division, and exemptions could not be set aside in kind; (5) that there was a responsible party willing to pay $2,000 for said stock of drugs. On July 17th, parties interested appeared, when the matter was continued until July 20th,—the restraining order being modified, by consent of all parties, so as to allow the trustee to sell the residue of stock, after laying off T. W. Grimes' exemptions, which he did, said sale amounting to $375; the low price, according to his report, being on account of the cloud on the title. Previous to said restraining order being issued, T. W. Grimes sold his exemptions to W. B. Pollard for $500, but had not divided the same, as the stock of goods was in the custody of the trustee in bankruptcy. On July 20th, the bankrupts filed their answer to said restraining order, and the creditors who had made the consent order asked that they be discharged from their agreement made in writing on July 4th. On July 20th, after hear-

ing argument, the referee set aside the order of July 4th, on the grounds: (1) That it was not binding on the creditors who were not present, though affected with notice; (2) that there was no authority for making said agreement or interlocutory order under the bankrupt act; (3) that if there is such authority it was an order in fieri, and that, the bankrupt court being a court of equity, it could be set aside at any time by the referee; (4) that the agreement could not be carried out in good faith, because there would not be sufficient assets, after T. W. Grimes had his exemptions, for E. E. Grimes to get his, or the creditors anything. The referee, therefore, set aside said order of July 4th, restoring all parties to the position in which they were prior to said agreement made in writing July 4th, and further found that said property, being incapable of division, should be sold, and the exemptions paid the bankrupts in money, and the balance administered under the bankrupt act, and that the sale to W. B. Pollard should be set aside. To the above order of the referee the bankrupts filed the following exceptions: (1) That the referee erred in holding that the order of July 4th was not binding on all the creditors; (2) in his holding that the order was in fieri, and could be set aside or modified at any time; (3) that the business of a drug store was incapable of division, and that, therefore, the bankrupts were not entitled to their exemptions in kind, but should receive the same in money.

The action of the appraisers in appraising and setting apart the exemptions of T. W. Grimes, in pursuance of an agreement entered into on the 4th day of July, 1899, between certain creditors of the bankrupt firm and the bankrupts, before the referee, and with his approval, to the effect that T. W. Grimes should receive his exemptions, to be set apart from the stock of goods in the hands of the trustee, and that E. E. Grimes, the other partner, should be paid the amount of his exemptions, to wit, $500 in cash from the proceeds realized from the sale of the balance of the stock of goods, and that said allotment should be final, and not subject to exceptions on the part of either of the bankrupts or their creditors, must be set aside. Such agreements cannot be recognized in a court of bankruptcy. The law as to the duties of trustees in setting apart the exemptions in bankruptcy is mandatory. Bankruptcy Act 1898, § 47, subsecs. 10, 11, prescribe that the trustees shall—

"(10) Report to the courts, in writing, the condition of the estates, and the amounts of money on hand, and such other details as may be required by the courts, within the first month after their appointment and every two months thereafter; * * * (11) set apart the bankrupt's exemptions and report the items and estimated value thereof to the court as soon as practicable after their appointment."

Exceptions to such allotment may be filed by the bankrupt, or by any creditor, within 20 days after the same has been made and filed with the clerk or referee. This duty cannot be performed by any other party. It is wholly and entirely the duty of the trustee, and any agreement on the part of the bankrupt or the creditors that the exemptions shall be allotted in any other manner than that prescribed by the bankruptcy law, or through other agencies than that of the

trustee of the bankrupt, is a nullity. An impression seems to prevail that appraisers may be selected to value the exemptions to be set apart to the bankrupt, and even so careful a writer as Mr. Loveland, in his most excellent work on the Law and Proceedings in Bankruptcy, in his comments on the subject of exemptions, seems to have fallen into this error. On page 348 he says: "If it becomes necessary to appraise exempt property for the purpose of setting it off, it may be appraised, like other property of the bankrupt, by three disinterested appraisers appointed by the court;" and he cites, in his notes on the same page, Bankruptcy Act 1898, § 70, subsec. b. On examination of this section, the only reference to the appointment of appraisers is found in section 70, subsec. b. This prescribes that "all real and personal property belonging to bankrupt estates shall be appraised by three disinterested appraisers; they shall be appointed by and report to the court. Real and personal property shall, when practicable, be sold subject to the approval of the court; it shall not be sold otherwise than subject to the approval of the court for less than seventy-five per centum of its appraised value." It will be observed that this subsection in no wise authorizes and empowers appraisers to either value or set apart the bankrupt's exemptions. As a matter of course, in many cases in bankruptcy where the assets are nominal, and do not exceed the exemptions allotted, this appraisal is not necessary; but, where the assets are in excess of exemptions, the statute clearly requires that the property should be appraised. This inventory filed by appraisers may aid the trustee in making his allotment, but he is not in any wise concluded by it, nor has he any right to adopt it as his own. The object of the statute in requiring an appraisal of the estate of a bankrupt is evidenced by the last clause of this subsection, to wit: "The real and personal property shall not be sold * * * for less than seventy-five per centum of its appraised value." There were other exceptions to the allotment made by the appraisers of the bankrupts' exemptions, consideration of which is not necessary, as the allotment was fatal, for the reason above shown.

It appearing in this case that the assets of the bankrupts are considerably in excess of the exemptions allowed by law, it is ordered that the referee select three disinterested parties as appraisers, who shall, after being duly sworn by the referee, appraise the entire estate of the said bankrupts, and report their action to this court. On the filing of this inventory, the trustee shall proceed to set apart the exemptions of T. W. Grimes and E. E. Grimes, bankrupts.

It is insisted by counsel for creditors that the stock of goods owned by the bankrupts in this case, being a stock of drugs, is incapable of division, and that exemptions, therefore, cannot be made in kind, as it would leave a bare remnant of the stock, from the sale of which little could be realized. It is further insisted that a court of bankruptcy is a court of equity, and that it would be inequitable to permit the bankrupts to select their exemptions from the stock of goods, leaving a remnant of perhaps worthless and unsalable stock, thereby entirely defeating the claims of the creditors. It is urged by the creditors that equity and justice require that this stock of goods be sold as a whole, and that the exemptions should be paid in cash to the bank-

rupts from the funds so realized. But while it is true that the court of bankruptcy is a court of equity, it can neither take from nor add to the law as it is written. Bankruptcy Act 1898, § 6:

"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 in the state wherein they have had their domicile for the six months or the greater portion thereof immediately preceding the filing of the petition."

The exemptions in force at the time of the filing of the petition in bankruptcy by Grimes Bros., in the state of North Carolina, are prescribed by the constitution of 1876 (article 10, § 2):

"Every homestead, and the dwellings and buildings used therewith, not exceeding in value $1,000, to be selected by the owner, or in lieu thereof, at the option of the owner, any lot in a city, with the dwellings and buildings used thereon and occupied by a resident of the state, and not exceeding $1,000 in value, is exempt from process. * * * The personal property of any resident of the state, to the value of $500, to be selected by him, is exempt, except as to taxes or obligations contracted for the purchase price."

The Code of North Carolina (page 199, § 507) prescribes:

"Whenever the personal property of any resident of this state shall be levied upon by virtue of any execution or other final process issued for the collection of any debt, and the owner or any agent, or attorney in his behalf, shall demand that the same, or any part thereof, shall be exempt from sale under such execution, the sheriff or other officer making such levy shall summon three appraisers, as heretofore provided, who having been first duly sworn, shall appraise and lay off to the judgment debtor such articles of personal property as he, or another in his behalf, may select, and to which he may be entitled under this chapter and the constitution of the state, in no case to exceed in value five hundred dollars, which articles shall be exempt from said levy, and return thereof shall be made by the appraisers, as upon the laying off of a homestead exemption."

In Frost v. Naylor, 68 N. C. 326, Justice Read says:

"A chose in action can be selected by the debtor as a part of his personal property exemptions. The phrase 'such other property,' used in the constitution, must be understood to mean such like property as had been expressly named. But the language of our constitution is different. It does not mean any property, but exempts 'personal property of the value of five hundred dollars, to be selected by the debtor.' The allotment may be made from time to time, and as often as the debtor may be pressed with executions; the policy being to enable the debtor not only to have the exemptions allotted to him once, but to keep them about him all the time, for the comfort and support of himself and family. Such is the policy of our constitutional provision, and it allows the debtor to select what he thinks most useful."

See, also, Oakley v. Van Noppen, 96 N. C. 247, 2 S. E. 663; Campbell v. White, 95 N. C. 491.

The trustee can have no discretion in setting apart the exemptions to a bankrupt. The bankruptcy act of 1898 is mandatory. The bankrupt is entitled to make his own selection, under the homestead laws of North Carolina; and in the case at bar he has demanded, and is entitled, to have his exemptions set apart from the stock of goods now in the possession and custody of the trustee. This stock is said to consist almost entirely of drugs, and is incapable of division. But it is nevertheless personal property, consisting, as it does, of soda-water fountains, counters, prescription cases, and all the appointments of a drug store; and, if the debtor demands certain articles

from the said stock to be set apart to him as his exemptions, he is entitled to have it done. It is true that it may leave on the hands of the trustee, as contended, a small remnant of unsalable, and perhaps virtually worthless, goods, and it may appear unjust and inequitable to creditors that this should be, but "lex ita scripta est." Besides, creditors can hardly complain, as debts are contracted in this state with full knowledge of its liberal constitutional homestead provisions.

In the matter of the claim of L. W. Schouler against the trustee of Grimes Bros., bankrupts, it appears that Grimes Bros. held a lease on the premises in which they carried on their business from Schouler, and which expired December 31, 1898. On the 25th day of December, 1898, the firm of Grimes Bros. had executed a deed of assignment, under the laws of North Carolina, to one Nading, as assignee. At the date of this assignment the firm owed Schouler $175, for rent of the said premises preceding the adjudication in bankruptcy. The assignee, Nading, who was, on the adjudication of the bankrupts, named by the creditors as trustee, has so far neglected or declined to pay rental for the said premises which has accrued since the adjudication of Grimes Bros., bankrupts, though he has been continually in possession of the said storehouse of Schouler's, and using the same as a warehouse for the storage of the stock of goods of the bankrupt firm. Counsel for Schouler insists that an order should be made by this court requiring Nading, trustee, to deliver to Schouler $121.70 out of the exemptions of T. W. Grimes, in pursuance of an agreement of T. W. Grimes, with claimant Schouler, prior to the institution of involuntary proceedings in bankruptcy by creditors against Grimes Bros., and their adjudication in bankruptcy. This order the court declines to make. The title to exempt property does not pass to the trustee; it is vested in the bankrupt. Bankruptcy Act 1898, § 70, a. He may sell it or mortgage it. But, while this is true, property of the second class cannot be considered exempt property until it is selected and set apart. Woolfolk v. Murray, 44 Ga. 137, 138. It must necessarily pass to the trustee, who has temporary dominion over it until the exemptions are made. His title may be termed a defeasible title. When the exemptions are formally set apart by the trustee, and affirmed by the court, the title of the bankrupts then becomes superior to that of the trustee, and absolute. After the exempt property has been designated and set apart to the bankrupts by the trustee, it has been administered, and has passed out of the possession and control of the bankruptcy court. The trustee has no further concern with it, nor has the court any jurisdiction to defend such property from adverse claims or liens that may or may not be distinguished by the bankruptcy proceedings. It will not entertain a proceeding to enforce a lien upon such property. Jeffries v. Bartlett, 20 Fed. 496; In re Preston, 6 N. B. R. 545, Fed. Cas. No. 11,394; In re Hunt, 5 N. B. R. 493, Fed. Cas. No. 6,883; In re Camp, 91 Fed. 745. Such a lien may be enforceable in a state court without regard to any pending proceedings in bankruptcy. But the claim of Schouler for rental of the premises used and occupied by Nading, trustee, since the adjudication in bankruptcy, stands upon a different footing. This claim must be paid by the trustee.

Section 64, b, Bankruptcy Act 1898, prescribes "that there shall be paid the actual and necessary cost of preserving the estate subsequent to filing the petition." "Expenses of a sale should be paid out of the estate of the bankrupt, and such costs are left by the statute to the discretion of the court, and must be disposed of on equitable principles." Where a party enjoys the aid of a court of bankruptcy, he should pay the costs incurred in obtaining this aid. Loveland, Bankr. 580. Bankruptcy Act, § 2 [18], says: "Courts of bankruptcy are vested with jurisdiction, both in law and equity, to tax costs whenever they are allowed by law, and render judgments therefor against the unsuccessful party, or in part against each of the parties and against the estate in bankruptcy." It cannot be seriously contended that the occupancy of this storehouse was not necessary to preserve the stock of goods of Grimes Bros.

Schouler has not been guilty of any laches in the matter; for it appears that he has repeatedly demanded the possession of the premises, and has made every effort in his power to obtain the same. He could not have forcibly ejected Nading or dumped the stock of drugs into the street. The bankrupts' property has been thus preserved; but the bankrupts insist that their exemptions must first be set apart to them, and, if there be anything left, Schouler's claim for rental since their adjudication, and the legal and necessary expenses incurred in closing up the estate, can be paid out of the remainder of the estate of the bankrupts. This contention cannot be maintained either on legal or equitable grounds. The rental for the storage of the goods of the bankrupt firm is part and parcel of the legitimate costs incurred in this case, and is a lien upon the estate of the bankrupts, or any assets that may be in the hands of the trustee, or that may hereafter come into his hands. In re Collier, 93 Fed. 194; Norman v. Craft, 90 N. C. 211; Latta v. Bell, 122 N. C. 639, 30 S. E. 15. "For the time the trustee is compelled to occupy the premises he should of course pay rent, and it should be treated as a part of the expenses of administering the proceeds of the estate." In re Jefferson, 1 Nat. Bankr. News, No. 12, p. 288, 93 Fed. 948. A trustee in bankruptcy who would permit an estate in his custody to be wasted or damaged when he is in possession of property of the bankrupt, sufficient to realize funds therefrom to prevent such waste or damage, would be grossly negligent, and would be subject to removal from his trust.

The able counsel for the bankrupts doubtless overlooked section 510 of the Code of North Carolina. This reads:

> "The costs and expenses of appraising and laying off the homestead or personal property exemptions, when the same is made under execution, shall be charged and included in the officer's bill of fees upon such execution or other final process, and when made upon the petition of the owner they shall be paid by such owner, and the latter costs shall be a lien on said homestead."

In the case at bar it will be observed that the bankrupts demanded their exemptions set apart to them in kind. In this case it was the duty of the trustee, if he had no available funds on hand, to sell so much of the stock of goods in his custody as might have been necessary to defray storage account, etc. The costs of storage of the stock

of goods in this case is, under the circumstances, as much a part of the costs in this matter as the costs incurred by the trustee in formally setting apart the exemptions of the bankrupts.

The action of the referee in the above-entitled case, in confirming the report of the appraisers, is set aside, and it is ordered and adjudged that the referee appoint three disinterested parties, who, after being duly sworn by him, shall appraise the entire estate of the bankrupts, T. W. and E. E. Grimes, trading as Grimes Bros. On the filing of this inventory, the trustee of the said bankrupts shall immediately proceed to set apart the exemptions of the said Grimes Bros., allotting to each member of the firm, out of the partnership assets, such articles of personal property, or articles from the stock of goods in his hands, as may be selected by the said T. W. and E. E. Grimes, to the amount and value of $500 each; which said report shall be filed in court, and be subject to such exceptions as may be entered by creditors within 20 days' notice after the filing of such report. It is further ordered that the trustee, R. W. Nading, shall pay to L. W. Schouler the sum of $———, the amount due for rent of storehouse used for the storage of the stock of goods of Grimes Bros. from the ——— day of January, 1898, the date of the adjudication of the bankruptcy of the said firm; and, if the said Nading shall have no available funds to pay said claim, he shall immediately sell so much of the said stock of goods as may be necessary to pay the amount of said storage to said Schouler, filing with the court an itemized statement of the articles sold, and the amount realized therefrom, and the full amount paid L. W. Schouler, with his receipt therefor. After the allotment of the exemptions allowed by law, it is further ordered that the trustee sell the residue of the said stock for cash to the highest bidder, at Winston, N. C., after giving 10 days' notice of time and place of sale, and file his report with the clerk of this court.

In re BAUDOUINE.

(District Court, S. D. New York. September 14, 1899.)

1. BANKRUPTCY—ASSETS OF ESTATE—SURPLUS INCOME OF TRUST.

Where trustees under a will are thereby directed to pay to a certain beneficiary, during his life, one-fourth of the income of the trust estate, with no direction for accumulation, and no discretion in the trustees as to such payment, and the law of the state (New York) provides that the surplus of an income so settled, beyond what is necessary for the support of the beneficiary, shall be liable in equity to the claims of his creditors, such surplus income, on the bankruptcy of the beneficiary, may be claimed by the trustee in bankruptcy as assets of the estate, although it is not within the classes of property enumerated in Bankruptcy Act, § 70, as vesting in the trustee, for that section is not to be construed as exclusive of other kinds of assets not therein described.

2. SAME—AFTER-ACQUIRED PROPERTY—ACCRUING INCOME.

Such surplus income, though it accrues after the adjudication in bankruptcy, is not after-acquired property in such sense that it will not pass to the trustee in bankruptcy, the bankrupt's interest in the income of the trust estate being a vested interest at the time of the adjudication, and a present property right then existing.

3. SAME—ASCERTAINMENT OF SURPLUS—SUMMARY PROCEEDINGS.
The amount of such surplus income of the bankrupt may be ascertained and made available to creditors by a summary proceeding in the court of bankruptcy, on petition of the trustee. There being no adverse claim of title by any third person as respects the income payable to the bankrupt, resort to a plenary suit in equity is not necessary.

4. SAME—PARTIES.
In proceedings in a court of bankruptcy to determine the amount of the surplus income accruing to a bankrupt under the trusts created by a will, whereby the trustees therein named are directed to pay to him a fixed share of the income of the trust estate during his life, in order that such surplus may be made available for creditors in the bankruptcy proceedings, the testamentary trustees may be made parties by petition, so as to be bound by the decree, in the exercise of the jurisdiction conferred on the courts of bankruptcy by Bankruptcy Act, § 2 (6), to "bring in additional parties in proceedings in bankruptcy, when necessary for the complete determination of the matter in controversy."

5. SAME—EFFECT OF STATE STATUTE.
Though the state statute provides that surplus income accruing to a beneficiary under a will, above what is necessary for his support, shall be "liable in equity" to the claims of his creditors, this does not oblige a trustee in bankruptcy, who seeks to make such surplus income of the bankrupt available for creditors, to bring a bill in equity, nor prevent the court of bankruptcy from ascertaining the amount of such surplus, and subjecting it to administration in summary proceedings; as state laws regulating practice have no reference to proceedings in bankruptcy.

In Bankruptcy. On motion of the trustee in bankruptcy for an order directing the referee to ascertain and report the amount of the surplus income accruing to the bankrupt from a certain trust estate.

Edward Van Ingen, for the motion.

Shearman & Sterling, Charles F. Halsted, and John A. Garver, opposed.

BROWN, District Judge. By a codicil to the will of Charles A. Baudouine, executed in September, 1893, a large amount of real estate situated in the state of New York was left to his executors in trust to apply one-quarter of the rents, issues, profits and income thereof to the use of his grandson John F. Baudouine, the bankrupt above named, during his life. One other quarter was given to his grandson Charles A. Baudouine, and those two grandsons were also made executors and trustees of the will. Subsequent to the death of his grandfather, the above-named John F. Baudouine filed his voluntary petition in bankruptcy in this court on March 31, 1899, and on the 25th of April following was adjudged a bankrupt. A trustee in bankruptcy was subsequently appointed on June 5th. In his schedules the bankrupt states that he "is a beneficiary under the will of his grandfather and entitled to one-quarter of the income of the trust estate created by said will, and has a contingent interest in other shares of said income now vested in other beneficiaries, but as he is advised by counsel and verily believes both said vested and contingent interest are inalienable and cannot be affected by this proceeding."

By section 60, art. 2, tit. 2, c. 1, pt. 2, Rev. St. N. Y., concerning uses and trusts (page 729), a trust like that created by this will, vests the whole estate in the lands "in the trustees in law and in equity, sub-

ject only to the execution of the trust." The persons for whose benefit the trust is created, it is declared, "shall take no estate or interest in the lands, but may enforce the performance of the trust in equity."

Section 63 declares:

"No person beneficially interested in a trust for the receipt of the rents and profits of lands can assign or in any manner dispose of such interest."

Section 57 declares:

"Where a trust is created to receive the rents and profits of lands and no valid direction for accumulation is given, the surplus of such rents and profits beyond the sum that may be necessary for the education and support of the person for whose benefit the trust is created, shall be liable in equity to the claims of the creditors of such person in the same manner as other personal property which cannot be reached by an execution at law."

The trust under the above will is of the simple character referred to in the sections above quoted. There is no direction for any accumulation, nor is there any provision making the payment of the income to the beneficiary dependent upon any discretion of the trustees, nor any provision for any different application of the income in case of the insolvency or bankruptcy of the beneficiary, such as is sometimes associated with similar trusts. Numerous decisions of the court of appeals and of other courts of the state of New York, leave no question that though the interest in such trust is inalienable by the beneficiary, the surplus beyond what is necessary for his support may be appropriated to the claims of creditors. Williams v. Thorn, 70 N. Y. 270; Schenck v. Barnes, 156 N. Y. 316, 50 N. E. 967; Moore v. Hegeman, 72 N. Y. 376; Tolles v. Wood, 99 N. Y. 616, 1 N. E. 251; Id., 16 Abb. N. C. 1; Schuler v. Post, 18 App. Div. 374, 46 N. Y. Supp. 18.

Upon the examination of the bankrupt it appeared that his income from his vested one-quarter interest in the estate during the year previous was about $30,000, or $2,500 per month, and that he had additional income in his receipts from commissions on the estate and otherwise; and that he is a widower and has a family of three children, the oldest of whom is 8 years of age. Upon a petition setting forth these and other facts, the trustee applies for an order directing the referee in charge to inquire and report what is the amount of the income of the bankrupt from said estate, and what portion thereof is necessary for his support, with a view to having the surplus applied to the claims of creditors through the trustee in bankruptcy.

Several objections are raised both to the right to the surplus income in bankruptcy, and to the proceeding by petition to reach it.

1. The income sought to be reached is that accruing since the filing of the bankrupt's petition and the adjudication in bankruptcy; and it is urged that such income is after-acquired property, not available in bankruptcy. But under this will the bankrupt's interest in the income during his life is a vested interest; as such it was a present property right existing at the time when the adjudication was made, although the amounts due under it become payable to him from time to time afterwards. Except for the provision of the statute making this interest inalienable by the bankrupt's own acts, it could have been assigned and transferred by him like any other species of proper-

ty; and such an assignment would have carried all future payments. The objection, therefore, that the bankrupt's interest was not a present property right at the time of the adjudication and that the subsequent payments of income would be after-acquired property, cannot be sustained. Future payments are available to pay present debts. Wetmore v. Wetmore, 149 N. Y. 520, 530, 44 N. E. 169; Williams v. Thorn, supra. In the language of Mr. Justice Swayne in Nichols v. Levy, 5 Wall. 433, 441:

"It is a settled rule of law that the beneficial interest of the cestui que trust, whatever it may be, is liable for the payment of his debts."

2. It is further objected that a beneficial interest of this nature is not such a property interest as is authorized to be taken by the trustee in bankruptcy under the provisions of the bankrupt law of 1898, inasmuch as it is not literally included in any of the clauses of section 70 stating what property shall vest in the trustee. By that section, the trustee is vested by operation of law with the title of the bankrupt as of the date he was adjudged a bankrupt, (1) to documents relating to his property; (2) to interest in patents, etc.; (3) to beneficial powers; (4) to property transferred in fraud of creditors; (5) to property which the bankrupt could by any means have transferred, or which might have been levied upon and sold under judicial process against him; (6) to rights of action arising upon contracts or from the unlawful taking of property; with the further right (e) to avoid any transfer by the bankrupt which any creditor might have avoided. The above clause 5 manifestly does not literally embrace this trust interest, inasmuch as by the law of this state the trust income could not be transferred by the bankrupt nor levied on or sold under judicial process.

The bankruptcy act, however, cannot be construed so narrowly as to exclude any vested interest constituting an asset available to creditors, merely on the ground that this asset is not expressly enumerated in section 70. Other provisions of the bankrupt act show that the act is designed to cover all the property and estate of the bankrupt and all assets that can in any manner be legally made available for the payment of his debts, and to distribute all those assets equally among his creditors. As an incident to this complete distribution of assets, it further provides for the bankrupt's discharge from his debts. A discharge in bankruptcy upon any other condition than the complete appropriation of every known asset legally available to creditors, would be not only a glaring wrong to creditors but contrary to every conception of a just system of bankruptcy. Here there is presumably a considerable surplus income, which under the will and the law of this state is expressly made available to creditors for the payment of their claims. If the bankrupt is discharged, as he presumably may be, and this surplus is not appropriated in bankruptcy, the creditors will be deprived of any resource against this asset, though by law entitled to it; because their claims will be canceled by the discharge; and even if any redress remained to them, any one creditor first obtaining a decree in the state court against the surplus, would be entitled to priority over others.

It is manifest, therefore, that the bankrupt act cannot be justly administered, nor the rights of creditors be secured against certain loss, unless this important asset is reduced to the possession and administration of the bankruptcy court. Section 70 in no way prohibits this. Its provisions are not exclusive of other assets not therein described; and it should not be made exclusive by unnecessary construction, when that construction would evidently thwart the purpose of the act, and work a manifest wrong to creditors and an advantage to the debtor to which he is not entitled. By section 2, the court of bankruptcy is authorized (7) to cause the estates of bankrupts to be collected, reduced to money and distributed. By section 47, trustees are required (2) to collect and reduce to money the property of the estates for which they are trustees. There can be no doubt that the terms "property" and "estates of bankrupts" are here used in the broadest sense, and intended to include every species of property not legally exempt, that can be made available for the benefit of creditors. Sections 14 and 29 make a willful concealment of assets a ground for refusing a discharge. It would be absurd for the law to deny a discharge for concealment of assets, and then to refuse to take them when made known. The penalty for concealment is the highest evidence of the intent to appropriate every available asset.

Section 70 cannot be so construed as to defeat this intent merely because a certain asset may not happen to fall within the literal words of this affirmative section. It is not a case in which the maxim "Expressio unius exclusio alterius" applies. In some states, moreover, equitable interests may be sold upon execution. It cannot have been the intent of the bankrupt act to make the creditor's right to have the debtor's property belonging to creditors distributed in bankruptcy or not distributed at all dependent in the different states upon a mere question of state practice as to the mode of getting at the debtor's property.

I find, therefore, that the surplus income, if any, when ascertained, will be an asset vesting in the trustee as the representative of creditors and distributable in bankruptcy.

3. It is further objected that the surplus income, even if liable to creditors in bankruptcy, cannot be reached upon petition in the bankruptcy proceeding, but only by suit in equity in the state court under section 23, cl. b.

It was settled under the bankruptcy act of 1867 (Smith v. Mason, 14 Wall. 419), and the same may possibly be the general rule under the present act (In re Abraham, 35 C. C. A. 592, 93 Fed. 767), that controversies in reference to the title to property claimed adversely by third persons and in their possession prior to the proceedings in bankruptcy, should be determined by plenary suit rather than by summary proceedings upon petition in bankruptcy. The right of trial by jury in many cases requires this rule. In the present case, however, there is no adverse claim of title by any third person as respects the income payable to the bankrupt. The trustees under the will have no color of claim to any beneficial interest in the income; while the trustee in bankruptcy makes no pretense of claim to the principal of the trust estate. By the terms of the will and the legal effect of the New

York statutes above cited, the trustees hold the income collected in trust to pay to the bankrupt so much of it as may be needed for his support, and to pay the surplus, as duly adjudged, to his creditors. The trustees have no more interest adverse to creditors than they have adverse to the beneficiary. The present case does not come, therefore, within the authorities cited, which, as I understand, require a plenary suit only where some substantial right or title of a third party in possession of the assets would be invaded by a more summary proceeding. See Beach v. Hobbs, 82 Fed. 916, 919; In re Smith, 92 Fed. 135; In re Buntrock Clothing Co., Id. 886. The only adverse interest or claim is by the bankrupt, and he is estopped from raising any such objection; since by his own application in bankruptcy he has voluntarily submitted himself and every asset available to creditors, to the jurisdiction and ordinary proceedings of this court, so far as he himself is concerned; while the trustees, having no adverse interest, may properly be made parties to the proceeding by petition, so as to be bound by the decree, under the provisions of section 2 of the bankrupt act, which expressly gives this court jurisdiction in bankruptcy proceedings, not only (7) to cause the estates of bankrupts to be collected, but (6) "to bring in and substitute additional persons or parties in proceedings in bankruptcy when necessary for the complete determination of the matter in controversy"; and still further (11) "to determine all claims of bankrupts to their exemptions."

Under the latter clause I see no reason to limit the word "exemptions" to real estate or chattels exempted by state laws from levy and sale on execution. It is not thus limited in the above clause, nor in section 6, which provides that "this act shall not affect the allowance to bankrupts of the exemptions which are prescribed by the state laws."

The bankrupt states this trust income in his petition, and claims that it is exempt under the state law. It certainly is exempt wholly, or in part; and it is solely under the state law that this exemption exists. By the state law, this exemption is a conditional or qualified exemption; and under the above provisions, it appears to be within the express grant of jurisdiction, and the duty of the court "in bankruptcy proceedings" to determine the amount of this exemption in order that whatever surplus is left may not be lost to creditors. In the case of Spindle v. Shreve, 111 U. S. 542, 546, 4 Sup. Ct. 522, 524, Mr. Justice Matthews, in referring to a trust interest of this character, speaks of it in terms as an "exemption." "The bankrupt act (Rev. St. § 5045)," he observes, "expressly adopts the local law of the state as to such exemptions."

4. The provision of the state statute, that the surplus "shall be liable in equity to the claims of creditors in the same manner as other personal property which cannot be reached by an execution at law," so far from distinguishing such a surplus from any other equitable assets, as respects the mode of reaching it, declares that it shall be liable in the same manner. By the general law of debtor and creditor, no equitable assets could be reached except by bill in equity. In a court of bankruptcy, however, which in its principles of administra-

tion is in the highest sense a court of equity, more expeditious proceedings by petition or on order to show cause are allowed in many cases for the purpose of recovering assets and settling disputed claims, though without any sacrifice of substantial rights. Provisions of the state law relating to practice merely, whether as respects legal or equitable assets, have no reference to a federal system of bankruptcy or to the practice under it, as respects the collection of such assets or the determination of their amount. In bankruptcy it is immaterial what may be the practice of the state courts, for the time being, in that regard. Section 57 of the New York statute above cited, was enacted while the old common law and chancery practice remained unchanged. The effect of that provision was to make this asset collectible in the same manner as any other equitable asset. In bankruptcy, therefore, it would be subject to the ordinary rule of practice in courts of bankruptcy; and where as here there are no hostile claims of title to the fund by third persons, a plenary suit is unnecessary. Though changes in the state practice have here been made as to the mode of collecting most equitable assets, a bill in equity is still required to reach a surplus trust income. Its relations to the practice in bankruptcy, however, remain precisely as before. On the hearing of a bill in equity in the state court the income necessary to the debtor for the support of himself and of those dependent upon him, according to their station in life, is determined upon the proof submitted by the parties. The same inquiry will be made upon the petition here presented; all the proofs that could be presented in a plenary suit may be presented here; the trustees may be cited to answer, and to offer such proofs as they may be advised; and there is the same opportunity for a hearing before the court and for a review by appeal as in a plenary suit. No substantial right will be lost or abridged by the proceeding on petition, and the motion is therefore granted.

In re DUNAVANT.

(District Court, W. D. North Carolina. September 15, 1899.)

1. BANKRUPTCY—LIENS—TIME OF ATTACHING.
   The lien of a mortgage or deed of trust of realty, made and recorded more than four months before the filing of a petition in bankruptcy by or against the mortgagor or grantor, is not affected by his adjudication as a bankrupt.

2. SAME—LIEN OF JUDGMENT.
   Where, by the law of the state, the lien of a judgment attaches to all the real property of the debtor within the county where it is docketed, from the date of such docketing, such a lien, attaching more than four months before the filing of a petition in bankruptcy against the debtor, is not affected by his adjudication as a bankrupt.

3. SAME—ASSETS—RESULTING TRUST.
   Where a trust deed of land was given to secure the payment of a debt, and the trustee, in pursuance of the directions of the deed, made sale of the property on default of payment, and it was bid off by the creditor secured, for a price exceeding the aggregate amount of his own and a superior lien on the property, but no money was ever paid, and the trustee conveyed the property by deed to such purchaser, without collecting

the price bid, *held*, that such deed was unauthorized, and did not devest the title of the original owner of the property, but the latter had a resulting trust therein, such as might be subjected, under a decree in equity, to the payment of his debts, and which therefore would pass to his trustee in bankruptcy as assets of his estate.

4. SAME.
An interest in the nature of a resulting trust in realty owned by the bankrupt will pass to his trustee in bankruptcy for the benefit of his creditors, notwithstanding a previous levy of an execution on such interest and a sale thereunder, when by the law of the state a resulting trust is not such property as can be sold on execution.

5. SAME—ASSETS—EARNINGS OF MINOR SON.
Where a father, although himself insolvent, has expressly emancipated his minor son, the earnings of the latter thenceforward and during the remainder of his minority, or property purchased with the same, do not belong to the father, and cannot be claimed by his creditors as assets of his estate in bankruptcy.

6. SAME—FRAUDULENT CONVEYANCES—STATUTE OF LIMITATIONS.
Where, in proceedings in bankruptcy, creditors impeach a deed of land made to a son of the bankrupt, alleging that it was procured by the bankrupt as a means of defrauding his creditors, but an action to set aside such deed would have been barred by the statute of limitations in the courts of the state, before the adjudication in bankruptcy, the bankrupt may plead the statute in bar of the petition of such creditors.

7. SAME—NOTICE IMPUTABLE TO CREDITOR.
Where the state statute provides that an equitable action founded on fraud or mistake shall be barred within three years, but that the cause of action shall not be deemed to have accrued until discovery by the aggrieved party of the facts constituting such fraud or mistake, proceedings by creditors of a bankrupt to avoid a deed alleged to have been procured by the bankrupt as a means of defrauding his creditors will be barred by the statute, when the facts of the transaction were all known to their attorney more than three years before the filing of the petition in bankruptcy, the knowledge of the attorney being in this case imputable to his client.

In Bankruptcy.

The above-entitled cause having been referred to W. S. Pearson, a referee in bankruptcy in this district, to investigate, and to pass upon all matters in controversy between certain judgment creditors of S. D. Dunavant, bankrupt, and the bankrupt, and especially to report what, if any, interest the said bankrupt had at the date of his adjudication in bankruptcy (December 24, 1898) in certain lands described in the answers of the respondents, the referee, on due notice to all parties interested, examined the bankrupt and a number of witnesses at his office, in Morganton, N. C., on the 2d day of June, 1899, and from the evidence, duly recorded and herewith made a part of this record, found the following facts, to wit:

"That prior to the year 1890 the bankrupt, S. D. Dunavant, was the owner of a considerable amount of property, and, among other pieces of real property, he was the owner of the land in controversy, known as the farm on the Catawba river, situate in Burke county, consisting of 184 acres, and worth not more than $6,500 (sixty-five hundred dollars). That during said year of 1890 the said S. D. Dunavant borrowed $3,000, and in order to secure the said debt he executed a trust deed on said land to one Charles Root, and that the said debt, with a considerable amount of interest, is still due to the party to whom said trust deed has been assigned, and constitutes a first lien on said farm, and is no way affected by this proceeding in bankruptcy. That on the 1st day of June, 1891, the said S. D. Dunavant executed a deed conveying this land to S. T. Pearson in trust to secure certain indebtedness due the Piedmont Bank, and on the 5th day of September, 1892, he executed a second trust deed or mortgage to S. T. Pearson and W. C. Ervin on all his property, real and personal, except a homestead which had been assigned him in his life

estate in a house and lot in Morganton, and his personal property exemption, of less than $500 in value. This last-mentioned trust deed or mortgage was given for the benefit of the Piedmont Bank, the First National Bank of Johnson City, and others, and included the farm in controversy.

"I find that on the 7th day of August, 1893, the trustees, S. T. Pearson and W. C. Ervin, having first sold the other property conveyed in the trust deed to them, proceeded, under the power given them in said deed, to expose to sale the farm in controversy, subject to the Root mortgage of $3,000, and the same was bid off in the name of the Piedmont Bank at the sum of $6,000; that at the time of the sale of said farm the said S. D. Dunavant only owed the said Piedmont Bank the sum of $2,002, leaving a balance of $3,998 due on its said bid of $6,000, which should have extinguished the Root mortgage, according to the testimony of S. D. Dunavant; that the said trustees did not collect from the said Piedmont Bank the said sum of $3,998 due on its said bid as aforesaid, but chose to treat the transaction as if only $2,002 had been bid for said land, subject to the Root mortgage, and undertook on the day of said sale, to wit, the 7th day of August, 1893, to execute a deed to the said Piedmont Bank for said farm, reciting a consideration of $6,000, the exact amount bid for said land, but no part of which was paid in cash, as required by the terms of the sale and by the express terms of the trust deed under which the power was given; that a judgment was rendered in the superior court of Burke county, at term, on the 20th day of March, 1893, in favor of the respondent, S. M. Rice, and against the said S. D. Dunavant, for the sum of $1,878.70, with interest on $1,592.12 from said 20th day of March, 1893, till paid, and costs, and the same, having been thereupon docketed in the office of the clerk of said court, from thenceforth became and was a lien on all the real property of said bankrupt situate in said county, subject to a credit of $585.90 paid thereon August 5, 1896, and that the rendition and docketing of said judgment is prior in point of time to any judgment now subsisting against the said S. D. Dunavant.

"I find: That on the 30th day of December, 1893, S. T. Pearson contracted with H. J. Dunavant, then a minor, to take his notes, with father, S. D. Dunavant, as surety, for the sum of $2,002, as the purchase price of the land in dispute, subject to Root's mortgage, and Mr. Pearson, also acting as secretary, and G. P. Ervin, as president, of the Piedmont Bank, attempted to convey the farm in controversy, in the name of the said bank, to the said S. T. Pearson, upon the following trusts, to wit: 'That is to say, H. J. Dunavant, as principal, and S. D. Dunavant, as security, are indebted to the Piedmont Bank of Morganton in the sum of $2,002, evidenced by the two notes under seal, one note for $1,058, due on the first day of March, and one note for $944, due on the 30th day of June, 1894, both of said notes bearing 8% interest after maturity, and are, moreover, indebted to Bessie P. Hunt in the sum of $3,000, as evidenced by note of even date herewith, due one day after date, and bearing 8% interest from date. Now, therefore, this indenture further witnesseth that the said S. T. Pearson, trustee, may at any time sell any part of the tract above described, subject to the exception of 9½ acres as aforesaid, at either public or private sale, upon such terms and for such prices as to him may seem equitable and just, and apply the proceeds to the payment of said note and interest in such order as to the trustee may seem just, or to the payment of any note, principal and interest, given in renewal of said note, or any part thereof, after deducting costs of sale, including advertisement, surveyor and attorney's fees, together with 2½% commission to said trustee, and continue to make sale of said property from time to time, in the exercise of his discretion as aforesaid, until all said notes and interest are paid off and fully discharged, and, after the payment of all of the said debts and interest, shall hold the portion of said tract which he has not sold as aforesaid in trust for H. J. Dunavant, S. L. Dunavant, S. Dewitt Dunavant, Jr., and M. V. Dunavant, until such time as the said M. V. Dunavant shall attain the age of 21 years, at which time the part of said tract remaining unsold shall be conveyed by said trustee to said H. J. Dunavant, S. L. Dunavant, S. Dewitt Dunavant, Jr., and M. V. Dunavant, in fee simple, as tenants in common, with such warrants as under this conveyance he can give.' That the two notes signed by H. J. Dunavant as principal and S. D. Dunavant as surety,

specified in the said trust deed to S. T. Pearson, represented the exact amount which would have been due from S. D. Dunavant to the said Piedmont Bank, had there never been any sale of said farm under the trust deed executed by S. D. Dunavant to S. T. Pearson and W. C. Ervin as trustees. That on 30th of December, 1893, when said bank contracted with said H. J. Dunavant to sell farm to him for $2,002, and the Root mortgage, and convey the same to S. T. Pearson in trust as aforesaid, the said H. J. Dunavant was a minor under the age of 21 years, and that since that date the said H. J. Dunavant and S. D. Dunavant, as guardian for his children, have been in possession of said land as tenants of said trustee, and are now in possession under the said deed of December 30, 1893. That executions were issued from the superior court of Burke county, on certain judgments against said S. D. Dunavant in favor of S. M. Rice, T. I. Gillam, Smith, Courtney & Co., J. Allen Smith, and Slater, Myers & Co., on the ——— day of ———, 1896, and levied upon the alleged interest of said S. D. Dunavant in the lands described, and the same was sold by the sheriff of Burke county on the 8th day of September, 1896, and said creditors procured J. T. Perkins, as trustee for them, to purchase the same for $500, and the said sheriff conveyed said land in fee simple to said Perkins by deed dated 17th of September, 1896, and registered 18th of September, 1897, in Book V, No. 2, page 467. That on the 18th day of September, 1897, the Morganton Land & Improvement Company conveyed to S. T. Pearson, trustee for H. J., S. L., S. D., Jr., and M. V. Dunavant, in consideration of $440, two tracts of land in Burke county, one tract containing 12½ acres, and the other tract containing 9½ acres, which deed is duly registered in Burke county, in Book E No. 2, page 379, February 9, 1898; and I find from the testimony of S. D. Dunavant that these tracts of land were purchased and paid for by H. J. Dunavant, then an adult, having attained his majority in July, 1896.

"I find from the testimony of S. D. Dunavant, H. J. Dunavant, and B. S. Gaither that in the year 1891 H. J. Dunavant was then sixteen years old, and, desiring to engage in business in Morganton on his own account, in buying and selling ice, he went to his father, S. D. Dunavant, and borrowed fifty dollars from him, and that his father said to him, 'You can have all from now on that you can make;' that he continued the business in 1892, with John Presnell as his partner, in the same manner; that in 1893 he worked as a commissary clerk on a railroad in Pennsylvania, at a salary of $50 per month, his name being on the pay roll, and he received and used his own wages, as other employés, with his father's knowledge and assent; that in 1893 and 1894 he worked as a commissary clerk for Dunavant, Corpening & Miller, on a railroad contract in Caldwell county, at a salary of $50 per month; that his name was on the pay roll, and he received and used his own wages, with the full knowledge of his father.

"I find that during the year 1894 S. D. Dunavant, who was a railroad contractor of long experience, obtained a contract for work on a railroad in Jamaica in the name of Dunavant & Co., and that he was insolvent at the time he took said contract; that he told H. J. Dunavant, who was then a minor, and up to that time had been working at $50 per month, that he would give him one-fourth of the profits on said work if he would accompany him to Jamaica, and accordingly the said H. J. Dunavant went with him to Jamaica, and did practically the same work there that he had been doing at other points for $50 per month; that within about six months H. J. Dunavant returned to the United States, leaving the said S. D. Dunavant in Jamaica; that when the said S. D. Dunavant returned, after seven or eight months' absence, he brought with him a draft for $7,000 on the New York Equipment Company, payable to himself individually, being one-half of the profits for the work done in Jamaica by Dunavant & Co., and that the said S. D. Dunavant indorsed said draft, and placed the same in the Piedmont Bank for collection, and that the same was collected, and he gave H. J. Dunavant a check for $3,246, which said H. J. Dunavant used in paying his notes given by him to the Piedmont Bank for the purchase money of the land described, and in part payment on the interest due on the Root mortgage.

"I find that said S. D. Dunavant was continuously insolvent from the time he took the contract for work in Jamaica, and before, up to and including the

time when the profits of the said work, or a part thereof, were used for the purchase or relief of said land as aforesaid, and has continued insolvent ever since, and that all during these times the said H. J. Dunavant was a minor living with his father, and incapable of making any contract which would bind him, or of earning a legitimate salary of more than $50 per month.

"I find that the trust deed to S. T. Pearson, purporting to be for the benefit of the children of S. D. Dunavant, was not registered until the 17th day of December, 1897, more than four years after its attempted execution, and that the attempted acknowledgment of the said deed by the officers of said bank was made after the said bank failed, and a receiver had been appointed and taken charge of the affairs of said bank.

"I find as a fact from the testimony of S. D. Dunavant, and from the records on file in this proceeding, that immediately upon the appointment of his trustee in bankruptcy, on the 14th day of January, 1899, said bankrupt informed said trustee of the substantial facts in regard to said transaction, and of the conveyances, sales, etc., connected therewith, and caused his attorney to exhibit to said trustee said deed and conveyances connected with said transaction, and said trustee embodied said facts in a petition to the court, and asked for instructions as to his duties in the matter, and stated that he had investigated the matter fully, and was satisfied that said bankrupt had turned over all his property and had concealed nothing from him, the said trustee.

"I find that J. L. Anderson has agreed to bid as much as $50 for the interest of said S. D. Dunavant in said farm, whatever it may be, and that he is able to secure his said bid, and to indemnify the trustee, Manly McDowell, for the costs of making sale of the same; that the intestate of the respondent, J. L. Anderson, obtained judgments against the said S. D. Dunavant for the amounts set out in his petition and proof of claim, and the same were docketed in the superior court as set out herein; that the respondents have made due proof of their said claims before me as referee in bankruptcy, in the amounts set out in the schedule of said bankrupt, and as hereinbefore stated.

"I find as a fact that S. T. Pearson, trustee, and H. J. Dunavant knew of the price bid by the Piedmont Bank for the farm, and of the way the trustees, W. C. Ervin and S. T. Pearson, treated said bid, and what was done in regard thereto, and that they had notice of the failure of the bank to pay the price bid by it for the land, subject to the Root mortgage."

A. C. Avery and S. T. Pearson, for bankrupt.

Isaac T. Avery and W. C. Ervin, for creditors.

EWART, District Judge. Upon the above statement of facts as found, the referee concludes:

(1) "That, as a matter of law, a proceeding in bankruptcy does not affect liens accruing four months prior to petition filed, and that the trust-deed mortgage from Dunavant to Charles Root is a valid mortgage and first lien on the farm in controversy, in favor of the first holder thereof."

I approve this finding.

(2) "The referee further finds, as a matter of law, that a fiduciary making a sale under an instrument providing for such sale is only authorized to make title upon the payment of the price bid. I conclude, on the findings of fact, that the deed made by S. T. Pearson and W. C. Ervin to the Piedmont Bank on the 7th day of August, 1893, was unauthorized and invalid, and, the grantee having taken with notice of the failure of the Piedmont Bank to pay the price bid, the said deed did not operate to devest the title and interest of S. D. Dunavant in said farm, but the status theretofore existing between said Piedmont Bank and S. D. Dunavant still subsists, so far as said farm is concerned, and that S. D. Dunavant has a resulting trust therein, subject to the Root mortgage, liable to be subjected, under a decree, to the payment of his debts."

I approve this finding. Ex parte Macay, 84 N. C. 59; 16 Am. & Eng. Enc. Law, p. 805.

(3) "I find, as a matter of law, that the docketing of a judgment constitutes a lien on all real property of the judgment debtor in the county where the same is docketed, from the date of its docketing. I therefore conclude, on the finding of facts, that the judgment of S. M. Rice is a valid, subsisting, and first lien on the interest of the said S. D. Dunavant in the farm on the Catawba river, to the extent of his said interest as hereinbefore found, to wit, on his resulting trust therein."

I approve this finding. Code N. C. § 435.

(4) "I find that executions issued on the judgments of respondents, and the same were levied on the interest of said S. D. Dunavant in said farm, and at a sale under said execution on the 5th day of September, 1896, the interest of said S. D. Dunavant in said farm was sold by the sheriff of Burke county, and purchased by one J. T. Perkins as trustee for respondents. I find that, as a matter of law, that a resulting trust cannot be sold under execution under the laws of North Carolina, and that J. T. Perkins, trustee, took no estate under his deed from T. M. Webb, sheriff."

I approve this finding. Hardin v. Ray, 94 N. C. 456; Clark's Code (N. C.) § 450, subsec. 4.

(5) "I find, as a conclusion of law, that the services and earnings of a minor son, until he arrives at the age of 21 years, belong to his father, and, it having been shown that the purchase money, to wit, $2,673.36, paid for said land to said bank by H. J. Dunavant, was received by him from the profits of the work of Dunavant & Co. in Jamaica in 1896, before he had attained his majority; that by virtue of the law this money became the property of the father, and, being invested in said land, the land became the land of S. D. Dunavant, and the said S. D. Dunavant now owns said land, subject to the incumbrance of $3,000, and accrued interest, to Mary Sheafer, assignee of the Root mortgage; that the attempted emancipation of the son, H. J. Dunavant, by S. D. Dunavant, was not of sufficient notoriety to put creditors of S. D. Dunavant on notice that his earnings and profits were his own."

This conclusion of law I do not concur in. It appears from the evidence taken by the referee—not only of the bankrupt, but his son, H. J. Dunavant, and of other witnesses—that Dunavant, the bankrupt, had in the year 1891 emancipated his son, and has never since that date in any way interfered with his business, or received any benefit, profit, or share of his earnings. It further appears that the son, H. J. Dunavant, an active and energetic young man, had not only had the entire conduct and management of his own business, but was very often consulted by his father in the business affairs of the latter. At an early age as 20 he was a partner with his father in a railroad contract in Jamaica, out of which he made a large sum of money, and which, it appears from the evidence, he controlled absolutely, without any interference whatever on the part of his father. Browne, Dom. Rel. (a text prescribed by the supreme court of North Carolina) p. 79, says:

"The right of action for a minor's services is presumed to be in the father. But the father may voluntarily relinquish this right to the child. This is called 'emancipation.' This agreement may be expressed or implied from the circumstances. The father may do this although insolvent. In such case payment by a third person of a minor's wages to him is valid."

In this case it appears that the emancipation was express. H. J. Dunavant testified as follows:

"I have made a lot of contracts, both good and bad, before I was twenty-one years of age. When I first started into business my father told me that I could have all I made."

This statement of Dunavant, Jr., is corroborated by the father, S. D. Dunavant, and other witnesses.

"Emancipation gives the child a right to his own time and wages, and the control of his own person, and discharges a parent from obligation to support, unless the child becomes unable to support himself. It may be in writing or by parol, for the whole minority or part of the time." Browne, Dom. Rel. p. 85. "The child's earnings cannot, after emancipation, be recovered by the father, although he has notified the employer not to pay the child. Nor can the father's creditors attach them, although he is insolvent; and after emancipation the father may deal with the child as a stranger." Id. p. 86; Campbell v. Campbell, 11 N. J. Eq. 268; McCloskey v. Cyphert, 27 Pa. St. 220; Stanley v. Bank, 115 N. Y. 122, 22 N. E. 29; Bray v. Wheeler, 29 Vt. 514; Chase v. Elkins, 2 Vt. 290; Lackman v. Wood, 25 Cal. 147. The emancipation may be implied from circumstances. See Beaver v. Bare, 104 Pa. St. 58; Ream v. Watkins, 27 Mo. 516. The emancipation may be complete, although the child continues to reside with parents. Rush v. Vought, 55 Pa. St. 437; Beaver v. Bare, 104 Pa. St. 58. "A minor who works for his father after his time has been given to him may recover for his wages." Gen. Dig. p. 788.

In Halliday v. Miller, 29 W. Va. 426, 1 S. E. 829, the court says:

> "It is universally agreed that the father may voluntarily relinquish his child's earnings, though he be a minor, and allow him to earn for himself, and receive and appropriate his own earnings at his pleasure. Such an arrangement between the father and his minor son is an emancipation of the son. By such an agreement the son is put, as to his services, on the same footing as if he had attained the age of twenty-one years, when the law would emancipate him. Such emancipation by the father may be by parol or in writing, and it may be proved by circumstantial evidence or it may be implied. The right of the father to emancipate his minor son is unquestionable, and this right exists though the father be insolvent." Campbell v. Cooper, 34 N. H. 49; Cloud v. Hamilton, 11 Humph. 104; Armstrong v. McDonald, 10 Barb. 300; Atwood v. Holcomb, 39 Conn. 270; Lackman v. Wood, 25 Cal. 147; McCloskey v. Cyphert, 27 Pa. St. 225; Dierker v. Hess, 54 Mo. 250; Hall v. Hall, 44 N. H. 293; Chase v. Elkins, 2 Vt. 290.

"The father may emancipate his child whenever he chooses to do so. That right is not within the control of his creditors, and they cannot prevent an insolvent father from relinquishing all right to the future services or earnings of his child." Penn v. Whitehead, 17 Grat. 503; Bobo v. Bryson, 21 Ark. 387; Wilson v. McMillan, 62 Ga. 16; Penn v. Whitehead, 94 Am. Dec. 478; Bobo v. Bryson, 76 Am. Dec. 406; Trapnell v. Conklyn (W. Va.) 16 S. E. 570. "The father of a minor whom he has emancipated is not entitled to his earnings during his infancy, nor damages recoverable by the infant after majority for a tortious act committed during his infancy." Blumenthal v. Shaw, 23 C. C. A. 590, 77 Fed. 954. It appears from the evidence in this case that the money invested in the purchase of the land in controversy was the money of young Dunavant, and was used by him in good faith, and with no purpose or intention of defrauding the creditors of S. D. Dunavant. Having been fully emancipated by his father, the profits accruing to him as a partner (receiving one-fourth from the Jamaica contract) belonged to him, and could be used in any manner

he saw fit. The emancipation appears to me to have been amply sufficient to put creditors on notice that his earnings and profits were his own.

The referee further reports, "The plea of the statute of limitations, interposed by the bankrupt, is respectfully referred to your honor."

Code N. C. § 155, subsec. 9, reads as follows:

"An action for relief, on the ground of fraud or mistake, in cases which heretofore were solely cognizable by courts of equity (the cause of action in such cases not to be deemed to have accrued, until discovery by aggrieved party of the facts constituting such fraud or mistake), is barred within three years."

"If, by matter appearing on the face of the pleadings, the plaintiff either has no equity, or his remedy therefor is barred by force of a public statute, the objection is valid at the hearing, though not insisted on by plea or demurrer, nor relied on in the answer." Robinson v. Lewis, 45 N. C. 58. "Where the statute of limitations applies, it may be pleaded, or is ground for a demurrer to a bill in equity." Falls v. Torrence, 11 N. C. 412. "If it appears on the face of the bill that the plaintiff's case is barred by the statute of limitations, advantage may be taken of it by motion on the trial." Whitfield v. Hill, 58 N. C. 316, approved in Isler v. Dewey, 84 N. C. 345. If the bill alleged no matters to avoid the bar apparent on its face, it would be considered as stating no cause of action. 6 Enc. Pl. & Prac. 201.

The deed which is attacked in this case by Rice and Anderson, administrator, judgment creditors of Dunavant, bankrupt, as being invalid, and as having been procured by the bankrupt to defraud his creditors, bears date December 30, 1893. The subscribing witness to the said deed is Mr. I. T. Avery, who was the attorney of record for S. M. Rice, and took the judgment against Dunavant and in favor of Rice in the superior court of Burke county March 20, 1893. It is insisted by creditors that the statute can only begin to run from the date of the discovery of such fraud or mistake. Code N. C. § 155, subsec. 9, above quoted. Conceding that to be true, it appears from the evidence that all the material facts in this matter were known to the judgment creditors and their attorney of record more than three years before the filing of the petition in bankruptcy by Dunavant. "Where the creditor employs an attorney to collect his debt by suit, and all the facts made necessary by the bankrupt law to invalidate a preference gained by such suit are known to the attorney after he enters on such employment, the knowledge of the attorney is the knowledge of the creditor." Black, Bankr. 201; Mayer v. Hermann, 10 Blatchf. 256, Fed. Cas. No. 9,344; Rogers v. Palmer, 102 U. S. 263. It appears in this case that Mr. Avery's partner, Mr. W. C. Ervin, was attorney for the Piedmont Bank, and that the interlineation made in the deed drafted December 20, 1893, is in the handwriting of Mr. Ervin. Clearly, he must have known of the contract and the provisions of the said deed. The deeds of trust drawn on the 1st of June, 1891, and 5th of September, 1892, were drawn by one or the other of these attorneys. In the answers filed in this case by respondents Rice and Anderson, administrator, it is alleged that executions had been issued on their judgments in 1896, and a sale of Duna-

vant's interest made in September, 1896, so that it is manifest that all the material facts in this matter must have been within the knowledge of these respondents for more than three years before the adjudication in bankruptcy of S. D. Dunavant. The plea of the statute of limitations in this case interposed by the bankrupt is sustained. The petition on the part of the judgment creditors, S. M. Rice and Anderson, administrator of T. I. Gillam, to sell the interest of the bankrupt, S. D. Dunavant, in the Catawba tract of land, is refused.

In re WALKER.

(District Court, D. North Dakota. September 19, 1899.)

BANKRUPTCY—EXAMINATION OF BANKRUPT—RIGHT OF CREDITOR TO REQUIRE.

At the first meeting of creditors in a proceeding in bankruptcy, any person who is actually a creditor of the bankrupt, and whose debt is provable under the act, is entitled to examine the bankrupt, although he has not made formal proof of his claim; and the fact that his name is included in the bankrupt's list of creditors will be prima facie sufficient evidence of his having a provable debt.

In Bankruptcy. On review of decision of referee in bankruptcy.

Cowan & McClory, for bankrupt.

E. A. Maglone, and Phelps & Phelps, for creditors.

AMIDON, District Judge. This is a proceeding in bankruptcy. At the first meeting of creditors, W. N. Abbott, a creditor mentioned in the bankrupt's list, but who had not yet made proof of his claim, appeared specially by counsel for the purpose of examining the bankrupt under oath, in order, as was then stated, to determine whether it was worth while to prove his claim. Counsel for the bankrupt objected to any examination by this creditor, for the reason that his claim had not been proved. The referee sustained the objection, and at the request of counsel for the creditor now certifies the question thus raised to the court for its determination.

Subdivision (b) of section 55 of the bankruptcy act provides as follows: "At the first meeting of creditors the judge or referee shall preside, and before proceeding with the other business may allow or disallow the claims of creditors there presented, and may publicly examine the bankrupt or cause him to be examined, at the instance of any creditor." Section 21 of the act also provides that a court of bankruptcy may, upon application of any creditor, require the bankrupt to appear in court to be examined concerning his acts, conduct, or property. The question raised before the referee depends upon the meaning of the term "creditor," as employed in these sections. By section 1 of the act it is provided that, unless the same be inconsistent with the context, the word "creditor" shall be construed to include "any one who owns a demand or claim provable in bankruptcy." There is nothing in the context which requires a restricted meaning of the term as employed in the sections above quoted. Throughout the act, whenever the word is used in a narrow sense, apt language

is employed to indicate such an intention. For example, only those whose claims have been allowed are permitted to vote for the trustee (section 56), or share in the dividends (section 65), or determine whether a composition shall be accepted (section 12b). These are some of the cases in which the context shows that the term "creditor" is used in a narrower sense than that indicated by the definition in section 1, and, when no such restriction is declared by the context, the general terms of the definition must be held to apply. Under the act of 1867, after much conflict, it was finally settled that a creditor who had not proved his claim was entitled to oppose the discharge of the bankrupt. In re Smith, Fed. Cas. No. 12,977; In re Murdock, Fed. Cas. No. 9,939. If he is entitled to oppose the discharge without proving his claim, he ought likewise to be allowed to examine the bankrupt for the purpose of establishing the grounds of his objections; and it has been expressly decided that a creditor is entitled to make such examination without first filing specifications of his objections to the discharge. In re Price, 91 Fed. 635. The general principle to be deduced from the entire act would seem to be that only those creditors whose claims have been proved and allowed can participate either in the management of the estate or in the dividends derived therefrom, but as to all other matters any person having a provable claim is entitled to be heard.

Was there sufficient evidence before the referee to show that the creditor had a provable claim against the estate? I think there was. The claim was listed by the bankrupt as a debt which he was owing, and he was required by section 7 of the act to state under oath the amount of the claim, and the consideration out of which it arose. This, of course, would not establish the claim, nor the right of the creditor to share in dividends; but as to such matters as the examination of the bankrupt, and as against him, it certainly makes out at least a prima facie case that the claim exists and is provable against the estate. The ruling of the referee was therefore erroneous, and is reversed, and he is directed to permit the creditor to examine the bankrupt, if he shall so desire.

In re SANBORN.

(District Court, D. Vermont. September 11, 1899.)

No. 131.

1. BANKRUPTCY—SALE OF PROPERTY FREE OF INCUMBRANCE.
   A referee in bankruptcy, sitting as a court of bankruptcy, has power to order the trustee of a bankrupt to sell free of incumbrances personal property of the bankrupt in his possession, but covered by a chattel mortgage, on notice to the incumbrancer, and to approve the sale when made.

2. SAME—APPROVAL OF SALE BY REFEREE.
   Where a creditor of the bankrupt was secured both by a mortgage of personalty and a mortgage of realty, and there was some doubt as to the property covered by the chattel mortgage, and the referee ordered the trustee to sell the personal property free of incumbrances, which was done, for a price found to be its fair cash value, though this was less than the

amount of the mortgage debt, *held*, that the referee's approval of the sale thus made was within the fair exercise of his discretion.

In Bankruptcy.

John L. Spring, for petitioner.
George A. Weston, for trustee in bankruptcy.

WHEELER, District Judge. This is a petition for review of the approval by the referee of a sale by the trustee of mortgaged personal property, free of incumbrance, for less than the amount of the mortgage debt, which was large in proportion to this property, and was further secured by a mortgage of real estate being foreclosed by possession under a judgment on a writ of entry. That the referee, sitting as a court in bankruptcy, has power to order and to approve a sale, free of incumbrance, of property in possession by the trustee, on notice to the incumbrancer, seems to be clear. This was deduced by the supreme court of the United States from similar provisions in this respect to the present act in the act of 1841. In re Christy, 3 How. 292; Houston v. Bank, 6 How. 486. The same conclusion was announced on the corresponding provisions of the act of 1867 in Ray v. Norseworthy, 23 Wall. 128. In the latter case Mr. Justice Clifford, in delivering the opinion of the court, said, "Beyond all doubt the property of a bankrupt may, in a proper case, be sold, by order of the bankrupt court, free of incumbrance." What would be a proper case is a matter of discretion. Loveland, Bankr. 574. There appears to have been some confusion as to what property was covered by the mortgage, and a sale free of incumbrance might be advantageous as to that in question. The whole amount of the sales of that found to be covered by this mortgage is only $65.40, which is found to be the fair cash value. Setting aside the sale would have required the trustee to gather back numerous articles and animals of small and changeable value, and to return the prices paid to the purchasers, and would give the mortgagee the right only to have them sold again in the same way. The approval of the sale under these circumstances seems to be within the scope of the fair exercise of the discretion involved. Proceedings affirmed.

In re COMINGORE, Collector.

(District Court, D. Kentucky. July 5, 1899.)

1. EVIDENCE—REQUIRING PRODUCTION OF DOCUMENTS—RECORDS OF COLLECTOR OF INTERNAL REVENUE.
   The reports made by a distiller, or by storekeepers or other officers, to a collector under the internal revenue laws, are in no sense public records, but are executive documents which the United States, in its sovereign capacity, has acquired for the sole purpose of administering its own governmental affairs, and are its private property, the custody and use of which the secretary of the treasury has the lawful authority to control by proper regulations.
2. SAME—POWER OF STATE COURTS.
   Under Rev. St. §§ 161, 251, 321, a regulation promulgated by the commissioner of internal revenue, under the direction of the secretary of the

treasury, prohibiting collectors from producing the records of their offices, or furnishing copies thereof, for the use of third persons, or for use as evidence in behalf of litigants in any court, is a valid and binding regulation; and neither a state nor a state court has authority to require a collector to violate it, or to punish him for contempt because of his refusal to produce such records, or to testify to their contents.

8. SAME—CERTIFIED COPIES OF COLLECTOR'S RECORDS.

There is no statute of the United States requiring or permitting a collector of internal revenue to make or certify copies of reports on file in his office, and a state has no authority, either in its sovereign capacity or as a litigant, to impose such duty upon him.

This was an application by David N. Comingore, collector, for a writ of habeas corpus.

R. D. Hill, U. S. Dist. Atty., for petitioner.
Winslow & Winslow, for respondent.

EVANS, District Judge. The petitioner for the writ of habeas corpus in this case is the collector of internal revenue for the Sixth district of Kentucky, duly appointed and commissioned by the president of the United States. Previous to March 1, 1899, the auditor's agent, claiming that Elias Block & Sons, distillers, had failed to list for state taxation certain distilled spirits in their warehouse in Carroll county, Ky., instituted civil proceedings against them in the name of the commonwealth of Kentucky, under the provisions of section 4241 of the Kentucky Statutes, to compel an assessment of the spirits for taxation. On that day the petitioner, in obedience to a subpœna, appeared as a witness to give his deposition in the case before W. A. Price, a notary public. After being duly sworn, he was asked several questions, to which he made answers as follows:

"(3) Did the defendants, Block & Sons, owners of said distillery, make, under the provisions of the laws of the United States, reports to your office as to the amount of liquor which they manufactured and deposited in the bonded warehouses located on said distillery premises from the year 1887 down to the present time? If so, how often, under the provisions of the law, do they make such reports? A. They make reports monthly. (4) Did they, under the provisions of said law, also make applications to your office during said time for permission to withdraw such liquors from bond? If so, how often? A. They make applications whenever withdrawals are made,—daily, if they choose. (5) Are these reports of deposits and requests for privilege to withdraw, or official records made therefrom, now in your office, or under your control in any way, for the period commencing October 1, 1885, and ending July 1, 1897? A. They are on the files of this office, but not under my control, except as collector. (6) Please file official copies of them, and make them a part of your deposition. A. I will have to decline to do this, under section 3167 of the Revised Statutes of the United States, and the rulings of the department. (7) What rulings of the department do you refer to, other than section 3167 of the statutes? A. The ruling of the department is as follows: 'The department does not permit the giving out of anything contained in internal revenue returns or documents by a collector, storekeeper, or any other officer of a collection district, for purposes other than those which the statutes of the United States contemplate.' (8) Who made the ruling of the department? A. It is made by the secretary of the treasury, through the internal revenue commissioner."

For failing to answer some of the questions in the manner desired, and for failing to furnish the official copies demanded, the notary public then adjudged that the petitioner should pay a fine of $5, and

be confined in the county jail for six hours, or until he was willing fully to answer the questions and furnish the copies. This judgment of the notary public was, per se, ineffective, under section 538 of the Kentucky Code of Practice, and had to be reported to the court in which the litigation is pending; the Code requiring that the court shall render judgment for the fine imposed, to the extent it is approved. The notary reported this action to the county court, by which it was approved, and judgment entered in the following form:

"It is therefore ordered and adjudged by the court that the plaintiff's motions be sustained, and that plaintiff is entitled to use as evidence the facts stated in the reports and papers filed by any or all of the defendants in the office of the collector of internal revenue for the Sixth district of Kentucky, and also such facts as are stated in the reports made to said office by certain officers known as 'United States storekeepers,' and any other similar records, papers, documents, or exemplifications in said office tending to show the amount of liquors on hand at the distillery of the defendants on the 15th day of September, 1889, 1890, 1891, 1893, 1894, 1895, 1896, and on the 15th day of November, 1892. It is further ordered that the witness D. N. Comingore make or cause to be made, or permit the plaintiff, its agent or attorneys, to make, true copies of such of said papers as the plaintiff or its attorneys may demand, and that said Comingore, as collector, attest the same and attach his seal of office thereto, if he has such seal, and that he permit the plaintiff or its agent or attorneys to compare said copies with the originals and verify the same, and that he also testify further in regard to same, if demand be made; and leave is hereby given to complete the taking of said deposition on giving proper notice, and for this purpose the clerk is directed, upon request of plaintiff's attorneys, to transmit said deposition as now on file to W. A. Price, notary public, Covington, Ky. It is further adjudged that the action of the notary public, W. A. Price, in adjudging the witness D. N. Comingore to be in contempt for failure to file copies of reports, papers, documents, and exemplifications, or to testify as to their contents as requested, be sustained and affirmed, and that the commonwealth of Kentucky recover of said D. N. Comingore the sum of five dollars as a fine, and that he be taken by the sheriff of Kenton county, Ky., and confined in the jail of said county for the space of six hours, or until he signifies his willingness to comply with the request made in the deposition attempted to be taken, as follows: 'Please file official copies of the reports made to your office by Block & Sons as to the amount of liquor which they manufactured and deposited in the bonded warehouses located on their distillery premises from the year 1887 down to the present time, and also official copies of applications made by them to your office, during said time for permission to withdraw such liquors from bond.' Also with the following request: 'Please file official copies of such reports of the United States storekeepers as show the liquors on hand at the warehouses on the distillery premises of the defendants in Carroll county on September 15, 1890, September 15, 1891, November 15, 1892, September 15, 1893, 1894, 1895, and 1896.'"

Afterwards, on June 27, 1899, the said notary public and plaintiff's attorney appeared at petitioner's office to continue his deposition, and the following colloquy took place:

"I call your attention to the opinion of the court rendered April 3, 1899, copy of which has been furnished you, and as to which you have had ample time to be advised fully, and now ask if you will file official copies of such reports of the United States storekeepers, spoken of at the time of the former taking of your deposition, as show the amount of liquor on hand at the warehouses of the defendants on their distillery premises in Carroll county, Ky., on September 15, 1890, September 15, 1891, November 15, 1892, September 15, 1893, September 15, 1894, September 15, 1895, and September 15, 1896, or allow us, on behalf of the plaintiff in this action, access to and inspection of such records or papers for the purposes of taking copies for use on behalf

of the plaintiff as evidence in this action? Answer. I will have to decline, just as I did in the other case, and for the same reason as given in the other case. Q. 24. Please examine the records and reports under your control and in your custody as collector, and state what amounts of liquors were contained in the warehouses owned by the defendants in Carroll county on the following dates: September 15, 1890, September 15, 1891, November 15, 1892, September 15, 1893, September 15, 1894, September 15, 1895, and September 15, 1896. Answer. I decline to answer, for the same reasons as stated before."

Thereupon the notary public, and not the court nor the clerk thereof, issued an order for committing the petitioner to jail. The order was placed in the hands of the respondent, the sheriff of the county, who took the petitioner into custody, and the writ of habeas corpus was applied for and issued.

There is no dispute about the facts, though it may be doubted whether the petitioner's imprisonment was not wholly unauthorized upon the ground that the notary public had no power, under the Kentucky Code, to issue the process under which the arrest was actually made. Sections 535, 538, Civ. Code Prac. But the court will not pass upon that point, inasmuch as all parties desire that there shall be a judicial determination of the very important and interesting questions involved, namely: Was it the duty of the collector of internal revenue to answer the questions propounded, and to give the information or furnish the official copies demanded of him? And has the state of Kentucky, as a litigant in a civil action in her own court, the right to exact it of that officer in such a case?

A question somewhat kindred to these has been passed upon by three different federal courts. All of the cases, however, were different from this in two important particulars: First, that the information in each of them was desired in aid of the criminal laws of the states in regard to the occupation of retailing distilled spirits, as to which some of the facts are required to be made public by section 3240 of the Revised Statutes of the United States; and, second, the latest regulation bearing on the subject had not then been promulgated. In the case In re Hirsch, 74 Fed. 928, Circuit Judge Shipman, of Connecticut, in an elaborate opinion, held that the collector should be compelled to testify. His opinion seems even to go to the extent of holding that the treasury department has no authority of law for making a regulation that would prevent it. The learned judge, in aid of the state court proceeding, seems to have held that the spirit of section 3240 of the Revised Statutes required a construction that would compel internal revenue officers to testify in all cases where information was sought by the state as to who were retail dealers in distilled spirits. If that be correct, it would seem to follow that the same liberality of construction would, on the other hand, require it to be held that the spirit of section 3167 forbids any collector to give the information demanded of the petitioner in cases like this; and, indeed, the public policy of the United States might seem also to require this construction. That section prohibits the collector and other internal revenue officers from disclosing certain information they acquire from visits to distilleries, etc. In a somewhat earlier case (In re Huttman, 70 Fed. 701), Judge Williams, of the district of Arkansas, sitting by designation in Kansas, had expressed

views exactly contrary to the Hirsch Case, though this fact does not seem at that time to have come to the notice of Judge Shipman. In the latest case (In re Weeks, 82 Fed. 729), Judge Wheeler, of the district of Vermont, held, with Judge Williams, that the collector was not required to answer. This conflict of authority seems to make necessary, or at least appropriate, a further examination of the whole subject.

It should not be, and I think never is, the purpose or desire of the federal tribunals to interfere with any of the legitimate functions of the state courts or officers. Indeed, the leaning will be in the other direction. Judicial proceedings, federal and state, are essential to the good order of society, and to the protection of the rights of the individual citizen. Those proceedings would often prove abortive, if the courts had not the most extensive powers, as well as full authority to compel witnesses to testify to facts within their knowledge, and, indeed, to produce papers under their individual control in proper cases. This general proposition is certainly true, notwithstanding there are many exceptions to it, notably such as pertain to privileged communications, incompetent testimony, testimony that would tend to degrade the witness or subject him to criminal prosecution, and such as is forbidden by public policy. In this case, if the petitioner had been called to testify only as to facts within his personal knowledge, no law would exempt him from that duty, if what he knew was competent testimony, and its admission was not forbidden by other rules. It is not claimed that any of the information desired at his hands is within his personal knowledge. It is all contained in certain reports made to him by the distillers and by other United States officers, and which are in his possession in his official capacity as an officer of the United States. As it is clear that they are not his private property, it is essential to accurately ascertain the nature of those reports, and his relations to them and his duties respecting them.

In order to obtain money for the support of the government, congress has passed laws for the collection of the revenue to be derived from internal sources. A complete system has been established. It is placed under the treasury department. The secretary of the treasury is its head. It is operated through the bureau of internal revenue, at the head of which is the commissioner. The entire system is under his supervision, but subject to the control of the secretary of the treasury. Section 3301, Rev. St., provides that every storekeeper shall on the first Monday of every month make a report to the collector of the quantity of distilled spirits in the warehouse in his charge; and section 3307 requires that the distiller shall, monthly, make and swear to a report substantially similar. These reports thus made to the collector in the course of administering the laws of the United States, and for this executive purpose alone, are now demanded of him by the state officials in the manner before shown. Under the law, in the exceptional instance of a distiller, the property of the citizen is arbitrarily laid hold of by the United States as soon as it is manufactured, and is kept under its control until the tax is paid, possibly eight years afterwards. Meantime these reports

must be made. So far as the information contained in the reports is obtained from the distiller, it is extorted for the sole purpose of enabling the United States to ascertain and collect from him its revenues. This purpose is all that relieves both this act and that of so long holding his property from being mere tyranny. The information derived from these reports is not obtained for publication in any manner. It is entirely official. Under this state of fact, it does not seem to the court that these reports are in any sense records open to the use of the public. They are the property of the United States, in the custody of its officers. They were exacted for the sole purpose of collecting revenue. It is true that they are property of a peculiar character, but that does not alter the fact. Property is defined as being the exclusive right of control and dominion over a thing, and may include anything that is subject to ownership. Public records and documents are such as are placed on the public files for the use or information of the public, to which the public has access, and of which the public has the right, usually upon payment of certain fees, to demand copies. They are not property, in any ordinary sense. In many cases copies of the public records of the United States may be authenticated by the head of the department or other ultimate custodian. Familiar instances of such public records are those in judicial proceedings, and where documents are required to be registered or recorded, patents for land, and many others. See Boyden v. Burke, 14 How. 575. But there is no statute or law of the United States which authorizes or permits the collector of internal revenue to make or to certify for use by any one else copies of the reports which have been gathered for particular governmental purposes. The United States has not authorized the use of these executive documents by anybody for any purpose, except the official one for which the reports were made. No statute is shown which gives the litigant in this case any right to claim the use of this property—the private property of the United States—for any purpose whatever. The petitioner is the immediate custodian thereof, under the control of his superior officers. They have forbidden him to put this property of the United States to the uses required by the litigant in the state court, and yet the petitioner is arrested for obeying the orders of his superior officers respecting private papers of the government, in which the state of Kentucky has no interest whatever, and over which it has no more lawful control than it has over any other property of the United States. The purpose for which the litigant desires this property cannot affect the question of its right to it. It would not be contended that the state of Kentucky had any right to claim this property or its use, except for the single quality it is supposed to have of silently testifying upon the issues involved in the case against Elias Block & Sons. No logic is perceived in the possible suggestion that that makes a difference in right, though it may make the use more desirable in fact. The state, except so far as it may be given by statute, has no right over the property or the archives of the United States government. No statute is shown to justify the claim now made, though a statute is necessary to make the claim good. No sovereign can claim or obtain the right to demand the use of the

archives or quasi private documents of another sovereign without its consent, expressly given, and public policy forbids that any attempt to extort such use should be encouraged. Most unseemly, not to say dangerous, consequences might otherwise ensue. The state, while it may compel the petitioner, as a mere individual, to tell what he may know in that capacity, has no power to control him as an officer, nor to regulate the conduct of his official duties with reference to these reports nor their contents, as those duties can only be fixed by the laws of the United States and the orders and regulations of his superior officers. Among the official duties thus prescribed for the petitioner in the conduct of his office, and respecting the care of the property of the United States committed to his custody, is that which requires that he shall not do with it what is demanded at his hands in this case.

It may be assumed to be clear that a state statute cannot impose duties upon a federal officer as such. Much less can a state court do so. The attempt to do it in this case through the medium of a process of contempt must fail, because the state shows no statutory right thus to appropriate the property of the United States, nor to impose a duty upon its officers. If it were otherwise, and if the officers of the United States, in the discharge of their duties, could be interfered with by state courts or officers, it might soon produce a state of affairs that would be intolerable. It might, for example, take much of their time, or put them to great expense. If the state courts could for this purpose appropriate this property, or could compel official copies to be made or official information to be compiled, where would the line be drawn? And, vice versa, if the federal authorities or courts could interfere with the duties of state officers, except in those cases expressly authorized by the supreme law of the land, or necessary to carry into effect the laws of the United States or to enforce the judgments of her tribunals. There is no law of the United States which would give the federal authorities power over the property of a state, except occasionally through the writ of ad quod damnum, and through the exercise of the right of eminent domain.

While these views are believed to be correct as to mere property, as distinguished from true public records, as above defined, it probably might not be held that federal courts, on the one hand, and state courts, upon the other, were incompetent to compel custodians of public records either to give copies lawfully demanded upon payment of fees, or else to attend with the records, in proper cases, under a subpœna duces tecum. But this would be upon the ground that they are records to which all the public has the right of access. The right, however, if held to exist, would not extend to another class of papers which the state might own, and which pertained to the conduct of its government, and which its policy has not opened to the public. For example, in the early case of Morris v. Creel, 2 Va. Cas. 49, it was held that a paper submitted to the executive council of Virginia for the purpose of enabling it to perform its executive functions ought not to be withdrawn by the clerk without the order of the council, and therefore no attachment should be awarded against the clerk

for refusing to obey a subpœna duces tecum commanding him to produce the paper to be read in evidence. Every paper in the custody of public officers is not a public record. Some, as in this case, may be mere papers belonging to the United States, as documents pertaining to the administrative affairs of the United States, and as mere property which the United States has obtained for its mere executive purposes, and over which, through its proper agents and officers, it has exclusive control, and which the state cannot demand, for purposes of testimony or otherwise, contrary to regulations made under authority of the federal statutes.

It is altogether correct to say that neither the secretary of the treasury alone, nor the commissioner of internal revenue, with his approval, can make regulations having the force of law, unless authorized to do so by congressional enactment; but it is also believed to be true that sections 161, 251, and 321, together, are ample to authorize the making of the regulations hereinafter set forth. They contain provisions as follows:

By section 161:

"The head of each department is authorized to prescribe regulations, not inconsistent with law, for the government of his department, the conduct of its officers and clerks, the distribution and performance of its business, and the custody, use and preservation of the records, papers, and property appertaining to it."

It is provided by section 251:

"The secretary of the treasury * * * shall prescribe rules and regulations not inconsistent with law, to be used under and in the execution and enforcement of the various provisions of the internal-revenue laws; * * * he shall give such directions to collectors and prescribe such rules and forms to be observed by them as may be necessary for the proper execution of the law," etc.

And by section 321 that:

"The commissioner of internal revenue, under the direction of the secretary of the treasury, shall have general superintendence of the assessment and collection of all duties and taxes now or hereafter imposed by any law providing internal revenue and shall prepare and distribute all the instructions, regulations, directions, forms, blanks, stamps, and other matters pertaining to the assessment and collection of internal revenue."

At all events, the following regulations were made, namely:

"Treasury Department.

"Office of Commissioner of Internal Revenue.

"Washington, D. C., April 15, 1893.

"The following regulations are issued as supplementary to the instructions and suggestions contained on pages 41 and 42 of the regulations, series 7, No. 12, revised August 3, 1896: All records in the offices of collectors of internal revenue or of any of their deputies are in their custody and control for purposes relating to the collection of the revenues of the United States only. They have no control of them, and no discretion with regard to permitting the use of them for any other purpose. Collectors are hereby prohibited from giving out any special tax records, or any copies thereof, to private persons or to local officers, or to produce such records, or copies thereof in a state court, whether in answer to subpœnas duces tecum or otherwise. Whenever such subpœnas shall have been served upon them, they will appear in court in answer thereto, and respectfully decline to produce the records

called for, on the ground of being prohibited therefrom by the regulations of this department. The information contained in the records relating to special-tax payers, in the collector's office, is furnished by these persons under compulsion of law for the purpose of raising revenue for the United States; and there is no provision of law authorizing the sending out of these records, or of any copies thereof, for use against the special-tax payers in cases not arising under the laws of the United States. The giving out of such records, or any copies thereof, by a collector in such cases, is held to be contrary to public policy, and not to be permitted. As to any other records than those relating to special-tax payers, collectors are also forbidden to furnish them, or any copies thereof, at the request of any person. Where copies thereof are desired for the use of parties to a suit, whether in a state court or in a court of the United States, collectors should refer the persons interested to the following paragraph in rule X of the rules and regulations of the treasury department, namely: 'In all cases where copies of documents or records are desired by, or on behalf of, parties to a suit, whether in a court of the United States or any other, such copies shall be furnished to the court only, and on a rule of the court upon the secretary of the treasury requesting the same.' Whenever such rule of court shall have been obtained, collectors are directed to carefully prepare a copy of the record or document containing the information called for, and send it to this office, whereupon it will be transmitted to the secretary of the treasury with a request for its authentication under the seal of the department and transmission to the judge of the court calling for it, unless it should be found that circumstances or conditions exist which make it necessary to decline, in the interest of the public service, to furnish such copy. N. B. Scott, Commissioner.

"Approved:

"L. J. Gage, Secretary of the Treasury."

Now, as against persons desiring to use the property of the United States, these statutes should be liberally construed to preserve that property, and no third person has any right to gainsay it. He has no interest in the property. At all events, it is believed that the statutes and regulations constitute a binding rule for collectors of internal revenue in their control of the governmental property intrusted to their care sufficient to justify them in rendering obedience to their chief, especially as against all outside persons, and also sufficient to excuse them for refusing to permit anybody to use or get the benefit of that property who does not show some positive law of the United States as a basis of a demand for it. Here the state of Kentucky is a litigant only in a civil suit, and it may well be supposed that the general principle that, when a government abandons its sovereignty and becomes a private litigant, it is subject to ordinary rules, should have some application; but, whether so or not, the court is convinced that the state can manifest no right to the papers asked for, except by means of some statutory enactment bestowing it, or through some act of courtesy, as distinguished from a right on the part of the lawful custodian. It is an old rule that one government will not aid another in enforcing its revenue laws. Whether it should be applied to the operations of our state and national governments need not, in the abstract, be considered. Certain it is, however, that no law of the state can be found which is intended to aid the national government in the collection of its revenue, nor can any be found in the statutes of the United States which was intended to assist the states. Whether comity would require such enactment on the part of both need not be considered. The fact remains that such legislation has not been regarded as at all needful or desirable. The United States has a com-

plete revenue system of its own, and equally so has the state. They are, and must necessarily be, entirely independent of each other, though in some respects (notably in the matter of taxing the occupation of a retail dealer in distilled spirits) the statutes of the United States make it plain that by taxing the occupation it is by no means meant to authorize such occupation contrary to local laws. It only intends to tax the occupation if it is in fact carried on, but does not authorize it to be carried on. This is the basis of the provisions of section 3240, as well as section 3243, of the Revised Statutes. And it should not be overlooked that while, by the regulations above given, the treasury officials undertake to control the use of the reports referred to, they do not undertake altogether to deprive litigants of their use as testimony, except so far as the lawful custodian thereof regards it as incompatible with the public interest. While he has the right and the power altogether to exclude others from all use of such property, yet, under certain circumstances, as matter of courtesy, copies of the papers will be furnished. Surely the owner of property or his sole agent may annex conditions to a grant of the use of it. Indeed, there might be many considerations of public policy to support that course in case of merely executive or administrative papers like these,—considerations affecting both the amount and safety of the revenue. Nor is the state of Kentucky powerless. It has its own independent and complete system for taxing distilled spirits. True, the power of the United States is supreme, to the extent of having the first right; but the statutes of the state (sections 4105 to 4114, inclusive, Ky. St.) provide ample machinery for compelling reports from distillers, and, indeed, everything else necessary for the purpose. The state has neither occasion nor right to call upon the United States nor her officers for reports made under the administration of its laws in order to enforce the collection of the state revenue. Nor would the United States have the right to call upon the state. Each government must take care of its own concerns in such matters, and it is much doubted by the court whether the commonwealth of Kentucky or the government thereof in any way really makes or desires to make this claim, although her name is used in the suit in the Carroll county court by the auditor's agent.

It may be added that the court has been influenced somewhat by the conviction that, if the copies of the reports and the desired information were obtained from the collector, they would be altogether inadmissible and incompetent as evidence, and that it would ultimately be so held by the state court. While the collector was practically ordered by the state court to furnish or permit to be taken copies of the reports, or else to compile therefrom the data demanded, there is no law authorizing the collector to authenticate copies of papers, nor to compile figures from them so as to make them admissible as evidence, and the state court cannot impose the duty upon him. He should not be imprisoned because the head of the department will refuse to authenticate them, and a statement by him of what the papers contain, without producing the originals or authenticated copies, would probably be mere hearsay, and by no means the best evidence of their contents. And, if there has been a fishing expedition

merely to get information upon which to base ulterior movements by the plaintiff in the suit, surely the commitment of the petitioner would then be altogether inexcusable

To sum up the whole matter, the court has reached the conclusion: First, that the reports are executive documents, which the United States, in its sovereign capacity, has acquired for the sole purpose of administering its own governmental affairs; second, that the officers of the national government cannot be compelled by another sovereignty to put those documents at its disposal, without some express law of the United States authorizing it; third, that such documents are privileged, and to a certain extent quasi confidential, communications, the use of which is limited to the purposes for which they are made, unless the parties interested consent to a more extensive use (this proposition more especially applies to the reports of the storekeeper); fourth, that any demand for their use by any outside party must depend for success upon the courtesy of the government, and upon its notion as to the public policy of complying with the request; fifth, that no litigant has any right to their use in any other way or upon any other basis than such as may be fixed by the United States or under its authority; sixth, that the reports are property, and their ownership rests in the United States; seventh, that the state of Kentucky, either as a litigant or otherwise, has no right to exercise any control over them, through its courts or otherwise, except as the right may be given by congressional enactment or the courtesy of the government; eighth, that the secretary of the treasury has lawful authority to control or to make regulations for controlling that property and its custody; ninth, that the regulations made were within his authority, and show the only way in which the courtesy of the government respecting the matter in hand will, in the absence of legislation, be exercised, and the courts have no power to overrule it; tenth, that the state court had no lawful jurisdiction, right, or power to impose upon the collector, an officer of another sovereignty, the duty of making copies of the reports, or that of permitting others to take them, or that of compiling information from their contents; eleventh, that the reports are parts of the governmental archives, accumulated through mere executive and administrative processes, and as such are privileged, at least to the extent that no other sovereignty in its own interest can seize or control them for any purpose whatever without the consent of the sovereign owner, lawfully manifested; and, twelfth, that the effort to make the collector testify to their contents is virtually an attempt to compel the United States to produce them. The proposition underlying all the others is that nobody can acquire any control over or right in this class of papers belonging to the United States in any manner, except by its authority. These conclusions seem to be supported by 1 Greenl. Ev. §§ 250, 251; Jones, Ev. § 780; U. S. v. Eliason, 16 Pet. 291; Hagood v. Southern, 117 U. S. 52, 6 Sup. Ct. 608; Ableman v. Booth, 21 How. 506; Cunningham v. Railroad Co., 109 U. S., 451, 452, 3 Sup. Ct. 292, 609; Electoral College Case, 8 Fed. Cas. 427; Boyd v. U. S., 116 U. S. 616, 6 Sup. Ct. 524; Black, Const. Law, 441; Ex parte Reed, 100 U. S. 13; Carr v. U. S., 98 U. S. 433; Virginia Coupon Cases, 114 U.

S. 286, 5 Sup. Ct. 911; In re Ayers, 123 U. S. 443, 8 Sup. Ct. 164. And, to illustrate further, it may be added, upon the authority of Ex parte Rowland, 104 U. S. 612, that, if a mandamus should be sought in this case, it would not lie, because no statute has ever made it the duty of the collector to do as required by the state. Of course, it has not been forgotten nor overlooked that there are cases where the production of private papers in the possession of third persons not parties to the litigation can be exacted, but this is generally where the litigant has a rightful interest in them. The rule has no application here. 1 Greenl. Ev. § 559; Am. & Eng. Enc. Law (1st Ed.) p. 257. Otherwise, the party is left to his own resources to obtain the paper, or to lay the foundation for secondary evidence of its contents. If the litigant has no right in or to the papers in the hands of the third person, nor any legal interest in them, it might possibly violate the fourth amendment of the constitution to force the latter to produce them by an unwarrantable seizure, actual or constructive. And in another connection, so far as the distillers' reports are concerned, Boyd v. U. S. might again apply.

It seems to the court, upon these considerations, that in refusing the demand made upon him, and for which he is now in custody, the petitioner, an officer of the national government, is discharging a duty imposed upon him by the laws of the United States and by his lawful superior officer, concerning the custody of the executive papers and private property of the United States committed to his official custody; that there is no law making it his duty to do otherwise than he did; and, therefore, that he is in the custody of the respondent in violation of the laws of the United States and of his rights thereunder, and should be discharged therefrom.

An offer was made to prove that it had been the custom of collectors, with the consent of the distillers, to give the desired information. The court held that such testimony, being objected to, was wholly immaterial, and could in no wise affect a case where neither the collector nor the distiller consented, and where the secretary and commissioner forbade. The petitioner is discharged.

GENERAL ELECTRIC CO. v. RAHWAY ELECTRIC LIGHT & POWER CO.

(Circuit Court, D. New Jersey. August 1, 1899.)

PATENTS—VALIDITY AND INFRINGEMENT—ELECTRIC RAILWAY CONTACT DEVICES.

The Anderson patent, No. 412,155, for an improvement in electric railway contact devices, consisting substantially in interposing metallic spring brushes between the forks of the trolley arm and the hub of the contact wheel, so as to encircle the spindle and bear upon the end of the hub, for the purpose of transmitting the current from the wheel to the trolley arm, construed, and *held* to show meritorious and patentable invention over the prior devices of the Heysinger patent, No. 359,607, and the Vandepoele patents, Nos. 396,310, 397,451, and 408,638; and also *held* infringed.

This was a suit in equity by the General Electric Company against the Rahway Electric Light & Power Company for alleged infringement of a patent for improvements in electric railway contact devices.

F. H. Betts and L. F. H. Betts, for complainant.
Charles E. Mitchell and R. C. Mitchell, for defendant.

KIRKPATRICK, District Judge. This is a suit in equity for an infringement of letters patent of the United States, No. 412,155, granted to Albert Anderson, and dated October 1, 1889. The bill prays for an injunction and accounting. The invention relates to that type of electric railways where the current is supplied to the car from a conducting wire suspended above the roadway, the electrical connection between the overhead wire and the car being maintained by means of a traveling contact device generally known as a "trolley." The trolley in general use consists of a long arm reaching upward from the car, upon which it is hinged or pivoted, to the overhead conducting wire, with the under side of which it makes contact by means of a wheel or roller journaled between forks on the outer end of the trolley arm. The invention of the patent in suit more particularly relates to certain metallic conducting brushes intervening between the end of the trolley wheel and the frame or fork in which the wheel is journaled for the purpose of maintaining a good electrical connection against them. These brushes are strips of spring copper, or other good electrical conductor, attached at one end to the trolley fork. At the other end, which is free, they bear with spring pressure on the end of the trolley wheel hub at a point between the said hub and the embracing frame or fork, and are so constructed that they embrace the shaft or spindle on which the trolley wheel revolves, and thus make contact against the entire end section of the wheel hub. This contact brushing device, which takes the electric current from the end face of the trolley hub, and furnishes a means of passage through the trolley pole, and eventually to the car motor, is the specific part of the invention in suit. It is set out in the eighth claim of the patent in suit as follows: "The combination with a trolley frame and trolley wheel of metallic conducting brushes, g^2, between the hubs of the trolley wheel and the said frame, to operate substantially as described." The defenses set up by the answer are lack of invention and complete anticipation, lack of patentable novelty in view of the prior art, and noninfringement on the part of the defendant.

An examination of the drawings, specifications, and claims of the patents cited by the defendant as being anticipatory of complainant's device reveals little that is pertinent to this suit. For the most part they have no relation to electric trolley contact devices, but deal in general with mechanisms for making electric contact between any rotating and stationary bodies by means of metallic spring conductors extending from the one to the other. Of those relating to trolley devices for electric railways it will only be necessary to consider the patent granted to Heysinger, No. 359,607, dated March 22, 1887, and those to Vandepoele, numbered 396,310, 397,451, 408,638, and dated, respectively, January 15, 1889, February 5, 1889, and August 6, 1889. The Heysinger patent is for a trolley running in an underground conduit, while those to Vandepoele relate to devices for trolleys running overhead in contact with electrically charged conductors. The

Heysinger device, shown in drawing 5 attached to the patent, consists of a trolley arm terminating in a forked frame, between the ends of which on the pin or shaft, W, the trolley wheel revolves. This wheel is so arranged as to engage and make contact with the underground conductor. The particular form of trolley wheel or roller claimed and shown is made in two parts. Each part is a disk of metal perforated in the middle, and with flanges to form a hub around these perforations, whereby to insure steady running on a small shaft inserted through them. The outward edges of these disks or rollers are also flanged, one upwardly and the other downwardly, so that they will form a grooved periphery and contact surface, in which the conductor may lie. The two sections of this split trolley are held together and are kept in pressing contact with the conductor by means of a light spiral spring inserted between one side of the trolley fork and the surface of one of the loose revolving halves of the trolley wheel. The only function of this spring, V, is to keep the two contact disks together, and give them gentle pressure upon the conducting cable. This alone is what is specified for it in the patent. There is nothing similar either in the purpose, construction, or use of the complainant's spring contact, g^2, and the Heysinger spring, V. They are only alike in that they are springs. In the Vandepoele patent, No. 396,310, the means employed for collecting the current from the rolling trolley contact wheel and conducting it to the trolley frame and arm, so that it may efficiently pass to and actuate the motor below, is relied upon as an anticipation. To collect and conduct the electric current, Vandepoele in this patent provides metallic spring fingers, one end being in contact with either the periphery or exterior lateral surface of the rolling contact wheel, and the other in metallic connection with the side plates or frame carrying the trolley wheel. By this means he seeks to obtain ample continuous conducting surface without necessitating its passage through the bearing of the contact wheel. This he no doubt accomplishes, but in so doing he has not anticipated the Anderson device. It is true, his object was to make electrical contact between a rotating and stationary body, but that alone was not the object of the Anderson patent. Devices accomplishing this broad purpose had been patented long before Vandepoele's attempt. There were particular results accomplished in and by the Anderson device that the Vandepoele design neither meant to nor could do. Apparently Vandepoele did not recognize the importance of certain peculiarities necessary to be observed in order to have a proper construction and placing of this contact spring on a trolley, and in failing to recognize them made no provision for improvements which such knowledge might have suggested. This is wherein Anderson differed from his predecessors. He observed certain defects, and successfully tried to remedy them. He made valuable improvements in the art as it then existed. These improvements are not anticipated by this Vandepoele device, as can be clearly seen by an examination of the drawings describing it. What has just been said in regard to this Vandepoele device is equally applicable to the devices set out in the other two patents to which reference has been made. In the patent No. 397,451 nothing

whatever is said concerning a spring contact for carrying electric current from the trolley wheel to the trolley arm. The only suggestion given that such might have been intended in this device is that in Fig. 3 of the drawings a diagram of a spring is shown, which might, perhaps, be used for such a purpose. However, this is only conjecture, and no evidence is given that such a spring was so used. But, whatever the use of the spring shown in the diagram may have been, it is not so placed or constructed that it can for any reason be considered an anticipation of the Anderson device. It is not in any particular an embodiment of Anderson's intended improvement to the art, and is therefore without weight in considering the patentability of Anderson's device. It needs but a careful observation of the apparatus set out in the remaining Vandepoele patent, No. 408,638, combined with a knowledge of what the requisites for a successful contact device are, and an understanding of the improvements sought by Anderson and allowed by his invention, to have it apparent that there is much difference between Vandepoele's contact device and the Anderson combination. There are differences in structure and arrangement of the two devices. The spring force is differently applied, the shape of the contacts different, as well as the point of contact between the trolley wheel and the contact devices. The want of similarity becomes more evident when we understand the needs of the art, what Anderson by his peculiar construction and improved contact arrangement did, and wherein the Vandepoele device failed.

Let us consider some of the requirements of a satisfactory trolley spring contact device. For proper working, the spring brush must transmit without the slightest interruption a current of electricity of great power, without occasioning any arc between the wheel or spring contact or trolley frame or shaft. If the contact device be so constructed that there are any small or exposed projecting parts, these parts are certain to be hit by the arc, and fused or damaged, or be stripped off by the wire when the wheel becomes derailed and flies up beyond the conductor under the influence of the force exerted by its operating spring. The brush must also bear on the wheel with sufficient pressure to maintain the electrical contact, and keep the surface clear of dirt and corrosion, while it shall not have sufficient pressure to become heated by friction, or interfere with the free, smooth movement of the wheel. It must have a sufficient area of contact to transmit the current under all possible conditions of service. It must be fully protected against stray arcs and against mechanical injury during shipment, during its running through switches, or when the wheel is derailed. It must also be maintained in position against the hub of the wheel despite any drag or twisting tendency. The protection of the brushes is of particular importance. To illustrate: In an ice storm there is a continuous play of the arc around the wheel, and, if it strikes the spring of the brush, it at once draws its temper, and renders it useless. The location of the brush is not only important for their protection, but also for the purpose of contact without causing frictional injury to the spring or wheel under the high speed of operation. It must not retard the

wheel movement. In these respects the trolley contact devices prior to Anderson's were of unsatisfactory construction. Heated journals, melted and untempered springs, broken contact devices, inefficient contact surface, and general lack of adaptability to the work required were some of the problems to be solved by Anderson in his effort to produce a successful contact. How does Anderson's apparatus eliminate these defects in prior machines? First, the spring, g [2], is held in place by the rivet at one end and by the eye embracing the spindle at the other. Hence there is no danger of these springs being bent outwardly, and thereby fail to bear on the hub of the trolley, or so as to come in contact with a switch box or any external object. It is confined simply and securely in its proper position between the hub of the trolley and the frame. Moreover, the spring contact does not bear on the periphery of the wheel, nor yet on the periphery of the hub, but on the end of the hub, whereby there is a minimum of speed of the wheel on the brush, and a minimum degree of retarding action of the brush on the wheel. Likewise the area of contact is a flat surface, not a cylindrical one with a tangential brush thereon. The brush adjusts itself constantly to this surface, and the range of play of the extremity of the brush is very small. The contact surface cannot be roughened by arcs, as would be the case of a spring bearing on or near the periphery of the wheel. By reason of its location between the hub of the wheel and the frame, the springs are protected against all mechanical or electrical injury. The springs, not being exposed, do not get bent back or stripped off. They cannot be injured by striking the sides of the switch or crossing boxes, nor by coming in contact with cross wires when the trolley is derailed. Electrically speaking, they are absolutely protected against injury by arcs, since no arc generated around the trolley would take the path of the contact springs. It follows from what has been said that the specific combination devised by Anderson and set out in the claim in suit is both novel and possessed of great utility. There was nothing in the teaching of the prior art that rendered this combination obvious to one skilled therein. The prior patents do not teach that the spring should be located and arranged in a protected position between the frame and the end of the wheel hub. It was rather the obvious thing to locate the conducting brushes or springs upon the outside of the trolley frame, and be so arranged that they should not bear against the end of the hub of the trolley wheel. Anderson, by the combination of the claim of the patent in suit, departed from the teachings of the prior art, and did exactly what was not the obvious thing. The fact that his combination was so successful, and so well overcame the difficulties which had stood in the way of making a satisfactory contact device, while yet so at variance with the ideas embodied in previous patents, and that the principle has been followed by late inventors, seems to be satisfactory evidence that it required invention. In my opinion, the claim of the patent is valid. Does the defendant infringe? The defendant's device consists of a Y-shaped trolley head connected at the end by a small shaft or spindle. On this shaft or spindle, and between the ends of the trolley arm, a trolley wheel or roller rotates to collect current from an overhead

conductor. For the purpose of carrying the electric current from the wheel or roller to the trolley arm, there are two metallic contact springs located between the ends of the roller and the trolley arm, pressing one against each end section of the roller, and embracing the shaft on which the roller revolves. These springs have one end in metallic connection with the sides of the trolley frame and the other in electrical contact with the end or face of the hub of the roller or contact wheel. It will be perceived that the defendant's device embodies the elements and combination of claim 8 of the Anderson patent in suit, No. 412,155.

Element for element, the defendant's apparatus and complainant's device are alike. Each has the rotating trolley wheel or roller, both having the same function. Each has the forked trolley arm supporting on a shaft between their ends the rotating trolley wheel or roller. Each has the metallic spring contact electrically connecting the rotating wheel and the trolley arm, and in each this spring contact is located between the ends of the wheel hub and the trolley fork making contact against the hub face or end section of the trolley or roller, and embracing the shaft or spindle in which the roller rotates. The defendant's device offers the same relative parts of its roller as a contact surface to the spring contact as does the complainant's device, and it has the same kind of spring contact-making connection with said surface, and similarly carrying current to the trolley arm. In my opinion, the contact devices are alike in purpose and construction, and the elements and combination of the one are the elements and combinations of the other. There should be a decree for complainant.

COVERT v. TRAVERS BROS. CO.

(Circuit Court, S. D. New York. August 9, 1899.)

1. PATENTS—DEFENSES—LACHES.
   A delay of 14 years in bringing suit, while the owner of the patent knew that the defendant was continually engaged in manufacturing and selling an infringing device, is a bar to a decree for an accounting.
2. SAME—ROPE CLAMPS.
   The Covert patent, No. 208,157, for an improvement in rope clamps, consisting in connecting the ends of two ropes by clamping them, under extreme pressure, with one or more open rings of metal, is void because of anticipation and lack of novelty and invention.

This was a suit in equity by James C. Covert against the Travers Bros. Company for alleged infringement of a patent for an improvement in rope clamps.

Charles G. Coe, for complainant.
Briesen & Knauth, for defendant.

TOWNSEND, District Judge. To the bill of complaint herein, alleging infringement of the first claim of patent No. 208,157, issued to complainant September 18, 1878, for an improvement in rope clamps, defendant, at final hearing, has interposed nine defenses, which will be considered and disposed of in their order.

Said claim is as follows:

"The herein-described method of connecting one part of a rope adjacent to another part, or the ends of two ropes, by clamping the same with one or more open rings of metal, under extreme pressure, as set forth."

On demurrer, Judge Coxe held that the second claim was manifestly invalid on its face, by reason of want of patentable novelty. Covert v. Travers Bros. Co., 70 Fed. 788. The patent covers the method of holding two pieces of rope by pressing them together with a ring of stiff metal wire. The patent expired in 1895, two months after this suit was brought.

The first defense, of laches, is established by the testimony of the complainant himself, who admits that he knew defendant was manufacturing the alleged infringing device for 14 years before he brought suit. Such laches are a bar to a decree for an accounting, and there can be no injunction, because the patent has expired. McLean v. Fleming, 96 U. S. 245; Kittle v. Hall, 29 Fed. 508.

The second defense, that the patent has already been held invalid, is both admitted and proved. In 1888, upon final hearing before Judge Wallace, a bill alleging infringement of the patent in suit was dismissed for want of novelty; and it is not claimed that there is any material difference as to the facts in the present case, or that the learned judge made any mistake of fact or law.

The third defense, of anticipation, is proved by various prior patents and printed publications showing metal eyelets, wire or flat strips, and clasps and clamps which embody substantially the means covered by said second claim.

The fourth defense, of denial of invention, is necessarily established by the foregoing facts; and the court may take judicial notice that the alleged invention is nothing more than the application to a rope or cord of the devices from time immemorial applied to garters, suspenders, curtain cords, and tag strings.

It is unnecessary to discuss the further defenses of insufficient specification, nonpatentability for other reasons, noninfringement, and abandonment.

The writer has recently had occasion to condemn the practice of speculating on chances in patent causes after an adverse decision, by a new suit before a new judge, instead of by a disposition of the first suit by appeal. It is not necessary to point out the application of those remarks to this patent for a mere mechanical device utterly devoid of merit and of inventive ingenuity. Let the bill be dismissed.

THE WILLOWDENE.

(District Court, E. D. Pennsylvania. September 14, 1899.)

Nos. 29, 30.

SHIPPING—LIBEL FOR BREACH OF CHARTER.

The master of a British vessel, under a time charter expiring April 26, 1898, by instruction of the owner, refused to load a cargo at Philadelphia for Matanzas, Cuba, on the ground that the voyage could not be made before the expiration of the charter. Before the vessel could have been loaded war was declared between the United States and Spain, the port of Matanzas was blockaded, and the vessel would not have been cleared for that port. *Held* that, inasmuch as no actual damage was sustained

by the charterer, a libel against the vessel for breach of the charter would not lie, and the ground on which the master's refusal to load was based became immaterial.

In Admiralty. These were suits in rem against the British steamship Willowdene for breach of charter.

Biddle & Ward and J. Rodman Paul, for libelants.

Convers & Kirlin and Henry R. Edmunds, for respondents.

McPHERSON, District Judge. The Willowdene is a British steamer, owned in Newcastle. On January 18, 1898, her New York agents chartered the vessel in that city to Daniel Bacon, under a contract whose terms need not be set out in detail. It is enough to say, in general, that the charter required the vessel to be delivered to Mr. Bacon at a port in the United States north of Hatteras, and that the term of hiring was three calendar months from the date of delivery. She was thus delivered upon January 26th, and thereupon began to carry cargo to and from the West Indies. Two voyages were made between January 26th and April 13th, and upon the last-mentioned date the vessel arrived at New York with an inward cargo of sugar. Upon the second outward voyage she had carried coal from Philadelphia to Matanzas and Havana under a subcharter to the American Export Coal Company, and upon March 16th a second subcharter to the coal company was made by Mr. Bacon, providing for the carriage of another cargo to Havana or Matanzas only, or to both ports, at the company's option. The master of the steamer learned of this second subcharter before he left Matanzas on the return voyage to New York, and no doubt communicated the fact to the owners in England. At all events, shortly after the ship had returned to New York, probably on April 14th or 15th, the owners cabled their New York agents that they would not allow another trip under the charter for less than £950 per month, this sum being an advance upon the rate of hiring originally agreed upon. It will perhaps explain the present dispute more clearly if the correspondence between the parties be quoted in some detail.

On April 15th, Bennett, Walsh & Co., the steamship's agents in New York, wrote the following letter to Mr. Bacon:

"April 15, '98.

"Daniel Bacon. Esq., New York—Dear Sir: We have to-day received the following cable from owner of Steamship Willowdene, reading: 'Willowdene expires within ten days. Owner will not allow another trip under £950 per month, present charter. What are you going to do about it?' We take this to mean that the owner wants £950 after expiration of present charter. Kindly let us have your opinion on this matter, so we may cable owners immediately, and oblige.

"Yours, truly, Bennett, Walsh & Co."

To this letter Mr. Bacon replied on the same day:

"New York, April 15, 1898.

"Messrs. Bennett, Walsh & Co., Agents, Br. S. S. Willowdene, City—Dear Sirs: Duly replying to your favor of even date, re charter of S. S. Willowdene, I have to say that the charter of this vessel expires on the 26th inst., at 9 a. m. You are quite aware that the question of when a charter terminates, under such circumstances, has been brought up several times, and it has invariably been decided that the time charterer has the right to dispatch a boat on any reasonable voyage, up to the time of expiration of the charter. I calculate to have the vessel leave Philadelphia on the 18th inst. for

a quick trip to Cuba and return, and when I fixed her for that voyage I considered that I had a perfect right to send the boat on such a trip as was necessary to fill out my original time on the boat. I must take exception to the owners' right to change the rate of hire money, under any circumstances. Either I have no right to send the boat at all, which contention I dispute flatly, and cannot entertain, or else the original rate of hire governs any overrun of the original charter.

"Yours, truly, Daniel Bacon."

The agents responded as follows:

"April 15, 1898.

"Daniel Bacon, Esq.—Dear Sir: As agents of the owner of the steamship Willowdene, and in behalf of owners, and in compliance with their instructions, we notify you that the charter party of this steamer expires April 26, and the owners protest against your sending the steamer to Philadelphia to-morrow to load coal for Cuba, as you cannot complete the voyage at that time, and they hold you liable to the extent of damages, and refuse to consent to a breach of charter unless rate is made £950 per month for the extra time over what the vessel is chartered for.

"Yours, truly, Bennett, Walsh & Co."

Upon April 16th, Mr. Bacon repeated the contention of his previous letter:

"April 16, 1898.

"Messrs. Bennett, Walsh & Co.—Dear Sirs: Replying to your favor of yesterday, in which, on behalf of the owners of the S. S. Willowdene, you protest against my sending the vessel to Philadelphia to load coal for Cuba, I would say that it is absurd for the owners to contend that I have not this right, as the vessel is certainly under my charter, at least until the 26th inst. You will, of course, acknowledge that on a low or falling market, were I to attempt to redeliver the ship one day before the expiration of the 3 months, that owners would, of course, refuse to accept my plea that time was almost up. I can only further say that, if the owners in any way prejudice my interests, I will hold them, and the ship, strictly accountable for any damage which I sustain, and, of course, I expect to be responsible to the owners for any liability I may incur of any kind, under our present charter.

"Yours, truly, Daniel Bacon."

Upon the same day the master wrote the following letter to Mr. Bacon:

"Dear Sir: Replying to your letter of the 15th inst., to my agents, I beg to advise that I am not informed of any case in which it has been decided that the time charterer has the right to dispatch a boat on a voyage on which she cannot be at least on the way back to her port of return delivery at the time of the expiration of the original term. You have advised me by telephone to-day that you do not think the discharge of the ship will be completed before Monday, the 18th inst. She could not, therefore, reach Philadelphia before the 19th, and, judging by my experience on the two previous voyages on which I have loaded coal under your charter, I could not leave Philadelphia before the 21st or 22d. By leaving on the 21st or 22d, we would reach Matanzas about the 27th, as six days must be allowed for the passage. On my previous voyages, it has taken 11 days to discharge a full cargo of about 3,100 tons in Havana, and 8 days to discharge 2,000 tons in Matanzas. Basing the probable despatch for this voyage on the experience of the previous voyages, the discharge in Matanzas would not be finished before the 8th or 9th day of May, and, if the ship returned in ballast, she would probably reach New York about the 14th or 15th of May. If we brought a return cargo of sugar, from seven to ten days would be used in the loading of it, at the rate of the previous voyage, which would retard our arrival here until about the 22d to 25th of May, or nearly a month beyond the period of your present charter. On the last round voyage, you will recall that we sailed from New York on the 8th of March, and from Philadelphia on the 10th, and only arrived back in New York on the 13th of April. If this length of time were consumed on another voyage, our return here, assuming

that we left on the 18th of April, would be about the 24th of May. My owners consider it would be unreasonable for you to detain the ship so long beyond April 26th, at 9 a. m., the date on which the charter party dated 18th of January, 1898, will expire. I am instructed, therefore, to decline to enter upon another voyage to Cuba under the existing contract.

"Yours, very truly, Wm. Anderson, Master."

Meanwhile the cargo was being discharged, and, in anticipation of the completion of this work, Mr. Bacon gave the master of the vessel the following instructions on Friday, April 15th:

"April 15, 1898.

"Capt. Anderson, S. S. Willowdene—Dear Sir: I expect to get the Willowdene under way for Philadelphia, Monday, and you should therefore be up to Philadelphia, and alongside of the coal wharf, if possible, by Wednesday morning early. The vessel will load at Greenwich, as before. If the Willowdene gets a fair start Wednesday morning, shippers expect to finish her loading in time for her to sail Wednesday. Considering the possibility of trouble between the governments of Spain and the United States, before your ship can get away from Cuba, I wish to lay out the following plans, in the event of communication being cut off between myself and you after you have left Philadelphia: First, as to collection of freight: As before, we cannot, of course, demand payment of freight until after the ship finishes discharging, under ordinary circumstances; but if there is any way of getting it, or any part of it, in advance, I will trust you to take the necessary steps. If upon the vessel's discharge, should war have broken out previously, the only way to do, I suppose, is to try and get the cash in hand, and keep it on board the ship until you return. I will write Messrs. D'Costa on the subject, so that they will work with you. Then, should the ship be unfixed for homeward cargo, after trouble had commenced, I will leave the chartering in the hands of yourself and Messrs. D'Costa. The last rate paid on sugar was 13 cents per 100 pounds; 10 cents per 100 pounds would give me a small profit on the ship. Of course, you would do the best you could as regards getting a good freight. If it should be impossible to get any homeward cargo, you will, of course, get clear of Cuba as soon as possible, and I would suggest your touching at the nearest port, say Key West, for orders, wiring me your arrival immediately. With nothing further to mention, I am,

"Yours, truly, Daniel Bacon.

"Please mail or deliver letters herewith upon arrival in Matanzas."

The dispute having reached this stage, counsel were consulted by both parties,—indeed, the consultation may have been somewhat earlier, but the precise date is not important,—and the probability of an appeal to the courts became evident. Counsel for the vessel prepared to enter security in case a libel should be filed, and agreed that she should not leave New York until security was given. On April 18th, the following letters were exchanged:

"Apl. 18, '98.

"Daniel Bacon, Esq.—Dear Sir: S. S. Willowdene: I have cabled my owners in pursuance with my letter to you of the 16th, and, although the boat is chartered until the 26th, they are willing (so you do not pay dead hire) to take the boat as soon as she has finished discharging her cargo. But, as I notified you on the 16th, they will not allow the boat to proceed on another voyage to Cuba, as it would be in violation of charter party, for reasons stated. The charter party expires on the 26th; to-day is the 18th, which leaves but eight days between to-day and the expiration of present charter to proceed to Philadelphia and load for Cuba; and, practically speaking, the charter party would be about finished before I left the United States.

"Yours, truly, Wm. Anderson, Master."

"April 18, 1898.

"Capt. Anderson, Br. S. S. Willowdene—Dear Sir: Replying to your various favors re withdrawal of your vessel from my time charter, please note that I

cannot allow any of your contentions. Kindly repair to this office promptly, to enable me to clear your vessel for Philadelphia. She will be discharged this evening, and I want to get her off to sea. If you violate our charter in any way, such as withdrawing the ship, I will sustain damages, and the ship will also be liable for any damage sustained by the subcharterers (the shippers of her coal cargo), and I must here reiterate that ship and owners will be held strictly accountable for all losses to me of any kind whatsoever.

"Yours, truly, Daniel Bacon."

"April 18, 1898.

"Capt. Anderson, Br. S. S. Willowdene—Dear Sir: As you have declined to clear the ship for Philadelphia this afternoon, as requested by me, I beg to advise you that, should any loss of time result through this refusal, I shall hold the ship responsible, and deduct the time lost.

"Yours, truly, Daniel Bacon."

"April 18, 1898.

"Daniel Bacon, Esq., Messrs. Alexander & Ash, 1 Broadway, New York—Dear Sirs: S. S. Willowdene. We have just been informed by Messrs. Alexander & Ash that they propose to file a libel forthwith against this vessel, and stating that the master has to-day refused to go to Philadelphia under the pending charter party. This is to inform you that no such refusal has been made, and that the captain is now and has at all times been ready to proceed in due course to Philadelphia or to any other port within the proper terms of the charter party. He has been in consultation with us on this subject, with the understanding that we were to furnish security to a libel that would be filed by your proctor, Mr. Macklin, for a refusal of the vessel to proceed to Cuba, and there never has been any issue between us with respect to her proceeding to Philadelphia. We are prepared to furnish you security to a libel demanding that the ship shall proceed on the voyage to Cuba heretofore contemplated by you, and the only reason the vessel has not cleared to-day is that it was understood that proper security must first be given, before she would be permitted to leave this port, and it has been in satisfaction of this understanding that she has remained. Under these circumstances, the master is quite willing and hereby tenders his ship for a voyage from here to Philadelphia, and will clear and proceed for that port at the earliest opportunity, upon your instructions and waiver of the requirements for security before departure, which has heretofore been the understanding between the attorneys for the respective sides. You will take notice that Mr. Bacon's letter of this date was not received by the master until it was too late to have cleared, as, although the custom house remained open until 4 o'clock, the British consul's office closed at 3 p. m., to which fact the master directed the attention of Mr. Stoddard on his conversation with him after 3 p. m. to-day.

"Yours, very truly, Convers & Kirlin, Proctors for Willowdene."

To the last letter Mr. Bacon replied on April 19th:

"Messrs. Convers & Kirlin, S. S. Willowdene—Dear Sirs: I have duly to acknowledge the receipt of your valued favor of the 18th inst., directed to myself and my attorneys, and the contents of same have my most careful attention. In regard to your various little legal excuses regarding the clearing of the ship, allow me to say that I had no use for them whatever, and, in fact, do not take them seriously. The real state of the case, in my opinion, is as follows: The owners of the vessel, on account of the increased value of time-chartered boats, are trying to extort an additional £100 hire from me, in a case in which they must know well they are morally and technically in the wrong, and I was surprised at your entertaining the case. I presume I have been selected as the party to which a test case is to be applied, and I, on my part, shall use my best efforts to make the owners of the vessel pay for their unwarrantable interference. Probably you do not intend to make misstatements, but I am quite ready to produce my witnesses to show that the captain did actually decline yesterday, and, furthermore, would state that on Saturday he understood fully that he was to clear on Monday morning, and would have done so had owners attended to their own business. The ship is now cleared, and ready to sail for Philadelphia, and will load there and sail

according to my charter party, unless I learn meanwhile of some better reason for her not so doing than has, as yet, been presented to me.

"Yours, truly, Daniel Bacon."

There has been some controversy concerning the delay of the vessel in leaving New York. I do not think that such delay as may have occurred should have any influence in the decision, but, in any case, I see no fault in the vessel. Her cargo was not discharged until 5 o'clock in the afternoon of the 18th. She did not receive her papers from the British consul until 10 or 11 o'clock in the morning of the 19th, and she sailed between 2 and 3 o'clock on the same day. She reached Philadelphia about half past 7 on the morning of the 21st, and, in obedience to the instructions of Mr. Bacon's agents in that city, proceeded to pier 4, at Greenwich. Thereupon the master addressed the following inquiry to the agents, and also to the American Export Coal Company:

"Gentlemen: In view of the fact that the charter party between the steamer and Daniel Bacon will expire by limitation at 9 a. m. on the 26th of April, I desire to know before taking any cargo on board what port it is destined for. Yours, very truly, Wm. Anderson, Master."

To this letter of the master these replies were sent upon the same day:

"International Coal-Mining Co.

"Philadelphia, April 21, 1898.

"Mr. William Anderson, Master Steamer Willowdene, Phila.—Dear Sir: Replying to your favor of date, the coal to be loaded into the steamer Willowdene is destined for Matanzas, Cuba.

"Respectfully yours, Henry W. Lambirth, President."

"Philadelphia, April 21, 1898.

"Captain Anderson, Br. S. S. Willowdene—Dear Sir: In reply to your communication of even date, we would state that the time charterer, Daniel Bacon, of New York, has given us instructions to have your vessel load a full cargo of coal, which is ready and waiting, and that we are to clear the vessel for Matanzas, Cuba. We hand you herewith copy of charter under which said cargo is to be loaded, and insist upon your commencing to load at once, or your steamer will be held liable for all losses, damages, etc., arising from your refusal to carry out contract.

"Yours, truly, I. Westergaard & Co., Agents for Daniel Bacon."

Whereupon the master rejoined to the agents and the company as follows:

"Philadelphia, 21 April, 1898.

"Gentlemen: Having received notice from you that the cargo ordered to be laden on board my steamer is bound for a port in Cuba, I beg leave to refer to my letter of April 16th, to Mr. Daniel Bacon, the charterer of this steamer, and to inform you that I decline to load any cargo of coal for a port in Cuba, upon the grounds stated in that letter.

"Yours, very truly, Wm. Anderson, Master."

The coal company answered, insisting that the vessel should proceed to load:

"New York, April 21, 1898.

"Captain S. S. Willowdene, Mr. Wm. Anderson, Philadelphia—Dear Sir: We beg leave to advise you that we shall hold your steamship and owners liable for any damage incurred because of noncompliance with the conditions of contract entered into between the American Export Coal Co. and Mr. Daniel Bacon, the chartered owner of your steamer, and we shall take such steps as are necessary to enforce our rights. You will please proceed to load at once, as the coal is standing at the piers.

"Yours, truly, American Export Coal Company,

"Henry W. Lambirth, Vice President."

This closed the correspondence, except that Mr. Bacon telegraphed to his agents during the day, inquiring whether the master objected to all West India ports, or only to Cuba, and in reply to the inquiry the master wrote the following letter:

"S. S. Willowdene, Philadelphia, 21 April, 1898.

"Messrs. I. Westergaard & Co.—Gentlemen: Referring to telegram read to me by Mr. Butler inquiring whether I object only to Cuba or to all West India ports, I beg leave to say that if you will notify me which port you wish to send the ship to in West Indies I will then give you a reply.

"I remain, gentlemen, yours, respectfully,

"Wm. Anderson, Master."

No answer was given to this communication, and nothing further seems to have passed between the parties. On April 22d, Mr. Bacon attached the vessel, and on April 23d the coal company took similar proceedings. The marshal's custody continued until noon of April 26th, when security was entered, and the ship was released.

The libelants' position is clearly indicated by the foregoing correspondence. In brief, it may be stated thus: Under a time charter, the vessel may be sent upon a voyage to any port permitted by the contract, at any date before the expiration of the charter, although it is certain that the voyage cannot be finished until after the charter expires; or, at least, she may be sent upon a voyage to the same ports at which she has been previously trading under the charter, or upon a voyage not longer than those which she has previously completed, although it is certain that the voyage cannot be finished until after the charter expires. The claimant disputes this position, and contends that under such a charter the vessel cannot be sent upon a voyage from which it is certain she cannot return until after the term of hiring has expired. The question is important, and not easy to answer. It is rendered more difficult in the present case, because the charter now before the court contains conflicting provisions, which no construction can fully harmonize. There is a question also concerning the existence of a custom in the port of New York, that may affect the rights of the parties under a time charter; and a third question concerning the right of the coal company to file a libel in rem, no cargo having been received under the subcharter. But I pass these questions without deciding them. They may arise hereafter before the circuit court of appeals, but it seems to me to be useless for the district court to consider and decide them, if I am right in believing that both libels must be dismissed for a reason that is alone sufficient.

This reason is the breaking out of war between Spain and the United States on April 21st, followed immediately by the blockading of the ports of Havana and Matanzas, whereby it became impossible to undertake the voyage upon which the libelants were insisting. The facts are well known. On April 20th, congress passed a resolution demanding that Spain should at once relinquish its authority and government in the island of Cuba, and withdraw its land and naval forces therefrom; and the president was directed and empowered to use the entire land and naval forces of the United States, including the militia of the several states, to carry the demand into effect. This resolution was communicated to the Spanish government on the same day, and diplomatic relations between the two countries were

immediately broken off. This breach was recognized by both nations as a state of war, and accordingly when congress, on April 25th, made the formal declaration, the statute announced "that war has existed since the 21st day of April, A. D. 1898, including said day." On April 22d, the president proclaimed a blockade of the north coast of Cuba, between Cardenas and Bahia Honda, thus including Havana and Matanzas; and the blockade was at once made effective, and continued for several months. The collector of the port of Philadelphia would have refused to clear the Willowdene for Havana or Matanzas on April 21st, if a clearance had been applied for on that day, and of course there would have been a similar refusal afterwards, as long as the blockade remained in force. These facts, I think, fall within the clause of the charter concerning "restraint of princes, rulers, and people," and excused the ship from undertaking the voyage in controversy. By the declaration of war, it became unlawful for an American citizen, whether an individual or a corporation, to trade with the enemy, even in a neutral ship; and, even if the trade had been lawful, the charter could no longer be carried out, because the ship could not enter the blockaded ports. There was no alternative order to go elsewhere. The master was directed to sail for Cuba,—a particular port of that island being specified,—and when he declined to undertake such a voyage no further instructions were given.

I do not understand the libelants to deny the general propositions just stated. Their answer is that this defense cannot now be taken, because the master's refusal to go to Cuba was put distinctly upon a different ground, and to this ground they insist that the ship must now be confined. The answer might be sound enough in many cases, but I do not think it is sufficient in the present controversy. Assuming that the contract between the parties was broken by the refusal of the master to sail for Cuba, upon what theory are the libelants to recover damages? Manifestly, upon the theory that the voyage could have been made, save for the master's wrongful conduct, and therefore that the charterers have been deprived of the profits that would otherwise have come into their pockets. But this theory breaks down entirely in the face of the facts. Even if the captain had agreed to go, the voyage could not have been made, and, of course, no profit would have accrued therefrom to either charterer. To allow a recovery of profits that could never have been realized, merely because the master put his refusal upon one ground rather than upon another, seems to me impossible. In the situation now before the court, it is the fact of refusal that is important, and not the master's reason therefor. When he refused, a state of war existed, and the contemplated voyage was unlawful, the charterers being American citizens; and, before the cargo could have been taken on board, the unlawful voyage had also become impossible, an effective blockade having been established. The refusal had abundant support, therefore, and I see no legal or equitable reason to estop the ship from setting up now the complete justification that actually existed, although another ground for the refusal was then relied on. The libelants were not injured in any degree by the master's ignorance that war existed, and by his consequent silence upon this point.

In each case the libel will be dismissed, with costs.

GRIFFING v. A. A. GRIFFING IRON CO.

(Circuit Court, D. New Jersey. September 18, 1899.)

CORPORATIONS—SUIT BY STOCKHOLDER—GROUNDS FOR APPOINTMENT OF RECEIVER.

Proof of usurpation, ultra vires, fraud, or gross negligence on the part of the directors will alone justify a court in appointing a receiver for a solvent corporation at suit of a stockholder. The fears of the complainant that a suit brought by the corporation against an officer will not be diligently prosecuted, owing to the relations of the parties, will not warrant the appointment of a receiver to take charge of such suit, where no laches on the part of the corporation is shown.

This was a suit in equity by a stockholder in a corporation for the appointment of a receiver, and to wind up the business of the defendant. On rule to show cause against the appointment of a receiver pendente lite.

Theodore F. Hamilton and Edward S. Griffing, for complainant.
William L. Edwards and Clifford W. Hartridge, for defendant.

KIRKPATRICK, District Judge. The complainant in this cause is a stockholder in the defendant corporation, and as such asks the court to appoint a receiver to close its business, because it is insolvent. The charge of insolvency not only is denied under oath by the officers of the company, but an inspection of the figures set out in the complaint fails to substantiate the charge. The allegation in the bill is that, after the payment of all its just indebtedness, there will remain $60 per share to be distributed to shareholders. The bill also sets out that there is a certain suit pending in the courts of the state of New Jersey, which has been brought by direction of the board of directors against the present vice president and general manager of the company, to recover certain moneys which have been, as is charged, fraudulently appropriated. The complainant says that, on account of the relation of the parties, he fears this suit will not be diligently prosecuted, and he therefore asks the appointment of a receiver to take charge of the same. The answering affidavits show no laches on the part of the company's solicitors in the prosecution of the suit. No term of court at which it could be heard has been allowed to pass by. The pleadings have been promptly filed, and no extension of time asked for or given by either party. There is no denial of facts. The questions raised are purely legal, and the interference of officers not probable. So far as appears, the case is progressing regularly to final hearing. No need is shown for the interposition of the court to protect the interests of creditors or stockholders from any breach of trust by the directors. Such necessity should clearly appear to warrant the court in assuming the management of a solvent corporation, and take the conduct of its business out of the hands of the directors, to whom it has been intrusted by a majority in interest of the stockholders. Proof of usurpation, ultra vires, fraud, or gross negligence alone would justify such action. The presumption is that the directors will act in good faith, and for the best interest of the company, and this presumption is not overcome by the

fears of a stockholder, unsupported by facts, that a contrary course of conduct will be pursued by them. There is no proof of dishonest purpose on the part of directors in the conduct of the suit already begun, and no sufficient reason shown why a receiver should be appointed pendente lite. The rule to show cause will be discharged.

JACK v. WALKER et al.

(Circuit Court, S. D. Ohio, W. D. June 8, 1899.)

TAXATION—MORTGAGES OWNED BY NONRESIDENT—OHIO STATUTE.

Debts owned by a nonresident of the state of Ohio, evidenced by notes and mortgages on real estate within the state, are not taxable there, under Rev. St. Ohio, §§ 2731, 2734, 2735, unless the possession and control of the securities for the purpose of investment and reinvestment have been surrendered by the owner to a resident agent.[1]

In Equity.

On the 28th day of February, 1895, the appellee, John V. Jack, filed his bill in chancery in the United States circuit court within and for the Southern district of Ohio against the appellants, Isaac N. Walker, auditor, and Charles H. Eulass, treasurer, of Warren county, Ohio. In his bill, Jack averred that the matter and amount in dispute, exclusive of interest and costs, exceeds the sum or value of $2,000; that he is and has been a resident of the state of New York for more than eight years last past; and that the defendants, Isaac N. Walker and Charles H. Eulass, are residents and citizens of the state of Ohio; that he is the owner of certain moneys and credits evidenced by promissory notes secured by mortgages upon real estate in Warren county, Ohio; that Isaac N. Walker is auditor, and Charles H. Eulass is treasurer, of said county; that the auditor is about to place on the tax duplicate of said county and assess against Jack the taxes about to be levied on his moneys and credits to the amount of $297,794. He further averred that the auditor is about to assess illegally against Jack taxes on the above-described moneys and credits, and to certify the same to the treasurer for collection, and that the treasurer is about to collect the same, without authority of law. A restraining order was prayed for and allowed. Defendants filed a general demurrer to the bill, which was overruled, and they thereupon filed their answer to the bill. In their answer, defendants admitted the averments regarding the citizenship of defendants, the nonresidence of Jack, and official capacity of defendants, as set forth in the bill; that Jack owned the moneys and credits described in the bill, and that the same were evidenced by notes secured by mortgages on real estate in Warren county, Ohio; that defendants were about to list for taxation the moneys and credits above described, and that they were about to levy and collect such taxes as should be assessed against the same. Defendants denied that the taxes so about to be assessed, levied, and collected by them were illegal, and they further denied all manner of unlawful acts and proceedings charged in said bill. They further averred in their answer that said moneys and credits specified in complainant's bill during said years were invested, loaned, and controlled within the county of Warren, and state of Ohio, by one George W. Carey, the agent of complainant, who was during all said years a resident of said county and state. Complainant filed the usual replication. The case was tried upon the evidence introduced by the parties. For former reports, see 79 Fed. 138; 31 C. C. A. 462, 88 Fed. 576.

---

[1] As to taxation of intangible property of nonresidents in general, see note to Walker v. Jack, 31 C. C. A. 467.

Paxton, Warrington & Boutet and Wm. F. Eltzroth, for complainant.

Wm. McDonald and George Burr, for defendants.

CLARK, District Judge (after stating the facts as above). Only a single narrow question is open as the case comes back here. Upon the whole case I conclude that the money and credits have not been surrendered to the control of Carey so far as to give a situs for taxation in Ohio. It is not necessary to refer to the cases examined. Carey's connection with the loans was rather in the way of clerical aid than as agent in possession and control for investment and reinvestment. Jack does not at any time appear to have surrendered control or the right to possession, such as an agent must have to give the credits a tax situs. It is not to be doubted. I think that the legislature of Ohio might fix the situs of an investment like these mortgages in Ohio for the purpose of taxation. But even under the dictum which the court of appeals feels disposed to respect, it is not credits in the hands of Carey, or under his control. The truth is that the legislature has never attempted in terms, nor by any fair implication, to tax securities like these at all, and I have no doubt that surprise would be felt at such a construction of the statute if ever adopted when the point calls for a decision. I decide no question except the single one left open by the court of appeals, and that is decided in plaintiff's favor. Whether plaintiff is a citizen of Ohio or New York is, of course, not touched, but it is apparently a far more serious question than the one now disposed of. Decree for complainant.

SINSHEIMER et al. v. SIMONSON et al.

(District Court, D. Kentucky. September 20, 1899.)

No. 108.

BANKRUPTCY—PETITIONING CREDITORS—ESTOPPEL.

Where a debtor made a general assignment for the benefit of his creditors, and the assignee qualified and brought a suit in the proper state court for the settlement of the trust under the direction of the court, and within four months thereafter certain creditors filed a petition in involuntary bankruptcy against the assignor, alleging such assignment as an act of bankruptcy, *held*, that they were not estopped to maintain such petition on any or all of the following grounds: (1) That, having knowledge of the assignment and of the acts of the assignee therennder in conducting the business and selling the stock on hand, they delayed instituting proceedings for two months; (2) that, pending a proposition for compromise, they sold to such assignee for cash small bills of goods to replenish the stock and make it more salable; (3) that they submitted to the assignee, at his request, unverified statements of their claims, for the specific purpose of comparing the same with the entries in the insolvent's books; (4) that an order made by the state court for the sale of the assignor's goods was submitted to the attorneys for the said creditors, and by them indorsed "Seen."

In Bankruptcy. Petition for adjudication in involuntary bankruptcy.

Kohn, Baird & Spindle, for petitioning creditors.
M. A., D. A. & J. G. Sachs, Humphrey & Davie, and A. E. Wilson, for respondents.

EVANS, District Judge. This court in March last, for reasons stated in the opinion then announced (92 Fed. 904), refused to permit the filing of the answer then tendered by the defendants. The time for answering had previously expired, and the court, upon that as one of the grounds and in the exercise of its discretion, thought the answer should not be filed. This discretion was largely influenced by the view that the answer did not state a defense, and possibly by some suspicion that its averments were exaggerated. Overruling this exercise of discretion upon appeal by one only of the alleged bankrupts, namely, D. G. Simonson, the circuit court of appeals reversed this judgment. 95 Fed. 948. In its opinion the court said:

"Coming to apply our conclusions to the case at bar, we cannot doubt that the answer tendered made a case of estoppel against the petitioners. They are alleged to have become parties to the assignment proceedings, to have filed their claims under the assignment, and to have requested a reference to pass upon their claims, the accounts of the assignee, and the questions of distribution. They waited three months and a half before filing their petition. By their acquiescence, they certainly induced the assignors, the assignee, and the purchasers of the assets from the assignee, to believe that they would not seek to set aside the assignment. Were the assignment to be set aside now, it would avoid every sale the assignee has made, and revest in the trustee in bankruptcy the title of the assignors. It is conceded that the distribution, under the assignment, would be exactly the same as under the bankruptcy proceedings. The bankruptcy proceedings will only increase the costs, and possibly defeat the payment of the costs already earned in the state court proceedings. Had these creditors filed their petition soon after the assignment, all the unjust results of their delay pointed out would have been avoided; for then the assignee would not have sold the assets, and the state officers would not have rendered the services, and the creditors would not have distribution delayed by four months."

Since the return of the case issues have been formed, and upon the trial the evidence was heard orally before the court, and much latitude was purposely allowed. It took a somewhat wide range, but the hearing gave the court good opportunities for weighing it, and forming some conclusion as to its value and credibility. It did not escape attention that only one of the alleged bankrupts testified, although the others were present in court, and he seemed to have less interest in it than might have been expected. He alone had taken the appeal, he alone had sworn to the original answer, and he alone, by the later pleadings, has raised the issues now to be determined.

In passing upon the questions involved, the circuit court of appeals had necessarily assumed that the averments of the answer were true, and, being so, it was held that the facts stated would estop the petitioners from claiming the relief prayed for in the petition. But in an amended answer, filed by D. G. Simonson since the return of the case, one, at least, of the material averments upon which the circuit court of appeals had acted was withdrawn, and on the trial there was not even an offer to prove either that the petitioners had become parties to the assignment proceedings in the state court, or had filed

their claims under the assignment in any legal or statutory sense, or had requested a reference to pass upon the claims, the accounts of the assignee, or the questions of distribution. The allegations of the answer on these points were entirely abandoned, and in lieu of the claims set up originally others have been substituted, thus making practically an entirely new defense. The court might comment with some plainness upon the new situation thus developed, particularly in view of the utter failure of proof upon the facts assumed to be true in passing upon the case in the circuit court of appeals, by reason of the unfounded assertion of which considerable damage has probably resulted to the estate in the way of continued rentals, and to the creditors in the way of interest and delay. But, passing this phase of the case, stated in general terms the claims now set up by the defendant D. G. Simonson are—First, that the petitioners are estopped because they knew of the assignment, and of the acts of the assignee thereunder, in conducting the business and selling the merchandise on hand, and yet, with this knowledge, delayed instituting the proceedings for over two months; second, that soon after the assignment, and with knowledge of it, the assignee purchased of one of the petitioners $287.04, and of another $250.25, worth of goods to replenish the stock, and make it more salable, and paid the cash therefor; third, that the assignee, soon after accepting the position, notified the petitioners of the assignment, and requested them to send to him a statement of their claims, which they did; and, fourth, that, after the assignee had instituted an action in the Jefferson circuit court, an application to that court was made by his counsel for directions to sell the remnant of the stock of merchandise on hand, fixtures, etc., and upon the order entered in the case respecting this matter the following words, before its entry, were written, namely, "Seen. Kohn, Baird & Spindle;" and it is also claimed that the costs and expenses of administering the estate in this court will be as great as in the state court.

Upon this substituted contention of the defendant D. G. Simonson, the issues were formed, and the court has been in some doubt as to the proper practice,—whether to make findings of fact, or whether to file a full stenographic report of the evidence, and, treating it as the depositions of the witnesses, make it part of the record. As being best in this particular instance, the doubt will be solved by doing both.

First, however, it may be well to dispose of one phase of the case. On February 14, 1899, this proceeding was brought by Sinsheimer, Levenson & Co., Freeman Bros., and N. Snellenburg & Co., three creditors whose claims aggregated about $10,000. On April 1, 1899, the Louisville Banking Company, A. Meinecke & Son, the Kenton Hardware Manufacturing Company, the Scotland Neck Cotton-Mills Company, and Rowe & Cronin, five creditors whose debts aggregated about $20,000, filed another petition, having for its object the same relief as was asked in the first proceeding, and based upon the same alleged act of bankruptcy. Before the hearing, the court directed that the five last-named creditors should be added as petitioners in this case, and then entered an order consolidating the two proceed-

ings into one. At the hearing it was clearly shown that the five last-named parties had either proved and filed their claims in the state court proceeding, or had voluntarily become parties to it. Upon this state of fact, under the rule established in this case by the circuit court of appeals, those five petitioners are estopped from claiming the relief sought. They will not hereafter be regarded as petitioners. Only the three creditors who joined in the petition first filed will be treated as such.

Limiting its consideration to them, the court, upon the evidence, finds the material facts to be as follows, namely: On December 5, 1898, the co-partnership firm of Simonson, Whiteson & Co., composed of D. G. Simonson, I. Whiteson, and Leo Stern, being then insolvent, executed and delivered to L. Comingor, their head bookkeeper, a general assignment for the benefit of their creditors, which, being recorded, was accepted by said Comingor, who, pursuant to law, qualified and entered upon the discharge of his duties. On December 7th, the assignee mailed to creditors of the assigned firm a request that they send a statement of account, so that he could see if it agreed with the firm's books. Pursuant to this request, two of the petitioners mailed statements, but did not prove their claims, nor make the affidavit upon them required by Ky. St. §§ 90, 3870. On December 8, 1898, the assignee instituted an action against the debtors in the Jefferson circuit court, common pleas division, for the purpose of having his trust administered and settled under the direction of that court. The trustee's counsel in that action were the firm of M. A., D. A. & J. G. Sachs, who were also the counsel of the firm of Simonson, Whiteson & Co. Subsequently an application was made to the court in that case by the said firm's attorneys for an order directing the sale of the remaining portions of the merchandise and the fixtures in the store, and, pursuant to a promise made under the circumstances detailed in the evidence, the judge of that court would not enter the order until the law firm of Kohn, Baird & Spindle had been informed of it. The proposed order was shown to D. W. Baird, a member of the latter firm, by D. A. Sachs, but all concern in the matter, and all purpose to interfere in it, were then disclaimed by Mr. Baird, who at first refused to have anything to do with it. However, at the earnest request of Mr. Sachs, he finally wrote upon it the words, "Seen. Kohn, Baird & Spindle." This was done for the accommodation of Mr. Sachs, and upon his assurance that otherwise he would have more trouble in getting the order. On the 9th day of December, 1898, a committee of the Eastern creditors of the firm reached Louisville, and, after looking over the ground and the books of the firm, agreed to advise creditors to accept an offer of settlement at 50 cents on the dollar. A writing was drawn for creditors to sign, agreeing accordingly, but it was, by its terms, not to be binding unless 90 per cent. in value signed it. A large number signed, but not 90 per cent. of them. The whole indebtedness was about $110,000, the gross assets something over $90,000, without excluding the expense of reducing them to cash, and one of the largest creditors was the Louisville Banking Company, whose claim was about $19,000. It failed to enter into the agree-

ment. Pending the effort to effect this settlement, the assignee continued to sell the merchandise without objection from the petitioners, who knew of it, and who hoped to see enough realized therefrom to pay the 50 cents in cash, if the creditors agreed to that plan of settlement, and he ultimately sold the remainder of the stock and the fixtures under the order referred to. Soon after the assignment, and while the effort to effect a settlement was in progress, the assignee, in order to replenish stock and make it more salable, found it wise to purchase certain new goods. For that purpose he purchased of Sinsheimer, Levenson & Co. $287.04 worth, and in like manner purchased of N. Snellenburg $250.25 worth, and paid cash to both. When the committee visited Louisville, in December, 1898, they were intent upon effecting the settlement, and concerned themselves but little, if at all, about the assignee or his work; but in the meantime the petitioners directed their counsel to prepare, and about December 10th they did prepare, the petition in bankruptcy ultimately filed in this proceeding. The defendants and their counsel were notified of this fact, and of the purpose of the petitioners to institute this proceeding, unless the proposed settlement was accomplished. The petition was not filed at an earlier date than February 14, 1899, because of the repeated assurances of the defendants' counsel that they would be able to get the requisite 90 per cent. of the creditors, and because the petitioners' counsel were repeatedly requested by the defendants and their then counsel to delay filing it to see if the compromise could not be effected. The petitioners had agreed to the terms of compromise, upon the conditions stated in it. The petitioners were not parties to the assignee's suit in the state court. They did not file their claims under the assignment. They did not request a reference to pass upon the claims, nor the accounts of the assignee, nor the question of distribution. They did not, nor did either of them, prove their claims, nor make affidavits to them, as required by the Kentucky Statutes, but, at the request of the assignee and for his accommodation, two of them sent a mere statement, for the express and only purpose of enabling the assignee to see if their claims agreed with the company's books. What the petitioners in fact did was to delay action in this court until it could be seen whether there could be a settlement, not through the assignment, but independently of it and outside of it. They did nothing showing active, positive, or other consent to the assignment. Their efforts were to secure a settlement independently of it. Failing in this, they sued within four months after the assignment was made. The defendants' then counsel were, at the outset, confident of getting the Louisville Banking Company to agree to the proposed compromise, but there is more than a suspicion that the storm center in this whole trouble was around the effort of the defendants' then counsel to secure a large fee for themselves. Indeed, when listening to the testimony, it was impossible to resist the conviction that those attorneys were the real litigants, using the name of one, but only one, of the alleged bankrupts. The expenses and costs of winding up the estate in the state court, outside of those necessary to reduce the assets to cash, which would probably be the same under each jurisdic-

tion, will greatly exceed those incident to winding it up in bankruptcy. Under the bankruptcy act, the fees and expenses, except attorney's fees, are plainly fixed, and in the aggregate, including counsel fees, would probably be less than $3,000. In the state court, however, besides considerable court fees and costs, they would include a large fee, probably $3,500, to the assignee's attorneys, another $3,500 to the assignee himself, at least $250 to the commissioner of the court for passing upon the claims and computing dividends, and a much larger sum for rentals, after allowing for the $4,000 realized by the assignee. The rent of the premises in which the defendants did business was over $13,000 per annum. It is not shown how long a lease they still hold, but their term had not expired. If it be true, as this court has held in Re Jefferson, 93 Fed. 948, that the adjudication in bankruptcy dissolves the relation of landlord and tenant, the last item above enumerated would not have been a charge upon the estate in this court, as it must necessarily be in the state court, unless a new tenant can be found.

These being the material facts, the question for the court to determine is, are they, together or separately, sufficient to estop the petitioners from insisting upon the right given to them as creditors by the express provisions of the bankruptcy act? It seems to the court that sound judgment and just principles of law demand a negative answer, unless the opinion and judgment of the circuit court of appeals in this case require otherwise. But, as we have seen, the case now under consideration is not the one passed upon by the appellate tribunal, but an entirely different one. And it may be well to observe that, when this case was first before the court, the question of estoppel was not argued. Counsel laid the stress of their case upon other grounds, and in passing upon it the court, probably unfortunately, treated the question somewhat after the manner of counsel. And, indeed, the question of estoppel has turned out to have been altogether a moot question in the case until now. However, in considering it, we are to be guided by the ratio decidendi of the court's opinion. If correctly apprehended, this was that a creditor of an alleged bankrupt, who made a general assignment for the benefit of his creditors, could not first claim under the assignment, and then against it; that if he procured the making of the assignment, or if, after it was made without his procurement, he consented to it, by proving his claim under it, or if he asserted his claim in a suit for a settlement brought by the assignee, or if he entered his appearance in such a suit, or if in any manner he actively asserted his claim under the assignment, he was estopped from availing himself of the right of action given him by the bankrupt law. It must be conceded that these general principles are correct, but the court is clearly of opinion that the facts of this case do not bring it within them.

While, upon principles entirely correct, it can be held that a party has estopped himself from asserting a right against another, whether it be founded upon a contract or a statute, yet in passing upon the question the court should not exclude any person from a right given by congress, except upon the strongest reason, nor in

considering the subject should certain essential propositions be disregarded or overlooked. The constitution gives to congress the exclusive power to establish a uniform system of bankruptcy. Congress has done so by the existing statute upon the subject. The courts may interpret that statute, and ascertain the meaning of its language, and may, in proper cases, enforce estoppels, but they are without power to add to its provisions. By section 3 it is provided, absolutely and without qualification or condition, that "acts of bankruptcy by a person shall consist of his having * * * (4) made a general assignment for the benefit of his creditors"; and, further, that "a petition may be filed against a person who is insolvent, and who has committed an act of bankruptcy, within four months after the commission of such act." By section 59, cl. B, it is further enacted that "three or more creditors who have provable claims against any person which amount in the aggregate, in excess of the value of securities held by them, if any, to five hundred dollars or over, or if all of the creditors of such person are less than twelve in number, then one of such creditors whose claim equals such amount may file a petition to have him adjudged a bankrupt." These provisions giving rights are not to be disregarded upon light or trivial grounds, nor has the circuit court of appeals so intimated. If the doctrine of estoppel is to be applied and enforced upon any but the most urgent principles of equity, then, instead of having a uniform system of bankruptcy based upon plain and unequivocal statutory provisions, we shall have those provisions frittered away or not, according to the various or varying notions of the judges as to what should estop a party from the assertion of rights explicitly given by a legislative power, over which the courts have no rightful control.

Granting that, upon the facts as they appeared to the circuit court of appeals, it would be unconscionable for these creditors to throw these debtors into bankruptcy, and that they may, for that reason, be held to be estopped from doing it, still it seems to me it would be entirely inexcusable for the court to say that the petitioners in this case shall be denied their plainly-given statutory right, either because of the insignificant matter of their counsel, at the request of the alleged bankrupts and their attorneys, writing the word "Seen" upon an order in a case to which they were not parties, and with respect to which they had given their counsel neither authority nor instructions, and in which their counsel claimed neither; or because, under the circumstances detailed in the evidence and pending a proposition of compromise, the assignee purchased a small quantity of merchandise from them; or because they sent to the assignee, at his request and for a specific purpose, an unproved and unverified statement of their debts, in order to see if they agreed with the firm's books; or because they delayed, not three and a half months, as suggested in the opinion of the circuit court of appeals, but two months and nine days, to institute proceedings, when the statute, in plain and unambiguous terms, unconditionally gave them four months within which to do it, and extended no power to the courts to curtail or abridge the period; or because the administration of the estate would be more or less

expensive in the state court; or because of all these things combined.

Upon the subject of the costs and expenses, it may be remarked that congress in no way made the right of the creditor dependent upon the relative expensiveness of the two proceedings, nor upon the fact that the assignee had incurred expenses. Logically, that should not, per se, affect the question, and it is not believed that what was said in that connection by the circuit court of appeals in its opinion in this case was meant to be more than an illustration to enforce the views it had expressed upon the other facts appearing to be true when the case was before it. That this is the correct view may be assumed from the circumstance that the remarks in that connection of the learned judge who delivered the opinion were probably not necessary to a decision of the question of estoppel based upon the allegations of the pleadings before the court. Otherwise, we should have to assume that the appellate court meant to assert the power of the courts to say that, when congress declared the creditors should have four months in which to get others to act with them, and then elect whether they would sue in bankruptcy, it only meant that they should have this right provided no expenses had been incurred in the state court, or that the expenses in this court did not exceed those of the state court. The court could not have so thought, because, while petitioners in cases like this may be estopped by some act of their own, the doctrine of estoppel could not be made to rest upon the question of the costs of the proceedings here or elsewhere; and especially should the petitioners not be estopped from doing what would clearly decrease the cost and expenses of winding up the bankrupt's estate, which is known to have been one of the objects congress intended to achieve.

Coming to the question of acquiescence, it seems to the court that the creditor has the right to ascertain all the facts, and consider them for the statutory period, before he is bound to act, or lose any right by mere nonaction, and he may at any time within four months sue, unless meanwhile he has done some positive act (such as those which, without warrant, were imputed to petitioners by the original answer) which would make it inconsistent with good faith for him to claim the right the law gave him. If he did this, the four-months period would no longer concern him, as the estoppel would work from the time he did the things which estopped him. Otherwise, the law expressly gives him the right to remain silent for four months, and then to sue within that period. This being so, his mere silence, even with full knowledge of all that the assignee is doing, cannot defeat him. The law gives him the right to acquire information, and to silently acquiesce four months, and he should not be estopped by exercising this statutory privilege.

It seems to the court that the doctrine of estoppel in this connection must be based upon the idea that the creditor has in some positive way ratified the assignment. Ratification, or some act which is equivalent to it, must be the basis for applying the doctrine. It would rarely be fair or just to impute ratification to a creditor in a case of this character unless he had shown some intention to

agree to the assignment, or had done some act which the court could fairly hold should require that such an intention should be imputed. Instead of that, in this case the intention of the petitioners was always clearly manifested never to claim under the assignment, but to file their petition in this court, unless there was a settlement independent of the assignment. Surely, it is fair to assume that, when the bankrupt act was passed, congress had it in its contemplation that assignments would be made; that assignees would accept the trust, and enter promptly upon the discharge of their duties; that they would preliminarily ask for a statement of claims against the estate; that they would sell assets; that creditors would look into their conduct, and consider what was best to be done; that there would be purchasers of the assets; that there would be expenses of administration incurred; that assignees would meanwhile act upon the assumption that the assignment was valid; and that all the usual things would take place,—yet in plain terms that body enacted the bankruptcy legislation, which the courts can only interpret when doubts arise as to its meaning, but to which they can properly add nothing. With all these matters in its contemplation, congress did not add any proviso or condition to cover the contention in this case. And so we say again that, while the doctrine of estoppel should be applied to litigants in bankruptcy in proper cases, it should not be done upon slight or trivial grounds, and only that sort are believed to exist in this case. If it be otherwise, where will the line be drawn which will save creditors any of the rights given by the statutory provisions we have cited? The statute gives the creditor four months within which to elect intelligently, and his silence, even with that perfect knowledge of all the facts which he is given four months to acquire, cannot lawfully deprive him of his statutory right. Nothing can do that, unless he does some positive act of claiming under the assignment, or asserting a right under it, or in some way actually ratifies its provisions, or does some act which, upon equitable principles and in good conscience, would make it wrong for him to overthrow an instrument he had thus actually agreed to. Hence it will be found that in all the cases there were acts of positive consent or of assertion of rights under the assignment,—something more than a silent failure, even with perfect knowledge of all that had been done, to take any position during the period given by express law for consideration and election. The statute does not say that time shall be shortened by an earlier acquirement of knowledge of all the facts in the case. Congress fixed the period at four months. It recognized that the creditor during that period may be in more or less of a dilemma, and it recognized that it would be harsh, unjust, and unwarranted to say that slight acts, even of mere precaution, while this dilemma lasted, should estop him. Indeed, in this case it seems to the court that, if there is any ground for estoppel, it works against the defendants, and not the petitioners. It was the then counsel of the defendants who requested the writing of the word "Seen" upon the proposed order in the state court, by Kohn, Baird & Spindle, and it should not be overlooked that this was in no

sense an appearance, nor did it purport to be an appearance, of anybody, much less that of the petitioners, who are in no way named in it. It was the same counsel who repeatedly requested the delay in filing the petition in bankruptcy. The delay was the result of that request, and not of any ratification by petitioners of the assignment. It was by the request of the assignee that two of the petitioners sent statements of their claims for the information of the assignee, and upon which nothing else could have been done in that condition, as they were neither proved nor verified, as the law required. This was an inconsequential act, done for a particular purpose, at the assignee's request, while the proposition of compromise was pending, and without the slightest intention of consenting to anything except the request. In making the request, the assignee was in no sense complying, or meaning to comply, with section 90 of the Kentucky Statutes, nor were the creditors in any just or legal sense proving or filing their claims. It was upon the application of the assignee that the state court authorized the purchase of the small bills of goods to replenish stock, and make it more salable, and it was also upon the request of the assignee that the two petitioners sold him the goods, when it was expected that a compromise would soon be obtained. It is a familiar rule that "the assertion of an estoppel may be prevented by the existence of an estoppel by deed or by matter in pais against its use," and also that "an estoppel against an estoppel sets the matter at large." Branson v. Wirth, 17 Wall. 42; 7 Am. & Eng. Enc. Law (1st Ed.) pp. 5, 25; Herm. Estop. § 578. Setting the matter at large would mean, in this case, that no just obstacle has been interposed to the granting of the relief sought. It seems to the court that it would be grossly unjust and unfair, at the demand of the defendants together, or of the defendant Simonson alone, if he is the only litigant, to hold that the petitioners are estopped in this case for doing what they had been requested to do by those now insisting upon the estoppel; and the court has no doubt that granting the prayer of the petition will greatly redound to the interest alike of the alleged bankrupts and their creditors (for whom alone the bankrupt act concerns itself), however much it may disappoint others.

It may be proper to observe that, whatever may have been the practice elsewhere under the old bankrupt act, in this district there was never any difficulty in adjusting, upon a fair and equitable basis, the accounts between the trustee in bankruptcy and the assignee in the state court. And it should not be forgotten in such cases that the state assignee, and all who deal with him, have full notice of the provisions of the bankrupt law and of the rights of creditors thereunder. To entirely exempt them from the consequences of this notice would be to repeal quoad hoc the bankrupt act itself. And it would be a most strained conclusion which attributed the costs of the state court proceeding instituted within three days after the assignment, or the expenses of the assignee, to any act of the petitioners. The assignment was made without their consent, and the suit was brought wholly without their aid. At all events, in the opinion of the court, the evidence has developed no

case for depriving these creditors of their right to insist that the general assignment of the defendants was an act of bankruptcy. The court thinks it was an act of bankruptcy, and an adjudication will be made accordingly.

In re LAUGHLIN.

(District Court, N. D. Iowa, Cedar Rapids Division. September 30, 1899.)

1. BANKRUPTCY—EFFECT OF DISCHARGE—PARTNERSHIP DEBTS.
   Where one member of a partnership files his voluntary petition in bankruptcy, seeking a discharge from both individual and firm debts, and is adjudged bankrupt, but no adjudication is made against the partnership as such, the creditors of the firm may prove their debts against the bankrupt, and cause his interest in the firm property to be subjected to the payment thereof, under Bankruptcy Act 1898, § 5, cl. h; and, if a proper foundation is laid in the pleadings and notices to creditors, the discharge granted to the bankrupt will release him from both classes of debts.
2. SAME—PETITION—NOTICES TO CREDITORS.
   Where one member of a partnership files his petition in bankruptcy, with the object of obtaining a discharge from debts of the firm, as well as his individual debts, the petition should set forth the names of the partners, and pray for a discharge from partnership debts; the schedules should list both the petitioner's individual property and debts, and the property and debts of the firm; notices to creditors should inform them that firm creditors are affected, and that the bankrupt seeks a discharge from their debts; and notice of the filing of the petition and of creditors' meetings should be sent to the partners who have not joined.
3. SAME—AMENDMENT OF PETITION.
   If the petition and schedule as originally filed do not conform to these requirements, they should be amended before an adjudication is made. If adjudication has already passed, it may be set aside, and leave granted the petitioner to amend; and thereupon an adjudication should be again entered, and the case proceeded with de novo.

In Bankruptcy. Submitted on petition for discharge, and referee's record of proceedings thereon.

John C. Leonard, for bankrupt.

SHIRAS, District Judge. This case is now before the court upon the petition for discharge; and the record of the proceedings had before the referee shows that the petition upon which the adjudication was entered was, in form, a petition on behalf of the bankrupt individually, no reference being made therein to any partnership relation between the petitioner and any third party, nor is it averred therein that the petitioner seeks a discharge from the debts due from any partnership of which the petitioner was at any time a member. In the schedule attached to the petition, and containing the names of the creditors, it is stated at the foot thereof that "all the above debts were contracted by the firm of Laughlin & Hassel, Walker, Iowa, a firm composed of Charles H. Laughlin and Robert L. Hassel, etc.," and it thus appears that all the debts existing against the bankrupt are firm debts. In no other part of the record is there any reference made to the partnership, all the proceedings having reference only to the bankrupt in his individual capacity. It thus ap-

pears on the face of the record that the only debts existing against the bankrupt are those due from the firm of Laughlin & Hassel, and yet the proceedings had affect the bankrupt only in his individual capacity. Thus the notice sent to the creditors of the first meeting is addressed to the creditors of Charles H. Laughlin, and the same is true of the notice upon the hearing for the discharge. There is therefore nothing in the record showing that the creditors of the firm of Laughlin & Hassel were notified of the pendency of any proceedings affecting their interests, and it is difficult to see upon what ground it could be claimed that the firm creditors would be barred by a discharge founded upon the record as it now stands. Under the provisions of the act now in force, I hold that one partner may institute proceedings looking to a discharge from the partnership, as well as his individual debts, and, the proper foundation being laid, that he may obtain a discharge effectual against both classes of claims. Thus, in the last clause of section 5 of the act it is provided that:

"In the event of one or more, but not all of the members of a partnership being adjudged bankrupt, the partnership property shall not be administered in bankruptcy, unless by consent of the partner or partners not adjudged bankrupt; but such partner or partners not adjudged bankrupt shall settle the partnership business as expeditiously as its nature will permit, and account for the interest of the partner or partners adjudged bankrupt."

This clause, read in connection with the preceding parts of the section, clearly shows that although all the partners may not be adjudged bankrupt in a given case, and therefore the firm and its property do not become subject to the jurisdiction of the court, unless by consent of all the partners, yet the partners not adjudged to be bankrupt are required to account for the interest of the bankrupt partner in the firm business. Therefore, if one partner only is adjudged a bankrupt, but the other partners agree that the partnership property may be administered in the bankruptcy proceedings, or, not consenting thereto, they in obedience to the act, account to the trustee for the interest of the bankrupt in the firm property, the firm creditors will receive the benefit thereof; and certainly it is not the intent of the act that the firm creditors shall be enabled to reach and subject to the payment of their claims the firm property, or the bankrupt partner's interest and share in the firm property, but that the bankrupt partner cannot obtain a discharge against the firm debts, because the firm was not adjudged bankrupt.

It may be urged that the correct procedure, if all the partners will not join in a petition to have the firm adjudged to be bankrupt, is to file a petition for an adjudication, making the nonconsenting partner a defendant thereto, which, under the rule laid down by the supreme court in Medsker v. Bonebrake, 108 U. S. 66, 2 Sup. Ct. 351, may be done, and, unless cause be shown, the firm may be adjudged a bankrupt; but under the decision of the supreme court in that case, and under the express provisions of general order No. 8 (18 Sup. Ct. v.), it is open to the nonconsenting partner to defeat the adjudication against the firm by showing that the firm is not insolvent, or that it has not committed an act of bankruptcy, and in

that event the adjudication can only be had against the petitioning partner or partners; and then the last clause of section 5, already quoted, becomes applicable, and under its provisions the trustee can subject the interest of the bankrupt partner in the firm property to the payment of the debts provable in the bankruptcy proceedings. Certainly, if the interest of the bankrupt partner in the firm property can thus be reached by the trustee for the purposes of administration, the firm creditors are entitled to prove up their claims against the bankrupt estate; and under the provisions of section 17 of the act a discharge releases the bankrupt from all provable debts, save such as come within the exceptions provided for in the section. If it were held that a debtor cannot obtain a discharge from partnership debts unless the firm be adjudged a bankrupt, then the beneficent purposes of the act might be defeated in a large proportion of the cases to which it was undoubtedly intended to apply. It is a matter of common knowledge that the indebtedness from which relief is now being sought under the bankrupt act has in a great number of instances been incurred by persons associated as partners. The fact that in the majority of these cases the firms have ceased to do business, perhaps years ago, has not, however, changed the indebtedness from that of the firm to that of the individual members. If, therefore, no relief from the firm debts can be had unless the firm be adjudged a bankrupt, then in many cases it would be impossible for a debtor to obtain a release from the firm debts, if one of the partners objected to the proceedings; for, under the provisions of general order No. 8, it is open to any one of the partners to contest the adjudication against the firm, and to defeat it by showing that the firm is not insolvent, or, if insolvent, that it has not committed an act of bankruptcy. To avoid this result, provision is made in the last clause of section 5 for adjudging a part only of the members of a firm to be bankrupt, and a mode is provided for reaching their interest in the partnership property and subjecting it to administration by the bankruptcy court; and, as the act has thus made provision for giving to the creditors the benefit of the bankrupt's interest in the firm property and business, the bankrupt partners will be entitled to a discharge effectual against the firm creditors. To become entitled, however, to a discharge barring the firm creditors, under such circumstances, the proper foundation must be laid in the proceedings instituted on behalf of the bankrupt partner. In the petition originally filed it should be averred that the petitioner is indebted in his individual capacity, if such be the fact, and also as a member of a firm, naming it, and giving the names of the several partners; and the petition should pray for a discharge from the firm as well as his individual debts. To this petition should be attached the proper schedules, setting forth the firm debts, the firm property, if any, and all other matters, the same as is required in the case of a proceeding brought by all the partners. Schedules of the individual property and debts should also be attached to the petition. In the notice to the creditors to attend the first meeting, it should be stated that the firm, as well as the individual creditors, are notified to attend, as the bankrupt is seeking a

discharge from both classes of claims; and also in the petition for a discharge a release from the firm as well as the individual debts should be asked; and in the notice to creditors of the filing and hearing upon the petition for discharge the fact that a release from the firm debts is prayed for should be specifically set forth. Notice of the filing of the petition and of the creditors' meetings should be sent to the nonjoining partner or partners, in order that, if necessary, they may appear and protect their rights and interests in the proceedings. The attention of the referees in this district is called to this matter, and they are instructed that it is their duty to examine all petitions referred to them, and, if it appears that the bankrupt is seeking a discharge from firm as well as individual debts, then, if necessary, the petition and schedules must be amended so as to comply with the foregoing requirements before the adjudication is entered thereon; and care must be taken, in framing the notices to creditors, that they conform to the views herein expressed.

In the particular case now before me, as already stated, the only debts owing by the bankrupt are those due from the firm of Laughlin & Hassel; but the proceedings are in such form that a discharge would not bar them, and therefore it would be useless to grant a discharge which would be one in form only. The case is therefore returned to the referee, with instructions to set aside the orders by him entered, and to grant leave to the petitioner to amend his petition and schedules so as to conform the same to the requirements of this opinion, and, upon this being done, to enter the adjudication and proceed with the case anew in the mode herein pointed out.

In re McFAUN.

(District Court, N. D. Iowa, Cedar Rapids Division. October 2, 1899.)

1. BANKRUPTCY—EFFECT OF DISCHARGE—PARTNERSHIP DEBTS.
   Where a member of a firm files his voluntary petition, and is adjudged bankrupt thereon, but no adjudication is made against the firm, and the schedule includes debts created by the partnership, but neither the petition for adjudication, the notice to creditors, nor the application for discharge makes any reference to firm liabilities or asks relief against firm debts, such debts will not be affected by the discharge.
2. SAME—AMENDMENT OF PETITION.
   Where a member of a partnership files his petition in bankruptcy, with the object of obtaining a discharge from debts of the firm as well as his individual debts, and is adjudged bankrupt thereon, no adjudication passing against the firm, but the petition, schedules, and notices to creditors do not contain the averments and information necessary to lay the foundation for a discharge effectual as against firm creditors, the adjudication may be set aside on motion of the bankrupt, and leave granted him to file an amended petition, and thereupon an adjudication may be again entered, and the case proceeded with de novo.

In Bankruptcy. Submitted on petition for discharge, and referee's record of proceedings thereon.

J. M. Dower, for bankrupt.

SHIRAS, District Judge. The schedules attached to the petition show that a large part of the indebtedness of the bankrupt consists of debts created by the firm of McFaun Bros. The petition for adjudication, the notice to creditors, and the petition for discharge make no reference to any firm liability, and do not ask any relief against firm debts. A discharge granted on this record will not, in my opinion, operate to bar the firm debts, but will only affect the debts owing by the bankrupt individually. See opinion filed in case of In re Laughlin, 96 Fed. 589, in which the proper mode of procedure in this class of cases is pointed out. The record is returned to the referee, with instructions to call attention of counsel to the views of the court in the case. If bankrupt does not wish to amend, a discharge will be granted on the present record, but it will be at risk of bankrupt, so far as the firm debts are concerned. If bankrupt wishes to amend, the referee can enter an order setting aside the adjudication heretofore entered by him, and all proceedings based thereon, and allowing an amended petition for adjudication to be filed in the form pointed out in the Case of Laughlin; the further proceedings to be in the mode therein indicated.

In re HARTMAN.

(District Court, N. D. Iowa, C. D. October 2, 1899.)

1. BANKRUPTCY—DISCHARGE FROM PARTNERSHIP DEBTS—PRACTICE.
   Where one member of a partnership files his petition in bankruptcy, with the object of obtaining a discharge from debts of the firm as well as his individual debts, the petition should set forth the names of the partners, and pray for a discharge from partnership debts; the schedules should list both the petitioner's individual property and debts, and the property and debts of the firm; notices to creditors should inform them that firm creditors are affected, and that the bankrupt seeks a discharge from their debts; and notice of the filing of the petition and of creditors' meetings should be sent to the partners who have not joined.
2. SAME—AMENDMENT OF PETITION.
   If the petition and schedule as originally filed do not conform to these requirements, they should be amended. If an adjudication has already been made, it may be set aside, and leave granted to the petitioner to amend; and thereupon an adjudication should be again entered, and the case proceeded with de novo.

In Bankruptcy. On bankrupt's application for discharge, and referee's record of proceedings thereon.

E. P. Hudson, for bankrupt.

SHIRAS, District Judge. The record shows that Hartman owes debts as an individual, as well as a member of the firm of McClintock & Hartman. The amended petition shows that Hartman is seeking a discharge from both firm and individual debts. The proper mode of procedure in this class of cases is set forth in opinion filed in Laughlin's Case, 96 Fed. 589, which see. The notices to creditors do not inform them that Hartman is seeking a discharge from firm debts,

nor are there attached to the petition schedules of the firm property. Record is returned to referee, with instructions to call attention of attorney to the matter. If a discharge is now granted, it will bar individual debts, but would not bar firm debts. The proper course would be to set aside adjudication and all proceedings since had thereon. The schedules to petition should be amended. Then enter adjudication showing that it is based on a petition asking relief against debts of firm of McClintock & Hartman. Notice to creditors of first meeting and of petition for discharge must notify them that Hartman asks relief against firm as well as individual debts.

In re CARMICHAEL.

(District Court, N. D. Iowa, W. D. September 27, 1899.)

1. BANKRUPTCY—PROVABLE DEBTS—PARTNER'S CLAIM FOR CONTRIBUTION.
   Where judgments against a firm, in favor of certain of its creditors, were bought up by one of the partners, who took assignments of the judgments to himself, *held*, that he thereby became a creditor of each of his co-partners for their respective shares of the money advanced by him in purchasing the judgments, and was entitled to prove a claim for such share against the individual estate of one of the co-partners in bankruptcy.

2. SAME—OPPOSITION TO DISCHARGE—FAILURE TO KEEP BOOKS.
   Under Bankruptcy Act 1898, § 14, in order to defeat a bankrupt's petition for discharge on the ground of his having failed to keep proper books of account, it must be shown that such failure was with a fraudulent intent on the part of the bankrupt to conceal his true financial condition, and in contemplation of bankruptcy.

3. SAME—"CONTEMPLATION OF BANKRUPTCY."
   The words "contemplation of bankruptcy," as used in the bankruptcy act in relation to the bankrupt's right to be discharged, mean contemplation on his part of becoming a bankrupt on his voluntary petition, or of doing an act or acts which will enable his creditors to obtain an adjudication against him; and contemplation merely of a condition of insolvency is not enough.

4. SAME.
   A failure to keep proper books of account, in a business in which the bankrupt had been engaged as a partner with others, but which terminated several years before the enactment of the bankruptcy law, is no ground of opposition to his discharge, since such failure could not have been "in contemplation of bankruptcy," within the meaning of section 14 of the act (30 Stat. 550).

5. SAME—GROUNDS FOR REFUSING DISCHARGE.
   It is no ground for refusing a bankrupt's application for discharge that the creditor objecting thereto holds a judgment against him for willful and malicious injury to property, or a claim founded upon the fraud of the bankrupt or his misfeasance as a fiduciary. Such debts will not be affected by the discharge when granted, but they do not defeat the bankrupt's right to be discharged.

In Bankruptcy. Submitted on objections to petition for discharge and the evidence in support thereof.

P. R. Bailey, for bankrupt.
O. H. Montsheimer, for opposing creditor.

SHIRAS, District Judge. The petition upon which the adjudication of bankruptcy was entered in this case was voluntarily filed by John A. Carmichael, and in form is his individual petition, no reference being made therein to any partnership relation having existed between the petitioner and any third party, and the adjudication was entered against Carmichael only. In the progress of the case before the referee, it was developed that some 15 years ago the bankrupt was a member of a firm composed of Robert Jones, George W. Schee, and the bankrupt, and the bulk, if not all, of the indebtedness set forth in the schedules attached to the petition was created for goods purchased by the firm, which failed and went out of business some 15 years ago, but it does not appear that any formal settlement of the partnership affairs has ever been had. At the first meeting of the creditors, George W. Schee appeared as a creditor, setting up the fact that he had bought the judgments entered against the firm in favor of the creditors thereof; and, upon a hearing subsequently had, the referee found and adjudged that he was a creditor of the bankrupt in the sum of $1,282.67, as evidenced by judgments against the partners, but assigned to Schee. Upon the filing of the petition for discharge, Schee filed objections thereto, and the case is now before the court upon the question whether the bankrupt is entitled to a discharge. Under the form of the petition and the adjudication, the bankrupt is only entitled to ask a discharge against his individual creditors, as there has been no foundation laid in the proceedings for a discharge against the partnership creditors, if any such now exist. So far, however, as the opposing creditor is concerned, he is but a creditor individually of the bankrupt. By the purchases made by him of the judgments entered against the firm of which he was a member, he discharged the liability of the firm to the judgment creditors, but became a creditor of his co-partners for their respective shares of the money by him advanced in the purchase and discharge of these judgments, and the mere fact that he procured assignments in writing to himself of the judgments in question does not change his position with respect to his co-partners. It was therefore open to Schee to appear as a creditor of Carmichael, his former partner, and to prove up his claim against him as an individual; but, having done so, he occupies merely the position of an individual creditor, against whom a discharge, if granted, will be effectual, the same as though he had never been a partner with the bankrupt.

Thus we are brought to a consideration of the grounds relied upon to defeat the granting the discharge prayed for, the first of which is that the bankrupt, prior to his failure, with fraudulent intent, and in contemplation of insolvency and bankruptcy, failed to keep proper books of account, from which his true condition might be ascertained. The only evidence offered in support of this specification is the testimony of the bankrupt with respect to the books of account kept by the firm prior to its failure, some 15 years ago. Under the present act, to defeat the right to a discharge it must be shown that the failure to keep proper books of account was with the fraudulent intent on part of the bankrupt to conceal his true financial condition, and in contemplation of bankruptcy. The evidence fails to show that the

mode in which the books were kept was adopted for any fraudulent purpose whatever, or in contemplation of bankruptcy. Under the decision of the supreme court in Buckingham v. McLean, 13 How. 151, it must be held that the words "in contemplation of bankruptcy" mean that the debtor has in view going into bankruptcy on his own petition, or the doing of an act or acts which will enable his creditors to obtain an adjudication against him, and therefore proof merely of a condition of insolvency will not meet this requirement of section 14 of the bankrupt act. If this construction of this clause is the proper one, it follows that the failure to keep proper books of account in connection with a business which terminated some 15 years ago could not have happened with a view to, or in contemplation of, bankruptcy; for at that time the act was not in existence, and therefore there was no statute providing a method by which a debtor could procure a decree adjudging him to be bankrupt on his own petition, nor was there any statute defining the acts either of omission or commission on part of the debtor that would enable his creditors to procure an adjudication against him, and therefore it is impossible to show that the failure of the bankrupt to keep proper books of account, which failure took place years before the enactment of the bankrupt act, was in contemplation of bankruptcy.

The next specification relied upon as a ground for defeating the granting a discharge is that the creditor, Schee, has a judgment against the bankrupt for willful and malicious injury to the property of said Schee, but the difficulty is that the evidence wholly fails to show that Schee holds a judgment of this character. The evidence does show that, when the property of the firm was disposed of, Carmichael consented to a sale of property inventoried at $600 for the sum of $200, in consideration of receiving a year's board from the purchaser. It is doubtless true that Schee, as a partner of Carmichael, could have had this sale set aside, as in fraud of his rights, had he moved to that end in proper time, or possibly he might have obtained a judgment for damages against his partner, based upon a charge of fraud in this sale of the firm property; but he did not do so, and therefore he cannot claim that he has a judgment in any form against the bankrupt, based upon this transaction, and, if he had, it would not in fact be based upon a willful and malicious injury to his property committed by the bankrupt, and, furthermore, if he had a judgment against the bankrupt for willful and malicious injury to his property, that fact would not defeat the granting the discharge, but would only except the judgment from the effect of the discharge under the provision of section 17 of the act.

This latter fact is also applicable to the remaining ground of objection to the discharge, to wit, that Schee has a claim for fraud and misappropriation of the firm property by the bankrupt, in that he connived at a sale thereof for much less than its value, he holding it in a fiduciary capacity. If the creditor has such a claim, he has never proved it as a debt in these proceedings, nor has he established it by judgment; but, if he had, it would not be a bar to the granting the discharge, but would only constitute a claim which would be excepted out from the effect of the discharge when granted.

Finding no substantial merit in the objections interposed to the petition for discharge, the same are overruled, and the petition for a discharge is granted.

In re RHUTASSEL.

(District Court, N. D. Iowa, C. D. September 23, 1899.)

1. BANKRUPTCY—GROUNDS OF OPPOSITION TO DISCHARGE.
To defeat the bankrupt's application for a discharge, it is necessary that the specifications in opposition thereto should allege, and the objecting creditors prove, the commission by the bankrupt of one or other of the two acts which the bankruptcy law (section 14b) denounces as grounds for refusing a discharge.

2. SAME—ISSUES—EFFECT OF DISCHARGE.
The question whether or not the debt of a particular creditor is such as to be excepted from the operation of a discharge in bankruptcy cannot properly be raised or tried upon the bankrupt's application for discharge, and creditors' opposition thereto; the only proper issue being the bankrupt's right to a discharge. The effect of the discharge, if granted, upon any particular claim, is to be determined when the discharge is pleaded or relied on as a defense to the enforcement of such claim.

3. SAME—DEBTS AFFECTED—JUDGMENT IN ACTION FOR FRAUD.
If the bankrupt obtained a loan of money from a bank by means of false representations as to the amount of property he owned, and gave his promissory note for the amount of the loan, a judgment on such note is not a "judgment in an action for fraud or obtaining property by false pretenses or false representations," within the meaning of Bankruptcy Act, § 17, providing that such judgments shall not be released by a discharge in bankruptcy.

In Bankruptcy. Submitted on report and certificate of referee, with petition for discharge and objections thereto.

F. H. Harriman, for bankrupt.
John M. Hemmingway, for creditors.

SHIRAS, District Judge. Upon the filing of the petition for discharge in this case, the Bank of Hampton objected to the granting a discharge to the bankrupt upon the ground that the debt due the bank, and which now exists in the form of a judgment, was created by false pretenses and fraudulent representations with respect to his property on the part of the debtor; and it is further prayed that the court, if a discharge is granted, will find and adjudge that the discharge is not effective as against the claim of the bank, because of its fraudulent origin; and the creditors further ask that the testimony in support of the objections to the discharge be taken before the referee, or some other proper party residing in the county wherein the debts were created.

Under the provisions of the bankrupt act, there are certain matters inhering in the conduct of a bankrupt which will defeat the granting of a discharge; and there are other matters inhering in or connected with the character of certain claims which except them from the effect of a discharge, if granted. To defeat the right to a discharge, it must be shown that the bankrupt has committed an offense punishable by imprisonment under the provisions of the act,

or, with fraudulent intent to conceal his true financial condition, and in contemplation of bankruptcy, destroyed, concealed, or failed to keep books of account or records from which his true condition might be ascertained. Section 14 of bankrupt act. The effect of a discharge, when granted, is declared in section 17 of the act, which provides that a discharge shall release a bankrupt from all his provable debts, except taxes; judgments in actions for fraud, or obtaining property by false pretenses or false representations, or for willful and malicious injuries to the person or property of another; claims not duly scheduled by the bankrupt, unless the creditors had notice or actual knowledge of the pendency of the proceedings; and debts created by fraud, embezzlement, misappropriation, or defalcation of the debtor while acting as an officer or in a fiduciary capacity. The facts set forth in the specifications filed in opposition to the petition for discharge do not show that the bankrupt has committed an offense punishable by imprisonment, under the provisions of section 29 of the act, or that with fraudulent intent, and in contemplation of bankruptcy, he has destroyed or concealed, or failed to keep, books of account or records from which his financial condition might be ascertained. The specifications therefore fail to show a reason for refusing the discharge, and the only remaining question is whether the court will hear and determine the proposition touching the effect of the discharge upon the debt due the bank, upon the hearing of the petition for discharge. As a matter of pleading, the petition presents only the question whether the bankrupt is entitled to a discharge, and does not tender any issue touching the effect of the discharge, if granted, upon particular debts or claims. In opposition to the petition, creditors are entitled to aver and prove any matter which the act declares shall bar the granting of a discharge, but it would certainly be no ground for refusing a discharge if it appeared that there were claims in existence which a discharge would not bar or release. The right to a discharge is one thing, and the effect of it, when granted, is another, and wholly distinct, proposition. The only issue tendered by the petition is the right to a discharge, and the only facts properly pleadable in opposition thereto are those which show that under the provisions of section 14 the bankrupt is not entitled to a discharge. The issue upon the effect of a discharge will arise when a creditor seeks to enforce a judgment or claim, and the debtor pleads his discharge in bar thereof. This question was very fully and carefully considered by Judge Woolson in Re Thomas, 92 Fed. 912; and I concur in the conclusion reached by him, that the proper place and time for the determination of the effect of the discharge is when the same is pleaded or relied upon as a defense to the enforcement of the particular claim.

Furthermore, the record presents the question whether the claim of the bank comes within any of the exceptions named in section 17, which enumerates the several classes of claims which are not released by a discharge under the act. The bank now holds a judgment entered upon two promissory notes executed by the bankrupt, and, in the objections set forth to the petition for discharge, it is

averred that the bankrupt obtained a loan of money from the bank by certain false statements respecting the property he then owned. The judgment, however, which now constitutes the evidence of the claims held by the bank, is not a judgment rendered in an action for fraud, or for obtaining property by false pretenses or false representations, but is founded on the express promise to repay the money loaned by the bank, as evidenced by the notes executed by the bankrupt, and therefore the judgment does not show that the debt upon which it is based was created by fraud or by false statements. If the bankrupt act provided that claims created by fraud, false statements, or false pretenses were excepted out from the bar of a discharge, then the mere fact that the claim had been put into judgment might not preclude the holder thereof from proving its original and essential nature, in order to enable the court to determine whether it came within the exceptions of the statute. Wisconsin v. Pelican Ins. Co., 127 U. S. 265, 8 Sup. Ct. 1370. Thus, if the bankrupt, while acting in an official or fiduciary capacity, had misappropriated or embezzled money coming into his hands, and a judgment for the amount misappropriated or embezzled had been rendered against him in an action for money had and received, the merger of the claim into a judgment of that form would not debar the owner of the claim from showing, as against a plea of a discharge under the bankrupt act, that the claim or debt now evidenced by the judgment was one created by the fraud, embezzlement, misappropriation, or defalcation of the bankrupt while acting in an official or fiduciary capacity, because the last clause of section 17 of the act excepts from the operation of a discharge provable debts created by the fraud, misappropriation, or embezzlement of one acting in an official or fiduciary capacity. The point of inquiry under this clause of the act is, how was the debt created? not in what form is it now evidenced? Under the second clause of section 17, the question of the form of the debt, as well as of its original nature, is an essential in determining whether the particular debt will be barred by a discharge, or whether it is protected against the bar of the discharge by coming within the exceptions created by this clause of the section. The second clause of this section does not except out from the effect of the discharge claims created by fraud, or by obtaining property by false statements, or by willful and malicious injuries to the person or property of another, but does except out judgments rendered upon causes of action of the named nature; and therefore, to come within the exception, it must appear that the creditor holds a judgment which was rendered in an action for fraud, or for obtaining property by false pretenses or by false representations, or for willful and malicious injury to the person or property of the creditor. In other words, the judgment, read in connection with the pleadings upon which it is based, must establish the fact that the claim sued on and merged in the judgment was created through fraud or by false pretenses, or by willful and malicious injury to the person or property of another. For illustration, suppose the bankrupt by false representations purchased goods on credit from A. In such a case it would be optional with A. to

waive the fraud and to sue upon the contract of purchase, or to sue for damages, basing the action on the fraud. In the former case the question of fraud or false pretenses or representations would not be involved, and would not be heard nor adjudicated, whereas in the latter case the question of fraud would be heard and adjudged, and it is only judgments of the latter character that come within the exceptions contained in the second clause of section 17. It is apparent that, if it had been enacted that a discharge should not bar claims or debts created by false pretenses or false statements, such a provision would have been a fruitful source of litigation in the future, and would have subjected the bankrupt to constant worry and pressure from creditors claiming that the debts due them had in fact been created by false statements with respect to the financial condition of the debtor, and were therefore not within the bar of the discharge, and hence the wisdom of the provision that limits the exception to judgments which show on their face that the claim merged therein was based on the fraud of the bankrupt. But, whatever the reason for the enactment may have been, the fact remains that the second clause of section 17 embraces only judgments for frauds, or for obtaining property by false pretenses or statements, or for willful injuries to person or property, and cannot be extended to include claims not in judgment, or judgments based on the contract, express or implied, of the bankrupt, and not upon a fraud or wrong of the nature of those described in the clause in question.

As already stated, in the specifications filed in opposition to the petition for a discharge it is shown that the judgment held by the bank is not based upon any fraud proven to have been committed by the bankrupt, but is founded upon the promissory notes executed by him; and, therefore, in the view taken of the law by the court, it would be a useless expenditure of time and money to make an order for the taking of testimony in support of the specifications, as is now asked on behalf of the opposing creditors. The application for a discharge will come before the court on the first Monday in October, and counsel will then be heard, if ground exists for opposing the discharge.

In re MURRAY et al.

(District Court, N. D. Iowa, W. D. September 26, 1899.)

1. BANKRUPTCY—VOLUNTARY AND INVOLUNTARY—PARTNERSHIP PETITION.
   Where some of the members of a partnership file their petition in bankruptcy asking for an adjudication against the firm, the other partners not joining, the proceeding is, in its inception, a voluntary proceeding in bankruptcy; and it will so remain in its entirety unless the other partners, on due notice, dissent from the petition and contest the adjudication, in which case the proceeding becomes, as to those partners, an involuntary one.

2. SAME—ORDER OF REFERENCE.
   Where a petition in bankruptcy is filed by certain of the members of a partnership, praying an adjudication against the firm, and averring that the partner who has not joined in the petition is not a resident of the district, and that his residence is unknown to the petitioners, if the judge of the court of bankruptcy is absent from the district, or the division of

the district in which the petition is filed, at the time of its filing, the clerk should forthwith refer the case to the proper referee.

3. SAME—NOTICE TO PARTNERS NOT JOINING.
Where a petition in bankruptcy is filed by one or more of the members of a partnership, asking an adjudication against the firm, but there are other partners who do not join in such petition, no adjudication can be made until the nonjoining partners have had notice of the pendency of the petition, and of the time fixed for hearing thereon.

4. SAME—SERVICE OF NOTICE—PUBLICATION.
If the partners who have not joined in such petition can be found, whether within the district or without it, personal service of such notice must be made upon them. But, if personal service cannot be had, then, upon the filing of an affidavit showing that fact, the court will order publication of the notice in the same manner as in equity cases.

5. SAME—CONTEST OF PETITION—HEARING.
Where a petition praying an adjudication in bankruptcy against a firm has been presented by a part only of the partners, and referred to the proper referee, if the partners who did not join in the petition shall, upon notice, enter their appearance, and contest the adjudication of the firm, the referee cannot act on the petition, but must certify the case to the judge, before whom the issue will be heard and determined.

In Bankruptcy. Submitted on report of referee.

P. R. Bailey, for petitioners.

SHIRAS, District Judge. This case is now before the court upon a report from the referee, which presents the question of the proper practice to be pursued in cases wherein a petition in bankruptcy is filed by one or more of the partners in a firm, asking that the firm be adjudged a bankrupt, and that the individuals be discharged from the partnership, as well as the individual, debts; it being averred in the petition filed that one of the partners does not reside in the district, and that his present residence is unknown to the petitioners.

In section 5 of the bankrupt act, it is provided that the court of bankruptcy which has jurisdiction of one of the partners may have jurisdiction of all the partners, and of the administration of the partnership and individual estate; and, as the petitioning partners in this case are residents of the Northern district of Iowa, there is no question that the bankruptcy court of this district has full jurisdiction over the case, although one of the partners may not reside therein. It is also well settled that, in a proceeding of this character, it is open to the partner who has not joined in the petition to contest the same, and to defeat an adjudication against the firm, by showing that the partnership is not insolvent or has not committed an act of bankruptcy; the general mode of procedure in such case being set forth in general order No. 8, as promulgated by the supreme court. 18 Sup. Ct. v.

The first question left in doubt, however, under this rule, is whether, in case the judge is absent from the division of the district in which the petition is filed, the clerk must send the case to the referee; or can it only be proceeded with before the judge up to the time when the adjudication is had upon the petition? Under the provisions of section 18 of the act, in voluntary cases, if the judge

is absent from the district or the division thereof wherein the petition is filed, the clerk must forthwith refer the case to the proper referee; but, in cases of involuntary bankruptcy, the same remains for hearing before the judge until the adjudication is had, but, if no contest is entered against the petition within the time fixed in the act, then, in the event of the absence of the judge from the district or from the division of the district wherein the proceedings were filed, the clerk must refer the case to the referee. Thus, it appears that the referee, in the absence of the judge from the district or the division thereof wherein the proceedings are filed, can enter the adjudication, except in those cases wherein, by proper pleading, an issue is made upon the question of bankruptcy. In the class of cases like that now before the court, it is not the creditors who, in the first instance, are setting the machinery of the act in operation, but the petition is filed by the debtors; and therefore, so far as the proceedings have yet progressed, the proceeding is a voluntary one, and will always remain so, so far as the petitioners are interested.

It appears, however, that there is one member of the partnership who has not, up to this time, joined in the petition asking to have the firm adjudged to be bankrupt, and it is apparent that it cannot yet be known whether the proceeding will become an involuntary one against him or not. If, upon being notified of the pendency of the case, he should join with his co-partners in asking that the firm be adjudged bankrupt, then it would be clear that the proceedings would be wholly voluntary. If, however, upon being notified of the proceedings, he should, under the provisions of general order No. 8, make defense to the petition, then the proceeding would become, as to him, an involuntary one, to be dealt with accordingly; for, as is said by the supreme court in Medsker v. Bonebrake, 108 U. S. 66, 71, 2 Sup. Ct. 351, 353: "It is not a voluntary bankruptcy if the man is forced into it against his will by his partner, any more than by any one else; and it is compulsory and involuntary if he refused to join in such case, and is forced into it, as much as in any other enforced bankruptcy." A proceeding brought by a part of the members of the firm is, in its initiation, a voluntary one, and will remain so in its entirety, if, upon notice, the other member or members of the firm actively join with the petitioners, or by acquiesence consent to the adjudication of the partnership; but, if the nonpetitioning member refuses to join in the proceedings, and contests the adjudication, then the proceeding becomes, as to him, an involuntary one.

It follows, therefore, that, when a petition on behalf of a part of the members of a firm is filed in the clerk's office, it cannot then be classed as an involuntary proceeding, because it may never become such, and, in the absence of the judge from the district or division, it is the duty of the clerk to refer the case to the proper referee. The case, however, whether coming before the judge or a referee, cannot be properly proceeded with until notice of the pendency of the proceeding has been given to the member or members of the firm who have not joined in the petition as filed, and, under the provi-

sions of general order No. 8, a time must be fixed for a hearing upon the petition, of which due notice must be given.

If the nonjoining member or members of the firm can be found, in the district or out of it, personal service of the notice must be made; but, if personal service cannot be had, then, upon filing before the judge (or the referee, if the case has been referred by the clerk) an affidavit showing that personal service of notice cannot be made, an order of publication of notice will be made, as provided for in section 18 of the act, which enacts that notice by publication shall be given in the same manner, and for the same time, as in cases in equity in courts of the United States, which are governed by the provisions of section 8 of the judiciary act of March 3, 1875 (18 Stat. 472), which requires the court to make an order requiring the named party to appear and plead to the petition by a named day, and to direct the publication of such order, if personal service thereof cannot be made, in such a manner as the court may direct, not less than once a week for six consecutive weeks. If, upon the hearing thus provided for, the nonpetitioning member or members of the firm join with their co-partners in the prayer of the petition, or, by failing to enter an appearance, show that they do not purpose to contest the adjudication, then the referee will enter the adjudication, and the case will be proceeded with as in other voluntary proceedings.

If, however, the nonpetitioning members of the firm should appear at the hearing, and, by proper pleading, should make defense to the proceedings, as provided for in general order No. 8, then the referee must certify the case to the judge, before whom the issue will be heard, a jury trial being had if the party has demanded the same under the provisions of section 19 of the act; that is, by filing with the referee a written demand for a jury at or before the time fixed for the hearing before him.

NOTE.

[Form of Order to be Entered and Published.]

In United States District Court, Northern District of Iowa, —— Division.
In Bankruptcy.

In matter of ————, Alleged Bankrupt:

It appearing in the above case, now pending before ——, referee in bankruptcy for the district of —— county, Iowa, that it is the purpose of the proceedings to adjudicate the firm of —— to be bankrupt, as well as the individuals composing said firm, and it further appearing that ——, —— a member (or members) of the firm, has not joined in the petition of his co-partners herein filed:

It is therefore ordered that this case be set down for hearing before ——, referee in bankruptcy, at his office in ——, on the —— day of ——, at —— o'clock, — m, and the said —— is hereby ordered to appear at that time and place, before the said referee, and then and there to plead to or answer the petition now on file, in case he desired to contest the same, or, in default of such appearance and pleading, the prayer of the petition will be granted.

It is further ordered that a copy of this order be personally served upon the said —— at least fifteen days before the time for said hearing, if personal service can be had, but, if such service cannot be made, then, upon filing with the referee an affidavit showing that fact, this order may be served by publishing the same once a week for six consecutive weeks in the ——.

In re CAROLINA COOPERAGE CO.

(District Court, E. D. North Carolina. September 14, 1899.)

1. BANKRUPTCY—COSTS—INTERVENTION.
Under Bankruptcy Act 1898, § 2, subsec. 18, providing that courts of bankruptcy may "tax costs, whenever they are allowed by law, and render judgments therefor against the unsuccessful party, in proceedings in bankruptcy," where a petition in involuntary bankruptcy is filed against a corporation, and an execution creditor intervenes, and opposes the adjudication, denying the insolvency of the respondent, but his contention fails, and the adjudication is made, the costs of the proceeding, in so far as the same were rendered necessary by his opposition, may be taxed against such intervener.

2. SAME—WITNESS FEES.
A petition in involuntary bankruptcy being filed against a corporation, one of its creditors, who had levied an execution on its property, intervened, and contested the petition, on the ground that the corporation was not insolvent, and claimed a prior lien on the property. These issues were determined against him, and the adjudication was made. *Held*, that the fees of the witnesses summoned by him should be taxed as costs against him, and also the fees of any witnesses summoned by the petitioning creditors, whose examination would not have been necessary but for the intervention.

3. SAME—COMPENSATION OF EXPERTS.
Extra compensation to expert witnesses above the statutory witness fee of $1.50 per day and mileage cannot be taxed as costs, or allowed against a losing party, in a court of bankruptcy; and the court will not be bound to make such an allowance because counsel have so agreed, especially where the agreement is not in writing.

4. SAME—COST OF PRESERVING PROPERTY.
Where a creditor who has levied an execution on property of his debtor interpleads to a petition in involuntary bankruptcy against the latter, and opposes (unsuccessfully) an adjudication thereon, and the property is surrendered by the sheriff, under order of the court of bankruptcy, and sold, the expense of preserving and caring for the property in the interim should not be taxed as costs against such intervener, if it does not appear that his intervention and contest delayed the sale.

5. SAME—REVIEW OF REFEREE'S DECISION—EXCEPTIONS.
On review by the judge in bankruptcy of a decision of the referee, counsel desiring to be heard by the court must file exceptions to the findings of the referee, as required by the rule of the court.

In Bankruptcy. On a petition in involuntary bankruptcy against the Carolina Cooperage Company, one Tyner, a creditor, who had recovered judgment against the corporation, and caused execution to be levied on its property, intervened, and opposed the adjudication, alleging that the corporation was solvent, and claiming a prior lien on its property. The defense failing, and the adjudication being made, the court ordered that there should be taxed against the intervener such part of the costs of the proceeding as were rendered necessary by his intervention and claim of priority. Tyner excepted to the bill of costs as taxed by the clerk, and moved before the referee for a retaxation, and now brings a petition for review of the decision of the referee on said motion.

John D. Bellamy, for petitioning creditors.
Iredell Meares, for intervening creditor.

PURNELL, District Judge. The report of the referee, after hearing counsel on motion to retax costs in compliance with a former order in this behalf against the interpleader, Tyner, of such costs as were rendered necessary by said Tyner's resisting the adjudication and his claim of priority, having been duly filed and considered, it is ordered and adjudged:

1. "That the recommendation of the referee that the costs taxed against said Tyner for 'entering and filing the report of the referee on priority of claim,' recording the same, and serving original papers, be stricken out," is affirmed.

2. The reduction of the allowance for witnesses before the commissioner from $10 to $3, as charged in the bill of costs, is approved as far as it goes, but it does not go far enough to comply with the law. The witness fees are allowed in the bill of costs as "expert witnesses." Extra allowance to expert witnesses cannot be allowed or taxed against a losing party in a United States district court sitting in admiralty or bankruptcy, but must be paid, according to the statute, $1.50 per day for actual attendance, and mileage. Rev. St. § 848; The William Branfoot, 3 C. C. A. 155, 52 Fed. 390, and 8 U. S. App. 129. Any extra allowance to "experts" is a matter of personal or private contract between the parties,—the one summoning the expert and the witness so summoned and used. The witness fees will therefore be reduced to the amount allowed by statute,—$1.50 per day for actual attendance,—and no more. And for this amount witnesses must prove their attendance, as provided by statute, before any fee can be taxed in a bill of costs. It is said, but does not appear in the report, that counsel agreed on this amount. Agreements of counsel cannot bind the court when deciding a question of law, and such agreements are disregarded entirely, and under all circumstances, unless in writing, and signed by the parties. Counsel who assume to do acts out of the ordinary course of practice, and bind their constituents or estates, should be willing to put such agreements in writing, and make them a part of the record. This rule is inviolate in this district. In the bill of costs as taxed by the clerk, it appears seven witnesses were examined before the commissioner. Four of them attended one day. These four witnesses were summoned, it appears, on behalf of Tyner, and he should be taxed with their fees at $1.50 per day. The other three were summoned in behalf of petitioning creditors, but their examination would not have been necessary but for the action of Tyner, and under the former order of court their fees, if they have regularly proved attendance, should be taxed against Tyner, the intervening creditor, claiming priority, which claim has not been sustained.

3. "That the item 'actual expense of taking care of property—$247.73'—be taxed, one-third, to wit, $82.54, against Tyner, and the balance be paid out of the estate." Was this taking care of the property in consequence of Tyner's interpleader or contest of the adjudication? Tyner had recovered judgment in an action of tort, execution issued, and the property of the bankrupt levied on, when the petition in bankruptcy was filed. Tyner—it is presumed, under advice of counsel—contested the adjudication, and then contended that this

gave him priority over other creditors. Adjudication was made, and the claim of priority decided against his contention. But suppose he had not contended for what he was advised was right; that the corporation was solvent, and he was entitled to a priority in the payment of his judgment,—still it would have been necessary to care for the property. Did his contention delay the sale of the property? The property was in the hands of the sheriff, and when taken therefrom by order of this court it was necessary to take care of it, even if Tyner had immediately abandoned his claim, and taken no further steps to preserve his rights. Under the provisions of the act, which are ample for the purpose, and were invoked in this case, the property could be, and was actually, sold before the determination of the claim of priority. If the petitioning creditor delayed in making application to the court for the order of sale, the contention of Tyner was in no way the cause of the procrastination, and the court, acting under equity rules, would not be justified in taxing him with any part of the costs thus incurred. Bankrupt Act, § 64, provides, too, that the cost of preserving the property shall be paid out of the estate. This is not a part of the cost contemplated in the former order, and the recommendation of the referee in this behalf is not approved. No part of this item will be taxed against Tyner, but will be paid by the estate. The former order of court was under and in accordance with the provisions of the bankrupt act (section 2), which provides that the courts of bankruptcy shall be invested with such jurisdiction in law and equity as shall enable them to (subsection 18) "tax costs whenever they are allowed by law, and render judgments therefor against the unsuccessful party, or the successful party for cause, or in part against each of the parties, and against estates, in proceedings in bankruptcy."

Except as herein modified, the recommendation of the referee and the bill of costs taxed by the clerk are affirmed. It is further considered and adjudged that, no exceptions to the finding of the referee being filed as required by the rule of this court, only a note in the report saying counsel request to be further heard, counsel having been heard before the referee, a further hearing is deemed unnecessary. The rules were made for the guidance and convenience of parties and their solicitors, and the court will enforce them, even if officers and solicitors seemingly regard them as matters of form only. Rules are, or should be, of record in every court in this district, have been printed and distributed, and must be followed in proceedings in bankruptcy. Solicitors practicing in the courts of bankruptcy frequently jeopardize the rights of their clients by disregarding these rules.

In re YOUNG.

(District Court, E. D. New York. August 9, 1899.)

BANKRUPTCY—FEES AND COSTS—DISBURSEMENTS OF ATTACHING CREDITOR.

Where the lien of an attachment is dissolved by the adjudication of the debtor as a bankrupt, the creditor has no lien upon the property of the bankrupt for the costs and disbursements incurred by him in such suit, and is not entitled to an order requiring the trustee to pay him the amount of such costs out of the estate.

In Bankruptcy. On petition of Francis Doherty & Co., creditors of the bankrupt, for an order directing the trustee in bankruptcy to pay to them the sum of $236, being the amount of costs and disbursements incurred by them in an attachment suit which they had been prosecuting against the bankrupt, but which was terminated, and the lien of the attachment dissolved, by the adjudication following within four months after the commencement of such suit.

Baggott & Ryall, for petitioners.
Edward K. Sumerwell, for trustee in bankruptcy.

THOMAS, District Judge. The motion herein is denied. The fees are an incident of the lien. When the lien fails, the incident fails also. It is not apparent that the estate has been benefited by an expense of $236, made in an attachment proceeding in an action to collect the sum of $392.50. However, the main question passed upon is the nonexistence of a lien. If the petitioners desire to review the question, the trustee will retain a sufficient sum to meet the claim, if the appellate court should consider the demand or any part thereof justly payable.

In re SCOTT.

(District Court, N. D. Texas. May 23, 1899.)

No. 13.

1. BANKRUPTCY—DIVIDENDS—PREFERRED CLAIMS.
   Where, upon the declaration of a dividend in a bankruptcy proceeding, a certain amount of money is reserved, sufficient to pay a like dividend upon claims which had previously been disallowed for insufficient proof, but with leave to claimants to amend, such claimants have no lien upon the money so reserved, nor is the referee bound to distribute it to them; and if thereafter a claim for an attorney's fee is presented, which is entitled to priority of payment as part of the costs of administration, it must be paid out of such reserved fund, in preference to the general creditors.
2. SAME—ATTORNEY'S FEE.
   The claim of the bankrupt's attorney for a fee, payable as part of the costs of administration, does not lose its right to priority of payment out of the funds on hand at the time it is presented, merely because it was not presented until after the declaration and payment of a first dividend.
3. SAME—DIVIDEND—SETTING ASIDE.
   A dividend in bankruptcy, once declared and paid, cannot be set aside, notwithstanding it was erroneously made so large as not to leave sufficient money in the trustee's hands for an equal dividend to creditors afterwards perfecting their proofs, in addition to the costs of administration.

In Bankruptcy. On review of ruling of referee in bankruptcy.

Baker & Ross, pro se.

MEEK, District Judge. It appears from the certificate of the referee herein that on the 17th day of February, 1899, W. T. Robinson, trustee for the bankrupt estate, having reported funds in his hands more than sufficient to pay a 5 per cent. dividend, the referee declared a dividend of 24 per cent. on all claims which had been al-

lowed up to that date, reserving from the amount shown to be in the hands of the trustee a sum sufficient to pay a like dividend upon the claims of Habbeler & Co., of Chicago, Ill., for $88.84, and B. F. Avery & Sons, of Louisville, Ky., $87.40, which claims had been presented prior to the date of declaration of the dividend, but had been disallowed on account of not having been properly proven, and leave having been asked and granted to these creditors to amend the proofs of their claims. It further appears that, after the declaration of said dividend, on, to wit, February 18, 1899, the Saunders Duck & Rubber Company, of St. Louis, Mo., proved and had allowed their claim of $43.60, and that on March 2, 1899, Habbeler & Co. and B. F. Avery & Sons presented amended proofs of their claims, and same were allowed by the referee. It further appears that on March 3, 1899, Messrs. Baker & Ross, attorneys for the bankrupt, A. L. Scott, having filed their petition and claim for services in representing the bankrupt, were allowed an attorneys' fee in the sum of $150, to be paid as costs of administering the estate. It further appears that the trustee reported to the referee that he had not sufficient money remaining in his hands to pay said attorneys' fees and also to pay anything on the claims of B. F. Avery & Sons and Habbeler & Co., and that thereupon the referee ordered that the balance of the funds in the hands of the trustee be applied to the claim of Baker & Ross. B. F. Avery & Sons and Habbeler & Co. excepted to the ruling of the referee in this respect, and the question is certified to me by the referee for my opinion thereon.

I am of the opinion that the action of the referee should be sustained. The claim of Messrs. Baker & Ross for attorneys' fees for services rendered the bankrupt, which was allowed by the referee, is entitled to priority of payment, under section 64, par. b, Bankruptcy Act. At the time of the declaration of the dividend, the claims of Habbeler & Co. and B. F. Avery & Sons had been presented, but had not been allowed, because of imperfect proofs of claim. Only those claims which have been properly proven and allowed by the referee before the declaration of a dividend are permitted to participate in the distribution under it. Permission having been obtained by Habbeler & Co. and B. F. Avery & Sons to amend their proofs of claim, the referee had sufficient grounds for concluding that those claims would probably be presented and allowed, and therefore held back from distribution under the dividend a sufficient sum to pay an equally large dividend upon these claims. Yet the referee is not bound to use the funds so held back in payment of this dividend upon them. Indeed, he cannot pay any part of them until another dividend is declared, in which dividend such claims must take their pro rata with other claims which, by the time of the declaration of another dividend, may have been properly proven. Claims enjoying the first dividend are not allowed to share in the second distribution until those that were credited with no part of the first dividend shall be paid a sum equal in amount to that received by other creditors. Section 65, par. c. The holding back of any amount by the referee from distribution gives claimants, whose debts are not properly proven, no lien of any kind upon said amount. The fact that the claim for an attorneys'

fee was not presented until after the declaration of the first dividend would not, in my opinion, destroy its right to priority of payment out of the funds on hand at the time it was properly presented. The referee should have withheld from distribution upon the declaration of the dividend sufficient funds to cover all expenses of administration and priorities. He is only required to hold back sufficient funds to cover claims that will probably be allowed, and I am of the opinion this includes those claims concerning which he has information such as justifies him in the conclusion that they will be allowed when presented. With these exceptions, he should devote the whole sum in the hands of the trustee to the dividend. In my judgment, under the circumstances existing in this case at the time of the declaration of the dividend, the dividend declared was too large; but it is not sought in this action to disturb the dividend already declared and paid, and, if it were sought to disturb this dividend, it could not be done simply by showing that the referee, in exercising his discretion, had made it too large. The dividend, when made pursuant to proper notice, and filed in court, virtually became the judgment of the court. Those creditors who failed to make proper proof of their claims must suffer with those who failed to make any proof before the time of the declaration of the first dividend.

It is therefore ordered that the action of the referee, in ordering the trustee to appropriate the balance of the funds in his hands to the payment of the claim of Messrs. Baker & Ross for attorney's fees, be, and the same is hereby, approved and confirmed.

In re RUSSIE.

(District Court, D. Oregon. September 14, 1899.)

No. 36.

BANKRUPTCY—EXEMPT PROPERTY—INDIAN LANDS.

An act of congress providing for the allotment in severalty of the agricultural lands of an Indian reservation, declared that the United States would hold the lands for 25 years in trust for the sole use and benefit of the several Indian allottees, who were not allowed to convey or incumber the lands during that time, and that at the expiration of that period the United States would convey the lands to the allottees, or their heirs, discharged of the trust, and free from all charges and incumbrances. During the time named, an Indian, one of the allottees under the act, became a voluntary bankrupt. *Held*, that the lands allotted to him did not vest in his trustee in bankruptcy, not being property which he could have alienated or incumbered, but being exempt under a law which was not repealed or affected by the bankruptcy act.

In Bankruptcy. On review of decision of referee in bankruptcy.

Carter & Raley, for bankrupt.

Balleray & Hailey, for objecting creditors.

BELLINGER, District Judge. This is a case of voluntary bankruptcy. The bankrupt is an Indian, and an allottee of lands under an act of congress approved March 3, 1885 (23 Stat. 340). The act provides for the allotment in severalty of agricultural lands com-

prised within the Umatilla reservation, in this state, to the Indians residing on such reservation. In addition to the allotment in severalty of agricultural lands, the act reserves a reasonable amount of pasture and timber lands for the use of the Indian allottees in common, and provides for a selection of 640 acres for an industrial farm and school, the whole to be in as compact a form as possible. The act further provides that:

"The president shall cause patents to issue to all persons to whom allotments of lands shall be made under the provisions of this act, which shall be of the legal effect, and declare that the United States does and will hold the land thus allotted, for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or in case of his decease, of his heirs according to the laws of the state of Oregon, and that at the expiration of said period the United States will convey the same by patent to said Indian, or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever: provided, that the law of alienation and descent in force in the state of Oregon shall apply thereto after patents have been executed, except as herein otherwise provided. * * * And if any conveyance is made of the lands set apart and allotted as herein provided, or any contract made touching the same, or any lien thereon created before the issuing of the patent herein provided, such conveyance, contract, or lien shall be absolutely null and void."

The creditors of the bankrupt contend that the allotted lands of Russie are subject to be taken as a part of his estate for distribution among creditors. Their contention is that the bankrupt law operated to repeal the provisions of the allotment act. By section 70 of the bankrupt act the trustee is vested "with the title of the bankrupt as of the date he was adjudged a bankrupt, except in so far as it is to property which is exempt, to all (1) documents relating to property; (2) interest in patents, patent rights, copy rights and trade marks; (3) powers which he might have exercised for his own benefit, but not those which he might have exercised for some other person; (4) property transferred by him in fraud of creditors; (5) property which, prior to the filing of the petition, he could by any means have transferred, or which might have been levied upon and sold under judicial process against him; and (6) rights of action arising upon contracts or from unlawful taking or retention of or injury to his property." The bankrupt act recognizes all exemptions, whether state or federal, as they existed at the time of the passage of the act; and the section quoted, descriptive of the property with which the trustee is vested, does not include such property as that in controversy. This property is excluded from the description of property given in subdivision 5 of section 70 of the bankrupt act, which describes as one of the classes of property to be taken by the trustee property which, prior to the filing of the petition, the bankrupt could by any means have transferred, or which might have been levied upon and sold under judicial process against him. This is not such property, and it is clearly the intention of congress that property should not pass to the trustee which could not be the subject of conveyance or disposition by the bankrupt at the time the bankruptcy proceedings were inaugurated. It is not the policy of the bankruptcy act to interfere with the acts of congress relating to the disposition and control of property set apart for the benefit of members of the Indian tribes. Obviously, the policy of

congress is to preserve what may be termed "Indian lands" intact, for the benefit of the individuals composing the tribe to whom allotments have been or may be made; and therefore the right of disposition by the Indian allottees upon these reservations is expressly withheld. If the Indian cannot dispose of these lands by deed, or by suffering an execution to be levied upon them under judicial process, he cannot dispose of them by the method of a petition in bankruptcy. The policy which preserves the land from disposition in the one case operates in the other; otherwise, the providence which the government exercises over these Indians will be defeated, and the industrial Indian community which has been set up on the reservation, with its adjuncts of an agricultural farm and school, will be intruded upon by white men, who will succeed to the Indian title and privileges through the operation of the bankrupt law. It is argued that an Indian who voluntarily goes into bankruptcy should at least forfeit to his creditors the property interest which he holds under the allotment act. But the debts of such an Indian are not created upon the credit of the land allotted to him. The man who deals with such an Indian does so with knowledge of his disability to dispose of or incumber the land held under the allotment act. He expected nothing from this source, and has no reason to complain that he gets nothing. The decision of the referee, holding that the allotted lands in question are not liable for the bankrupt's debts, is affirmed.

In re FRICE.

(District Court, S. D. Iowa, W. D. August 9, 1899.)

No. 180.

1. BANKRUPTCY—OPPOSITION TO DISCHARGE—TIME OF FILING SPECIFICATIONS.
   Under general order No. 32 in bankruptcy (32 C. C. A. xxxi., 89 Fed. xiii.), providing that creditors opposing a bankrupt's application for discharge must enter their appearance, and within 10 days thereafter file specifications in opposition, unless the time shall be enlarged by special order of the judge, *held* that, where appearances are entered for the purpose of opposing the discharge, but the specifications are not filed within the next 10 days, it is discretionary with the judge to permit them thereafter to be presented, and to enlarge the time for filing by a nunc pro tunc order.
2. SAME—WHO MAY OPPOSE.
   Under Bankruptcy Act 1898, § 14 (b), providing that opposition to a bankrupt's application for discharge may be made by "parties in interest," persons who assert themselves to be creditors of the bankrupt, and who are named as such in his schedule, are entitled to oppose his discharge, although they have not proved their claims in the bankruptcy proceedings.
3. SAME—REQUISITES OF SPECIFICATIONS.
   Specifications in opposition to a bankrupt's application for discharge must be clear, specific, and circumstantial, and must distinctly allege one or other of the statutory grounds for refusing a discharge.

In Bankruptcy. On objections to bankrupt's application for discharge.

WOOLSON, District Judge. Application having been made by said bankrupt for his discharge, the same, under the rules of this district, was referred to H. C. French, Esq., referee in bankruptcy at Red Oak, Iowa, who duly fixed and gave due notice of time for appearing, etc., of parties objecting to discharge. No appearance was made by any creditors who had proven their claims. But certain persons, asserting themselves to be creditors, did appear and file written announcement of their intention to resist discharge. But said persons did not file, within the 10 days allowed by general order (32 C. C. A. xxxi., 89 Fed. xiii.), specifications of grounds of objection. Such were filed with said referee within two days thereafter, and while the referee had all the papers yet in his possession. This presentation, though out of time, it is discretionary with the judge to permit, since by nunc pro tunc order he may enlarge the time of filing, under said general order, as he might on application have enlarged it before time for filing had expired. These objectors appear to have been included as creditors on the schedules filed by the bankrupt as a part of his petition. The right to object is not restricted to creditors who have proven up their claims. By section 14 (b) of the bankruptcy act the judge is to hear the proofs and pleas in opposition to discharge, as presented by "parties in interest." Says Loveland, in his admirable treatise on Bankruptcy (page 599): "To entitle a party to oppose a discharge, he must have a pecuniary interest in the matter." The bankrupt having scheduled these objecting parties as creditors, they may well be assumed to have an interest in resisting discharge of the bankrupt from the debts they had against him, even though they regarded the amounts they would probably receive from the estate as not sufficient to induce the expense, etc., of filing and proving up their claims. The specifications filed are peculiar in the facts stated, and a brief from counsel preparing same would have proven highly interesting, if not instructive, and would well have justified being entitled "Much ado about nothing," as relating to the present matter. It is averred that "a few years ago"—why not the equally specific statement, "once upon a time"—"the bankrupt married a clerk, having no property"; he afterwards failed in business in Omaha, with debts outstanding "aggregating $10,000 to $20,000"; that neither himself nor wife at that time "had any money or property from which claims could be collected"; that the wife then "claimed to have neither money nor property out of which she could pay or secure claims for which she was personally liable." Said bankrupt thereafter "came to Shenandoah, and bought a business house, paying for it $4,200, taking the title thereto in his wife's name." And thereupon "your relators object to the discharge of said bankrupt for the reasons above set forth, because from said facts it appears that the money that went into the Shenandoah building and business must have been saved out of the Omaha business, and belongs to the bankrupt, and should go towards paying his debts, amounting to a fraud on his creditors if said money came out of the Omaha business." Therefore "your relators ask that said bankrupt be not discharged until he shows where the money that went into said building and business came from." No dates are given to the transactions, which we must

assume the attorney drafting the papers attempted to state. How stale the occurrences are we must only infer from "a few years ago." The debts held by the objectors are in no way shown to have grown out of, or in any wise to have been connected with, "the Omaha business." How they are related to the matter, the paper is silent; no charge of fraud practiced or attempted; only the inference indulged in that there "must have been saved out of the Omaha business" the purchase price of the Shenandoah property, which "amounted to a fraud on his creditors, if said money came out of the Omaha business"! And therefore the court is asked to refuse discharge until the bankrupt shall show "where the money that went into that building and business came from." This, too, in the absence of any direct averment of fraud in the matter! The case presents a parallel, if not a superior, to that wherein it is said the prosecuting counsel demanded the prisoner on trial be declared guilty unless he proved himself innocent of the charge under which he had been placed on trial! If counsel preparing these objections had read the bankruptcy statute, or only consulted the section relating to discharges, he could not have failed to note that this section points out only two grounds as justifying withholding discharge, and commands the court to grant discharge unless one of these two grounds is proven. He could scarcely fail to notice, if that section be now consulted by him, that the matters attempted (as we assume) to be stated by him are not embraced within either of these grounds. Occasionally it appears surprising that counsel will attempt to take action in matters committed to their charge without consulting the statute under which they act, or carefully examining the papers drawn up by them, for the purpose of ascertaining whether these present a basis upon which they can properly ask the action of the court. Due consideration of the attitude in which otherwise they present themselves should induce careful examination after the papers have been drawn up, even if they have lost sight of their client's best interests, and have no consideration whatever for the wholly useless burden they impose, and the almost trespass which they commit, upon the court, in consumption of judicial time and energy, in the attempt to extract from such papers, and to determine, if possible, whether back of it all there may not be some fact existing or some right existing to the client, which, in justice to him, should receive further action in the case.

With what lack of care for his clients' interests, and lack of consideration of the statutes, counsel for opposing creditors has attended, or failed to attend, to this case, is apparent from the fact that counsel has made no effort to avail himself of the various provisions of the statute, and the opportunities afforded at the different meetings of creditors, for placing the bankrupt under close and searching examination, whereby he might have probed to the very bottom the circumstances to which he has so indefinitely referred in the so-called "specification of grounds of objection" filed by him herein.

I desire that the clerk of this court shall very strictly observe the provisions of this statute requiring that counsel appearing for parties in bankruptcy proceedings must have been admitted to practice in this court. In some degree the observance of this requirement may

result in excluding those attempting to practice as attorneys, who do not employ knowledge of the law or give attention to matters intrusted to them to such a degree as to justify the expectation that the interests of their clients are reasonably safe in their hands. In the present case, as presented by counsel, there appears no ground, nor shadow of ground, under the present statute, in which the court could be justified in refusing discharge. Accordingly, discharge ordered.

In re BELKNAP et al.

(District Court, D. Kentucky. September 23, 1899.)

1. CRIMINAL LAW—REMOVAL OF PERSON TO ANOTHER DISTRICT FOR TRIAL.
On an application, under Rev. St. § 1014, for a warrant for the removal to another district for trial of a person arrested on a commissioner's warrant based on an indictment found in such other district, or on the hearing on a writ of habeas corpus sued out by such person, the only question to be considered is whether the indictment on its face charges the commission of an offense within the jurisdiction of the court in which it was returned.

2. INTERSTATE COMMERCE ACT—OFFENSES BY SHIPPER—JURISDICTION.
Under the provisions of the interstate commerce act (25 Stat. 858), making it an offense to secure the transportation of property by any carrier subject to the act at less than the regular rates by means of false billing, weights, or representations as to the contents of any package delivered to the carrier for transportation, which shall subject the offender to a fine and imprisonment on conviction in any court of the United States of competent jurisdiction "within the district in which such offense was committed," the offense is fully committed by a consignor at the place where the property is delivered for transportation, the false billing made, and the illegal rate secured; and a court of another district, where the property is delivered to the consignee, has no jurisdiction of such offense.

Hearing on Petition for Writ of Habeas Corpus.

Humphrey & Davie and W. M. Smith, for petitioners.
R. D. Hill, U. S. Dist. Atty., for respondent.

EVANS, District Judge. The petitioners were indicted in the district court of the United States for the Eastern district of Texas for alleged violations of the interstate commerce law. Being residents of the district of Kentucky, a copy of the indictment was transmitted here, and thereupon a warrant was issued for their arrest, and, having been executed, the United States made application to the judge of this court, under section 1014 of the Revised Statutes, for a warrant for their removal by the marshal to the Eastern district of Texas for trial. Meantime, however, they petitioned the court for a writ of habeas corpus, alleging, among other things: That they were citizens of the United States, and domiciled in the state of Kentucky. That they were held in custody by the marshal of the district of Kentucky under and by color of authority of the United States. That they were arrested and held in the state of Kentucky under a writ issued by a commissioner of the district court of the United States for the district of Kentucky for an offense alleged to have been committed in the Eastern district of Texas, and for which there had been

returned in the last-named district an indictment for violation of the interstate commerce law. That the commissioner's writ under which they were arrested was issued upon a copy of the indictment for the purpose of removing them to the Eastern district of Texas for trial on said charge. That they were unlawfully held in custody, and could not be lawfully removed to the Eastern district of Texas, because—First, the said indictment fails to charge an offense against the United States, or otherwise; second, because the district court of the United States for the Eastern district of Texas has no jurisdiction of the offense charged in said indictment. The petitioners also allege that they are members and officers of a corporation, and that they are not guilty of the offense charged; but these allegations do not appear to the court to be material, nor is their consideration proper upon the questions involved in this hearing. The return of the marshal to the writ of habeas corpus makes it appear that the petitioners are held in custody under the writ issued by the commissioner of the court upon the copy of the indictment, and not otherwise.

While the application to the judge for a warrant for the removal of the petitioners is before him as an officer, and not before the court, still the same questions arise upon it as upon the writ of habeas corpus. If the indictment, upon its face, charges the commission of any public offense against the United States within the jurisdiction of the court in which the indictment is pending, it is the plain duty of the judge to make an order for the removal to that district of the persons indicted. Doubts should not be solved against the indictment in such cases. On the contrary, it seems to me that they should be solved in favor of the removal of the accused, for the reason that the court in which the indictment is pending is entirely competent to determine all questions involved, and can be implicitly relied upon to determine them according to the law and the justice of the case; but, whether so or not, it is the exclusive right of that court to do it subject only to the duty of this court and of the judge thereof upon an application like this, and before he will make any order to send the accused to Texas to inquire whether, on the face of the indictment, a public offense against the United States has been charged, of which the court in which the indictment is pending has lawful jurisdiction. Obviously it would be a hardship and injustice to remove the accused persons to a distant state, or compel them to give bond for their appearance there, if it is apparent that the court there must itself hold that it has no jurisdiction of the indictment, or of the offense charged in it. That these are questions to be decided at the threshold of every case of this character seems to be clearly established by the opinions in the cases In re Greene, 52 Fed. 104, and U. S. v. Fowkes, 3 C. C. A. 394, 53 Fed. 13.

The provision of the interstate commerce act under which the indictment was found, as amended, reads as follows:

"Any person and any officer or agent of any corporation or any company who shall deliver property for transportation to any common carrier, subject to the provisions of this act, or for whom as consignor or consignee, any such carrier shall transport property, who shall knowingly and willfully, by

false billing, false classification, false weighing, false representation of the contents of the package, or false report of weight, or by any other device or means, whether with or without the consent or connivance of the carrier, its agent or agents, obtain transportation for such property at less than the regular rates then established and in force on the line of the transportation, shall be deemed guilty of fraud, which is hereby declared to be a misdemeanor, and shall, upon conviction thereof in any court of the United States of competent jurisdiction within the district in which such offense was committed, be subject for each offense to a fine of not exceeding five thousand dollars or imprisonment in the penitentiary for a term of not exceeding two years, or both, in the discretion of the court." 25 Stat. 858.

The indictment contains four counts, the first of which seems to be an accusation that the defendants, after a false billing, false classification, and false representation of contents, evidently made in Kentucky, delivered the merchandise, or caused it to be delivered, to the consignee in Texas. This accusation by no means appears to be a public offense under the clause of the statute above quoted. Nowhere does that statute make it an offense to deliver the goods to the consignee under any circumstances. Taken together and stated broadly, the remaining counts may be fairly said, in different forms, to charge the defendants with having, by means of willfully false billing, false classification, and false representation of the character of the goods delivered to the common carrier in Kentucky, obtained or caused to be obtained transportation of the merchandise at a less rate than the regular schedule and established rates over the common carriers included in the route from Louisville, Ky., to Beaumont, Tex. The false billing, classification, and representation referred to consisted, as alleged in the indictment, in falsely representing the merchandise as wagon material in the rough, instead of fine hardware, such as guns, etc., which in fact made up the shipment. In the opinion of the court, it manifestly appears from the indictment that all these acts were performed in Kentucky, that the rates of transportation were thereby obtained in that state, and that the merchandise was delivered for transportation to the carriers in that state. The statute provides that persons doing such acts shall be guilty of a misdemeanor, "and shall, upon conviction thereof in any court of the United States of competent jurisdiction within the district in which such offense was committed, be subject to a fine," etc. The court is clearly of opinion that, upon a fair construction of the language of the indictment, the offense was necessarily committed in Kentucky alone; that it was completed in that state; and that the statute does not give jurisdiction to any court of the United States except the one in the district in which the offense was committed. If this be the correct construction of the language of the indictment in connection with the statute, it must necessarily follow that the district court of the United States for the Eastern district of Texas has no jurisdiction of the offense charged in this case, and that it would so hold if the accused persons were sent there. If this be true, it would be unjust, as well as useless, to send them.

There was some contention that this was a continuing offense, which began in Kentucky, and was finally ended by the delivery of the goods to the consignee in Texas; but the court is of opinion that the offense charged was committed, and fully committed, in Ken-

tucky, where the defendants, according to the charge in the indictment, all resided and did business, and where all the acts were done which, under the law, together constituted the offense. It seems to the court, indeed, that there is only one offense charged in the indictment, and it is probable that this one offense is all that could be charged under the statute, so far as a shipper is concerned. To constitute the offense, there must be—First, a willfully false billing, classification, or misrepresentation of the character of the property to be shipped; second, the obtaining by that means of a lower rate of transportation than the regular rate; and, third, either the delivery of the property to the common carrier for transportation, or its actual transportation by it. All these elements appear from the indictment to exist in this case, but each one arises out of acts done in Kentucky, and not in Texas. It therefore inevitably follows that the offense they constitute was committed in Kentucky, and can, under the statute, only be punished here. For these reasons it seems to the court that the warrant for the removal of the defendants to Texas ought not to be granted, but, on the contrary, under the writ of habeas corpus, that the defendants should be discharged. They are discharged accordingly.

GUTTNER et al. v. PACIFIC STEAM WHALING CO.

(District Court, N. D. California. August 29, 1899.)

No. 11,730.

1. SHIPPING—CONVERSION OF SHIP'S STORES—POSSESSION WHICH WILL SUPPORT ACTION.

   Seamen who remained on board an ice-bound vessel after she had been abandoned by the master and others of the crew were lawfully in possession of the stores and other property on board belonging to the owners, and may maintain trespass therefor against the owners of another vessel, which took such stores and property off the vessel without their consent.

2. SAME—WRONGFUL TAKING.

   The taking of such stores was none the less a trespass because no resistance was offered, and no force used, where it was without the consent of those in possession; nor is it any defense to the action that they were taken to preserve the lives of the crew of the vessel taking them.

3. SAME—MEASURE OF DAMAGES—INTEREST OF PLAINTIFF.

   In an action to recover for the wrongful taking and conversion, by a stranger to the title, of property which was in the rightful possession of plaintiff, the measure of damages is the full value of the property converted, and defendant cannot limit the recovery to the value of the plaintiff's interest therein.

4. SAME—TORTS OF MASTER—LIABILITY OF OWNERS.

   The masters of two whaling ships, together with natives living on shore, took from an ice-bound vessel, without the consent of those in charge, certain provisions, which were divided between the ships, and also whaling gear, and other articles, which were kept by the natives. *Held*, that the owners of one of the ships could only be held liable for the value of such of the stores taken as were applied to the use and benefit of their vessel, and which it would have been within the scope of the master's employment to procure. The fact that the master consented to the taking of the other property by the natives cannot render his principals liable therefor.

D. T. Sullivan, for libelants.
Page, McCutchen & Eells, for respondent.

DE HAVEN, District Judge. This is an action for a marine trespass and conversion. The libel charges that in the month of October, 1897, one Leavitt, master of the whaling bark Newport, owned by the defendant, took by force from the bark Navarch, then on the high seas, certain provisions, ship's gear, whaling gear, tools, and other articles of which the libelants were then lawfully possessed as of their own property. The defendant, in its answer, admits the taking of certain provisions at the time and place stated in the libel, but denies that the libelants, or any of them, were lawfully possessed of the property so taken, and also puts in issue the allegation of the libel that any provisions, stores, or other articles of personal property were taken by force and against the will and consent of the libelants; and for a separate defense it is alleged that it was necessary for the master of the bark Newport to take the provisions mentioned in the libel for the use of the crews of the Newport and other whaling vessels ice-bound in the Arctic Ocean at that time, and for the preservation of human life.

1. The facts of the case may be very briefly stated as follows: The libelants were seamen on board the steam whaling bark Navarch, and on August 5, 1897, that vessel was ice-bound in the Arctic Ocean, and, though staunch and strong, was then abandoned by her master and all of her crew, it being thought that she was in the Northwest current, and such action necessary for the safety of those on board. They were unable to make land, and, after being five days upon the ice, returned to the ship, and there remained four days, when her master and all of the crew except the libelants and three other persons again abandoned her, and started for the United States steamer Bear, then in sight, and only a few miles distant. The libelants refused to leave the Navarch at this time, for the reason that in their opinion it was more dangerous to go upon the ice than to remain; and it is possible they may have thought, or some of them, at least, that, if the vessel was finally saved, they would be entitled to compensation as salvors if they continued with her. None of them, however, knew anything about navigation, nor were they ever called upon to exercise any skill as navigators, as the Navarch drifted with the ice until the latter part of September, when she was sighted about 12 miles from Point Tangent by the Newport and the Fearless. These last-named vessels were lying ice-bound in a position of safety, about one-quarter of a mile from shore, and out of the current. They were only provisioned for six weeks, and therefore in need of additional supplies to subsist their crews until they could be released from the ice the following summer; and when the Navarch was sighted an officer from each, and a number of natives with sleds, were at once sent out to her, for the purpose of obtaining such stores and provisions as could be spared, and also to assist her crew in coming to the vessels in shore, if they desired so to do. This party succeeded in reaching the Navarch, and the sleds were, with the consent of the

libelants, loaded with supplies, all of which were lost upon the return trip on the ice; and the masters of the Newport and Fearless then determined to bring in all of the stores remaining upon the Navarch. This action was deemed necessary by them, because their vessels did not have sufficient provisions for the winter, and also because the Navarch was in a position of extreme peril and already abandoned by her master and most of the crew. In order to bring in the provisions, it was necessary to secure the assistance of natives with their sleds, and, for the purpose of inducing them to assist in this work, the natives were told that they might keep for themselves all of the whaling gear, sails, and tools which they might save from the Navarch. This was satisfactory to them; and under the direction of two officers, one from the Newport and one from the Fearless, they proceeded with sleds to the Navarch, and brought in all of her provisions, some whaling gear, a number of sails, and other articles. The provisions were placed on board the Newport, and less than one-half was retained by Capt. Leavitt for the use of that vessel, and the remainder divided between the Fearless and the steamer Jennie. The other articles were taken by the natives, with the exception of one hawser and two lengths of hose, which were retained on the Newport, and a steam pump and two sails, purchased by the master of the Fearless from one of the crew of the Navarch, who is not a libelant. The provisions divided between the Newport, Fearless, and Jennie were of the value of $871, and it is claimed by the libelants that the whaling gear and other articles kept by the natives were of the value of $2,900, or thereabouts. Whether this property was taken from the Navarch with the consent of the libelants will be considered in another part of this opinion.

2. It will be seen from the facts stated that the stores and other property taken from the Navarch belonged to the owners of that vessel. The libelants were, however, in lawful possession of the property at the time it was taken, and had the right to so continue as against every one except the true owner. The possession thus had was not the possession of servants, merely, and is sufficient to entitle the libelants to maintain this action as against the defendant, who has not shown a better title, if, in fact, the property was taken from them against their will and consent. Jefferies v. Railway Co., 5 El. & Bl. 802; Wheeler v. Lawson, 103 N. Y. 40, 8 N. E. 360; Stowell v. Otis, 71 N. Y. 36. In the case last cited it was said: "The peace and good order of society require that persons thus in possession of property, even without any title, should be enabled to protect such possession by appropriate remedies against mere naked wrongdoers." As already stated, the present case falls within this rule, if the property mentioned in the libel was taken by the master of the Newport from the libelants against their consent. Upon this question of fact the evidence is sharply conflicting, and it is not deemed necessary to attempt in this opinion any analysis of the testimony of the different witnesses, or to do more than state the conclusion reached upon this point. I think it sufficiently appears from the evidence that the libelants were not willing to let the stores on

the Navarch be taken from their possession, except upon condition of receiving a written acknowledgment to the effect that payment therefor should be made to whomsoever might thereafter be shown to be entitled to the property or its proceeds. They made a request for such a writing, and it was not given. In view of the fact that the provisions were necessary to supply those on board the imprisoned whaling ships with food during the approaching Arctic winter, and also because the Navarch was in a position of extreme peril, and everything on her almost certain to be lost unless removed, the libelants would have been justified in giving up the provisions upon the condition named, while a sale made by them upon their own account, with the intention of appropriating the proceeds to their own use, would have been an act of conversion. It is difficult to understand why this request was not complied with, except upon the supposition that the masters of the Newport and Fearless were of the opinion that the libelants had no interest in the property, and were not entitled to demand such a receipt; but, whatever may have been the reason for such action, the provisions were taken from the libelants without giving the acknowledgment or receipt requested. No actual violence was used, and no resistance offered by the libelants to make a resort to violence necessary to effect the taking. In my opinion, the facts which have been stated justify a finding that the property was taken without the consent of the libelants. The masters of the Newport and the Fearless had no right to take the provisions without giving the receipt requested, and their action, although the protest against it may have been feeble, was a trespass, a wrongful interference with the property, an unwarranted assumption of authority to take and deal with it upon terms not consented to by the libelants, who were lawfully in possession. Any unlawful interference by one with the property of another, or with property in the rightful possession of another, is a trespass upon such property, and the degree of force used is immaterial so long as what is done amounts to an exercise of dominion over it, against the will of the owner, or other person in lawful possession. Miller v. Baker, 1 Metc. (Mass.) 27; Gibbs v. Chase, 10 Mass. 125; Reynolds v. Shuler, 5 Cow. 323; Cooley, Torts, p. 448. Thus it has been held that, when a horse is hitched where he has a right to be, it is a trespass upon the part of another to unhitch and remove him against the will of the owner to another position, however near. Bruch v. Carter, 32 N. J. Law, 554. Nor is it any defense in this case that the property was taken from the possession of the libelants for the purpose of saving human life. The motive or intention with which a trespass upon property may have been committed is immaterial except in resisting a claim for exemplary damages on account of the trespass.

3. It having been shown that the libelants are entitled to maintain the action, the next question relates to the rule by which the damages are to be measured. It is very earnestly insisted in behalf of the defendant, that under the broad and equitable principles which govern proceedings in courts of admiralty, the libelants ought not to recover more than the value of their interest in the property which was taken by the defendant; and the proposition is also advanced,

that the value of this interest cannot, in any event, exceed what would have been allowed them as salvors, if they had actually brought the property to a place of safety and delivered it into the possession of the owners of the Navarch. It is undoubtedly true, as a general proposition, that damages, to be just, should be precisely commensurate with the injury for which they are given, and upon this principle it has been held that, when one having a special or qualified interest in property sues for its conversion, he can only recover, as against the general owner, or a defendant in privity with such owner, the value of such special interest. 1 Suth. Dam. 210; Chamberlin v. Shaw, 18 Pick. 278. But it is only in such cases that the courts permit any inquiry as to the value of a plaintiff's special interest in property wrongfully taken from his possession and converted by a defendant. Such an inquiry will not be made at the instance of a stranger, and that is the position occupied by the defendant in this case. The defendant here is not in privity with the owners of the Navarch or their successors in interest, and cannot justify the wrongful act of its agent, or mitigate the damages resulting therefrom, by interposing the title of the owners of the Navarch, or their successors, as a defense; and it results from this view that whether anything was done by the libelants for the preservation of the property converted by the defendant, of sufficient merit to entitle them, as against the owners of the Navarch, or their successors, to any part of the judgment to be recovered in this action, is a question not before the court at this time.

The measure of damages for the trespass and conversion complained of here is the same as that upon which courts act in awarding damages in common-law actions of trespass or trover, when property has been taken from the lawful possession of a plaintiff by one who is unable to show a better title; and under that rule the libelants are entitled to recover the full value of the property converted by the defendant. 1 Suth. Dam. 210; Armory v. Delamirie, 1 Strange, 505, 1 Smith, Lead. Cas. 636; Russell v. Butterfield, 21 Wend. 300; Harker v. Dement, 9 Gill, 7. This is the doctrine of the leading case of Armory v. Delamirie, just cited, in which it was held that the finder of a jewel was entitled to recover its full value in an action of trover against one who had taken it for examination, and refused to return it. It is not perceived that there is anything inequitable in this rule, or in its application to the present case, as the satisfaction of the decree herein will be a bar to another action by the true owner for the same conversion (Chesley v. St. Clair, 1 N. H. 189; Bissell v. Huntington, 2 N. H. 143; Bac. Abr. Tit. "Trover," par. 33); so that the defendant will only be required to pay the value of the property which it has converted, and, as a necessary result of giving such an effect to the decree, the libelants will be accountable to the owners of the Navarch for all that may be recovered in this action over and above the value of their own special interest, if any they have; and it will be provided in the decree that the money to satisfy the same shall be paid into court, so that the owners of the Navarch, or their successors in interest, may intervene in this proceeding for the protection of their rights at any time before the amount which the

defendant is required to pay shall come into the hands of the libelants. If they do not choose to intervene, and are satisfied to allow the libelants to retain for their own use the amount recovered in this action, that is a matter which does not concern the defendant, and of which it has no right to complain. What, then, should be the extent of the recovery against defendant upon the facts of this case? In my opinion, the libelants are entitled to recover the value of so much of the property tortiously taken by the defendant's agent, Capt. Leavitt, as was appropriated to the use and benefit of the Newport (The Florence, 2 Flip. 56, Fed. Cas. No. 4,880), and no greater sum. The defendant is only liable for the tort of the master of the Newport in so far as he was engaged in accomplishing a purpose within the general scope of his employment, and he was not clothed by the defendant with authority to secure whaling gear and other property for the natives, nor supplies for any other vessel than the one of which he was master. In Cooley, Torts, p. 536, in discussing the general question as to when the master is responsible for the wrongful act of his servant, it is said: "The test of the master's responsibility is not the motive of the servant, but whether that which he did was something his employment contemplated, and something which, if he should do it lawfully, he might do in the employer's name." Certainly, under this rule the court would not be justified in finding as a fact that the master of the Newport was acting within the scope of his employment in so far as he acted jointly with the natives, and with the master of the Fearless in taking from the Navarch supplies and other property not for the use of the Newport. If he had entered into a contract with the owners of the Navarch for the purchase of all the property taken, they having notice that the purchase was made by him not only for the use of the Newport, but also for the use of the natives, and for the Fearless and the Jennie, such contract could not have been enforced as against the defendant, excepting in so far as it related to the property purchased for the Newport, because of want of authority in the master to bind the defendant beyond this; and so, when he joined with the other tort feasors in taking all the property from the Navarch, under the circumstances above stated, the defendant can no more be made liable for that portion of the property not taken for his use than if the master had procured such property by contract instead of tort. The proposition is not disputed that, when several persons unite in an act which constitutes a wrong to another, each one of them is liable for the entire damage resulting from the act of all; but this rule is not applicable when it is sought to hold a defendant responsible, not because of his actual participation in the wrong, but solely by virtue of the relation of principal and agent existing between him and one of the wrongdoers, when, as in this case, that which was done for the benefit of the principal, and in furtherance of the business intrusted to the agent, can be easily separated from that which was done by the agent for the benefit of others. The wrong complained of here was against personal property, consisting of different articles, and what was done by Capt. Leavitt in taking a portion of this property for the use of the Newport must, in this action against the defendant, be regarded as a tort separate and distinct from his wrong-

ful act in assisting to take at the same time the other property mentioned in the libel.

4. The libelants contend that the property kept by the natives was given to them by the masters of the Newport and Fearless as a compensation for services rendered to the defendant in bringing in the supplies, and that the defendant is therefore liable for its value as property applied to its use. The argument in support of this proposition is plausible, but is based upon an erroneous view of the real nature of the transaction. The natives and the masters of the Newport and Fearless were joint wrongdoers, and the agreement between them was, in effect, that the property taken should be divided, the provisions to be kept by the masters for the use of their vessels, and the whaling gear and other articles to be retained by the natives. The property retained by the natives under the division thus agreed upon cannot, in any legal sense, be considered as having been received by them from the master of the Newport as compensation for services rendered to the defendant; on the contrary, it was kept by them as their share of the property which they assisted in wrongfully taking from the Navarch. The fact that the master of the Newport consented to this disposition of the property is not sufficient to render the defendant liable for its value. The defendant was not an actual participant in the wrongful taking of any of the property belonging to the Navarch, and, as we have seen, is only liable for such portion thereof as was taken for the use of the Newport; and under this rule the defendant can no more be required to respond for the property wrongfully taken and kept by the natives for their own use than for the provisions taken for the use of the Fearless and the Jennie. I find the value of the property taken for the use of the defendant to be $450. Let a decree be entered in favor of the libelants for this sum and costs, the money to satisfy the decree to be paid into court.

THE PEGASUS.

(District Court, D. Oregon. September 14, 1899.)

No. 4,464.

MASTER AND SERVANT—INJURY OF SEAMAN—LIABILITY OF SHIP.

A seaman cannot recover damages from the ship for an injury received while obeying an order which is shown to have been a proper and usual one under the circumstances, and when the service required did not involve unusual risk.

This was a suit against the British ship Pegasus to recover damages for a personal injury to a seaman.

John Manning, for libelant.

J. C. Flanders, for claimant.

BELLINGER, District Judge. This is a libel for damages. Shortly after the ship Pegasus had left Port Townsend, and probably while still in tow of the tug, the boatswain gave the order, "Two men aloft!"

for the purpose of taking the turn out of the topgallant sail. Libelant and another went aloft, and discharged this duty, and while so engaged libelant claims to have sustained an injury resulting in a rupture, which he attributes to the negligence of the master or officers of the vessel in failing to have the sail clued up before sending the men aloft; the claim being that, on account of the shaking of the sail with the wind, the libelant became jammed somewhere between the sheave and the sheet, and was injured as stated. The testimony shows the order to go aloft was given by the boatswain. It was not specific as to the libelant. The order was, "Two hands aloft!" to which the libelant and another sailor responded. Upon the facts in the case it is not clear that there was any negligence on the part of the captain or of the officers in failing to clue the sail before sending these men aloft. Klinger, one of libelant's witnesses, and the sailor who accompanied libelant in the work, testifies that there was quite a strong breeze at the time, but not a gale of wind. Meyerdiercks, another witness testifying for libelant, says he cannot tell whether he considers the place where libelant went a safe place to go. This witness says that, if he had been ordered to go, he would have gone, never thinking of the question of his safety; that he goes where ordered, unless he can see plainly that he is in danger of his life. The boatswain testifies that it was just an ordinary breeze, and the thing required of the men was not a dangerous thing to do; that he has done the same thing hundreds and thousands of times. Jeffrey, the second mate, says that what was done was a common thing; that there was no storm of any sort; that the weather was showery; that the order given is such an order as is often given on board ship under circumstances such as these. Elliott, the first mate, testifies to the same thing,—that what was done was proper; that it is a thing that is done whenever it is needed, and done in the same manner; that, if libelant thought at the time that the sail should have been clued, he should have sung out to the deck, and that thereupon nobody would have compelled him to go out until the sail was clued; that the libelant went out of his own accord. This is all the testimony in the case, and it fails to make a case of negligence. It does not appear from the testimony of any of these witnesses that the order was one improper to be given, or that it was an unusual order, or that the service involved unusual risk; and the majority of the witnesses testify that the order was one usually given under the circumstances, that it was proper, and is a common thing on shipboard. Under these circumstances there can be no recovery, and the order will be that the libel be dismissed.

JENKS v. BREWSTER et al.

(Circuit Court, S. D. Iowa, E. D. September 12, 1899.)

No. 212.

1. JURISDICTION OF FEDERAL COURTS—CITIZENSHIP—ANCILLARY SUIT.
A suit in a federal court to obtain a construction and enforcement of a decree of the same court is ancillary to the former suit, and the court has jurisdiction regardless of the citizenship of the parties.[1]

2. FEDERAL AND STATE COURTS—PRIORITY OF JURISDICTION—PARTIES.
After the filing of a mechanic's lien on a packing-house property, the owners contracted with a second party to erect a refrigerating plant therein; the contract reserving title in the builder until the price should be paid. The lienholder brought suit to foreclose his lien in a federal court, not making the second contractor a party. Such suit resulted in a decree and sale of the property, but prior to such decree or sale the second contractor had commenced suit, in a state court having jurisdiction of the subject-matter, to establish his prior claim to the plant built by him, making the lienholder a party thereto. The latter appeared, and subsequently set up the decree of the federal court as a bar to the suit. After the sale of the property a decree was entered in such suit establishing the prior lien of the plaintiff therein on the refrigerating plant. *Held*, that the state court had full jurisdiction, and its decree was binding on the parties thereto, and on the purchaser of the property under the decree of the federal court; public notice of the claim to the refrigerating plant having been given at the sale.

3. JUDICIAL SALE—RIGHTS OF PURCHASER—TAXES.
The fact alone that purchasers of property at tax sale were stockholders in a corporation which then owned the legal title to the property is not sufficient to constitute such purchase a payment of the taxes, in favor of a subsequent purchaser of the property at a foreclosure sale.

This was a suit in equity for the construction and enforcement of a prior decree of the same court.

James H. Anderson, for plaintiff.
James C. Davis, for defendants.

WOOLSON, District Judge. This action is submitted upon an agreed statement of facts. The pressure of official duties will not permit an extended statement of the grounds upon which I reach the conclusions hereinafter stated. The facts relating to actual occurrences are not in dispute. Briefly stated as to each of the main questions involved, the findings and conclusions drawn therefrom are as follows:

1. As to plea to the jurisdiction, I find: (1) That the present bill is ancillary to the suit heretofore decided in this court, and hereinafter more particularly described, to wit, John Gubbins v. A. C. Lautenschlager and William Huttenlocher, No. ———, Equity; decree rendered July 16, 1896. 75 Fed. 615. (2) That under said decree the master commissioner therein named sold the real estate described in said decree, and as therein directed, and plaintiff, Jenks, is the grantee under deed of conveyance duly issued by said master, and brings this suit to have said decree construed and enforced as

[1] As to supplementary and ancillary proceedings and relief in federal courts, see note to Toledo, St. L. & K. C. R. Co. v. Continental Trust Co., 36 C. C. A. 195.

to his said rights as said grantee. (3) That in said principal suit this court had jurisdiction to render said decree, because of diverse citizenship of the parties thereto; the plaintiff therein, John Gubbins, being at date of commencement thereof a citizen and resident of the state of Illinois, and the defendants, A. C. Lautenschlager and William Huttenlocher, then being citizens and residents of the state of Iowa. (4) That at the commencement of the pending action plaintiff, Jenks, was a citizen and resident of the state of Illinois, and defendants Lautenschlager and Huttenlocher were also citizens and residents of said state of Illinois.

I conclude: (1) That, since the pending suit is ancillary to said principal suit, this court has jurisdiction to hear and determine same, although said named defendants have become, since said decree was rendered in said principal suit, and were at institution of pending suit, citizens and residents of the same state of which plaintiff herein was then a citizen and resident. (2) Decree must pass against said plea to the jurisdiction of this court herein.

2. As to the effect on parties herein of the decree entered in the district court of Lee county, Iowa, I find: (1) That in October, 1891, A. C. Lautenschlager and William Huttenlocher purchased a 10-acre tract of land near Ft. Madison, Iowa, intending to erect thereon an establishment for meat-packing purposes. In January, 1892, one John Gubbins contracted to furnish materials and work for a refrigerating plant to be by said Gubbins placed in said establishment, which establishment said Lautenschlager and said Huttenlocher erected on said tract of land. Gubbins placed such plant therein, and on July 8, 1892, duly filed, in accordance with the statutes of Iowa, his mechanic's lien against said real estate and the improvements thereon for such material and labor. Upon August 8, 1892, said Gubbins began suit in this court for foreclosure of such mechanic's lien. In that suit said Lautenschlager and Huttenlocher were made sole defendants. Such suit was prosecuted to decree, which was entered therein upon July 16, 1896. Under such decree the said premises were duly sold on September 2, 1896, and certificate of sale issued to one W. C. Nevin, who assigned said certificate to plaintiff, Jenks, who now is the holder of deed duly issued to him upon said certificate. At said sale, and before the property was sold, notice was publicly given that under the Fred W. Wolf Company contract, hereinafter specially stated, the refrigerating plant then in said packing establishment, and which had been there placed by said Wolf Company, was claimed to be the property of said Wolf Company, and did not pass under said sale to the purchaser thereat. (2) Upon July 12, 1892, said Lautenschlager and Huttenlocher contracted with the Fred W. Wolf Company for a refrigerating plant for said establishment, to be placed in said packing establishment in place of the said refrigerating plant theretofore placed therein by said Gubbins. This Wolf & Co. contract was made before any work was commenced on the plant therein contracted for, and before any materials for such plant had been placed in said packing establishment. Such contract provided that, "until purchase price is fully paid in cash, the property rights of the plant" should remain in said

Fred W. Wolf Company. After the work provided for in this contract had been performed by said Wolf Company, the contract was duly filed for record, to wit, on December 19, 1892. Upon September 14, 1894, said Wolf Company brought suit in the district court in and for Lee county, Iowa, wherein said Wolf Company claimed a large amount of contract price as yet unpaid; alleged that, under the contract last above stated, the plant so by it placed in said establishment was and remained personal property, and the title thereto remained under said contract in said Wolf Company; and prayed a decree either awarding such plant to be returned to it, or that the same be sold, and proceeds applied to payment of said unpaid contract price. To this suit said Lautenschlager and Huttenlocher, and also said Gubbins and others, were made defendants. In November, 1894, said Gubbins filed his answer therein—First denying that said Wolf Company had any interest in said refrigerating plant, as the same then stood in said establishment; second, averring his mechanic's lien (described in preceding paragraph) covered said plant, said plant having by said Wolf Company been attached to and made a part of said real estate after filing by said Gubbins of his said mechanic's lien, and with full notice to said Wolf Company of said lien; third, setting up the pendency in this court of his said action to foreclose said mechanic's lien, and that this court had therein and thereby obtained, and then had, full and exclusive jurisdiction thereof. After decree had been rendered in this court in said Gubbins mechanic's lien foreclosure, said Gubbins, to wit, on August 2, 1896, filed in said state court an amendment to his said answer, wherein is set out in full said decree, and averred that thereby plaintiff, Wolf Company, was "barred and estopped having or maintaining any suit against said Gubbins as to said property," viz. said refrigerating plant. Pending said Wolf & Co. suit, James C. Brewster was, as trustee, substituted as plaintiff. Decree was entered therein upon May 26, 1897, a copy of which is set out in said agreed statement of facts. In said decree said court, after finding the sum due to Wolf Company under their said contract, further finds as follows:

"The court further finds that in and by virtue of the contract made and entered into on the said 12th day of July, A. D. 1892, the said Fred W. Wolf Company retained the title and right of possession in and to the said property hereinafter described, and that in and by virtue of the said contract the said property hereinafter described retained its character as personal property; and the said plaintiff in this cause is entitled to a special execution restoring to him the possession of the personal property described in said contract of July 12, 1892, free and clear from the claim, right, title, and interest of any of the defendants herein. The court further finds that the said plaintiff, James C. Brewster, as trustee, is entitled to a first lien upon the said personal property described in and set out in the said contract of date July 12, 1892, in the said sum of $9,576.27, together with 6% interest from the 4th day of September, A. D. 1894; said sum being decreed a first lien upon said property, prior, paramount, and superior to the right, claim, or interest of each or any of the defendants herein. * * * It is further ordered and decreed that plaintiff is entitled to a special execution to issue to the sheriff of Lee county, Iowa, authorizing and directing the said sheriff to place the plaintiff in possession of said property, provided that the defendant John Gubbins may redeem said property by paying to the plaintiff, or to the district court of Lee county, Iowa, for his use and benefit, within ten days after the signing of this

decree, the sum of $9,576.27, with interest from the 4th day of September, A. D. 1894, and the costs of this suit, taxed at ——— dollars, and upon the payment of said sum by said defendant the lien of plaintiff shall be satisfied, as against said property."

.—(3) That said decree as rendered by said state court stands in its original force, with no appellate proceedings pending. (4) That the district court within and for Lee county, Iowa, as a court of equity, and under the constitution and statutes of said state, had jurisdiction of the general subject-matter in the action above described, wherein the Fred W. Wolf Company was the original plaintiff, and subsequently James C. Brewster, as trustee, was substituted as plaintiff, and John Gubbins and others were defendants; being the action described in paragraph 2 of statement of facts found herein. (5) That said district court of Lee county, Iowa, had acquired in said action jurisdiction over said John Gubbins; said Gubbins, by counsel, appearing therein and pleading to said petition. (6) At the date of the institution of said action in said state court by said Fred W. Wolf Company, the suit was still pending and undetermined which said Gubbins had instituted in this court for the foreclosure of his said mechanic's lien; that hearing in said action in said state court and decision therein were not had until after decree in this court had been entered in this court in said Gubbins foreclosure suit, and said real estate had been sold under the provisions of said foreclosure decree. (7) No attempt is shown to have been made by said Gubbins, in his said foreclosure suit in this court, to have said Wolf Company or said Brewster, who, as trustee, was the substituted plaintiff in said action in said state court, brought as parties into said foreclosure suit, nor any of the issues tendered in said action in said state court actually litigated or decided in said foreclosure suit; and the decree entered in this court in said foreclosure suit does not expressly state or decide the matter so tendered and then at issue in the pleadings filed in said action in said state court.

I conclude: (1) That said district court of Lee county, Iowa, at the date of the decree therein entered in said action then pending therein, wherein said Brewster, as trustee, was plaintiff, and said John Gubbins and others were defendants, had jurisdiction of the subject-matters in issue therein, and of said John Gubbins, with reference thereto, and said decree is binding on this court in this action, and upon plaintiff, Jenks, herein, and said plaintiff is bound thereby; and the question of priority of liens upon the property, to wit, the refrigerating plant in controversy in said action in said state court, and as between said Brewster, trustee, and said plaintiff, Jenks, is not open to inquiry in this action. (2) Upon such issue as tendered herein in petition by said plaintiff, Jenks, and as to his prayer for injunction against said Brewster, trustee, to restrain removal of said refrigerating plant, decree must pass against said plaintiff, Jenks.

3. As to said question of taxes, presented against defendants other than said Brewster, I find: (1) That said real estate, to wit, said packing-house establishment, as described in decree by this court entered in said suit brought by said Gubbins for foreclosure of his said mechanic's lien, was sold for delinquent taxes of the year 1895, to

wit, for the sum of $737.57, upon December 7, 1896, and bid in by one J. W. Albright, to whom certificate of such tax sale was issued; that said certificate has been assigned to, and is now held by, George M. Hanchett, as trustee for S. and J. C. Atlee and defendant Dennis A. Morrison; and that the money with which said Albright bought said real estate at said tax sale belonged in equal proportions to S. and J. C. Atlee and to Dennis A. Morrison. (2) That, the taxes on said real estate having become delinquent for the year 1896, said Hanchett, as trustee, and for the use and benefit of said S. and J. C. Atlee and said Dennis A. Morrison, and as the holder of said tax-sale certificate, and with money belonging in equal proportions to said S. and J. C. Atlee and said Dennis A. Morrison, paid such delinquent taxes, to wit, the sum of $608.40. (3) That defendant Samuel Atlee was in 1894, and still is, a member of the firm of S. & J. C. Atlee. (4) That at the time of said purchase at said tax sale, and of said payment of said subsequent taxes, said Samuel Atlee and said Dennis A. Morrison were, and ever since have been, stockholders and directors in a corporation known as the Ft. Madison Stock-Yards Company. (5) That on December 20, 1894, A. C. Lautenschlager & Co., to whom on November 25, 1892, said A. C. Lautenschlager and said William Huttenlocher had conveyed the said real estate, to wit, said packing-house property, conveyed to said Ft. Madison Stock-Yards Company said real estate above described. (6) I do not find that there existed any understanding, arrangement, or agreement between the said Ft. Madison Stock-Yards Company and said S. & J. C. Atlee, or the said Samuel Atlee, or said Dennis A. Morrison, that said purchase at said tax sale, or said subsequent purchase of taxes, was to inure to the benefit of, or was in any wise made for or on behalf of, or at the instance or request of, said Ft. Madison Stock-Yards Company, nor that said Ft. Madison Stock-Yards Company had any interest in the moneys so expended in said tax-sale purchase or subsequent payment, nor that said money, or any part thereof, was to be refunded to said S. & J. C. Atlee or said Morrison by or on behalf of said stock-yards company.

I conclude: (1) That the fact that said Samuel Atlee and Dennis A. Morrison were at date of said tax-sale purchase and subsequent payment, and ever since have been, stockholders and directors in said Ft. Madison Stock-Yards Company, furnishes no sufficient grounds to authorize decree, as prayed by plaintiff herein, declaring said tax-sale purchase or said subsequent tax payment to have been made for or on behalf of, or that same inures to the benefit of, said stock-yards company; thereby becoming, as to plaintiff herein, merely the payment of taxes by the holder of the legal title to said real estate. (2) As to the matter of said tax sale and subsequent payment, decree herein must pass against plaintiff.

Decree ordered dismissing bill at costs of plaintiff.

BRAGG v. LAMPORT et al.

(Circuit Court of Appeals, Seventh Circuit. October 3, 1899.)

No. 565.

1. MARRIED WOMEN—CONTRACTS OF SURETYSHIP—ESTOPPEL.
Under the married woman's statute of Indiana of 1881 (3 Burns' Rev. St. §§ 6960–6964), which makes void contracts of suretyship by a married woman, but provides that she shall be bound by an estoppel in pais, like any other person, a married woman who conveys her realty for the purpose of enabling the grantee to make a mortgage thereon for his own benefit, which he does to a person who has no knowledge of such fact, and accepts the mortgage on the faith of the recorded title, is estopped from asserting the invalidity of the transaction to defeat the mortgage.

2. SAME—NOTICE TO MORTGAGEE—POSSESSION OF GRANTOR.
The fact that such a conveyance by a married woman shows on its face that the grantee is a son of the grantor does not charge a subsequent mortgagee from the son with notice of the illegal purpose for which the conveyance was made, nor does the fact that the grantor remained in possession of the property.

3. SAME.
The reconveyance of the property by the son to his mother after his execution of the mortgage thereon, but before its final acceptance by the mortgagee and the payment of the consideration, of which reconveyance the mortgagee had no actual notice, although it was recorded, did not charge her with such knowledge of the facts as to relieve the grantor from the estoppel created by clothing her son with apparent ownership.

4. SAME.
The deed of reconveyance being made expressly subject to the mortgage which was recited therein, and which the grantee assumed and agreed to pay as a part of the consideration, did not operate to revest the title in the grantee free from the unaccepted mortgage; the assumption clause being valid and binding, at least to the extent of recognizing the mortgage as an existing incumbrance.

5. MORTGAGES—TIME OF TAKING EFFECT—RELATION.
A mortgage signed, acknowledged, and delivered to an agent of the mortgagee, on its subsequent acceptance by the mortgagee takes effect by relation as of the date of such delivery, as against an intervening conveyance, where the equities of the parties require such application of the doctrine of relation.

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

Byron K. Elliott, for appellant.
John W. Kern and John F. McHugh, for appellees.

Before BROWN, Circuit Justice, and WOODS and JENKINS, Circuit Judges.

WOODS, Circuit Judge. This case was submitted on the briefs, without oral argument. The appeal is by Margaret J. Bragg, married, of Lebanon, Ind., from a decree of foreclosure of a mortgage on real estate in Lebanon conveyed to her by the mortgagor, Joseph G. Bragg, who is her son, by a deed of conveyance in the statutory short form of warranty deed, executed on the 15th and recorded on the 18th of March, 1889. The conveyance, by the terms of the deed, is "subject to a mortgage of $3,000, which the grantee assumes and agrees to pay, as so much of the purchase money." The mortgage was given by Joseph G. Bragg to secure his promissory note of even

date for $3,000 to Adeline R. Lamport, of New York City, to whose rights on her death her husband, the appellee, succeeded. It bore date the 8th, was acknowledged and delivered to the agent of the mortgagee, residing at Lafayette, Ind., on the 11th, and was recorded on the 25th of March, 1889, but, as the evidence clearly shows, was not accepted and the money that it was given to secure paid over before the last-named date, being held meanwhile to await an examination by counsel of the abstract of title. In her answer, the substance of which was anticipated and denied or met by matter of estoppel alleged in the bill, the appellant set up that the mortgaged property was and long had been hers; that on January 19, 1889, she and her husband, James Bragg, executed a conveyance of it to Joseph G. Bragg, described in the deed as her son, to enable him to procure a loan by mortgaging it; that he paid and she received no consideration for the conveyance; and that an agent of the mortgagee suggested and instigated the execution of the conveyance for the purpose stated. One of the averments of the answer, it is to be observed, is that the mortgage "was executed on the 8th day of March, 1889," and there is no allegation of the fact, now insisted upon as controlling, that the loan was not consummated and the mortgage accepted until after the execution and recording of the deed of reconveyance; the theory of the defense pleaded being that the conveyance by the appellant to her son was, and was known to the mortgagee to be, an attempt to evade the statute of the state, then and still in force, which forbids a contract of suretyship by a married woman. Each of the deeds (that conveying and that reconveying the property) purported to be "for the sum of ten thousand dollars," but, other than as stated, there was no consideration for either, and the appellant received no part of the money obtained upon the mortgage.

The legislation of Indiana touching the disabilities of married women, and their powers to acquire, own, and dispose of property and to make contracts, ending with the act of April 16, 1881 (Rev. St. 1881, §§ 5115–5119; 3 Burns' Rev. St. §§ 6960–6964), is reviewed and explained in the opinion of Judge Mitchell in Vogel v. Leichner, 102 Ind. 55, 1 N. E. 554. Numerous earlier and later decisions upon one phase or another of the subject have been made, and the last cited (Grzesk v. Hibberd, 149 Ind. 354, 48 N. E. 361) is claimed to be much like the present case; but the resemblance is only in particular features. In other respects there is a wide difference. The statute of 1881, after declaring abolished all legal disabilities of married women, except as therein otherwise provided, says:

"A married woman may take, acquire and hold property, real and personal, by conveyance, gift, devise or descent, or by purchase with her separate means or money; and the same, together with all the rents, issues, incomes, and profits thereof, shall be and remain her own separate property, and under her control, the same as if she were unmarried."

It also gives her complete power of disposition of her personal property, but forbids her to "enter into any executory contract to sell or convey or mortgage" or to "convey or mortgage" her real estate, "unless her husband join in such contract, conveyance or

mortgage; provided, however, that she shall be bound by an estoppel in pais, like any other person"; and finally, so far as relevant here, she "shall not enter into any contract of suretyship, whether as indorser, guarantor, or in any other manner; and such contract as to her shall be void."

Under this inhibition against contracts of suretyship, it is settled by numerous decisions that a married woman may not part with her title to enable the grantee to mortgage the property to secure a loan not intended for the benefit of herself or her property, and that, if the purpose of a conveyance so made be known to the proposed mortgagee, the mortgage will be void. See cases cited supra. But in those and other cases cited it is implied, and in Long v. Crosson, 119 Ind. 3, 21 N. E. 450, it was decided, that equity will not interfere to annul a mortgage which had been accepted by the mortgagee on the faith of the recorded title, without notice that the disputed conveyance had been made by a married woman for the purpose of evading the statute. In the opinion in that case it was said that having purposely transferred her title to her husband with the intention that he should thereafter, as he might find opportunity, mortgage it as his own property for his own benefit, "as against one who subsequently made the anticipated loan, and who is not shown by clear and satisfactory evidence to have had knowledge that the conveyances were a mere contrivance to evade the statute, she is now estopped from asserting that the transaction was of a character different from what it appeared to be." "The statute," it was said in Vogel v. Leichner, supra, "affords ample means for the protection of the person who becomes a creditor. It provides that she shall be subject to an estoppel in pais, as any other person. This does not mean that she is to be estopped by the mere form of the contract, without more. She is to be estopped as any other person, by causing the lender to believe that a state of facts exists which does not, or that the transaction is one thing, while in fact it is another." The evidence in this record establishes such an estoppel against the appellant, unless that conclusion is averted by the execution and registration of the deed of reconveyance of the property to her before the acceptance of the mortgage. That the loan was made and the mortgage accepted without notice to the mortgagee or her agent in the transaction of any infirmity in the title of the mortgagor is beyond doubt, and is not understood to be seriously questioned in the briefs.

Comment is made on the fact that it appeared on the face of the appellant's deed that she was conveying to a son, but, if of any significance, that circumstance tended to establish rather than to impeach the conveyance. One unacquainted with legal refinements might well have supposed that what the mother had done for a son —in this instance an only child—she might be deemed to have done for herself. In some of the decisions it is implied that, if she had intended an outright gift of the property, it was competent for her to make the conveyance, no matter what her motive may have been.

It is said that the decision in Long v. Crosson, supra, does not touch the merits of the controversy, for five reasons:

"(1) Because here there was no mortgage when the appellant's deed was recorded. (2) Because the appellant's deed was of record before there was even a contract to make a loan,—certainly before any money was paid or any mortgage accepted. (3) Because there was no trick or artifice on the part of the appellant, for she was in actual possession, and she placed her deed on record before any mortgage was executed. (4) Because the mortgagee had notice by the records and from possession, before she parted with any money, that the appellant owned the property. (5) Because the mortgagee's agent at Lebanon had full knowledge of all the facts."

By "appellant's deed" in the first and second propositions and "her deed" in the third are understood to be meant the deed of reconveyance. Of the fifth proposition it is enough to say it is not true in fact. The mortgagee had no agent at Lebanon, and the supposed agent, who in fact represented the mortgagor in the transaction, denied the knowledge attributed to him. The continued possession of the appellant was of no significance. A grantor's possession is not notice of any right or claim of right inconsistent with his recorded deed. Tuttle v. Churchman, 74 Ind. 311, 314, and cases cited. This point eliminated, the several propositions are resolved into one, and present simply the question of the effect of the execution and recording of the deed of reconveyance upon the estoppel created by the execution and recording of the first deed. That was an equitable estoppel, the appellant being responsible for the false appearance of title in her son. What is there in the reconveyance to affect that appearance, or to give notice of the truth? Absolutely nothing. Besides, it is to be observed, the loan was consummated and the mortgage accepted without knowledge on the part of the mortgagee or her agent of the existence of the reconveyance. The record, of course, constituted constructive notice. Such notice is a creature of law, and cannot be denied its legitimate consequences; but it has in its composition no ingredient or atom of equity, and, as we suppose, can never be the foundation or support for an equitable estoppel. If it could, it is not difficult to see that the laws which give the force of constructive notice to the registration of deeds or other instruments, instead of affording the protection intended, may be easily turned, under supposable conditions, into a snare. This record supplies an illustration. The appellant gave her son the appearance of ownership in order to enable him to procure this loan. If the mortgagee had known the purpose for which she conveyed, she could say the deed was made in violation of law and is void; but, having given the mortgagee no notice that the facts were different from what they seemed to be, she is estopped to deny the acts by which she created that appearance; and could estoppel be more righteous? She could have escaped that result only by giving to the one about to act on the faith of her deed actual notice of its invalidity. Estoppel may be destroyed by estoppel, but, if the first is equitable, the other, if not by contract, must be equitable too. In this case Adeline Lamport accepted the mortgage and parted with her money in reliance upon the record, and upon actual knowledge of the deed of the appellant to the mortgagor, and without notice that its validity was for any reason questionable. As against her, therefore, its validity remained beyond challenge by the appellant, notwithstanding the

execution and registration of the reconveyance, of which she had no actual knowledge. As to her, or the appellee, who has her rights, the case is the same as if the conveyance by the appellant to her son was valid from the beginning, and the reconveyance an independent transaction, executed in pursuance of a new and distinct agreement, or, to put it in another way, as if by the deed of her son she first became the holder of the title.

This brings us to the ultimate question, which from the appellant's standpoint is a purely legal one, but of a character to be controlled by equitable considerations. It is whether the conveyance to her, executed as it was before the acceptance of the mortgage, gave her an unincumbered title. That would have been the effect, perhaps, but for the fact that the conveyance was made subject to the mortgage, which, by the terms of the deed, she assumed and agreed to pay, as part of the purchase price. It is said that she had no power to make the contract of assumption; but that does not seem to be so. By force of the statute of 1881 she was relieved of all disabilities, except as stated, and in the acquisition of property she had a right to assume personal obligations for the price. See Rinn v. Rhodes, 93 Ind. 389; Chandler v. Spencer, 109 Ind. 553, 10 N. E. 577; Berridge v. Banks, 125 Ind. 561, 25 N. E. 805. But, if the assumption as a personal contract was invalid, it was certainly competent for her to acquire or accept the title subject to an incumbrance by mortgage or otherwise; and the recital in the deed to the effect that the conveyance was made subject to an incumbrance as a part of the purchase price binds her as a recital of fact, if not as a covenant to pay the incumbrance. If she could not charge herself with the mortgage debt, she could accept the property subject to the incumbrance; and to that extent, at least, the transaction was as if neither party had been under legal disability. If the covenant was one which she had power to make, the suggestion that it was without consideration can be established only by connecting this conveyance with that of January 19th, and showing its lack of consideration and its execution for an unlawful purpose; but that, as we have seen, is forbidden by the estoppel. On the face of the deed the consideration for the covenant to assume is expressly stated, and, the mortgagee having had only constructive notice of the existence and contents of the deed, it is not competent for the present purpose to show aliunde that the character of the instrument was different from what it seemed to be, or that the facts recited were not true. Assuming that the covenant was valid, she did not thereby bind herself, as surety, to pay the debt of another. She made the debt her own, and the original debtor became, in equity, only secondarily liable.

The final contention is that when the appellant received the deed of March 15th there was no mortgage in existence, and that the subsequent acceptance of the mortgage cannot be carried back by relation to the prior date of signing and acknowledgment, so as to cut off the intervening rights acquired by the appellant. The plain answer is that she acquired no right which was not understood and expressly declared to be subject to the mortgage as a subsisting lien. There can therefore be no injustice to her if the lien be made good

by relation. Before the execution of her deed the mortgage had been delivered to the agent of the mortgagee. If it was a conditional delivery, or a delivery in escrow, the doctrine applies that on final delivery it became operative by relation from the date of the first delivery. The cases in which the doctrine has been defined and applied are numerous. The following are some of the Indiana cases: Goodsell v. Stinson, 7 Blackf. 437; Dearmond v. Dearmond, 10 Ind. 191; McFadden v. Ross, 14 Ind. App. 312, 41 N. E. 607; Cloud v. Moorman, 18 Ind. 40; Woodbury v. Fisher, 20 Ind. 387; Felton v. Smith, 84 Ind. 485; Jones v. Loveless, 99 Ind. 318; Owen v. Williams, 114 Ind. 179, 15 N. E. 678; Smiley v. Smiley, 114 Ind. 258, 16 N. E. 585; Goodpaster v. Leathers, 123 Ind. 121, 23 N. E. 1090; Farmers' Loan & Trust Co. v. Canada & St. L. Ry. Co., 127 Ind. 250, 26 N. E. 784.

In Felton v. Smith it was said:

"The fiction of relation is allowed force when equity requires that the last of a series of acts shall be carried back to the first or original act for the purpose of shutting out intervening claims. In no case is it allowed force where the party insisting upon it is endeavoring to secure an unconscionable result."

In Smiley v. Smiley a deed of a father to his children, put in escrow for delivery after his death, was held good by relation against a second wife who before the marriage was informed of the deed. The general rule is everywhere recognized that the doctrine shall not be so applied as to do wrong to strangers; but the appellant, instead of being a stranger to this mortgage, came into privity with the mortgagor by accepting from him a conveyance of the incumbered title. She can no more dispute the mortgage than could her grantor, the maker of it. To quote from the opinion in Leiter v. Pike, 127 Ill. 287, 326, 20 N. E. 31:

"A deed placed in escrow conveys nothing until the conditions are performed. 'But,' says Shep. Touch. (6th Ed.) pp. 57, 59, 'when the conditions are performed, and the deed is delivered over, then the deed shall take as much effect as if it were delivered immediately to the party to whom it is made, and no act of God or man can hinder or prevent this effect then.' And it needs no authority to prove that that which the grantor himself cannot do, in this respect, he canot empower his grantee to do, for his grantee can but occupy his position; assuming, of course, that his grantee is chargeable with notice of the deed in escrow."

See, also, McDonald v. Huff, 77 Cal. 279, 19 Pac. 499; Jacobus v. Insurance Co., 27 N. J. Eq. 604.

The appellant at no step of the transaction disclosed was deceived, or acted without full knowledge of the facts affecting her interests. She should not be allowed now to convert her own acts and conduct, in which there was certainly no evil intention at the time, into agencies of deceit and of successful imposition upon another, who acted with innocent faith in appearances for which the appellant was responsible. The decree below is affirmed.

FARMERS' LOAN & TRUST CO. et al. v. CENTRALIA & C. R. CO. et al.

(Circuit Court of Appeals, Seventh Circuit. October 3, 1899.)

No. 608.

1. RAILROADS—JURISDICTION TO APPOINT RECEIVER.
The jurisdiction of a court to appoint a receiver for a railroad, and the validity of proceedings taken thereunder, do not depend on the technical sufficiency of the bill under which the appointment is made; and, if the bill was sufficient to invoke the exercise of jurisdiction, the fact that it was subject to demurrer, or that the court acted erroneously in the premises, will not invalidate receiver's certificates issued under orders of the court.

2. SAME—VALIDITY OF RECEIVER'S CERTIFICATES—CONSENT OF BONDHOLDERS.
A committee appointed by the bondholders of a railroad company, with power to act for them and in their stead in matters requisite or necessary for the enforcement and protection of their legal rights in the premises, has no authority to consent in their behalf to the issuance of receiver's certificates, to constitute a lien prior to the mortgage on the property of the company, and the proceeds of which are to be used in the payment of claims which are not entitled to preference over the bonds.

3. SAME—RIGHT OF BONDHOLDERS TO ATTACK CERTIFICATES—NOTICE TO TRUSTEE.
The fact that the trustee in a mortgage securing railroad bonds was notified of an application by a receiver, appointed in a suit in which the trustee had not been served with process or appeared, for authority to issue receiver's certificates, does not render an order authorizing the issuance of such certificates, and making them a lien prior to that of the mortgage, binding on such trustee or the bondholders it represents, and they have the same right to attack the validity of such certificates, and to assert their priority of lien, when subsequently brought before the court, as if such questions were then for the first time presented for determination.

Appeal from the Circuit Court of the United States for the Southern District of Illinois.

The appellant, the Farmers' Loan & Trust Company of New York, is the trustee in a deed of trust or mortgage executed on July 1, 1889, by the Centralia & Chester Railroad Company, to secure the payment of bonds of the same date to the amount of $1,680,000. The question presented by the appeal is whether receiver's certificates issued in pursuance of orders of the circuit court were properly made a lien upon the corpus of the railroad prior in equity to the lien of the mortgage, which was prior in date. After entry of the decree, the Ætna Insurance Company, on its own petition, showing that it held and owned twenty-five of the mortgage bonds, was admitted a party for the purpose of praying an appeal, and accordingly joined the trust company in taking the appeal and in assigning errors. The certificates in dispute were issued upon the authority of four orders entered on August 3 and December 16, 1897, and March 10 and July 23, 1898; the amounts authorized being in the order stated, respectively, $200,000, $175,000, $50,000, and $125,000. The validity of all of the certificates is denied, on the ground that the bill upon which the receiver was appointed was so defective as to afford the court no basis for the exercise of jurisdiction, and of a part thereof on the ground that there was no reason for their issue, and the proceeds were applied to the payment of demands which were not entitled in equity to a preference over the mortgage indebtedness.

The receiver was appointed on motion of the Missouri Car & Foundry Company, a corporation of Missouri, which on June 7, 1897, brought in the court below a bill against the Centralia & Chester Railroad Company, which was a corporation of Illinois. The Farmers' Loan & Trust Company was also named a defendant, the fact was stated of its holding a trust deed to secure bonds to the amount of $1,680,000, and process was prayed against it; but until November 4, 1898, no process was issued, and the subpœna then issued was directed

"to the Centralia & Chester Railroad Company, impleaded with the Farmers' Loan & Trust Company and others," and on the third day thereafter was returned, "Not served by order of the complainant's solicitors." Besides the formal averments of the organization and citizenship of the parties, the bill charged, in substance, that the railroad company was indebted to the complainant in the sum of $4,736.21 for equipment of the road; that the railroad company was insolvent, and unable to pay debts and obligations due to its employés and furnishers of supplies to the amount of $90,000; that suits involving more than $30,000 were pending against the company; that judgments to the amount of $10,000 had already been taken against the company, executions issued and levied on motive power, and that danger was imminent of a segregation of rolling stock from the railroad; that $28,000 of current earnings had been diverted and misapplied in the payment for construction and permanent betterments of the road; that the road was being operated as a continuous line, carrying passengers, freight, and mails, and that the interest of the public and of all concerned required that it be kept in operation as a railroad; and to that end it was prayed that the court take the road into its custody and appoint a receiver. Upon the filing of the bill, an appearance by attorney was entered for the railroad company, and thereupon an order was entered appointing C. M. Forman receiver. On the ensuing 11th, the receiver was granted leave to borrow $3,500. On the 16th, an order was made, which, after reciting the coming of the receiver by his attorneys, "and Jerome D. Gillett, president and representative of the bond and stockholders of said railroad," authorized the issue of receiver's certificates to the amount of $200,000; but, the order containing no provision that the certificates should constitute a lien on the road, an amendatory order, containing a like recital of the coming of Gillett, "president and representative of the bondholders and stockholders of the said railroad company," was entered on August 3d, authorizing the issue and prescribing the form of certificates to the amount specified in the previous order, and decreeing that when issued they should be "the first and paramount lien on the entire line," and upon other property and the earnings above operating expenses of the railroad.

On November 11, 1897, the receiver presented a petition showing what had been done in the way of completing unfinished parts of the road, praying for leave to procure further equipment, and asking that notice of the application be given to the Farmers' Loan & Trust Company of New York City, trustee, and to "J. D. Gillett, of No. 66 Broadway, N. Y., president of this company"; and on December 16, 1897, he filed a supplemental petition, purporting to show to the court that after filing the original petition "he caused notice of this application to be served upon the Farmers' Loan & Trust Company of New York City, trustee for the bondholders, and upon J. D. Gillett, of No. 66 Broadway, New York, president of said C. & C. Company, and that action herein has been deferred until a full and free conference could be had with the parties in interest." It is further stated that since the filing of the original petition it had been ascertained that the railroad company was indebted to parties in New York, Connecticut, Rhode Island, and New Jersey in the sum of $80,000, evidenced by promissory notes of the company, and in respect thereto it is said: "Your petitioner and the parties in interest have concluded that this indebtedness, with other indebtedness of said company, should be paid in preference to the mortgage indebtedness, the bondholders having consented thereto." The petition then explains the necessity therefor, and asks leave to issue certificates to the amount of $175,000 in addition to those before authorized. On the same day the following answer was filed:

"To the Honorable Judge of said Court, in Chancery Sitting: The undersigned, Wayne Griswold, of the city of New York, for answer to the petition of C. M. Forman, receiver of the Centralia & Chester Railroad Company, filed herein on this day, showeth unto your honor that at a meeting of the bondholders' committee, representing the bondholders of the Centralia & Chester Railroad Company, and owning and representing ninety-two per cent. of said bonds held in New York City on the 8th day of November, 1897, your respondent was appointed as their representative, with full power and authority to represent the bondholders herein. Respondent, further answering, says that said bondholders, through him, admit the facts alleged in the supplemental peti-

tion of the said receiver filed herein, and consent to the issue of the one hundred and seventy-five thousand dollars ($175,000) worth of receiver's certificates as prayed for, for the purposes therein stated. Respondent says that, as the representative aforesaid, he has carefully examined the property of said company and its condition, and that the action prayed for is for the good of all concerned; and further your respondent sayeth not.

"[Signed] Wayne Griswold, Representative of Bondholders."

The court thereupon entered the order prayed, it being recited as "appearing to the court that the Farmers' Loan & Trust Company of New York City, trustee for the bondholders of said railroad company, and J. D. Gillett, of No. 66 Broadway, New York City, president of said railroad company, had been duly notified in writing of this application," etc., and the certificates so ordered were declared a lien subordinate only to those first ordered.

To the petition of February 23, 1898, whereby, after reporting the disposition of the proceeds of the certificates before authorized, the receiver asked authority to issue certificates to the amount of $50,000, Griswold again answered, as attorney in fact for the committee appointed by the bondholders holding ninety-five per cent. of the bonds, to the effect that, as representative of the bondholders, he had "investigated the present actual condition of the property" of the railroad company, and that in his judgment it would be necessary, in the interest of the property, to expend $50,000 more in the completion of the road into Chester and in other work specified.

On March 1, 1898, the clerk of the court mailed to the Farmers' Loan & Trust Company at New York a letter over his official signature, in which he said:

"Gentlemen: I herewith inclose you copy of a notice of application for the issue of receiver's certificates to be issued by receiver of the Centralia & Chester Railroad Company. Will you have the kindness to acknowledge receipt of the notice on the duplicate copy herewith inclosed, and mail it to me at Springfield, Illinois. By so doing, you will greatly oblige,

"Yours, truly."

To that letter the following response was sent, and the letter and response were both marked "Filed," and were filed in the clerk's office on March 10, 1898:

"22 Williams Street, New York, March 7, 1898.

"James T. Jones, Esq., Clerk United States Circuit Court, Springfield, Ills.—Dear Sir: The Farmers' Loan & Trust Company has received your letter of March 1st and inclosures. Although the Farmers' Loan & Trust Company appears to be named as party defendant in the suit pending in your court, brought by the Missouri Car & Foundry Company against the Centralia & Chester Railroad Company, nevertheless the Farmers' Loan & Trust Company has never been brought in as a party, and has never entered any appearance in the suit. Please understand that nothing contained in this letter is to be construed as such appearance. We understand that the receiver has already obtained authority to issue certificates, and proposes to ask for further authority in that line, the trustee not appearing or being represented in the case. Such being the situation, we suggest that the trust company is not at all concluded in the matter, and may at any time attack the validity of the certificates and question the propriety of their payment.

"Very truly, Turner, McClure & Rolston."

Thereupon the order prayed was made, authorizing further certificates to the amount of $50,000, to be a lien subordinate only to those theretofore ordered; it being recited as "appearing to the court that Wayne Griswold, attorney in fact for the committee appointed by the bondholders holding ninety-five per cent. of the bonds issued, * * * had filed an answer to the petition herein, admitting the facts as therein alleged to be true, * * * and it further appearing that due notice had been given to the Farmers' Loan & Trust Company of New York, trustee, of the filing of said petition and the application for this order."

The order of July 23, based upon the receiver's petition of July 13, 1898, contains a recital of "it appearing to the court that Wayne Griswold, attorney

in fact for the committee appointed by the bondholders holding ninety-five per cent. of the bonds, * * * filed an answer to the petition herein, admitting the facts as therein alleged to be true, and also the necessity of securing an order for the issue of additional receiver's certificates, * * * and it further appearing to the court that due notice has been given to the Farmers' Loan & Trust Company, trustee, of the filing of said petition and for the application for this order." The answer of Griswold is not in the transcript, and it does not appear that the court, or the notice to the Farmers' Loan & Trust Company, named a time for the hearing of the petition.

The bondholders' agreement of October, 1897, contains, with others, the following recitals and provisions:

"Whereas, on the 7th day of June, 1897, a receiver was appointed for the Centralia & Chester Railroad Company, who is now in possession and control of said railroad, and engaged in finishing the same; and whereas, the undersigned, holders of the bonds of said road, are desirous of exercising, enforcing, and protecting their legal rights in the premises, to the end that the money due therefrom may be recovered: Now, therefore, we, the undersigned, who are holders to the amount of the said bonds set opposite our names respectively hereunto subscribed, in consideration of the advantages which will result to us, respectively, from concert of action in enforcing and protecting our rights, and in preserving and protecting the property of said railroad company, and of other good considerations, do hereby, each for himself, and not one for the other, or either of the others, agree with each other, and with the committee hereinafter mentioned, as follows, that is to say:

"First. That we will act together in concert in the endeavor to bring about such results as shall afford protection to the securities now held by us, and to see that said receiver properly performs his duty in the premises, and that no unnecessary waste or disbursements of the funds of the company shall be made in conducting the business, it being understood that whatever may be done under this agreement shall, subject to the stipulations herein contained, be for our equal benefit, according to the amount of said bonds held by us, respectively; and, in order to facilitate our proceedings under this agreement, W. S. Ingraham, Robert Rodman, William Fuller Tufts, and William T. Bolles, who are now the owners of a majority of the bonds of said Centralia & Chester Railroad Company, be, and they are hereby, appointed a committee in our behalf, and they and their substitutes, selected as hereinafter provided, are hereby authorized and empowered, as our attorneys and in our name, to take such proceedings, give such directions, execute such papers, and do such acts as they may consider judicious and proper, in order to protect the rights of the bondholders who are subscribers to this agreement.

* * * * * * * * * * * * *

"Third. That if, during the continuance of this agreement, and the existence of such committee, any question not herein provided for shall arise in reference to any matter growing out of the duties hereby devolved upon the said committee, it also shall be determined by a vote of the majority in interest, present or represented, at a general meeting of the parties in interest under this agreement; and such determination shall be binding as well upon the said committee as upon all subscribers hereto, and their representatives and assigns.

"Fourth. That we hereby give and grant unto our said committee full power and authority to do and perform all and every act or thing requisite and necessary to be done in and about the premises, as fully, to all intents and purposes, as we might or could do if personally present; hereby ratifying and confirming all that our said committee shall lawfully do, or cause to be done, by virtue hereof, including the power and authority to attend all bondholders' and stockholders' meetings, and if not ourselves present, either in person or by written proxy, to vote in our names, and upon our bonds and stock, on all questions that may come up at such meeting, and also to institute, maintain, and carry on any and all actions and legal proceedings, in our name or otherwise, for the purpose of carrying out the object of this agreement.

"[Signed by forty-eight bondholders, with an aggregate holding of 966 bonds.]"

The committee so appointed, on November 8, 1897, appointed Wayne Griswold their agent, and executed to him the following power of attorney: "Know all men by these presents, that we, W. S. Ingraham, William F. Tufts, and W. T. Bolles, and Robert Rodman, committee, representing all of the bondholders of the Centralia & Chester Railroad Company, have made, constituted, and appointed, and by these presents do make, constitute, and appoint, Wayne Griswold our agent, to represent us under said agreement, and do hereby make him our true and lawful attorney, for and in our name, place, and stead, to procure from the receiver of such road all the accounts of such receiver and of the Centralia & Chester Railroad Company, showing the indebtedness of such railroad company, the indebtedness of the receiver, also what debts of the railroad company and what debts of the receiver remain unpaid and what such indebtedness is for, also how near such railroad is to completion and how much money has been expended in its construction by the receiver and the purposes for which it has been expended, and to procure full information regarding the same. We also hereby authorize him, if it becomes necessary, to retain counsel, and make such application to the court as counsel shall advise, should the receiver refuse to give the information voluntarily, and to do all other acts necessary to protect the bondholders' interests; giving and granting unto our said attorney full power and authority to do and perform all and every act and thing whatsoever requisite and necessary to be done in and about the premises, as fully, to all intents and purposes, as we might or could do if personally present, with full power of substitution and revocation; hereby ratifying and confirming all that our said attorney or his substitute shall lawfully do, or cause to be done, by virtue hereof. In witness whereof," etc. This was duly signed, sealed, and acknowledged by the subscribers before a notary public.

The annual report of the receiver was filed on September 27, 1898, showing receipts and disbursements, including proceeds of receiver's certificates. The debt due the Missouri Car & Foundry Company had theretofore been paid in full. Following this report, on the same day, the receiver filed a petition for the sale of the road, representing that, "in view of the facts hereinbefore stated, there is no good or apparent reason why the receivership should be further continued, but, on the contrary, the receiver fears that he will be embarrassed by the necessity of creating indebtedness for the payment of which he can make no provision." It was further stated that the first, second, and third issues of certificates, amounting to $425,000, were sold to the Equitable Trust Company of Chicago, and "that $1,000 of the last issue was taken by the same company." Of the last issue it was alleged that $23,000 were held, and $7,000 contracted for, by the St. Charles Car Company, and $9,400 contracted for by the Pittsburg Locomotive Company.

On October 8, 1898, the Farmers' Loan & Trust Company brought its bill in the same court to foreclose its mortgage, making the railroad company and the Missouri Car & Foundry Company defendants, and on the same day subpœna was issued, and return made showing service on the railroad company and the other defendant not found. On the ensuing October 21st, the court entered a rule against the Farmers' Loan & Trust Company "to appear, plead, answer, or demur" to the bill in the first case by the 7th day of November next, and that the rule be served by the United States marshal for the Southern district of New York by copy. At the same time a like rule and order for the service thereof was entered requiring the trust company to plead, answer, or demur to the receiver's petition for an order of sale. On November 1, 1898, the receiver presented to the court a petition for an injunction forbidding interference with the receiver's possession by the Farmers' Loan & Trust Company, a further prosecution of the suit brought by that company, and the taking of any action whatever under the deed of trust, without leave of the court first obtained. The Equitable Trust Company, on November 14, 1898, filed its answer to the receiver's petition for an order of sale, asserting its purchase and ownership in good faith of the certificates in question, and on the next day the Farmers' Loan & Trust Company appeared, and filed an answer to the bill of complaint, also an answer to the receiver's petition for an order of sale, and a separate answer to the petition for an injunction. The Equitable Trust Company also filed an answer to the bill of the Farmers'

Loan & Trust Company, and, both cases having been put at issue by replication, they were, on November 28, 1898, by consent of solicitors, ordered consolidated. The evidence was taken without a reference to a master, and on June 2, 1899, the court entered its finding and decree adjudging the receiver's certificates valid, and the lien thereof prior in equity to the lien of the mortgage, and ordering payment accordingly out of the proceeds of the sale of the property, which is worth but little, if any, more than the amount of the certificates.

Wm. Burry, for appellants.
A. F. Hatch, for appellees.

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

WOODS, Circuit Judge, after stating the case, delivered the opinion of the court.

The bill of the Missouri Car & Foundry Company, under which the receiver was appointed and the several orders made for the issue of receiver's certificates, was doubtless demurrable, because it did not show that the demand of the plaintiff had been reduced to judgment (Scott v. Neely, 140 U. S. 106, 11 Sup. Ct. 712; Cates v. Allen, 149 U. S. 451, 13 Sup. Ct. 883, 977); and the defect was not cured by an admission of record of the existence and amount of the debt. There was no such admission. But it does not follow, as we conceive, that the court was wholly without jurisdiction of the cause, and all its proceedings void; nor, in our opinion, was jurisdiction lost upon payment of the demand of the plaintiff in the bill. "A court which appoints a receiver," it was said in Kneeland v. Trust Co., 136 U. S. 89, 98, 10 Sup. Ct. 950, 953, "acquires, by virtue of that appointment, certain rights, and assumes certain obligations, and the expenses which the court creates in discharge of those obligations are burdens necessarily on the property taken possession of; and this, irrespective of the question who may be the ultimate owner, or who may have the preferred lien, or who may invoke the receivership." It is true that in the next sentence the court proceeded to say: "So, if, at the instance of a party rightfully entitled thereto, the court should appoint a receiver of property, the same being a railroad property, and therefore under an obligation to the public of continual operation, it, in the administration of such receivership, might rightfully contract debts necessary for the operation of the road, either for labor, supplies, or rentals, and make such expenses a prior lien on the property itself;" but by the use of the expression, "at the instance of a party rightfully entitled thereto," it was not intended, we think, that the validity of a receivership, and everything done under it, should depend absolutely upon the actual or the alleged right of the plaintiff in the bill to invoke the appointment of a receiver. Though no objection was interposed, it was doubtless erroneous on the part of the court to proceed as it did on the bill in this case, but to hold that the validity of the proceedings in such cases will depend upon the exercise of an unerring judgment of the sufficiency of the bill to withstand demurrer would involve unendurable mischiefs. This bill was not insufficient, we think, to invoke the exercise of jurisdiction. In its general character and scope

it was of equitable cognizance, and the jurisdiction of the court did not depend upon technical sufficiency or fullness of averment. Sage v. Railroad Co., 125 U. S. 375, 8 Sup. Ct. 887; Brown v. Iron Co., 134 U. S. 534, 10 Sup. Ct. 604. A demurrer for lack of jurisdiction would have been irrelevant.

Aside from the question of jurisdiction, there is no ground for serious objection to the certificates issued, except that to the extent of $176,000 there was no lawful reason for their issue, and the proceeds were applied to the payment of obligations which, without the consent of the bondholders, should not have been paid in preference to the mortgage debt. There is dispute whether the obligations so paid were incurred by the railroad company in the construction of its road, or by others under construction contracts; but whether that dispute be resolved one way or the other is not important. The obligations were of long standing, and, though recently renewed, were entitled on no consideration, without the consent of the bondholders, to priority over the mortgage lien.

It is strenuously contended that the consent of the bondholders was obtained, both to the issue of the certificates and to the use made of the proceeds, but in the main that is not shown to be true. Gillett, the president of the railroad company, had no authority to represent the bondholders, and his own testimony is that, except as president of the company, he never claimed to have such authority. If the claim was made, it should not have been accepted without tangible proof capable of being set out in the record. In matters of such importance, there should be more than a recital in a docket entry, which, if it be evidence, is not conclusive of the fact against any but parties. The chief reliance, however, for proof of consent, is the bondholders' agreement, and the power of attorney given by the bondholders' committee to Griswold. But those writings neither declare nor warrant an inference of such consent. Rather the contrary. The bondholders, it is true, clothed their committee with "full power and authority to do and perform all and every act or thing requisite or necessary to be done in and about the premises, as fully, to all intents and purposes," as they might or could do if personally present. But what were the premises? The recitals and other clauses of the contract show plainly enough. The bondholders thereby declared themselves "desirous of exercising, enforcing, and protecting their legal rights in the premises," and the committee, appointed for that purpose, could not, under the general words quoted, consent to the disregard and outright destruction of the rights which they were appointed to protect. They did not attempt to exceed, nor indeed directly to exercise, their powers. If they were authorized to appoint Griswold to represent them in the matter, they could not, and, so far as appears, did not, attempt to give him powers greater than their own. They authorized him to represent them under the agreement, to do certain specified things, "and to do all other acts necessary to protect the bondholders' interests"; which, of course, did not mean that those interests should be given away in favor of general unsecured creditors, in whose favor there was no cognizable equity.

It is urged next that the bondholders are represented by the trustee named in the deed of trust, and are bound by what was done, because notice was sent to the trustee, the Farmers' Loan & Trust Company. That company, however, though named a defendant in the case, was not in fact a party, and the notices sent to it, in our opinion, were not effective to preclude objection to the orders of the court by the trustee, when finally it appeared in the case in obedience to formal notice. For the law of the case in this respect, we cannot do better than refer to the opinion of Mr. Justice Harlan in Hervey v. Railway Co., 28 Fed. 169, and to the opinion of the supreme court in the same case on appeal, in Union Trust Co. v. Illinois M. Ry. Co., 117 U. S. 434, 6 Sup. Ct. 809. We quote from the latter opinion at length:

"In regard to the fact that neither the Paris & Decatur bondholders nor their trustee were parties to the suit when the order of October 9, 1876, was made, the commissioner took the view, which the circuit court confirmed, that, while they ought to be heard before the order was made conclusive against them, yet, as the objections to the merit of the order would not have been availing if made before it was entered, and the money had been actually and faithfully applied, under the order of the court, to the improvement of the mortgaged property, no equitable reason appeared why the bondholders should keep the benefits and escape the burden. * * * Under these circumstances, the Paris & Decatur trustee and its bondholders in court, through it, can be heard to make no other objections to the orders made, except such as arise as to the merits of the expenditures made under them. The view of the commissioner and the circuit court was that the bondholders should have such rights and equities as they could have properly claimed as parties ab initio, and that this view should apply against them as well as for them. In this we concur. The principles properly applicable to this branch of the case were well expressed by Mr. Justice Harlan in his opinion of February 29, 1884, as follows: 'Those who take receiver's certificates must be deemed to have taken them subject to the rights of parties who have prior liens upon the property, and who have not, but should have been, brought before the court. While the court, under some circumstances, and for some purposes, and in advance of the prior lienholders being made parties, may have jurisdiction to charge the property with the amount of receiver's certificates issued by its authority, it cannot, without giving such parties their day in court, deprive them of their priority of lien. When such prior lienholders are brought before the court, they become entitled, upon the plainest principles of justice and equity, to contest the necessity, validity, effect, and amount of all such certificates, as fully as if such questions were then, for the first time, presented for determination. If it appears that they ought not to have been made a charge upon the property, superior to the lien created by the mortgages, then the contract rights of the prior lienholders must be protected. On the other hand, if it appears that the court did what ought to have been done, even had the trustee and the bondholders been before it when the certificates were authorized to be issued, the property should not be relieved from the charge made upon it, in good faith, for its protection and preservation. Of these rules or principles the parties who inaugurated this litigation cannot justly complain.' "

The amount expended in payment of objectionable claims, being $167,315.51, represents certificates sold at a discount of 5 per cent. to the amount of $176,121.59. It appears that W. S. Ingraham and Robert Rodman, who were members of the bondholders' committee, were holders of demands upon which the improper payments were made, and received payment thereof knowing that the money was of the proceeds of receiver's certificates. There seems to be no ques-

tion of the fact, and to the extent of the bonds held by them the certificates should be deemed valid. The decree below should be modified so as to declare invalid the certificates held by the Equitable Trust Company to the amount of $176,000 face value, less the interest therein of Ingraham and Rodman, to be determined according to the number of bonds held by them in proportion to the whole number outstanding; they to that extent not sharing in the surplus fund to be distributed among bondholders. The decree is therefore reversed, and the cause remanded, with direction to enter a decree in conformity with this opinion.

HUNT v. ILLINOIS CENT. R. CO.

(Circuit Court of Appeals, Seventh Circuit. October 3, 1899.)

No. 554.

RECEIVERS—RIGHT OF APPEAL—ADMINISTRATIVE ORDERS.

An order directing a receiver for an insolvent railroad to construct and maintain gates and other safeguards at the crossing of another road, in accordance with a contract by a predecessor of the insolvent company, and made on the petition of the company owning the other road, setting forth that the crossing was dangerous, is not a decree for specific performance, adjudicating the rights of the respective companies under the contract, but merely an interlocutory order in the receivership, directing the receiver in the administration of the estate, from which he cannot appeal.

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

This appeal is from an order or decree entered in the circuit court upon the hearing of matters which are presented under an intervening petition filed by the Illinois Central Railroad Company and an answer thereto by the receiver, in an action pending in that court for the foreclosure of a mortgage against the Toledo, St. Louis & Kansas City Railroad Company (hereinafter called the "Toledo Company"), wherein the Continental Trust Company of New York and John M. Butler are complainants. The original appellant was Robert B. F. Peirce, acting as receiver under appointment by the court in the foreclosure action, and as such in possession of and operating the railroad of the Toledo Company. At the hearing of the appeal, suggestion being made of the resignation of such receiver and the appointment of Samuel Hunt in his place, an order was entered continuing the appeal in the name of such new receiver. The petition of the intervener alleges that the defendant, Toledo Company, is the "legal successor and assign of the Charleston, Neoga & St. Louis Railroad Company (hereinafter called the 'Neoga Company'), and as such succeeds to and is legally bound to perform all the obligations" of the Neoga Company; that on the 20th day of June, 1881, the Neoga Company, for the purpose of obtaining permission to cross the right of way and track of the petitioner, Illinois Central Railroad Company, entered into a written contract as follows: "Memorandum of agreement by and between the Illinois Central Railroad Company, party of the first part, and the Charleston, Neoga & St. Louis Railroad Company, party of the second part, witnesseth: The party of the second part desires to cross the right of way and track of said Illinois Central Railroad Company at a point one thousand four hundred and eighty-eight (1,488) feet south of the center of the depot building of said company at Neoga station: Now, therefore, the consent of the party of the first part is hereby given to the party of the second part to make said crossing, on the following terms and conditions, to wit: In consideration of the

foregoing grant and privilege, the party of the second part, its successors and assigns, hereby covenant and agree to furnish good and suitable crossing frogs, and place the same in track in a substantial manner, free of all cost to, and subject to the approval of, the party of the first part, and to keep said crossing frogs in good condition for the passage of trains of both parties hereto, and repair and renew the same when necessary, from time to time; all of said work to be at the expense of the party of the second part. And the party of the second part, its successors and assigns, also covenant and agree to erect and maintain crossing gates for all tracks which are or may be built, and shall provide said gates with necessary signal lights at night; and when notified in writing, by the party of the first part, the party of the second part, its successors and assigns, shall provide and pay competent men to attend to and open and close said gates, as may be directed by said party of the first part, and to attend and to keep in order said signal lights. The party of the second part shall put in on its track, at the points of intersection with the right of way of the Illinois Central Railroad, cattle guards to prevent stock from getting upon the Illinois Central Railroad Company's tracks. It is further agreed, in consideration of the rights and privileges herein granted by the party of the second part, that if the party of the first part shall, at any future time, lay one or more additional tracks on its right of way, so as to intersect the track of the Charleston, Neoga & St. Louis Railroad Company, the party of the second part, its successors and assigns, shall furnish and lay in its track, ready for use, the necessary crossing frogs, and shall keep the same in good condition and repair, and renew the same, when necessary, from time to time, in perpetuity; all of said work to be done at the expense of the party of the second part. It is distinctly understood and agreed, by and between the parties hereto, that the party of the first part shall be held free in perpetuity from all expense and expenditures of every kind, on account of said crossings and gates and gate tenders, as aforesaid." The petition further alleges that the provision of the contract for the erection, maintenance, and operation of crossing gates "has not been complied with in any respect" by said Neoga Company, or by its successors, although "the defendant company and its receiver have been" requested and notified in writing to do so, and that several collisions have resulted from such failure. The prayer for relief is as follows: "In view of the premises stated, your petitioner prays that a short rule may be entered against Robert B. F. Peirce, the receiver appointed under the prayer in the original bill in this case, requiring him to show cause why he has not complied with said contract and built said crossing gates; and that on a full hearing your honor will order the said Robert B. F. Peirce, receiver, to proceed without delay, and build said crossing gates, and maintain the same, according to the terms of said contract." The answer of the receiver, after stating the proceedings and orders relating to his appointment and his possession thereunder, alleges certain acts of consolidation, a subsequent mortgage and a foreclosure and sale, through which title passed to the Toledo Company, defendant, and in effect denies any obligation on either said defendant or the receiver to perform the undertaking respecting gates and signal lights. It also asserts the injustice of the provision, the inadequacy of the device, and other grounds for refusing to comply with the demand. The defendants in the foreclosure action were not cited, and took no part in the hearing. The order or decree thereupon reads as follows: "And now, on this day, come the said petitioner, by William H. Green, its solicitor, and the said Robert B. F. Peirce, as aforesaid, by Clarence Brown, Esq., his solicitor, and this cause coming on to be heard, the court hears evidence and argument for both the petitioner and the receiver, and the court finds that on the 20th day of June, 1881, the Charleston, Neoga & St. Louis Railroad Company made and entered into a certain contract in writing with said petitioner concerning the crossing of the petitioner's railroad at Neoga station, in the state of Illinois, by the railroad of the said Charleston, Neoga & St. Louis Railroad Company, was made defendant in this court to answer a bill to foreclose a mortgage on its said railroad, and a decree was entered ordering that said railroad be sold, and it was sold, at public judicial sale, and by mesne conveyances from the purchaser at said sale the railroad of the said Charleston, Neoga & St. Louis Railroad Company became and is the property of the Toledo, St. Louis & Kan-

sas City Railroad Company aforesaid. The court further finds that the aforesaid contract contained covenants which are obligatory upon the Toledo, St. Louis & Kansas City Railroad Company holding title to said railroad under a judicial sale thereof, and which require the said company to erect and maintain crossing gates for all tracks of Illinois Central Railroad Company at the crossing of said tracks at Neoga, Illinois, aforesaid, and provide said gates with necessary signal lights at night, and provide and pay competent men to attend to and open and close said gates, and keep in order said signal lights, in such way as may be directed by the said Illinois Central Railroad Company. The court further finds that the railroad, and all the property in the state of Illinois, of the said Toledo, St. Louis & Kansas City Railroad Company, connected with the running of its said railroad, has been by the decree of this court placed in the hands and control of Robert B. F. Peirce, as the receiver of this court, under his direction and control. Therefore it is ordered, adjudged, and decreed that, at the cost of the Toledo, St. Louis & Kansas City Railroad Company, aforesaid, crossing gates be erected and maintained for all the tracks at the crossing of the Illinois Central Railroad by the Toledo, St. Louis & Kansas City Railroad at said Neoga station, in the state of Illinois, and said gates be provided with necessary signal lights at night, and competent men be employed to attend to and open and close said gates, and keep in order said signal lights, as may be directed by the Illinois Central Railroad Company. And the court further orders that the said Robert B. F. Peirce forthwith proceed to carry this decree into effect, and report his actions and doings in this behalf to this court."

Clarence Brown, for appellant.

William H. Green, for appellee.

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

SEAMAN, District Judge, after the foregoing statement, delivered the opinion of the court.

This appeal is by the receiver alone, and the argument on his behalf assumes that the decree or order in question is one for specific performance of the contract of the Neoga Company. It is thereupon contended (1) that the contract was a mere parol executory license; (2) that as such, being revocable and unrecorded, it was not binding on the defendant or the receiver; (3) that, being executory, the receiver could adopt or reject at his option; (4) that personal services were required by the contract, for which there can be no decree for specific performance; (5) that petitioner had an adequate remedy at law; (6) that the defendant company neither appeared nor was cited, and the decree was improper as one of specific performance affecting such defendant.

If this assumption is well founded as to the nature of the decree or order,—that it is an adjudication of specific performance of the covenants of the contract made by the original Neoga Company, as covenants running with the railroad property and binding upon purchasers,—the objections to such decree are not without force, and should be considered. On the other hand, if the order is purely interlocutory and administrative, operating alone upon the management of the receiver, it is not dependent upon the obligations of the contract, but upon an exercise of judicial discretion; and there is no adjudication of permanent liability to run with the property, the contract being treated as evidence by which to ascertain the reasonableness and measure of the duty imposed by the order upon the re-

ceiver. In the brief for the appellee it is said: "The order is interlocutory in the fullest sense of the term. It is in no sense a 'final decision.' It was not necessarily entered of record. Its validity did not depend upon its being in writing. It may be modified or changed or canceled by the court which made it." And, so considered, it is not material to inquire whether the covenants are binding beyond the original contractor, nor is the wisdom or propriety of the order open to review on behalf of the receiver.

We are of opinion that the so-called "decree" from which the appeal was allowed is exclusively an order of the court directing the receiver "in the administration of the estate," such as the recent opinion of Mr. Justice Brewer, for the supreme court, in Bosworth v. Association, 19 Sup. Ct. 625, clearly defines as one resting in "the sound discretion of the trial court," and not subject to appeal by the receiver.

Possession of the railroad property in controversy is in the circuit court, operating through a receiver, and it is charged with the duty of providing means and measures for safe and efficient operation. The facts are undisputed that the crossing referred to is dangerous, and that means are both attainable and necessary to protect passing trains. By the petition of the intervener, action of the court was invoked to that end, calling attention to the danger, to the need of devices for protection, and to refusal on the part of the receiver to make provision therefor. The petition further sets up the contract entered into by the Neoga Company as ground for requiring the receiver to furnish the appliances and services there mentioned; and the sole prayer is for a rule on the receiver to show cause, and that upon hearing he be ordered "to proceed without delay, and build said crossing gates, and maintain the same, according to the terms of said contract." The order, in effect, proceeds no further than such direction to the receiver, the expense to be borne by the property in his hands. Whether the court, in exercising its undoubted discretion in that regard, treated the contract either as entitled to equitable consideration in fixing this slight burden upon the estate, or as a legal charge, does not change the character of the order. The recitals which appear by way of findings are mere reasons for exercising the discretion, and not essential to the order, and cannot serve to extend its scope into an adjudication respecting rights and interests which were neither before the court nor necessarily involved. No appeal from the order would extend beyond its final requirement, by which crossing gates and signals are adopted for protection, and the receiver directed to furnish and maintain such means at the expense of the estate. On this conclusion, in a matter within the sound discretion of the court, the sole inquiry on review would be whether it constituted an abuse of discretion; and if it be assumed, by way of argument, that the means selected were not adequate, and that good reason did not appear for charging the receivership alone with performance, the utmost of the assumption would involve mere error in judgment, and in no sense an abuse of discretion. As the question is clearly administrative, relating to provision for safety in the operation of the road, its determination by the court and the

direction for performance are conclusive upon the receiver, and he cannot appeal. See Bosworth v. Association, supra, reviewing and distinguishing the decision of this court in the same case (53 U. S. App. 302, 26 C. C. A. 279, and 80 Fed. 969).

The appeal is dismissed.

CLEWS et al. v. JAMIESON et al.

(Circuit Court of Appeals, Seventh Circuit. October 3, 1899.)

No. 533.

CONTRACTS—VALIDITY—SALE OF STOCKS FOR FUTURE DELIVERY.

A contract for the sale and purchase of stocks for future delivery, made on the Chicago Stock Exchange, by the rules of which such contracts can be closed by the payment of the difference between the market and contract price on the day of delivery, is invalid, as an option contract, under the Illinois statute (1 Starr & C. Ann. St. [2d Ed.] pp. 1293–1298), and a court of equity will not entertain a suit based thereon.

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

The appellants, comprising the firm of Henry Clews & Co., of the city and state of New York, filed their bill in equity, naming as defendants (1) the members of the firm of Jamieson & Co., (2) the managing members of the Chicago Stock Exchange, and (3) the members of the firm of Schwartz, Dupee & Co., all citizens of the state of Illinois. The theory of the bill and the relief prayed for are thus stated in the brief of counsel for appellants: "To have administered and turned over to them $14,000, in the possession of the managers of the Chicago Stock Exchange, claimed by appellants to have been deposited in trust as security for the performance of a contract whereby the appellants agreed to sell and deliver, and the appellees Jamieson & Co. agreed to receive and pay for, on the 31st day of August, 1896, seven hundred shares of Diamond Match Company stock, which contract it is alleged Jamieson & Co. failed and refused to perform;" also, to obtain "an accounting for the loss and damages sustained by the appellants by reason of the breach of contract, and that Jamieson & Co. be decreed to pay to the appellants the amount ascertained." Separate answers were filed by the defendants Jamieson & Co. and Schwartz, Dupee & Co. The remaining defendants demurred to the bill as not stating a cause of action cognizable in equity, but the demurrer was overruled, and such defendants filed separate answers. On the issues thereupon the case was sent to a master, who heard the testimony and reported his findings, which were in favor of the complainants upon all issues, and that on the accounting there was due to them from Jamieson & Co. $64,400. The hearing before the court was upon exceptions to the master's report, and upon certain stipulations of further facts, and resulted in a dismissal of the bill for want of equity. 89 Fed. 63. From the opinion filed, this conclusion appears to have been based on the view that the complainants were not privies to the transaction between Schwartz, Dupee & Co. and Jamieson & Co. This appeal is from the decree of dismissal so entered.

The facts are substantially undisputed. The appellants, Henry Clews & Co., were operators in stocks and bonds at New York City; and Schwartz, Dupee & Co. were like operators or brokers at Chicago, on the Chicago Stock Exchange, as members. Jamieson & Co. were also like operators and members of the Chicago Stock Exchange. The relation of the complainants to any transaction in question appears in communications by wire between them and Schwartz, Dupee & Co., which are stipulated in the case as follows: "On the 16th day of July, 1896, at 11:19 a. m., Schwartz, Dupee & Co. received the following order from H. Clews & Co., by telegram: 'Sell 500 Diamond Match at 220½ for a/c. [Signed] H. Clews & Co.' On the same day, at 11:35 a. m.,

Schwartz, Dupee & Co. telegraphed Henry Clews & Co. as follows: 'Sold 500 Diamond Match at 221⅛ for the account. [Signed] Schwartz, Dupee & Co.' On the 20th day of July, 1896, at 9:23 a. m., Schwartz, Dupee & Co. received a telegram reading as follows: 'Sell 200 Diamond Match at 221 for the account at opening of market. They want put out at opening if possible, but it is good all day. [Signed] Clews.' On the same day, at 10:08 a. m., Schwartz, Dupee & Co. telegraphed Clews as follows: 'Sold 200 Diamond Match 221½ for the account. [Signed] Schwartz, Dupee & Co.' On the 25th day of July, 1896, at 11:41 a. m., Clews telegraphed Schwartz, Dupee & Co. as follows: 'Change the Diamond Match over to August account at 2½ per cent. If you can do it, let us know at once. [Signed] Clews.' And shortly after that, on the same day, at 11:48 a. m., Clews sent the following dispatch to Schwartz, Dupee & Co.: 'You sent us the difference this morning at 2½. At what difference can you do it now? [Signed] Henry Clews & Co.' On the same day, at 11:58 a. m., Clews telegraphed Schwartz, Dupee & Co. as follows: 'Change the 500 at two cents or better. [Signed] Clews.' On the same day, at 12:11 p. m., Schwartz, Dupee & Co. telegraphed Clews as follows: 'Bought Diamond Match 227 for the account. Sold 500 229 account 2nd. [Signed] Schwartz, Dupee & Co.' On July 27th, at 8:55 a. m., Clews telegraphed Schwartz, Dupee & Co. as follows: 'Change 200 more Diamond Match 2 per cent. or better. [Signed] Clews.' On the same day at 10:53 a. m., Schwartz, Dupee & Co. telegraphed Clews as follows: 'We changed the 200 Match at 2¼ difference. Will give you prices later. [Signed] Schwartz, Dupee & Co.' On the same day, at 10:55 a. m., Schwartz, Dupee & Co. telegraphed Clews as follows: 'Bought 200 Match 226¾ account. Sold 200 2nd account. [Signed] Schwartz, Dupee & Co.' And the stipulation further states "that the orders of Henry Clews & Co. to Schwartz, Dupee & Co., contained in said messages, were, as a matter of fact, executed as set forth in the aforesaid messages from Schwartz, Dupee & Co., on the Chicago Stock Exchange."

The word "account," as used in these telegrams, was understood, in the language of the stock exchange, to mean that the last day of the current month was the "day of delivery" on the proposed sale. The message of July 25th, so interpreted, was understood to mean that 500 shares of the stock previously sold for "account" should be carried over to August account, or "account second," for which accommodation the seller allowed 2 cents on the dollar, making $2.29 per share. The final direction on July 27th was to place 200 more shares on the same terms for August account, making their offers on that account 700 shares, with all previous offers canceled. By the rules of the stock exchange, each broker, as a member, was required to keep on deposit with the managers of the exchange, as a trust fund to secure performance, an amount equal to 10 per cent., par value, of the stocks bought or sold, and this deposit is readjusted at the close of each day's session. Under this rule, Schwartz, Dupee & Co. claim to have kept their deposits good; and this deposit, together with that made by the buyer, constitute the alleged trust funds referred to in the bill, for which administration is sought.

The method of conducting business in the stock exchange between the brokers is thus fairly stated in the master's report, and in the opinion filed by the trial court: "At ten o'clock there is an official call, at which the secretary and manager call all the stocks, bonds, and securities on the official printed list; and, as this call progresses, any member wishing to buy or sell bids thereon, and the record is made of the transaction, after which there is an irregular call, which closes at half past one, when the manager of the clearing house announces the clearing-house or settlement price for the day, which are the closing prices on the exchange for the respective stocks and securities. That the manager then substitutes trades, and sends out cards to all buying or selling on account for the current month or for the next month. That on the 25th of the month, and thereafter until the second day before the end of the month, two calls are made,—one for the current month and one for the next ensuing month,—and this is done to allow those who wish to do so to change their accounts over to the next month. That this substitution was made by the clearing department by a system somewhat similar to that employed by the clearing house for banks; that is, that, where a broker has purchased and sold during the day the same amount

of the same kind of stocks or bonds, his account is balanced by the clearing department, and all margins deposited by such broker may be withdrawn; that when sales and purchases are made by different brokers, one buying and the other selling the same kind of stock or bonds, a substitution is made by the manager of the clearing department, by which it appears that the broker selling has sold such stock, not to the person to whom it was originally sold, but to a person or persons other than those to whom such sales were originally made, and who originally bought of some one else, and that a broker purchasing stock has purchased from some broker other than the broker from whom he originally purchased the same. For instance, if A. sold 100 shares of stock to X., and B. has bought the same amount of the same stock from Y., and X. and Y.'s accounts are balanced by other transactions, the substitution would make it appear that A. had sold 100 shares to B., and B. had bought 100 shares from A., and the names of the parties with whom the original transactions had actually been made by A. and B. would not appear on the clearing-house sheet. That in the transaction on said exchange it is then customary for the parties thus substituted and brought into the relation of buyer and seller with each other by the manager to assent to the new relations thus formed, and to confirm the transactions as thus adjusted by the manager, and to put up the margins required by the rules, unless the margins are already on deposit in the exchange, in which case they are transferred by the manager to the new account."

The stipulation of facts further shows all dealings of both Schwartz, Dupee & Co. and Jamieson & Co. which appeared upon the clearing-house sheets of the exchange for all dates in question; and although the former had original and substituted trades in Diamond Match stock with sundry other brokers prior to August 3, 1896, no trade appears with Jamieson & Co. up to that date, except to the extent of 100 shares. On August 3d, Jamieson & Co. appear as taking by "substitution" from Schwartz, Dupee & Co. 1,150 shares of such stock at $2.22. Of this transaction it is asserted on behalf of complainants that 700 shares were "substitution trades" for the complainants' orders of July 25th and July 27th, although at lower price than named in the order, and that Jamieson & Co. thereby became the "ultimate purchaser" of such shares, in accordance with the rules of the exchange, and that "it is seldom the original purchaser who is ultimately made responsible, but by a process of daily novations the original purchaser and many subsequent purchasers liquidate their contracts and are discharged from liability thereon before the 'account day,' some other member of the exchange assuming the new obligation."

The stipulation in reference to the trades by Schwartz, Dupee & Co. further states as follows: "That the 500 shares sold July 25, 1896, by Schwartz, Dupee & Co. for the 'August account' were sold for the account of Clews & Co., the complainants. That 200 shares of the 350 shares sold July 27, 1896, by Schwartz, Dupee & Co. for the 'August account' were also sold on account of complainants. That all of the other sales made by Schwartz, Dupee & Co. for the 'August account' were made on behalf of other clients than the complainants. That the 750 shares sold by Schwartz, Dupee & Co. on July 28, 1896, were sold for four different clients of Schwartz, Dupee & Company,—for one to the amount of 50 shares, for another to the amount of 300 shares, for another to the amount of 350 shares, and for another to the amount of 50 shares. The client for whom Schwartz, Dupee & Co. bought the 350 shares on July 27th is the same person for whom they sold 350 shares on July 28th, and who sold in order to close his purchase of July 27th. That the client for whom Schwartz, Dupee & Co. sold 300 shares on July 28th is the same person for whom Schwartz, Dupee & Company bought 300 shares on July 29th, and said purchase of July 29th was made to cover said person's sale of July 28th. That the transactions heretofore set out in this stipulation of purchase and sale of Schwartz, Dupee & Co. and the other brokers whose names are stated, with the exception of those transactions which are marked as substitutions, were had by the brokers on behalf of different clients or principals whom they represented, and those transactions, so far as the different principals are concerned, were not settled or canceled by any of the substitutions, nor by any of the settlements between the brokers, except so far as

where one client or principal of a broker was, through such broker, both a purchaser and a seller. In other words, the settlements by substitution or otherwise through the clearing house were merely settlements between the members of the stock exchange, and were not settlements or cancellations of the contracts between the principals whom the bankers represented and the brokers themselves, except where the same broker had both purchased and sold for the same client."

On August 3, 1896, the Chicago Stock Exchange was closed by order of the managers, and remained closed until November 5, 1896, so that there was no opportunity for further transactions on the exchange in reference to the subject-matter of this controversy after August 3d. On August 31, 1896, Schwartz, Dupee & Co. made personal tender to Jamieson & Co. of 1,150 shares of Diamond Match stock, and the latter refused to accept or pay for the same.

The following stipulation further appears: "It is admitted by the complainants that at the time complainants gave the several orders to Schwartz, Dupee & Co. to sell on the Chicago Stock Exchange the various amounts of Diamond Match Company stock, and at the time said Schwartz, Dupee & Co. executed said orders, said Schwartz, Dupee & Co. did not have in their hands any stock of said Diamond Match Company which was the property of the complainants, nor did said Schwartz, Dupee & Co. at any time thereafter have in their hands any of the stock of said Diamond Match Company which was the property of the complainants. It is admitted by the complainants that the 1,150 shares of the capital stock of the Diamond Match Company tendered to Jamieson & Company by Schwartz, Dupee & Co. on August 31, 1896, were not the property of the complainants, nor any part thereof."

No communication with, or appearance on the part of, Henry Clews & Co., is shown in reference to the transactions after July 27th and up to September 10th and 11th, and any claim of their participation therein was unknown to Jamieson & Co. prior to the latter date. On September 11th Schwartz, Dupee & Co. delivered to Jamieson & Co. a letter of the former, dated September 9, 1896, referring to their tender of the 700 shares, and stating that the sale was made by them as agents for Henry Clews & Co., "who may rightfully take any steps to enforce the contracts" or make settlement, and also a letter of Henry Clews & Co., by their attorneys, dated September 10, 1896, claiming such interest in the transaction, and notifying that sale of the 700 shares would be made to the highest bidder at the rooms of the Chicago Real-Estate Board on September 15, 1896, etc. On September 22d and 23d notices were given, respectively, that the sale had been adjourned to, and was made on, September 22. On September 22, 1896, Schwartz, Dupee & Co. made pretended sale of 700 shares of the stock (being the same transaction set up in the bill), by way of fixing the price for measuring damages, of which the following stipulation of facts is made: "It is further admitted: That the 700 shares of said stock alleged in the bill of complaint to have been sold on the 22d day of September, 1896, were not delivered to Frank N. Gage, but immediately after said shares of stock were delivered to Major J. W. Conley, one of the firm of Schwartz, Dupee & Co., by H. J. Davis, who conducted said sale on behalf of Henry Clews & Co., for safe-keeping by said J. W. Conley. That afterwards and on the same day said H. J. Davis delivered to said Frank N. Gage a memorandum in words as follows: 'September 22, 1896. Sold to Frank N. Gage 700 shares of Diamond Match stock, numbered A680–686, inclusive, at $130 per share. Henry Clews & Co., per Estabrook & Davis.' That thereupon said Gage wrote below said memorandum the following: 'Chicago, September 22, 1896. O. K. Please deliver to I. H. Waggoner, Esq., and accept his check in settlement. Frank M. Gage.' And thereupon said Gage redelivered said memorandum and said order to said H. J. Davis, who thereupon delivered the same to Mr. I. H. Waggoner, together with an order on Schwartz, Dupee & Co. to deliver said certificates of shares to said Waggoner upon being paid the amount of $130 per share. That said Gage was employed by said Waggoner to bid at said sale, and that said Waggoner was acting for and on behalf of the complainants in this suit, in the employment of said Gage. Complainants object to the foregoing admission being considered as evidence; for, while admitting that these are the facts, at the same time they claim they are immaterial to the issues in this case, and object on the ground

of immateriality." The pretended sale was so made, for the reason that the exchange was then closed, pursuant to the rules, by order of the managers, notwithstanding a rule of the exchange which reads as follows: "Should any member neglect to fulfill his contract on the day it becomes due, the party or parties contracting with him shall, after giving notice as required by section 2 of the preceding article, employ an officer of the board to close the same forthwith in the exchange by purchase or sale, as the case may require, unless the price of settlement has been agreed upon by the contracting parties. In case of a failure of a creditor to close the contract as above, the price shall be fixed by the price current at the time such contract ought to have been closed under the rule. In all cases where an officer may be directed to buy or sell securities under this rule, the name of the member defaulting, as well as that of the member giving the order, shall be announced. No order for the purchase or sale of securities under this rule shall be executed unless made out in writing over the signature of the party giving the order, who shall state the reason therefor; and it shall be the duty of the officer who executes the order to indorse thereon the name of the purchaser or seller, the price and the hour at which the contract is closed, and hand the same to the secretary of the board, who shall within twenty-four hours ascertain whether the party for whose account the order was given has paid the difference, if any, arising from the transaction. If not, the secretary shall report the default to the president. The duty devolved upon the officers of the exchange under this rule shall be performed without charge. No party shall be permitted to supply offers to buy or sell securities closed for his account under the rule; and, when a contract is closed under this rule, any action of the defaulter, direct or indirect, by which the prompt fulfillment of such contract is delayed, hindered, or evaded, to the detriment of the other contracting party, shall subject the offending party to suspension for not less than thirty days, in the discretion of the governing committee, by a vote of two-thirds of the members present at the meeting. When contracts are closed out under the rule, any member supplying the bid or offer, and not duly receiving or delivering the stock, as the case may be, renders himself liable to prosecution under this article. Should any stock thus sold not be delivered until the next day, the contract shall continue, but the defaulting party shall not be liable to pay such damage as may be assessed by the arbitration committee. The same rules as to notice, time, and places that govern defaults in other contracts shall apply to borrowed securities, which, on nondelivery or receipt, must be borrowed or loaned in open market, except in case of actual default in receiving or delivering after notice to close the loan. Then the same are to be bought or sold as the case may be, for the account of the defaulter, in the manner provided in this article."

H. D. Estabrook, for appellants.

Samuel P. McConnell, for appellees.

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

SEAMAN, District Judge, after the foregoing statement, delivered the opinion of the court.

Except for the fund or deposit alleged to constitute security for performance of the contract in question, a remedy for a breach rests at law, and equitable jurisdiction depends upon the existence of such fund to be administered or charged. And to maintain the bill it is further indispensable for the complainants to establish: First, an executory contract of purchase by Jamieson & Co., bona fide and enforceable in equity, secured by such fund; second, privity of the complainants in the contract and fund; and, third, actual injury either suffered or impending through the alleged breach. Failing proof or admission of these requisites, or either of them, the bill is properly dismissed for want of equity.

From the opinion filed in the trial court, it appears that dismissal was based on a finding of want of privity in the alleged contract; and the arguments at the bar and in the briefs of counsel upon both sides are mainly directed to that question in its various phases, as presented by the peculiarities of the transactions. Other contentions relate to the measure of damages,—whether the rules of the exchange adopted by the parties furnish an exclusive method or measure to determine the amount of damages for a breach, and whether, in any view, the pretended sale offered on behalf of the complainants can be recognized. Underlying these contentions, however, on the undisputed testimony, this paramount question obtrudes itself: Is a valid contract shown, or one which equity will enforce even between proper parties? The importance of the inquiry thus arising is recognized as one affecting a branch of operations which appears to have countenance and extended practice in the commercial world, however infrequently its transactions are brought into courts of equity for adjustment. But it cannot be ignored when the purported contract is presented as the foundation for relief in equity, and neither silence nor acquiescence on the part of the litigants will excuse the court from its determination. Otherwise stated, the question for solution is whether the contract in proof was one of bona fide purchase and sale of stock, or was either a mere wagering transaction or a contract in options. In Irwin v. Williar, 110 U. S. 499, 508, 4 Sup. Ct. 165, the general rule governing such transactions is thus declared:

"The generally accepted doctrine in this country is, as stated by Mr. Benjamin, that a contract for the sale of goods to be delivered at a future day is valid, even though the seller has not the goods, nor any other means of getting them than to go into the market and buy them; but such a contract is only valid when the parties really intend and agree that the goods are to be delivered by the seller and the price to be paid by the buyer, and, if under guise of such a contract, the real intent be merely to speculate in the rise and fall of prices, and the goods are not to be delivered, but one party is to pay to the other the difference between the contract price and the market price of the goods at the date fixed for executing the contract, then the whole transaction constitutes nothing more than a wager, and is null and void."

In Embrey v. Jemison, 131 U. S. 336, 344, 9 Sup. Ct. 776, and in Bibb v. Allen, 149 U. S. 481, 492, 13 Sup. Ct. 950, this doctrine is reaffirmed, and in the latter case is well distinguished, as showing by the undisputed testimony that actual delivery was not only intended by both parties, but was expressly required by the rules of the Cotton Exchange governing the transactions.

Aside from the general rule, the contract in question is further subject to such statutory provisions of the state of Illinois as may be found applicable, and sections 130 and 131 of the Criminal Code of that state (1 Starr & C. Ann. St. [2d Ed.] pp. 1293, 1298) read as follows:

"Sec. 130. Whoever contracts to have or give to himself or another the option to sell or buy, at a future time, any grain, or other commodity, stock of any railroad or other company, or gold, or forestalls the market by spreading false rumors to influence the price of commodities therein, or corners the market, or attempts to do so in relation to any such commodities, shall be fined not less than $10 nor more than $1,000 or confined in the county jail not

exceeding one year, or both; and all contracts made in violation of this section shall be considered gambling contracts, and shall be void.

"Sec. 131. All promises, notes, bills, bonds, covenants, contracts, agreements, judgments, mortgages, or other securities or conveyances made, given, granted, drawn or entered into, or executed by any person whatsoever, where the whole or any part of the consideration thereof, shall be for any money, property or other valuable thing, won by any gaming or playing at cards, dice, or other game or games, or by betting on the side or hands of any person gaming, or by wager or bet upon any race, fight, pastime, sport, lot, chance, casualty, election or unknown or contingent event whatever, or for the reimbursing or paying any money or property knowingly lent or advanced at the time or place of such play or bet, to any person or persons so gaming or betting, or that shall, during such play or betting, so play or bet, shall be null and void and of no effect."

These provisions were under consideration in Pearce v. Rice, 142 U. S. 28, 40, 12 Sup. Ct. 130, and were held to invalidate a contract which arose out of grain deals on the Chicago Board of Trade. Rulings by the supreme court of Illinois in Tenney v. Foote, 95 Ill. 99; Lyon v. Culbertson, 83 Ill. 33, and Pickering v. Cease, 79 Ill. 328, are there cited and applied; and the later cases of Pearce v. Foot, 113 Ill. 228, Cothran v. Ellis, 125 Ill. 496, 16 N. E. 646, Schneider v. Turner, 130 Ill. 28, 22 N. E. 497, and Soby v. People, 134 Ill. 66, 25 N. E. 109, reaffirm such rulings, and clearly hold that contracts which purport on their face to be absolute for sale or purchase are within the prohibition of the statute, "if the real intention of both parties at the time of making the contract was to deal only in options, and make future settlement upon the basis of the difference in the market price, without the actual delivery of the grain or other commodity sold or purchased." Soby v. People, supra.

Wherever the general doctrine against wagering transactions stands alone as the test of validity, it is well settled in actions at law that a contract of purported purchase and sale will stand upon the presumption which arises in its favor, that actual delivery was intended, unless the proof clearly overcomes the presumption and establishes a mutual understanding by the parties that the transaction was a mere speculation in the market price, to be performed only by paying or receiving the amount of rise or fall in the market on the day named for delivery. In the case at bar there is no substantial conflict in the testimony, and on its face the correspondence between the complainants and their brokers speaks of "sales of Diamond Match stock for July account," of inquiries for the "difference" demanded to change to August account, and of changes then ordered and reported as made by allowing the "difference." It is not stated in terms by either party that delivery was not intended, nor does it appear in express terms in the correspondence or testimony that there was to be no actual delivery of the stock referred to on the purported sale. On the other hand, there is neither averment nor pretense that the sellers had or controlled any shares of the stock, or procured or intended to procure the same for delivery; and it is conceded that they had no stock at any time in the hands of their brokers, and no property in the stock of which pretended tender and sale was made after the alleged default. As the rules of the stock exchange made distinct provision for "closing contracts" so entered

into by paying "the difference" in market price, and the operations were conducted under such rules, by parties who were unquestionably acquainted with them, there is surely strong ground to infer an understanding by the parties that such was the contract, and not one of actual sale and delivery, or, as well described in Pearce v. Rice, 142 U. S. 28, 40, 12 Sup. Ct. 135, that they were "merely to speculate upon the rise and fall in prices, with an explicit understanding from the outset that the property apparently contracted for was not to be delivered, and that the transactions were to be closed only by the payment of the difference between the contract price and the market price at the time fixed for the execution of the contract."

In discussing the authority conferred upon the broker by the complainants, the brief of counsel presented on their behalf contains an interpretation of their contract which clearly discloses their understanding of the matter as above indicated, in the following paraphrase of the terms of these instructions:

"Please sell to whomsoever you think responsible seven hundred shares of Diamond Match stock at $229 per share, to be delivered August 31st. If the person to whom you sell should become dissatisfied with his bargain, and you can find some one to take it off his hands at a lower price, you are authorized to cancel the original contract and accept the substituted purchaser in the stead of the first purchaser, provided you are paid the difference in money. The money, of course, you will hold to our use. If the second purchaser, in turn, should wish to withdraw, and you or he can find some one willing to take the shares at a still lower price, you are authorized to cancel the existing contract, as before, and in like manner to accept the third purchaser, provided you are paid the difference in cash. And this you may do on like terms whenever and as often as you see fit. On the other hand, if the price advances it may be expedient and convenient that we should, if possible, cancel the existing contract (with whomsoever it may be), and obtain a new contract at the current price, in which event you are authorized to pay and charge to our account whatever it costs to obtain such a novation, and this also you are authorized to do whenever and as often as you may deem expedient; for we have carefully studied this matter, and we take it that, by the process indicated, we will be in or out on the day of delivery precisely the difference between our original offer and the then market price."

In equity jurisprudence it is fundamental that "equity looks to the intent rather than to the form," and "will never suffer the mere appearance and external form to conceal the true purpose, objects, and consequences of a transaction"; that one who seeks relief must come open-handed, with clean hands, and, to obtain relief, must clearly show that equity and good conscience are with him. In this view it is at least questionable whether relief can be claimed on the mere form of this contract, resting alone on its presumptive force at common law, without "probing the conscience" of the party for the true object. We are of opinion, however, that the transaction as disclosed clearly falls within the terms of the Illinois statute above cited, as interpreted by decisions of the supreme court of the state, and that neither the inquiry last suggested, nor the sufficiency of the proof to show a wagering contract under the common-law rule, requires decision to ascertain the invalidity of the contract thus disclosed.

In Schneider v. Turner, 130 Ill. 28, 22 N. E. 497, these provisions are held applicable to a contract relating to the sale of shares of

railway stock, and the proposition is refuted that the act merely invalidates gambling contracts, or such "option contracts as contemplate a settlement by differences." It is remarked in the opinion:

"If that construction is the true one, why was the statute enacted at all? Nothing is more clearly and firmly established by the common law than that all gambling contracts are void. It is equally well settled that all contracts for the purchase and sale of property, with the understanding or agreement of the parties—whether that agreement is expressed on the face of the contract or exists by secret understanding—that the property is not to be delivered or accepted, but the contract satisfied by an adjustment of the differences between the contract and market price, are mere wagers or gambling contracts, and void."

It is then said that the act intends more than the condemnation of contracts "which were already gambling contracts and void"; that its manifest object—

"Is to break down the pernicious practice of gambling on the market price of grain and other commodities. How is this object sought to be accomplished? There was or is nothing illegal or even immoral in an option contract, within itself. The evil aimed at nevertheless grew out of such contracts. As said by Judge McAllister in the opinion referred to in Tenney v. Foote, 'In practice on the stock exchange it was often the intention of the parties that no stock should be delivered, but the transaction settled upon differences;' and by Judge Andrews, in the Bigelow Case, 70 N. Y. 202, 'Contracts of this kind may be mere disguises for gambling.' In this case the parties might have intended, if appellants called for the stock, to settle on differences. The contract could have been made the disguise for gambling on the future price of stock of the North Chicago City Railway. The question is not, did they so intend? but, did not the legislature regard such contracts as lying at the root of the evil aimed at, and strike at them? The treatment is heroic, but the evil was most malignant. * * * The contract, tested by the statute, is void."

In the earlier case of Pickering v. Cease, 79 Ill. 328, this view is exemplified as follows:

"Agreements for the future delivery of grain or any other commodity are not prohibited by the common law, nor by any statute of this state, nor by any policy adopted for the protection of the public. What the law does prohibit, and what is deemed detrimental to the general welfare, is speculating in differences in market values. The alleged contracts for August and September come within this definition. No grain was ever bought and paid for, nor do we think it was ever expected any would be called for, nor that any would have been delivered had demand been made. What were these but 'optional contracts,' in the most objectionable sense; that is, the seller had the privilege of delivering or not delivering, and the buyer the privilege of calling or not calling for, the grain, just as they chose. On the maturity of the contracts, they were to be filled by adjusting the differences in the market values. Being in the nature of gambling transactions, the law will tolerate no such contracts."

So in Pearce v. Foot, 113 Ill. 228, 239, it is said:

"Although the statutes being considered are highly penal, there is no warrant for construing them with any unreasonable strictness. They ought rather to have a just, if not liberal, construction, to the end the legislative intention may be accomplished,—to prohibit all dealings in options in grains or other commodities. Nothing is productive of more mischievous results. Considerable fortunes secured by a life of honest industry have been lost in a single venture in 'options.' The evil is all the more dangerous from the fact it seemingly has the sanction of honorable commercial usage in its support. It is a vice that has in recent years grown to enormous proportions. Legitimate

transactions on the board of trade are of the utmost importance in commerce. Such contracts, whether for immediate or future delivery, are valid in law, and receive its sanction and all the support that can be given to them. It is only against unlawful 'gambling contracts' the penalties of the law are denounced, and no subtle finesse of construction ought to be adopted to defeat the end it is to be hoped may be ultimately accomplished."

However the terms "option" and "optional contracts" may be used and defined elsewhere, the construction of this statute by the supreme court of the state is controlling here, and invalidates the contract upon which the bill of complaint is founded. Such was the ruling in Lester v. Buel, 49 Ohio St. 240, 30 N. E. 821, where transactions were involved of like character on the Chicago Board of Trade, and were held to be within the provisions of the Illinois statute, and prohibited as well by a statute of Ohio of like import. We are of opinion that the bill was properly dismissed for want of equity, and the decree is affirmed.

WILLIAMS v. HEDRICK et al.

(Circuit Court of Appeals, Seventh Circuit. October 3, 1899.)

No. 483.

1. ESTATE—CONSTRUCTION OF DEED.
   Under the statute of Indiana (2 Burns' Rev. St. 1894, § 3348), providing that it shall not be necessary to use the words, "heirs and assigns of the grantee," in a deed to create in the grantee an estate of inheritance, and, if it be the intention of the grantor to convey any lesser estate, it shall be so expressed in the deed, a proviso in a deed, after the granting clause, that the grantee shall take only a life estate, with remainder in fee to others, is an expression of the grantor's intention which must be given effect, and, unless the remainder is one to which the rule in Shelley's Case applies, the first grantee will take only a life estate.
2. SAME—VESTED REMAINDER.
   Where a deed granted an estate for life, with remainder in fee to the children of the life tenant if he left any surviving him, and, if not, to a nephew of the life tenant, who was named, and the first grantee was without children, the nephew took a vested interest in remainder, subject to devestment in case the life tenant died leaving a child or children, and that interest is one which he may maintain any proper action to protect.
3. TAX SALE—FORECLOSURE OF LIEN—EFFECT OF DECREE.
   Where a purchaser of land at tax sale foreclosed his lien by suit to which the life tenant only was made defendant, and the land was sold under the decree for the full amount of the lien, the interest of the life tenant only passed by the sale, and the lien on the interest of the remainder-man was thereby extinguished.

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

The amended supplemental bill was brought by Lawrence Hedrick, a minor, by next friend, against Charles N. Williams, Charles L. English, trustee, and John W. Kent, to remove incumbrances and to quiet the title to real estate. English and Kent each filed a cross bill, and issue was duly joined upon the bill and cross bills. No important question of pleading is raised, and the points in dispute may be presented more clearly than in any other way by a statement of the facts, about which there is no disagreement.

On August 10, 1886, Jesse E. Hedrick, owning a farm of one hundred and seventy-one acres in Warren county, Ind., conveyed and warranted the same

to Joseph Hedrick by a deed drawn in the statutory short form, in which, following the description of the land, was this proviso: "Provided, always, that the estate herein conveyed to the said grantee, Joseph Hedrick, is for and during his natural life; and at his death the same shall vest absolutely, in fee simple, in the surviving children of the said Joseph, if any there be, as tenants in common; and, in case the said Joseph should die without issue alive, then the fee in said lands shall go to and vest absolutely in Lawrence H. Hedrick, son of Scott L. Hedrick." Joseph and Scott L. are nephews of Jesse E. Hedrick. Joseph is married, is about forty-five years old, but has no child. On January 19, 1891, under the ditch laws of the state (Burns' Rev. St. 1894, § 5632 et seq.), the trustee of Jordan township, where the land is, made a contract with one McAllister for the repair of a public ditch on the land, whereby it was held that a lien attached to the land from the date of the contract for the work done (Crawford v. Hedrick, 9 Ind. App. 356, 36 N. E. 771); and on December 24, 1894, a decree was entered in the Warren circuit court foreclosing the lien for the sum of $294.50, found due. The defendants to the suit were Joseph and Jesse Hedrick, and the appellant, Williams, on whose motion at the same term of court the decree was set aside and the suit dismissed as against him. On the day of entry the decree was sold and assigned to Kent. Two days later, on the 26th, Williams, claiming a right to redeem from the lien of the decree, paid to the clerk of the court the full amount, and the money was accepted by the clerk in satisfaction of the decree; but Kent refused to receive the money, and, after the bringing of this suit, assigned the decree to English, trustee. On June 18, 1891, Joseph Hedrick executed to the First National Bank of Danville, Ill., to secure his note to the bank of May 1, 1891, a mortgage "on all the real estate for life owned and held by" him, and, the mortgage having been foreclosed in the Warren circuit court in a suit brought by the bank against Joseph and Jesse Hedrick, the life estate was sold under and for the full amount of the decree on December 9, 1893, and a certificate of purchase executed by the sheriff to English, as trustee. On November 30, 1894, Williams, for the purpose of redeeming the land from this sale, deposited with or paid to the clerk of the court $822.28, but English refused to take the money. On February 9, 1891, the land was sold at tax sale for $167.59, the delinquent taxes of 1889 and 1890, and a certificate of the sale given to the appellant, Williams, who, after a lapse of two years, on March 20, 1893, received a tax deed; but, recognizing the invalidity of the sale, brought suit in the Warren circuit court to foreclose the lien of the taxes in his own favor, as in such cases provided by statute (3 Burns' Rev. St. § 8640), making defendants Joseph, Lawrence, and Jesse Hedrick, but not English or Kent, or the First National Bank of Danville; and, process not having been served upon Lawrence Hedrick, the suit as against him was dismissed before decree, which was rendered on October 13, 1893, declaring a lien for $512.38, including taxes paid after the sale; and on December 23, 1893, by virtue of the decree, the land was sold and conveyed by the sheriff to Ezra C. Voris, who, on February 22, 1894, quitclaimed to Williams, who, having taken possession, leased the farm to Frank Pence, and for the year 1894 received of him the stipulated rent of $600; but in January, 1895, Pence, without surrendering possession, accepted a lease of Kent; whereupon Williams brought suit for possession, and was given judgment, which was affirmed on appeal. Pence v. Williams, 14 Ind. App. 86, 42 N. E. 494. It is alleged in the cross bill of Kent that on January 10, 1895, Joseph Hedrick and wife conveyed the land to him by deed duly signed, acknowledged, and recorded, but that he had never asserted, and does not now assert, as against the plaintiff, any interest in the land other than to the extent of his judgment, reasonable costs, attorney's fees, and expenses.

The statute of Indiana concerning the conveyance of land (Revision 1881) contains the following provisions:

"Sec. 2927. Any conveyance of lands worded in substance as follows—'A. B. conveys and warrants to C. D. (here describe the premises), for the sum of (here insert the consideration)'—the said conveyance being dated, duly signed, sealed, and acknowledged by the grantor—shall be deemed and held to be a conveyance in fee-simple to the grantee, his heirs and assigns, with covenant from the grantor for himself and his heirs and personal representa-

tives that he is lawfully seized of the premises, has good right to convey the same, and guarantees the quiet possession thereof; that the same are free from all incumbrances, and that he will warrant and defend the title to the same against all lawful claims."

"Sec. 2929. It shall not be necessary to use the words 'heirs and assigns of the grantee,' to create in the grantee an estate of inheritance; and if it be the intention of the grantor to convey any lesser estate, it shall be so expressed in the deed."

"Sec. 2958. Estates tail are abolished; and any estate which, according to the common law, would be adjudged a fee-tail, shall hereafter be adjudged a fee-simple; and if no valid remainder shall be limited thereon, shall be a fee-simple absolute.

"Sec. 2959. A freehold estate, as well as a chattel real, may be created to commence at a future day; and an estate for life may be created in a term of years, with or without the intervention of a precedent estate, and a remainder limited thereon; a remainder of a freehold or a chattel real, either contingent or vested, may be created, expectant on the determination of a term of years.

"Sec. 2960. A remainder may be limited on a contingency, which, in case it should happen, will operate to abridge or determine the precedent estate."

For same provisions in 2 Burns' Rev. St. 1894, see sections 3346, 3348, 3378-3380.

G. W. Paul and S. N. Chambers, for appellant.

Addison C. Harris, for appellees.

Before WOODS, JENKINS, and GROSSCUP, Circuit Judges.

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

The contention of the appellant that the deed of Jesse Hedrick to Joseph Hedrick created in the latter a title in fee simple to the land described is not sound. By the common law a grant to a person named, without the addition of words of inheritance, carries only a life estate; and while it was provided by the statute that it shall not be necessary to use the words, "heirs and assigns of the grantee," to create in the grantee an estate of inheritance, that expression is itself qualified by the added words, "and if it be the intention of the grantor to convey any lesser estate, it shall be so expressed in the deed." Under this provision, the very elaborate discussion of common-law doctrines and decisions, to the effect that a granting clause must be construed by itself, and that the estate thereby conveyed cannot be cut down by subsequent terms of the instrument, is irrelevant. By force of the statute the intention of the grantor of land will be sought, in accordance with the ordinary and reasonable rule for the construction and interpretation of writings, in all that is to be found within the four corners of the deed, except when the rule in Shelley's Case is applied. That this deed was intended to give Joseph Hedrick only a life estate could not have been made more certain, and the expression of that intention, as it is found in the instrument, must be given effect. See Prior v. Quackenbush, 29 Ind. 475. The rule in Shelley's Case, when applicable, it has been held, will be enforced notwithstanding the statute, though the effect be to override the evident intention of the grantor (Ridgeway v. Lanphear, 99 Ind. 251), but that rule cannot be invoked here. See Burns v. Weesner, 134 Ind. 442, 34 N. E. 10, Doren v. Gillum, 136 Ind. 134, 35 N. E. 1101,

and McIlhinny v. McIlhinny, 137 Ind. 411, 37 N. E. 147, by which King v. Rea, 56 Ind. 1, and Fletcher v. Fletcher, 88 Ind. 418, were overruled. There being in existence no children of Joseph Hedrick, the remainder in fee is to be regarded as vested in Lawrence H. Hedrick, subject to devestment upon the death of Joseph Hedrick with surviving child or children. In addition to the cases cited above, see Granger v. Granger, 147 Ind. 95, 44 N. E. 189, and 46 N. E. 80; Kilgore v. Kilgore, 127 Ind. 276, 26 N. E. 56; Wilson v. White, 109 N. Y. 59, 15 N. E. 749. In the last case it was said: "The right of the contingent remainder-men constituted an estate in lands of which they could not be devested during the existence of the life estate, except by legal proceedings to which they were parties."

It follows that Lawrence H. Hedrick had a vested estate or interest in the lands here in dispute, for the protection of which he was at liberty to prosecute any appropriate action or suit. It also follows that he is not bound nor his interest cut off by the decree of foreclosure of the appellant's tax lien and the sale thereunder of the land to Voris. If children should be born to Joseph Hedrick, they would doubtless be bound, on the theory of representation, by the decree rendered against him (McArthur v. Scott, 113 U. S. 340, 5 Sup. Ct. 652; Bank v. Taylor, 9 U. S. App. 406, 449, et seq., 4 C. C. A. 55, and 53 Fed. 854); but Lawrence Hedrick and his interest could be affected only by a judgment or decree to which he was a party. He was a defendant in the suit to foreclose the tax lien, but was not served with process, and as against him the suit was formally dismissed. Another important consequence must be recognized: While the lien which was being foreclosed in that suit was a lien upon the entire property, and superior to all interests or estates of whatever character, the decree, taken, as it was, against the owner of a life estate only, extended to no more than that interest, and by virtue of the sale Voris acquired, and was able to convey to Williams, only the life estate of Joseph Hedrick; and, the bid having been for the whole amount of the decree, all other interests in the property were released, and the only harm done or possible to Lawrence Hedrick is the cloud upon his title by reason of the fact that the sale and deed by the sheriff purport to be of the land in fee, and not simply of the life estate of Joseph Hedrick. In this particular the relief granted should have gone only to the extent of adjudging the plaintiff's title and declaring it unaffected by the sale under the decree of foreclosure in favor of Williams. The plaintiff, after the extinguishment of the tax lien by the sale of the life estate, was under no necessity, and therefore had no right, to redeem from the sale in order to protect his own interest.

The ditch lien was one which it was the duty of the life tenant to discharge, and, if not already extinguished by the payment of the proper sum by Williams to the clerk, it was proper to provide for the extinguishment of it out of the rents in the registry of the court.

The mortgage to the First National Bank of Danville was limited in terms to the life estate of Joseph Hedrick, and the foreclosure thereof, and the sale and conveyance to the bank, involved no possible harm to the contingent estate in remainder. What was the effect

of Williams' attempt to redeem from the sale to English, trustee, and of English's attempt to redeem from him, we are not called upon to decide.

In so far as it was adjudged that the plaintiff had a right to redeem from the sale made to Voris, and to receive the rents or profits of the land during the life of Joseph Hedrick, the decree was erroneous. The decree is therefore reversed, and the cause remanded, with direction to enter a decree in conformity with this opinion.

SAFE-DEPOSIT & TRUST CO. OF BALTIMORE v. CITY OF ANNISTON.

(Circuit Court, N. D. Alabama, S. D. September 11, 1899.)

1. EQUITY—REMEDY AT LAW.
   A municipal corporation, though insolvent, cannot be enjoined from using its funds, nor can its funds be subjected, by equity, to the payment of a judgment, when there is an adequate remedy by mandamus.
2. SAME—PLEADING—DEMURRER—REMEDY AT LAW.
   A bill in equity against a municipal corporation to enjoin use of its funds, and to subject them to the payment of a judgment, is demurrable when it fails to allege an attempt to use the remedy by mandamus, or facts showing the inadequacy of that remedy.
3. SAME—REMEDY AT LAW IN THEORY.
   Equity can give no relief where there is a remedy at law in theory, although the legal remedy is inadequate in practice.

In Equity.

J. J. Willett and Skipwith Wilmer, for complainant.

Knox & Bowie, F. L. Blackmon, and Caldwell & Johnston, for defendant.

SHELBY, Circuit Judge. This cause has been submitted on motion to dissolve the restraining order heretofore granted, and on demurrer to the bill. The complainant is a corporation organized in the state of Maryland. The defendant is a municipal corporation in the state of Alabama. The bill, which is sworn to, shows that the complainant recovered two judgments at law in this court against the defendant in suits on past-due coupons for sums amounting in the aggregate to $29,869.99. Executions have been issued on them, and returned "No property found." The judgments are wholly unpaid, and the city has made no appropriation to pay them. The city has appropriated to the public schools of the city for the fiscal year 1898–99 the sum of $3,980. Part of this sum has already been paid for school purposes, and part of it is still held by the city. The coupons which formed the basis of the judgments to the extent of $10,000 were issued and negotiated by the city before the establishment of any public-school system in the city of Anniston. It is alleged that the city of Anniston "is wholly insolvent, * * * and that, if defendant is permitted to appropriate and pay this money out for public schools, * * * it will be a great wrong upon orator, and orator will be practically remediless." It is also alleged that the city is paying out said sum of $3,980 day by day for school purposes, and that

the amount in its hands is getting less every day. The prayer of the bill is for a writ of injunction to enjoin the defendant from appropriating or paying out any money on account of the public schools in the city of Anniston other than that derived from the state for school purposes. There is also a prayer for a writ commanding the defendant to pay over the said sum of $3,980 for and on account of said judgments. The complainant obtained an order on this bill, setting the application for the injunction down for hearing, and in the meantime restraining the defendant as prayed for in the bill. The defendant filed a motion to dissolve this restraining order, and also demurred to the bill. The grounds of demurrer assigned are, in substance, that the bill is without equity; that the complainant has a complete and adequate remedy at law; and that a court of equity is without jurisdiction to grant the relief prayed for. In Walkley v. City of Muscatine, 6 Wall. 481, it was held that mandamus, and not bill in equity, is the appropriate remedy to enforce the levy of a tax to pay a judgment against a municipal corporation. This is conceded in the argument for complainant, but it is contended that, as a surplus fund is already in the hands of the city officers, equity has jurisdiction to enforce its application to the payment of the judgment, and to enjoin its use for other purposes. Ordinarily, the remedy by mandamus is found adequate to secure the collection and the application of the fund. The application of the fund to the payment of the judgment debt is only part of what is usually done by the process of mandamus. If the levy, collection, and application of the tax can all be enforced at law by mandamus, the power of a court of equity is not needed to enforce the application of a fund already in hand. In Thompson v. Allen Co., 115 U. S. 559, 6 Sup. Ct. 144, the court said: "If the common-law court can compel the assessment of a tax, it is quite as competent to enforce its collection as a court of chancery. Having jurisdiction to compel the assessment, there is no reason why it should stop short, if any further judicial power exists under the law, and turn the case over to a court of equity." If it be conceded, therefore, on the averments of the bill, that the complainant is entitled to have the $3,980 raised as a school fund applied to the part payment of the judgments sued on,—a question not necessary to be now decided,—the remedy to enforce its application is by mandamus at law, and not by bill in equity. Hausmeister v. Porter, 21 Fed. 355.

There is no allegation in the bill showing that the judgments cannot be collected by proceedings at law by mandamus. It is averred that the defendant is insolvent. That averment can only mean that it has no property subject to execution,—a fact shown, also, by the sheriff's return on the executions. This condition is usual with municipal corporations, because of the fact that their property which is needed for public purposes—and they rarely own any other—is not subject to execution. The resources from which their debts are usually paid are derived from taxation. It does not appear from the bill that such resources cannot be made available to pay the judgments. In a case where the legal remedy by mandamus had been exhausted, proving ineffectual by reason of the refusal of citizens of the municipality to accept office, through which alone the taxes could

be collected, it is held by the court of last resort that equity can afford no remedy. Rees v. City of Watertown, 19 Wall. 107. This being settled, it must follow, for stronger reasons, that equity has no jurisdiction when the usual proceedings at law have not been tried, and when facts are not alleged showing that the judgments cannot be collected by such proceedings. In cases of judgments against municipal corporations, the writ of mandamus is looked on as the final process of the court; it performs, in substance and effect, the office of a writ of execution. 2 Dill. Mun. Corp. (4th Ed.) § 861. Both by statute and by the general principles of law and of equity jurisprudence the federal courts are prohibited from exercising jurisdiction in equity when there is a plain, adequate, and complete remedy at law. Rev. St. U. S. § 723. If the remedy at law is adequate in theory, it deprives equity of jurisdiction, although practically it may be inadequate to secure the collection of the claim sued on. "By inadequacy of the remedy at law is here meant, not that it fails to produce the money,—that is a very usual result in the use of all remedies,—but that, in its nature or character, it is not fitted or adapted to the end in view." Thompson v. Allen Co., 115 U. S. 554, 6 Sup. Ct. 140; Rees v. City of Watertown, 19 Wall. 107; 2 Dill. Mun. Corp. (4th Ed.) § 855. Usually the question as to whether a municipal corporation is acting within the limits of its authority raises a question of law to be settled on purely legal principles, unmixed with equity. It follows that the chancery court has no general jurisdiction to restrain, review, or set aside irregular, or even illegal, proceedings of such a corporation. Such jurisdiction, except in special cases, belongs to courts of law. 2 Dill. Mun. Corp. (4th Ed.) § 907, note 1; Id. p. 1092, note 1.

Where the averments of a bill show an honest debt, and a refusal to pay it,—"a high offense in a commercial community,"—it is with reluctance that the court turns the complainant away on demurrer. Relief would be willingly given if the law permitted it. The restraining order heretofore made must be discharged, and the demurrer to the bill sustained, and the bill dismissed. Decree accordingly.

On Application for Rehearing.

(September 25, 1899.)

It is suggested in the argument that the city is levying the extreme rate of taxation allowed by the constitution of Alabama, and that the bill before the court is filed in aid of a suit at law. I do not think that these and other matters referred to in the argument sufficiently appear from the averments of the bill to make it proper to consider them in rendering an opinion on the motion and demurrer submitted. In deciding the demurrer, the averments of the bill only can be looked to. It is urged on this application that, in the event it is denied, the court should extend the opinion so as to decide whether or not "it would be a defense on the part of the city of Anniston to state in its answer to the rule nisi in the mandamus proceeding that it had expended the money" referred to in the bill. The bill does not aver the pendency of mandamus proceedings, and, if it did, it would perhaps

be better to permit this question to be decided when it is put in issue in such proceedings. The court has carefully examined the application for a rehearing, and the authorities cited in support of the same, and is constrained to deny it. The application for rehearing is denied.

GAMEWELL FIRE-ALARM TEL. CO. v. CITY OF LAPORTE.

(Circuit Court, D. Indiana. October 4, 1899.)

No. 9,737.

1. MUNICIPAL CORPORATIONS—LIMIT OF INDEBTEDNESS—CONTRACTS.
Under the provisions of Const. Ind. 1851, art. 13, that no political or municipal corporation in the state shall ever become indebted in any manner or for any purpose to an amount in the aggregate exceeding 2 per centum of the value of the taxable property therein, to be ascertained by the last assessment for state and county purposes, a party contracting with a city which is indebted to the constitutional limit is charged with notice of such fact, and, if the contract purports to charge the city with any liability, the parties are in pari delicto, and the creditor cannot maintain an action in a court of equity to enforce any claim against the city growing out of such contract.[1]

2. SAME—RIGHTS OF PARTY UNDER INVALID CONTRACT.
Complainant entered into a contract with defendant city to install for its use a fire and police telegraph system, defendant to furnish right of way for the circuit, a room for a station, the use of certain poles, etc. The city was already indebted beyond the constitutional limit, of which fact both parties had knowledge. The system was installed, and an action was brought for the price, in which the state courts held the contract to be void. Complainant then filed a bill in equity to charge the city with rental for the system, or to compel it to transfer the system as a whole to complainant; the bill alleging that it was in operation, and that its parts could not be separated without irreparable injury. *Held*, that the contract did not create any liability against the city, either express or implied, or any equitable right in complainant to possession of the property of the city which formed a part of the system as an entirety.

In Equity. This was a suit for equitable relief against a city on account of the construction for its use of a fire and police telegraph system under a contract subsequently held void by the state court.

Morris, Newberger & Curtis, for complainant.
W. C. Ransburg and John H. Bradley, for defendant.

BAKER, District Judge. On the 16th day of July, 1890, the complainant entered into a contract in writing with the defendant, agreeing to install a fire alarm and police telegraph system in said city for $3,500, on the condition that the defendant should furnish a suitable room for the central, or battery, station, should secure the right of way through the public streets for the wire circuit, should give the use of all poles then standing that were owned or controlled by the city, and the use of a bell to be furnished by the city for giving alarm. It is alleged in the complaint that, in strict conformity with

[1] As to constitutional and statutory limitations upon municipal indebtedness in general, see note to City of Helena v. Mills, 36 C. C. A. 6.

the specifications and conditions of the contract, the fire alarm system was installed in said city and was accepted by it. The conditions of the contract could not have been conformed to without the city having furnished, for the purpose of installing the plant, the room for the central station, the easement of way through the streets, the use of the poles owned by the city, as well as the use of the alarm bell. The complaint sets out a copy of an opinion signed by the then city attorney of Laporte, which plainly discloses that the disability of the city to enter into the contract was within the contemplation of both parties, growing out of the fact that the city was then indebted in excess of 2 per centum of the assessed valuation of the property in said city. It is also alleged that the complainant brought suit in the Laporte circuit court for the purpose of recovering the contract price of the plant, and that, on appeal, it was decided by the supreme court of this state that the contract was void, and that no recovery could be had for the value of the labor and materials furnished in installing the plant, either upon the written contract or upon an implied contract. It is further alleged in the complaint that the defendant has been put to some expense and outlay for repairs, betterments, and additions to said plant and system, the amount of which is not known to the complainant. It is also alleged that the plant is now a going concern, and that the complainant is ready and willing to operate the system for the use and benefit of the city, upon the condition that the city shall pay a reasonable rental for the past use of it, and a like reasonable rental for its future use. It is also alleged that the system is complete and entire, and incapable of dismemberment and disintegration, without destroying the use thereof, and without doing irreparable injury to the several parts composing the same. The prayer of the bill, aside from the prayer for a temporary restraining order, is that an account be taken for the past use of the system by the defendant, and that it be ordered to pay the complainant the amount found due and owing for such use; that it be declared and adjudged that the defendant is, and since the delivery to it of said plant has been, a trustee holding the plant, and every part thereof, and all the easements, franchises, and privileges thereunto appertaining, for the use and benefit of the complainant, subject only to the public burden and duties necessarily incident to the use thereof for public safety and convenience, and that, unless some arrangement mutually satisfactory to said defendant and complainant be made, the defendant, as such trustee, be required and compelled to make over unto the complainant the possession of said fire-alarm plant, and every part thereof, together with all easements, franchises, and privileges appurtenant thereto, as an entire plant and property; and that the court will forever enjoin and restrain the defendant, and all its officers, agents, attorneys, and employés, from interfering with the complainant, and its officers, agents, and employés, in the management and operation of the said system and plant, after the same shall have been made over to the complainant, and from interfering in any wise with the disposition or use thereof. To this complaint the defendant has interposed a demurrer, and in argument has insisted—First,

that the complainant has an adequate remedy at law; and, second, if it has no remedy at law, that it is not entitled to relief on the facts set out in the bill, in a court of equity.

In the view that the court takes of the case, it is not necessary to consider whether the remedy of the complainant, if it is entitled to one, is by an action at law, either for the recovery of the property in specie, or for the conversion of it by the defendant. The constitution of this state provides that:

"No political or municipal corporation in this state shall ever become indebted in any manner, or for any purpose, to an amount in the aggregate exceeding two per centum of the value of the taxable property within such corporation, to be ascertained by the last assessment for state and county taxes previous to the incurring of such indebtedness; and all bonds or obligations in excess of such amount given by such corporation shall be void." Const. 1851, art. 13.

In the case of City of Laporte v. Gamewell Fire-Alarm Tel. Co., 146 Ind. 466, 45 N. E. 588, in the supreme court of this state,—a suit between the present complainant and defendant upon the contract set out in the present bill,—it was held that the complainant was required to take notice of the fact that the defendant was indebted at the time the contract was made beyond the constitutional limit, and therefore that the city had no power to become indebted in any manner or for any purpose; and it was further held that the city had no power to become indebted to the complainant, and that the common council of the city had no power to ratify or validate the same by resolution or otherwise. If the principle so announced by the supreme court in the suit between the parties to the present bill is not binding, the doctrine so announced is thoroughly well settled as the general rule of law. Any person dealing with the officers of a municipal corporation is bound to take notice of any constitutional limitation on their power to bind the corporation. In the present case the complainant is chargeable, not only with notice of the constitutional prohibition, but also chargeable with notice of whatever the public records of the city disclose as to the amount of the city's indebtedness, and notice of the records of the county and state as to the value of the taxable property in the city. So that, when the complainant entered into the contract and installed the plant, it was charged with notice and knowledge that the city had no power to incur the indebtedness in any manner or for any purpose in connection with the plant so installed. As said by the supreme court of the United States in Litchfield v. Ballou, 114 U. S., on page 192, 5 Sup. Ct. 821:

"The language of the constitution is that no city shall be allowed to become indebted in any manner or for any purpose to an amount, including existing indebtedness, in the aggregate exceeding five per centum on the value of its taxable property. It shall not become indebted,—shall not incur any pecuniary liability. It shall not do this in any manner. Neither by bonds, nor notes, nor by express or implied promises. Nor shall it be done for any purpose, no matter how urgent, how useful, how unanimous the wish. There stands the existing indebtedness to a given amount, in relation to the sources of payment, as an impassable obstacle to the creation of any further debt in any manner or for any purpose whatever. If this prohibition is worth anything, it is as effectual against an implied as an express promise, and is as binding in a court of chancery as in a court of law."

If the present bill can be maintained for the purpose of making the city pay a rental for the use of the property in the past and in the future, it does create a debt in violation of the prohibition of the constitution. If a suit can be maintained for the recovery of the rental value of property put in possession of the officers of a municipal corporation under the circumstances shown in this case, it would result in evading and defeating the operation of the constitutional prohibition. It would be an easy matter, under the guise of a contract of sale, to install a fire-alarm plant, or other plant, in a city indebted in excess of the constitutional limitation, and, when payment was refused in accordance with the terms of the contract, to sue the municipal corporation as a trustee, and charge it with the rental value of the plant so installed, for its past and future use. Such a construction would be an invitation to unscrupulous parties and faithless public officers to disregard the rights and interests of the taxpayers of the city, and to fasten an endless burden of indebtedness upon them.

But in this case there are other difficulties in the way of maintaining the present bill. The most favorable view that can be taken of the complainant's situation is that it and the defendant are in pari delicto. Where both complainant and defendant are in equal wrong, a court of equity will not lend its aid to extricate either from the position of wrong into which it has knowingly and purposely placed itself. As was said by the supreme court of Ohio in the case of Bridge Co. v. Campbell, 54 N. E. 372, 376: "In this case, both parties have acted in disregard of the statute, and the court will leave them where they have placed themselves, and refuse to aid either." Perhaps the complainant and defendant in this case are not participes criminis, as was said by the supreme court in Litchfield v. Ballou, supra, in the act of violating the constitutional prohibition, but surely they are in pari delicto, and equity will no more raise a resulting trust in favor of the complainant than the law would raise an implied assumpsit in favor of a party charged with the violation of a public policy so strongly declared.

Another objection to this assertion of right to the property as a going concern is that the plant is not entirely the property of the complainant. The poles of the city, the easement of way through its streets, the central station, the alarm bell, and certain betterments and additions alleged to have been made to the plant, belong to the city; and it is alleged that the property furnished by the complainant and annexed to the city's property is incapable of separation from it without irreparable injury. Without the poles and the use of the streets, and the other property furnished by, and belonging to, the defendant, the value of the remainder of the plant as a going concern is gone. The court has no rightful power to take from the defendant, either before or after compensation made, the property which belongs to the defendant. The court is clothed with no power to make either a contract for the sale or rent of this property on behalf of the city. In the property so furnished by the defendant it is manifest that the complainant has, and can have, no equity; and, on the complainant's own showing, it cannot separate its property

from the defendant's without irreparable injury. A wrongdoer cannot move a court of equity to do an irreparable injury to help him out of a situation into which he knew he had no right to put himself. For these reasons the demurrer to the bill will be sustained.

RODGERS v. PITT et al.

(Circuit Court, D. Nevada. September 18, 1899.)

No. 658.

1. ABATEMENT—EFFECT OF TRANSFER OF PLAINTIFF'S INTEREST.
   Under Gen. St. Nev. § 3038, which provides that, in case of the transfer of a party's interest in the subject-matter of a pending action, the action may be continued in the name of the original party, or the court may allow the transferee to be substituted, where a plaintiff has so transferred his interest he has no further control over the action; and the court cannot proceed therein until the transferee has appeared or has been brought in by process.
2. FEDERAL AND STATE COURTS—PRIORITY OF JURISDICTION—PROTECTION BY INJUNCTION.
   A suit was brought in a state court by owners of lands in severalty to establish water rights in connection with such lands, which they held or claimed through a ditch owned in common. No injunction was issued, and no action taken in the suit beyond the filing of the complaint and the answer of the defendants. Several years after, while the suit was so pending, certain of the plaintiffs sold and conveyed their lands and water rights. The grantee, who was a citizen of another state, subsequently brought suit in a federal court against the same defendants and others to establish his water rights. Process was served on the defendants, who appeared without objection, and, on application of complainant, a preliminary injunction was granted. *Held* that, on acquiring the property, the complainant had his election to continue the suit in the state court, either in the name of his grantors or by being substituted as a plaintiff, as permitted by the state statute, or, not having become a party to such suit, to commence a new one, and that having elected to do the latter, and the federal court, on the appearance of the defendants, being the only court then having full jurisdiction of all the parties and the subject-matter, it was entitled to retain such jurisdiction to dispose of the controversy, and to protect it by an injunction restraining the defendants from afterwards bringing the complainant into the state court and further proceeding therein.[1]

On Demurrer to Petition for Injunction.

Rodgers, Patterson & Slack and A. E. Cheney, for complainant.
R. R. Bigelow and J. W. Dorsey, for defendants Pitt and Hauskins.

HAWLEY, District Judge. The questions presented for decision herein arise upon the presentation of a petition on behalf of the complainant for a writ of injunction against the defendants, their attorneys and agents, enjoining them from prosecuting or conducting any further proceedings in a certain suit now pending in the district court of Humboldt county, Nev., entitled "J. H. Thies, P. N. Marker, and H. C. Marker, Plaintiffs, vs. W. C. Pitt, J. T. Hauskins, and L. L.

[1] As to enjoining proceedings in state courts, see notes to Garner v. Bank, 16 C. C. A. 90, and Trust Co. v. Grantham, 27 C. C. A. 575.

Downs, Defendants." The material facts presented in the petition may be briefly stated, in their chronological order, as follows: On November 30, 1892, there was filed in the state court a complaint in a suit wherein J. H. Thies, P. N. Marker, and H. C. Marker were plaintiffs, and W. C. Pitt, J. T. Hauskins, and L. L. Downs were defendants, praying for a decree adjudging to the plaintiffs therein the first and unrestricted right to the use of the flow of the waters of the Humboldt river, 404 cubic feet per second, for the purpose of irrigating the lands of the plaintiffs, the watering of their stock, and for their domestic purposes, etc. On March 7, 1893, the defendants Pitt and Hauskins filed their answer, denying many of the averments in said complaint, and, among other things, alleged that the plaintiffs were jointly entitled, as prior appropriators, to the use of only 435 inches of water as against the defendants. No injunction was ever issued in said suit. No trial of the case was ever had. No proceedings were ever taken after the filing of the answer, until July, 1898, as hereinafter mentioned. On November 13, 1895, complainant, Arthur Rodgers, acquired the interests and became the owner of all the lands, water, and water rights theretofore belonging to, and owned by, the said P. N. Marker and H. C. Marker, mentioned and described in the suit commenced in the state court. On May 2, 1898, Arthur Rodgers filed in this court his bill of complaint against W. C. Pitt and the other defendants herein mentioned, wherein he prayed that the claim of said defendants to have, divert, or use the waters of the Humboldt river be adjudged and decreed to be invalid as against him, and that their rights thereto be adjudged and decreed subordinate and inferior to his rights to have and use the quantity of water mentioned in the bill, whenever the same is necessary for the irrigation of his land, and for watering his stock, and for his domestic use. Upon proceedings regularly had therein, this court issued a temporary injunction restraining the defendants, and each of them, from diverting, or in any manner using, the waters of Humboldt river, so as to prevent 3,500 inches thereof, measured under a 4-inch pressure, from flowing in the bed of the river to the head of the complainant's ditch during the irrigating season. 89 Fed. 420, 424. This cause is still pending, and the injunction is still in full force and effect. The defendants W. C. Pitt and J. T. Hauskins are the same persons as were the defendants in the suit in the state court. The lands, water, and water rights mentioned and described in the complaint in the state court are the same as described and mentioned in the bill of complaint filed in this court. The parties to the respective suits are not identical. On July 16, 1898, the defendants moved the state court for leave to file an amended answer in the suit therein pending, and were by the court allowed so to do. This is designated as an "amended answer," and "amended and supplementary answer." In this answer defendants in the suit petitioned the court for affirmative relief therein against the complainant, Rodgers, and against J. H. Thies and L. M. Carpenter, who were co-tenants with complainant in a ditch which supplied him and them with water to irrigate their respective lands from Humboldt river, and this part of the pleadings is variously designated as a "counterclaim," the "cross complaint," and a "cross bill." Com-

plainant was thereafter duly served with process from the state court, and divers preliminary motions and proceedings have been taken therein.

The defendants interposed a demurrer to complainant's petition, upon the ground that the petition does not state facts sufficient to entitle him to the injunction or to any relief. Is this demurrer well taken? The general rule is well settled that, where different courts have concurrent jurisdiction, the court which first acquires jurisdiction of the parties, the subject-matter, the specific thing, or the property in controversy, is entitled to retain the jurisdiction to the end of the litigation, without interference by any other court. This rule is important to the exercise of jurisdiction by the courts whose powers are liable to be exerted within the same spheres and over the same subjects and parties. There is but one safe road for all the courts to follow. By adhering to this rule, the comity of the courts, national and state, is maintained, the rights of the respective parties preserved, and the ends of justice secured, and all unnecessary conflicts avoided. Any other rule would be liable at any time to lead to confusion, if not open collision, between the courts, which might bring about injurious and calamitous results. This rule is elementary law, and a citation of all the authorities in its support would be endless and useless. The following cases, among numerous others, have been examined: Bell v. Trust Co., 1 Biss. 260, Fed. Cas. No. 1,260; Gaylord v. Railroad Co., 6 Biss. 286, 291, Fed. Cas. No. 5,284; Union Trust Co. v. Rockford, R. I. & St. L. R. Co., 6 Biss. 197, Fed. Cas. No. 14,401; Union Mut. Life Ins. Co. v. University of Chicago, 6 Fed. 443, 447; Owens v. Railroad Co., 20 Fed. 10; Judd v. Bankers' & Merchants' Tel. Co., 31 Fed. 182; Sharon v. Terry, 36 Fed. 337, 359; Gates v. Bucki, 4 C. C. A. 116, 53 Fed. 961, 966; Reinach v. Railroad Co., 58 Fed. 33, 44; Wadley v. Blount, 65 Fed. 667, 674; Cohen v. Solomon, 66 Fed. 411, 413, 414; Hatch v. Bancroft-Thompson Co., 67 Fed. 802, 807; Foley v. Hartley, 72 Fed. 570, 573; State Trust Co. v. National Land Imp. & Mfg. Co., Id. 575; In re Hall & Stilson Co., 73 Fed. 527; Gamble v. City of San Diego, 79 Fed. 487, 500; Atlantic Trust Co. v. Woodbridge Canal & Irrigation Co., Id. 501; Zimmerman v. So Relle, 25 C. C. A. 518, 80 Fed. 417, 420; In re Foley, 80 Fed. 949, 951; Thorpe v. Sampson, 84 Fed. 63, 66; Smith v. McIver, 9 Wheat. 532, 535; Hagan v. Lucas, 10 Pet. 400; Peck v. Jenness, 7 How. 612, 625; Taylor v. Carryl, 20 How. 583, 596; Freeman v. Howe, 24 How. 450, 457; Riggs v. Johnson Co., 6 Wall. 166, 196; French v. Hay, 22 Wall. 238; Id. 253; Covell v. Heyman, 111 U. S. 176, 4 Sup. Ct. 355; Heidritter v. Oilcloth Co., 112 U. S. 294, 300, 302, 5 Sup. Ct. 135; Harkrader v. Wadley, 172 U. S. 148, 164, 19 Sup. Ct. 119; Brooks v. Delaplaine, 1 Md. Ch. 351, 354; Craig v. Hoge, 95 Va. 275, 279, 28 S. E. 317; Stearns v. Stearns, 16 Mass. 167, 170; Powers v. City Council of Springfield, 116 Mass. 84, 86; Carson v. Dunham, 149 Mass. 53, 20 N. E. 312; Insurance Co. v. Howell, 24 N. J. Eq. 238, 241; Schuehle v. Reiman, 86 N. Y. 270, 273; In re Schuyler's Steam Towboat Co., 136 N. Y. 169, 175, 32 N. E. 623; Gay v. Iron Co., 94 Ala. 303, 308, 317, 11 South. 353; Howell v. Moores, 127 Ill. 68, 79, 19 N. E. 863; Mount v. Scholes, 21 Ill. App. 192; Louden Irrigating Canal Co. v.

Handy Ditch Co., 22 Colo. 102, 114, 43 Pac. 535; State v. Chinault, 55 Kan. 326, 329, 40 Pac. 662.

The general rule, as above stated, is clear, plain, and positive. There is no room for any dispute or controversy as to its correctness, but a careful examination of the authorities shows that many of them do not march up to the full-breasted jurisdiction therein enumerated. The truth is that the language of the courts is used with reference to the facts presented in the cases before them, and is properly confined to such facts, and limited to the direct question there presented. To illustrate: Some of the authorities say, the court "which first acquired jurisdiction of the parties"; others, the court "which first acquired jurisdiction of the subject-matter"; others, "of a cause which presents the same issues and seeks the same relief"; others, the court which "first takes cognizance of the controversy"; others, the court which "first obtained possession of the property" in controversy. It is clear that this court first obtained jurisdiction over the person of the complainant. There is no pretense that the state court ever acquired any jurisdiction over him until long after the commencement of the suit and service of process in this court. Neither court has ever acquired possession of the land or water. There is no case cited by counsel which can be said to be on "all fours" with the present, and it is the duty of this court to ascertain, from the facts before it, the germ of the principle that must govern and control the disposition of the question before the court; for enough appears to make it certain that, notwithstanding the difference in the parties to the respective suits and other matters, there is need of but one trial, and the parties should not be compelled to be and appear in both courts at the same time, and litigate substantially the same questions. The proceedings in one court or the other should be stayed, at least, until the other has finally disposed of the suit before it, and then, if any question remains to be disposed of, the other court might be called upon to decide it. Union Mut. Life Ins. Co. v. University of Chicago, 6 Fed. 443, 447; Foley v. Hartley, 72 Fed. 570, 574; Zimmerman v. So Relle, 25 C. C. A. 518, 80 Fed. 417, 420; Hughes v. Green, 28 C. C. A. 537, 84 Fed. 833, 835.

Another question is equally well settled, viz.: If this court first obtained jurisdiction of this cause, it has the power and it is its duty to restrain the defendants herein from taking any proceedings in the state court which would have the effect of defeating or impairing the jurisdiction of this court. French v. Hay, 22 Wall. 250, 253; Dietzsch v. Huidekoper, 103 U. S. 494; Fisk v. Railroad Co., 10 Blatchf. 518, Fed. Cas. No. 4,830; Sharon v. Terry, 36 Fed. 337, 355; Frishman v. Insurance Cos., 41 Fed. 449; Railway Co. v. Kuteman, 4 C. C. A. 503, 54 Fed. 547, 551; Abeel v. Culberson, 56 Fed. 329, 333; President, etc., v. Merritt, 59 Fed. 6; Wadley v. Blount, 65 Fed. 667, 676; Central Trust Co. v. Western N. C. R. Co., 89 Fed. 24, 29.

The vital and controlling question, as to which court first obtained jurisdiction herein, is so important and so far reaching in its results that this court might very properly make a pro forma ruling, granting an injunction or refusing to grant it, for the sole purpose of having the case taken by appeal to a court of last resort, where the matter could

be definitely settled; but the parties have the right to demand the views of this court upon the demurrer, so as to enable them to determine what their future course may be.

In Union Trust Co. v. Rockford, R. I. & St. L. R. Co., supra, the court said:

"The main question arising is one of great delicacy, and the history of the jurisprudence of this country shows a most commendable disposition on the part of both the federal and state courts not to impinge upon each other's jurisdiction, but the delicate nature of the matter furnishes no reason why the court to which jurisdiction belongs should not firmly assert and maintain its rights."

The subject-matter of this controversy is equally within the jurisdiction of the state and federal courts. This is true of all controversies of like character, where the jurisdiction of the federal courts is invoked by persons authorized to bring suit in those courts.

When complainant acquired the land and water rights from the Markers, if he wished to litigate his rights to the waters flowing in the Humboldt river as against the defendants Pitt and Hauskins, three courses were left open to him, either of which he had the legal right to pursue, viz.: (1) He could have prosecuted that suit in the state court in the name of the original parties. (2) Or he could have made application to the state court to be substituted as a party plaintiff in the suit. Gen. St. Nev. § 3038; Walker v. Felt, 54 Cal. 386; Building Co. v. Walker (Kan. Sup.) 54 Pac. 1043; Alexander v. Overton (Neb.) 72 N. W. 212; Brown v. Kohout (Minn.) 63 N. W. 248; Harrington v. Connor (Neb.) 70 N. W. 911; Camarillo v. Fenlon, 49 Cal. 203; Plummer v. Brown, 64 Cal. 429, 430, 1 Pac. 703; Investment Co. v. Hughes, 89 Fed. 182, 185. (3) Or he could, in his own behalf, he being a nonresident of this state, commence a suit in this court to have his rights, as against the same defendants, Pitt and Hauskins, here heard and determined. He chose the latter course.

At the time of the institution of the suit in this court, the state court had not acquired any jurisdiction over the complainant. He had not appeared, and had not been served with any process therein, and that court did not have any control of the subsequent proceedings in the suit until one or the other of these steps had been taken. Gen. St. Nev. § 3057. That suit remained upon the calendar, but was held in abeyance. No action was taken therein by either party. In considering the questions involved herein, it must be understood that this court has nothing to do with the proceedings of the state court which were had subsequent to the time this court acquired jurisdiction of the pending suit. It is wholly immaterial whether they were correct or erroneous; they cannot be reviewed by this court. This court, upon the petition presented herein, can only deal with the status of the case as it existed when it acquired jurisdiction. The Markers, after disposing of their interest in the property, had no longer any direct control over the suit. Although they were the plaintiffs in the suit in the state court, they could not, after the transfer was made to the complainant, dismiss the suit. They could not do any act that would deprive the complainant herein of his rights in the premises.

In Walker v. Felt, 54 Cal. 386, this precise question was presented. The court in the course of its opinion said:

"Had the plaintiff in the action the right to dismiss it, after having transferred his interest in the subject-matter of the action to other parties? Section 385 of the Code of Civil Procedure (which is similar to section 3038, Gen. St. Nev.) provides that, in case of any transfer of interest, the action may be continued in the name of the original party, or the court may allow the person to whom the transfer is made to be substituted in the action. Under that section, it was the right of the successors in interest in this case to prosecute this action in one of these forms. The party who had transferred his interest devested himself of any power to control the action. He could not dismiss it, because his successors had a right to have it continued. The validity of the order of dismissal in this case rests solely upon the consent of the original plaintiff, given 10 years after he had transferred his interest in the action. As he had no right to interfere with the action, the court, on being advised of that, should have vacated the order based upon it."

In cases where there has been a transfer of the property pending the suit, the substitution, under the provisions of the statute, of the person who has acquired an interest in the property, is a matter that rests solely with the plaintiff and the person to whom such transfer was made. The defendants cannot have such substitution made. The change of parties can only be set in motion by the plaintiffs or their vendee, and the plaintiffs are not authorized to act in opposition to the rights of the transferee. Hestres v. Brennan, 37 Cal. 385, 388; Smith v. Harrington (Wyo.) 27 Pac. 803; Packard v. Wood, 17 Abb. Prac. 318, 322; Chisholm v. Clitherall, 12 Minn. 375, 379 (Gil. 251); Hirshfeld v. Fitzgerald, 157 N. Y. 166, 177, 51 N. E. 997. This was therefore the only court which, at the time of the commencement of this suit and of the service of process and appearance of the defendants herein, had full and complete jurisdiction of the parties and the subject-matter of the controversy and of the property affected by the litigation.

It is, of course, true that there was at that time a suit pending in the state court in which steps could have been previously taken that would have invested that court with full jurisdiction to hear and determine the merits of this cause. It is not, however, what might have happened,—what steps might have been taken,—but the pivotal question is, what was the condition at that time, under the steps that had been taken? This, it seems to me, is the true test to be applied to the facts set forth in this petition. The jurisdiction of a cause does not attach, within the meaning of the general rule, by the filing of a complaint and the issuance of a summons. It attaches only upon the service of process, and it is the duty of the court whose process is first served to retain the cause. In other words, it is the duty of the court which first obtains full and complete jurisdiction over the whole case to keep control of it, to the exclusion of the other court that had not obtained such full jurisdiction, and to grant the relief prayed for in the bill. Bell v. Trust Co., 1 Biss. 260, Fed. Cas. No. 1,260; Union Trust Co. v. Rockford, R. I. & St. L. R. Co., 6 Biss. 197, Fed. Cas. No. 14,401; Wilmer v. Railroad Co., 2 Woods, 409, Fed. Cas. No. 17,775 (opinion of Bradley, Circuit Justice); Union Mut. Life Ins. Co. v. University of Chicago, 6 Fed. 443, 447; Owens v. Railroad Co., 20 Fed. 10, 12; Wheeler v. Walton & Whann Co., 65 Fed. 720,

722; Riggs v. Johnson Co., 6 Wall. 166, 187, 196; Craig v. Hoge, 95 Va. 275, 280, 28 S. E. 317.

In Owens v. Railroad Co., and Central Trust Co. v. Western N. C. R. Co., supra, divers suits were brought at various times in different courts, both federal and state, praying for the appointment of a receiver and for the foreclosure of a mortgage. Some of the suits were identical, both as to the parties and as to the relief prayed for; others, the parties and the relief asked for were in some respects different, but substantially the same questions were involved in all the suits. There the question arose "as to which court first obtained jurisdiction over the subject-matter in controversy." The court, in discussing this question, among other things said:

"It will be observed that every step necessary to complete the jurisdiction of this court was taken before process was served on the defendant company, under the bill filed in the Sixth circuit. But it is claimed that the filing of the bill first in the Sixth circuit, which in this proceeding is the commencement of the suit, confers jurisdiction. This, of necessity, cannot be so. Other necessary steps must be taken to bring the parties before the court, before a complete jurisdiction is acquired. Until that is done, the court could make no order that would affect the rights of a party. The usual mode is by service of process. It may be, and in some cases is, done by an order of the court directing a seizure of the property, when some urgent necessity requires it, before service is had. In this case no such order was made, and we must therefore look to the service of process to ascertain which court first acquired jurisdiction. It is true that process was sued out first under the bill filed in the Sixth circuit, but service of process was first had under the one filed in this circuit. We therefore conclude that, as between these proceedings, the process of this court being first served on the defendant company, it gave this court full, complete, and prior jurisdiction over it, and the right to grant the relief prayed for in the bill. * * * In the bill filed in this court it was distinctly alleged and established by proof that one of the complainants had requested the trustee in the first mortgage, the Central Trust Company, to bring a suit of foreclosure of a mortgage, and the trustee refused to take any step or to exercise any of the discretionary powers for that purpose. It is now the settled law that, whenever a trustee neglects or refuses to institute proceedings for the protection of bondholders secured by a mortgage, the bondholders themselves may begin proceedings for that purpose. This was done by the present complainants on behalf of themselves and other bondholders, and, the case being first fully matured in this court, by reason of that fact the court in this circuit first took cognizance of the subject-matter in controversy, acquiring full and complete jurisdiction over it, and, as an incident to that jurisdiction, has possession and control over any property which may be the subject-matter of the dispute, to the end of the litigation."

In Taylor v. Taintor, 16 Wall. 366, 370, the court said:

"Where a state court and a court of the United States may each take jurisdiction, the tribunal which first gets it holds it to the exclusion of the other, until its duty is fully performed and the jurisdiction invoked is exhausted. * * * It is, indeed, a principle of universal jurisprudence that, where jurisdiction has attached to person or thing, it is, unless there is some provision to the contrary, exclusive in effect until it has wrought its function."

In Buck v. Colbath, 3 Wall. 334, 341, the court declared that:

"Whenever property has been seized by an officer of the court by virtue of its process, the property is to be considered as in the custody of the court, and under its control, for the time being, and no other court has a right to interfere with that possession."

In Merritt v. Steel-Barge Co., 24 C. C. A. 530, 534, 79 Fed. 228, 231, the court said:

"The doctrine in question is not limited in its application to cases where property has actually been seized under judicial process before a second suit is instituted in another court, but it applies as well where suits are brought to enforce liens against specific property, to marshal assets, administer trusts, or liquidate insolvent estates, and in all other suits of a similar nature, where, in the progress of the litigation, the court may be compelled to assume the possession and control of specific personal or real property. In cases of the latter kind, the rule is that the tribunal which first acquires jurisdiction of the cause by the issuance and service of process is entitled to retain it to the end, without interference or hindrance on the part of any other court. And this rule, in its application to federal and state courts, being the outgrowth of necessity, is 'a principle of right and of law,' which leaves nothing to the discretion of a court, and may not be varied to suit the convenience of litigants."

The difference in obtaining jurisdiction in suits in personam and in rem, and the distinction between the two classes of cases, are clearly pointed out and discussed in Cooper v. Reynolds, 10 Wall. 308, 316, and Pacific Coast S. S. Co. v. Bancroft-Whitney Co., 94 Fed. 180, 185. If the proceedings involve the determination of the personal liability of the defendant, he must, as hereinbefore stated, be brought within the jurisdiction by service of process within the state or district, or by voluntary appearance. If the proceeding be in rem, the res must be seized or attached, and be, at the time of seizure or attachment or other equivalent writ or process, within the jurisdiction of the court. In this class of cases the defendant is not personally bound by the judgment beyond the property in question, and it is wholly immaterial whether the proceedings against the property be by an attachment or by a bill in equity. It must be substantially a proceeding in rem. The jurisdiction may be obtained by any acts which are of equivalent import to those stated above, and stand for and represent the dominion of the court over the property and subject it to the control of the court. The jurisdiction of the court over the controversy is founded on the presence of the property, and, like a proceeding in rem, it becomes conclusive against the absent owners or claimants, as well as over the present contestants, if there be any. Boswell's Lessee v. Otis, 9 How. 336, 348; Pennoyer v. Neff, 95 U. S. 714, 724; Heidritter v. Oilcloth Co., 112 U. S. 294, 300, 5 Sup. Ct. 135; Arndt v. Griggs, 134 U. S. 316, 324, 10 Sup. Ct. 557; Shields v. Coleman, 157 U. S. 168, 178, 15 Sup. Ct. 570.

The suit in question is not a suit in rem. It may be that the nature of the suit comes within the general classification of suits quasi in rem. Brown, Jur. § 70 et seq.; Freeman v. Alderson, 119 U. S. 185, 187, 7 Sup. Ct. 165. But, whatever it may be called, the facts are that the state court had no independent or exclusive possession of the property involved herein. It had not issued any process against the property. No attachment had reached it. No receiver had been appointed to take charge of, manage, and control it. No injunction had been issued to restrain defendants from the use of any of the waters flowing in the Humboldt river. Neither the court, nor any of its officers, were in possession thereof. There was no seizure of the res. It cannot, therefore, be said that the state court first obtained such jurisdiction over the property as to entitle it, to the exclusion of this court, to hear and determine the controversy herein.

In Ball v. Tompkins, 41 Fed. 486, 490, the court, in discussing the question as to the nature and character of the possession of the courts, national and state, which excludes the exercise of authority over the subject or thing by the other, among other things said:

"The possession contemplated as sufficient to make it exclusive is that which the court by its process, or some equivalent mode, has, either for the direct purpose of the proceeding, or for some other purpose ancillary to the main object, drawn into its dominion and custody some thing. That thing may be corporeal or incorporeal,—a substance or a mere right. But a controversy, a question, an inquiry, is not such a thing. These may be the subject-matter of jurisdiction in a pending cause, which often proceeds from the beginning to the judgment without the court's having taken actual dominion of anything. But there is no exclusive jurisdiction over such a matter. The result may be a judgment which will establish a right, but the court has not had any possession. * * * The control which each court has over its own process has always been found adequate to prevent mischief from diverse judgments in the several jurisdictions. But, in proceeding on its way, whenever either court finds that the other has already taken actual dominion over some objective thing related to the subject, it will let the thing alone, so long as that dominion is retained, and proceed, if there be enough material besides to support the exercise of its jurisdiction, and the pursuit may reach fruit. If not, it will stop."

There is another phase of this case which has been merely referred to that should be further noticed. The complainant could have submitted himself to the jurisdiction of the state court without the trouble, cost, or expense of bringing an independent suit. It may be that it would have been better for all parties if he had done so; but, unless he was prohibited by law from bringing the suit in this court, he had the right so to do, because this court had equal and concurrent jurisdiction over the parties and the subject-matter of the controversy. Whatever the rights of the defendants may have been at the time of the institution of the suit in this court, if they had taken proper steps to stay the proceedings in this court, as a matter of comity between the state court and this court, it is clear to my mind that, by coming into this court after service of process upon them and submitting themselves to its jurisdiction, they waived their rights to have the case tried in the state court. The defendants ought not, after voluntarily submitting themselves to the jurisdiction of this court, and contesting the proceedings herein, and obtaining what they deemed to be an adverse ruling, to then endeavor to have a change of the place of trial, and take their chances in another court, on the ground that they might have brought the complainant within the jurisdiction of the state court, had they taken the necessary steps so to do. Jurisdiction over the parties and subject-matter cannot, of course, be conferred upon a court by mere consent. But, where a court has jurisdiction over the case, objections to the mere mode of the acquisition of such jurisdiction may be, and are, waived when no timely objections are made thereto. McBride v. Plow Co., 40 Fed. 162; Jewett v. Trust Co., 45 Fed. 801; Walker v. Bank, 5 C. C. A. 421, 56 Fed. 76, 81; Smith v. Railroad Co., 64 Fed. 1, 3; Railway Co. v. Brow, 13 C. C. A. 222, 65 Fed. 941, 944, 949; Noonan v. Railroad Co., 68 Fed. 1; Foley v. Hartley, 72 Fed. 570, 574; Long v. Long, 73 Fed. 369; In re Foley, 76 Fed. 390, 392; Collins v. Stott, Id. 613;

Toland v. Sprague, 12 Pet. 300, 331; Bushnell v. Kennedy, 9 Wall. 387, 393; Bank v. Morgan, 132 U. S. 141, 145, 10 Sup. Ct. 37; Railway Co. v. McBride, 141 U. S. 127, 132, 11 Sup. Ct. 982; Railroad Co. v. Cox, 145 U. S. 593, 603, 12 Sup. Ct. 905; Trust Co. v. McGeorge, 151 U. S. 129, 133, 14 Sup. Ct. 286; Improvement Co. v. Gibney, 160 U. S. 217, 219, 16 Sup. Ct. 272; Robinson v. Caldwell, 165 U. S. 359, 362, 17 Sup. Ct. 343; Brown v. Campbell, 110 Cal. 644, 649, 43 Pac. 12; Railway Co. v. Flanagan, 57 N. J. Law, 236, 238, 30 Atl. 476; Jolly v. Pryor (Tex. Civ. App.) 33 S. W. 889; Kincaid v. Storz, 52 Mo. App. 564, 570; Larkin v. Scranton City, 162 Pa. St. 289, 293, 29 Atl. 910.

The subsequent proceedings taken by the defendants in the state court were in the nature of an attempt to there obtain control of a suit in order to deprive this court of the complete jurisdiction which it first acquired over the parties and the subject-matter. This is not permissible. If it could be allowed, it would virtually amount to an abrogation, instead of the enforcement, of the general rule which it is the duty of all courts to strictly and faithfully adhere to. The pendency of a prior suit in a state court is not necessarily a bar to a suit in a federal court, even between the same parties, involving the same issues. Stanton v. Embrey, 93 U. S. 548, 554; Gordon v. Gilfoil, 99 U. S. 168, 178; Ball v. Tompkins, 41 Fed. 486, 490; Briggs v. Stroud, 58 Fed. 717, 720; Marshall v. Otto, 59 Fed. 249, 252; Wilcox & Gibbs Guano Co. v. Phœnix Ins. Co., 61 Fed. 199; First Nat. Bank v. Duel Co., 74 Fed. 373, 374; Short v. Hepburn, 21 C. C. A. 252, 75 Fed. 113; Marks v. Marks, 75 Fed. 321, 332; Holton v. Guinn, 76 Fed. 96, 101. Conflict of jurisdiction and embarrassment are always avoided by the rule of comity under which the court first obtaining full jurisdiction is allowed to proceed in a legal and orderly way to a final hearing of the case. The national and the state courts do not belong to the same system, so far as their jurisdiction is concurrent. Although they co-exist in the same space, they are wholly independent, and have no common superior. They exercise jurisdiction, it is true, within the same territory, but not in the same plane. As was said by Chief Justice Taney in Ableman v. Booth, 21 How. 506, 516:

"The sphere of action appropriated to the United States is as far beyond the reach of the judicial process issued by a state judge or a state court as if the line of division was traced by landmarks and monuments visible to the eye."

See, also, Riggs v. Johnson Co., 6 Wall. 166, 193; Gay v. Iron Co., 94 Ala. 303, 323, 11 South. 353.

In Covell v. Heyman, 111 U. S. 176, 182, 4 Sup. Ct. 355, 358, the court said:

"The forbearance which courts of co-ordinate jurisdiction, administered under a single system, exercise towards each other, whereby conflicts are avoided, by avoiding interference with the process of each other, is a principle of comity, with perhaps no higher sanction than the utility which comes from concord; but, between state courts and those of the United States, it is something more. It is a principle of right and of law, and therefore of necessity. It leaves nothing to discretion or mere convenience."

Guided by the analogies of the decided cases and by the principles of law announced therein, and the reason of the rule relating to the comity of courts and the necessity of harmonious and orderly proceed-

ings to be pursued by the respective courts in relation thereto, my conclusion is that, upon the facts stated in the petition, this court first obtained full and complete jurisdiction of the parties and subject-matter of the controversy herein.

The demurrer is overruled. The preliminary injunction issued upon the filing of this petition will remain in full force and effect until the further order of this court.

In re EARLE.

(Circuit Court, E. D. Pennsylvania. May 23, 1899.)

INSOLVENT NATIONAL BANKS—COMPOUNDING BAD OR DOUBTFUL DEBTS—JUDGMENTS AGAINST STOCKHOLDERS.

A judgment recovered by the receiver of an insolvent national bank against a stockholder on an assessment made by the comptroller, although uncollectible, is not a "bad or doubtful debt," which a court may authorize the receiver to compound, under Rev. St. § 5234.

This was a petition by George H. Earle, Jr., as receiver of the Chesnut Street National Bank of Philadelphia, alleging that the petitioner brought two several suits against Charles Stevenson and Samuel Filbert, respectively, to recover assessments ordered by the comptroller against said defendants as stockholders in said insolvent bank; that he recovered judgment in each of said suits, on which execution had been issued and returned nulla bona; that, as petitioner was informed and believed, neither of said defendants possessed property out of which such judgments could be collected; that the wife of said Stevenson and a brother of said Filbert had each offered a certain sum for the purpose of compounding and obtaining the discharge of said judgments, which offers, in the opinion of the petitioner, it was to the interest of his trust to accept. He alleged that in pursuance of written instructions from the comptroller, which were set out, he filed the petition, praying the court to authorize the compounding of said judgments.

Asa W. Waters and W. H. Addicks, counsel for the petitioner, submitted a brief in support of the petition, in which they stated the grounds relied on as bringing the application within the provisions of Rev. St. § 5234, as follows:

When the "liability" of stockholders of national banks to creditors, under section 5151, has been reduced to judgment, all questions as to the power of a court of competent jurisdiction to compound bad or doubtful judgments (debts) are eliminated, for the reasons: (a) Every judgment is, as a general rule, to be regarded as a new debt, not in any way affected by the old one. Freem. Judgm. (3d Ed.) § 217. (b) And, when the court is called upon to enforce, no inquiry will be made concerning the facts preceding the judgment, to ascertain whether the original demand was one which it would have enforced. Thatcher v. Gammon, 12 Mass. 268; Spencer v. Brockway, 1 Ohio, 259; State of Indiana v. Helmer, 21 Iowa, 370; Healy v. Root, 11 Pick. 390; Holmes v. Guion, 44 Mo. 164. (c) The rendition and entry of a judgment or decree establishes in a most conclusive manner and reduces to the most authentic form that which had hitherto been unsettled, and which had probably depended upon destructible and uncertain evidence. Freem. Judgm. (3d Ed.) § 215. (d) A judgment in the courts of the United States or any of the

states being a debt of record, and entitled to full faith and credit, is a merger of the cause of action in every part of the United States, in the same manner as in the state where it was rendered. Ault v. Zehering, 38 Ind. 429; Barnes v. Gibbs, 31 N. J. Law, 317; U. S. v. Dewey, 6 Biss. 501, Fed. Cas. No. 14,956. We maintain, therefore, that even if there is a doubt as to the power, under section 5234, Rev. St., to compound the "liability" of stockholders of a national bank to creditors, under section 5151, all doubt is removed after that liability is merged into a judgment; that the judgment then becomes the debt to be paid by the defendant, and the claim of receiver against the debtor is simply the judgment, without any regard to what was the cause of action upon which the judgment was taken. It is therefore a debt, within the meaning of section 5234, which can only be compounded, if bad or doubtful, by a court of record of competent jurisdiction. We know of no other power to authorize a compromise, and, if no compounding of these bad or doubtful judgments (debts) can be had, it will cause great loss to the creditors of these insolvent national banks; for if the power to compound does not lie in a court of record of competent jurisdiction, neither does the power to sell, and, being uncollectible, they become absolutely worthless.

DALLAS, Circuit Judge. After full consideration of the petition for an order authorizing the receiver to compound certain judgments obtained upon assessments on stock, and of the foregoing brief submitted in support of that petition, I am of opinion that the judgments referred to are not "bad or doubtful debts," within the meaning of section 5234 of the Revised Statutes; and, therefore, without intimating any opinion with respect to the power or duty either of the comptroller or of the receiver in the premises, the said petition must be, and it is, dismissed.

CITY OF PONTIAC v. TALBOT PAV. CO.

(Circuit Court of Appeals, Seventh Circuit. October 3, 1899.)

No. 563.

MUNICIPAL CORPORATIONS—LOCAL IMPROVEMENTS—METHOD OF PAYMENT.

Under the Illinois statute (1 Starr & C. Ann. St. [2d Ed.] p. 736), which vests the corporate authorities of cities and villages with power to make local improvements "by special assessment or by special taxation, or both, of contiguous property, or general taxation, or otherwise, as they shall by ordinance prescribe," where a local improvement is one of a class properly chargeable against abutting property, the decision of the city council to that effect is final; and a contractor for the work derives no additional rights, as to enforcing payment, from the fact that the cost of the improvement might originally have been ordered paid by general taxation.

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

On petition for rehearing. Denied.

For former opinion, see 94 Fed. 65.

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

SEAMAN, District Judge. The argument for rehearing rests upon a provision of the Revised Statutes of Illinois, not previously called to attention, found in section 1, art. 9, c. 24 (1 Starr & C. Ann. St. Ill. [2d Ed.] p. 736), which reads as follows:

"That the corporate authorities of cities and villages are hereby vested with power to make local improvements by special assessment or by special taxation, or both, of contiguous property, or general taxation, or otherwise, as they shall by ordinance prescribe."

In the light of this provision, it is clear that authority is conferred upon the municipality, when a local improvement is ordered, to determine, in reference to its nature, whether the expense shall be paid by special assessment, by general taxation, or by both methods; and that the remark in the opinion, as handed down, that the statute "imperatively requires that the expense, aside from street intersections, shall be borne by the abutting property," must be qualified accordingly. Improvements which are classified as "local" are of various kinds, many of them not proper subjects for special assessment; and by this statute the city council is vested with the power and the duty to determine the classification of the improvement, and establish by ordinance the appropriate method of defraying the expense. As stated in Village of Morgan Park v. Wiswall, 155 Ill. 262, 267, 40 N. E. 611, 612:

"The improvement being in truth and in fact a local improvement, the decision of the municipal authorities is final, when they adopt one or another of the modes prescribed by law for the purpose of raising funds for it." The power is "devolved upon the city council alone, and not upon the courts."

See, also, Lightner v. City of Peoria, 150 Ill. 80, 87, 37 N. E. 69; Fagan v. City of Chicago, 84 Ill. 227.

The improvement in question was of the class generally recognized as a charge upon abutting property, was so determined by the city council, and the contract under which the work was performed so provided. Section 49 of the same article declares:

"All persons taking contracts with the city or village, and who agree to be paid from special assessments, shall have no claim or lien upon the city or village in any event, except from the collections of the special assessments made for the work contracted for." 1 Starr & C. Ann. St. (2d Ed.) p. 777.

Section 64 establishes the same rule for claimants accepting or holding vouchers. Id. p. 784.

The expressions in the opinion have reference to these provisions, which are distinctly applicable here, and inhibit recovery in this action. The power so delegated to the corporate authorities can be exercised only for the object and in the manner prescribed. When it is exercised, and the work is performed, the latter provisions are controlling. If the assessment is "annulled by the city council," or "set aside by any court," the common council is empowered by section 46 to provide for a new assessment; and, "when the original ordinance proves defective and insufficient to support an assessment," the defect may be cured by amendment or supplemental ordinance and reassessment. City of East St. Louis v. Albrecht, 150 Ill. 506, 512, 37 N. E. 934. Such is the exclusive course open to this contractor, and mandamus is the sole remedy.

Rehearing is denied.

CHIATOVICH v. HANCHETT et al.

(Circuit Court, D. Nevada. September 4, 1899.)

No. 634.

1. LIBEL—WORDS USED WITH INTENT TO INJURE BUSINESS—MOTIVE.
While every individual has an absolute right to refuse any business relation with another, such right is limited to his own individual action; and if, without just cause, and through ill will, malice, or other evil motive, he influences others to do the same, he is guilty of an actionable wrong.

2. SAME—INFLUENCING EMPLOYES.
The publication by employers of a notice to their employés suggesting that they refrain from associating with a third person, and that none of them should trade or deal with him, and intimating that if they did so they would be considered unfriendly to their employers, if made without justifiable cause, and from motives of wanton malice or ill will, and with intent to injure, is actionable; and the person injured is entitled to recover for the injury, both to his reputation and business.

3. SAME—CONSTRUCTION OF PUBLICATION.
Such a notice is capable of a construction which is defamatory, and when proper innuendoes are contained in the complaint the defendants cannot complain of an instruction which submits the question whether or not it was defamatory to the jury, to be determined under all the facts and circumstances shown by the evidence.

4. SAME—EVIDENCE.
On the question whether a publication was defamatory, it is competent for the plaintiff to show the understanding of the meaning of the words used by persons who read it, and who resided in the community and knew both the parties.

5. SAME—MEASURE OF DAMAGES.
In an action for libel, in which plaintiff was entitled to recover damages for injury both to his reputation and his business, a verdict for $4,700 will not be held excessive.

On Motion for New Trial.

M. A. Murphy, for plaintiff.
Reddy, Campbell & Metson, for defendants.

HAWLEY, District Judge (orally). This is an action to recover damages for a libel. The jury found a verdict in favor of plaintiff for $4,700. The court at the trial, in the admission of evidence and in its charge to the jury, adhered closely to the views it expressed in overruling the demurrer to plaintiff's amended complaint. Chiatovich v. Hanchett, 88 Fed. 873. If any error occurred at the trial in either of these respects, the source of error will be found in that opinion. The contention of defendants is that the published notice was not libelous; that the words used therein are not in any sense defamatory, and cannot by the use of any innuendo be so construed; that by its publication no legal right of the plaintiff was invaded, and hence it is wholly immaterial what defendant's motives may have been. If we assume these premises to be correct, the conclusions reached by them would necessarily follow, because, if the defendants had the legal right to publish the notice, and it could not be construed to be defamatory, it would make no difference whether their motives were good or bad, whether they acted with or without malice,

or whether their acts resulted in benefit or damage to the plaintiff. A bad motive in doing an act which violates no legal right of another cannot make that act a ground of action. Motive alone is not enough to render the defendants liable for doing acts which they had the legal right to do, or, in the language of Judge Cooley, "an act which does not amount to a legal injury cannot be actionable because it is done with a bad intent." As was said by Black, J., in Jenkins v. Fowler, 24 Pa. St. 308, "malicious motives make a bad act worse, but they cannot make that a wrong which in its own essence is lawful." But if the notice could be construed as defamatory, and its publication did violate the legal rights of the plaintiff; if the defendants did acts which they had no legal right to do; if the acts performed by them amounted to a legal injury to plaintiff, and the publication of the notice was not a lawful exercise of their rights, but was in its own essence unlawful,—then the plaintiff could certainly maintain this action, and the court did not err in refusing to instruct the jury to find a verdict in favor of the defendants. The charge of the court must be construed in its entirety, and with special reference to the pleadings and the evidence given at the trial. In considering the objections urged by defendants, and reviewing the authorities cited by them, it must be borne in mind that there are no facts in this case which involve any question concerning the rights of protective labor associations, or the right of laborers to quit work at their will or pleasure, or the rights of employers to arbitrarily discharge their employés without assigning any reason therefor, and any discussion in regard thereto would be foreign to the issues here presented. The principles announced in the former opinion are fully supported by the authorities there cited, and will not be again discussed, except in so far as may be necessary in reviewing certain authorities cited by defendants which were not brought to the attention of the court at the time the opinion on demurrer was rendered. With these general observations, we will notice the specific points urged by counsel:

1. It is argued by the defendants that the court erred in its charge to the jury. The language of the court, which is claimed to be in conflict "with the weight of authority both in the United States and in England," is as follows:

"The law guards with jealous care the rights, privileges, property, and business of every person, and any wrongful or illegal invasion of either is a violation of his legal rights. The lawful exercise of a legal right is, of course, not actionable. It is undoubtedly true that every individual has the absolute right to refuse any business relation with any particular person or persons. But this general principle must be confined and limited to the individual action of the men who assert that right. It does not follow that any individual having that right can, from his own ill will, malice, revenge, or other evil motive, influence other persons to do the same thing. Every person has a right to enjoy the fruits and advantages of his own enterprise, industry, skill, and credit. He has no right to be protected against competition, but he has a right to be free from malicious, wanton interference, disturbance, or annoyance. If a loss comes as a result of competition, or the exercise of a like right by others, it is damnum absque injuria (damage without injury). But if it comes from the mere wanton or malicious acts of others, without the justification of competition or the service of any interest or lawful purpose, it then stands upon a different footing, and entitles him to recover damages for the malicious acts, should you consider them to be so."

Counsel admit that "the wrongful invasion of a right is actionable," and that "the lawful exercise of a legal right is not actionable." To this extent, at least, there is no disagreement between the learned counsel and the court. The next sentence in the charge is certainly not prejudicial to the rights of the defendants. It was inserted at their request, and is sound law. The objections to be considered must therefore be confined to that portion of the charge which limits the application of the general rule therein stated. Upon this point counsel cite Allen v. Flood, decided in the house of lords, and found in 46 Wkly. Rep. 258. The house of lords was divided in opinion. A majority held that the existence of a bad motive is immaterial, when considering whether an act is a civil wrong or not; that to induce employers, therefore, to dismiss their workmen and not to employ them in the future, in consequence of which the workmen suffer loss, is not, where no breach of contract is involved, a wrongful act, whatever the motive for doing it may be. The litigants in that case were members of two rival associations of workingmen. The case, in its facts, is totally dissimilar from the case at bar. Labored efforts were made in the prevailing opinions to distinguish it from the cases where the courts of England had previously held that intimidation, obstruction, molestation, or intentional procurement of a violation of individual rights, where there is no just cause for it, are each of them, where damage has been caused, actionable wrongs. Upon this point, as well as others, there was a wide divergence of opinion. The expressions used therein which are claimed to be adverse to the charge of the court herein had reference to the peculiar facts of that particular case, and hence the principles therein announced cannot be considered as applicable to a case like this, involving an entirely different state of facts. The general principles announced in Beck v. Protective Union (Mich.) 77 N. W. 13, 25 (which reviews Allen v. Flood), in so far as they are applicable, are in accord with the charge of the court under consideration. In the course of the opinion the court said:

"The case of Allen v. Flood is a forcible illustration of the difficulty, even in judicial minds, to agree. That case was really a contest between two labor unions,—the Shipwrights' Provident Union and a society of boiler makers and iron workers. The latter denied the right of shipwrights to do iron work upon vessels. The Glengall Company, for which both parties were at work, had a contract to repair a ship. Forty iron workers and the plaintiffs, Flood and Taylor, shipwrights, were at work on the job. The iron workers learned that plaintiffs had just before worked on a similar job, where they did iron work, and called in Allen, their district delegate. Allen informed the agents of the Glengall Company that the iron workers would quit work unless they discharged plaintiffs. The company discharged plaintiffs, but in doing so violated no contract, as they had the right to discharge them at any time. They, however, had an expectancy of continued employment, and, but for the statement of Allen, would have been retained. Flood and Taylor sued Allen in tort. A recovery was had in the trial court. The case was taken to the court of appeals, and sustained by a unanimous decision. It was then appealed to the house of lords, and the opinions of eight judges were presented, six of whom were for sustaining the judgment. Of the nine lords, six were against the judgment, and three for it. Of the twenty-one judges and lords, thirteen held the action of Allen to be an unlawful interference with the freedom of labor, and actionable. This case, therefore, to other courts than those of England, is mainly instructive in the learned and exhaustive opinions ren-

dered. The majority of the lords appear to have based their opinion upon the fact that there was no conspiracy, that the Glengall Company had violated no contract in discharging plaintiffs, and that the iron workers had the right to leave, and threaten to leave, their employment for any reason whatever."

Counsel cite Heywood v. Tillson, 75 Me. 225, in support of their position. It does not sustain them. Like Allen v. Flood, supra, the facts in the case are so radically different that it cannot be considered as an authority against the correctness of the charge in the present case. The failure to observe the distinction between the different classes of cases leads to confusion, doubt, and uncertainty. Courts are constantly compelled, in searching for light in order to reach the ends of justice, to carefully examine the facts upon which the apparent differences in the opinions are founded; and quite often, in order to prevent any doubt or uncertainty as to their own views, they state both sides, and show the distinctions which exist in regard thereto. Thus, in Vegelahn v. Guntner, 167 Mass. 92, 98, 44 N. E. 1077, the court said: "A combination among persons merely to regulate their own conduct is within allowable competition, and is lawful, although others may be indirectly affected thereby. But a combination to do injurious acts expressly directed to another, by way of intimidation or constraint, either of himself, or of persons employed or seeking to be employed by him, is outside of allowable competition, and is unlawful,"—and classed Heywood v. Tillson within the former class, and the case it had under consideration within the latter class. The case in hand does not, in my opinion, fall within the former class, and is not, therefore, in opposition to Heywood v. Tillson. Counsel also cite and rely upon the principles announced in Orr v. Insurance Co., 12 La. Ann. 255. That case, viewed in the light of the facts there presented, is not in opposition to the views expressed in Chiatovich v. Hanchett, supra, and repeated in the charge of the court. The distinction between the facts in Orr v. Insurance Co. and a case like the present is clearly pointed out in Graham v. Railroad Co., 47 La. Ann. 215–217, 16 South. 806, which is an additional authority, if any is needed, in support of the correctness of the charge of the court given in the present case. The court, after commenting upon the case of Orr v. Insurance Co., said:

"The issue before us is whether, while the plaintiff, engaged in a lawful business, is legitimately earning his livelihood by and through the custom and patronage of others, the defendant, a corporation, and its foreman, having the power of employing and discharging large numbers of persons, can, without incurring legal liability therefor, without justifiable cause, and moved solely by a malicious and wanton intent and design to injure the plaintiff, use their power of employment and discharge upon persons seeking employment from them, or already in their employ, so as to cause those who are already dealing with the plaintiff to desist from further doing so, and those who would desire to do so from carrying out their wishes, by threats of nonemployment or discharge. In so doing the defendant would not only control their own will, action, and conduct, but forcibly control and change, from pure motives of malice, the choice and will of others, through fear of nonemployment or discharge. This will and power of choice both the plaintiff and the parties themselves are entitled to have left free, and not have coerced in order simply to work the former damage and injury."

See, also, Delz v. Winfree (Tex. Sup.) 16 S. W. 111.

2. It is next claimed that the court erred in submitting the question whether certain language used in the notice was defamatory or not. The objections urged upon this motion do not call in question the general views expressed in the former opinion upon the demurrer, except the expression of the court, "that the words used in the objectionable paragraphs of the notice might be susceptible of the meaning charged in the innuendoes of the complaint."

At the trial the court charged the jury that:

"The complaint in this case specifies two different grounds upon which plaintiff seeks to recover damages: First, injury to plaintiff's reputation; second, injury to his business as a merchant."

After calling the attention of the jury to the language used in the published notice, the charge continues:

"And in relation to this matter I instruct you that any words will be presumed defamatory which subject the plaintiff to hatred, contempt, ridicule, or obloquy, or cause him to be shunned or avoided by his neighbors, and all words which by their ordinary meaning engender an evil opinion in the minds of right-thinking men, and tend to deprive him of friendly intercourse and society. I further instruct you that the words must be construed with reference to their natural sense, true import, and ordinary meaning; that the innuendo in the complaint cannot enlarge, extend, or change the natural import, sense, or meaning of the words; that the publication in its entirety is to be construed by the jury in the sense in which the community at large might and did understand it. Where the words, as published, are fairly capable of two different meanings (the language I have just quoted from the notice, in my opinion, is susceptible of two different meanings), one harmless and the other defamatory, it is a question of fact for the jury to determine from all the evidence in the case in which sense, within the meaning of the words, the persons to whom the notice was addressed, or persons who read the same, may have understood them. The burden of proof is upon the plaintiff to show that within these rules it was defamatory. If you believe from the evidence that the notice was posted by or under the directions of the defendants without any intention to injure the plaintiff's reputation, and that within its ordinary meaning, as understood by those to whom it was addressed, and other parties who read the same, it was not defamatory, it is your duty to find a verdict for the defendants. But if the jury believe from the language used and contained in the notice that, taken in connection with the entire publication, and with all the surrounding facts and circumstances testified to upon this trial, it is defamatory, within the ordinary meaning, as understood by those to whom it was addressed, and that it was false, and that plaintiff, in his reputation and good name, was injured thereby, it will be your duty to find a verdict in favor of the plaintiff, and assess such damages as you believe to be just and proper in the premises, under the evidence."

Was not this portion of the charge, as well as the other, as favorable to the defendants as the law would warrant? What did defendants mean when they suggested in the published notice to their employés "to refrain from associating with him [Chiatovich], either directly or indirectly, * * * and suggest that no one of our agents, representatives, or employés trade or deal with Chiatovich in any manner whatsoever. His interests are so antagonistic to ours, his purpose is so manifestly hostile, that those who favor him cannot complain if we consider them as equally unfriendly to us"? Is there not an intimation or insinuation, in the former part of this notice, that Chiatovich is not a fit or proper person for the employés of Hanchett to associate with? Is not the language used at least susceptible of this meaning? Does not the latter portion convey the idea, and

clearly intimate, that if any of their employés did associate, trade, or deal with Chiatovich in any manner, they would be discharged? Can any other meaning be given to it? There was no use of any direct threat. No need of any stronger language. It is idle to say there was no coercion, no intimidation. The law does not favor subterfuges. In searching for the truth, we must pierce through the surface covering, however disguised it may be, in order to ascertain the actual facts and determine the true meaning of the words. Threats in direct language are not the only threats that the law recognizes. Covert or unpublished threats may be just as effective as if published in direct terms. The employés knew what was meant. It is unnecessary to review the testimony. It makes no difference, so far as plaintiff's right of recovery is concerned, that some of the employés disobeyed the request and were not discharged. The fact remains that several of them, on account of said publication, withdrew their patronage from Chiatovich, and some of them declined to have any further association with him. There was a loss and injury to plaintiff clearly proven. Charges intended to reflect upon a man's character are seldom made in a direct, open manner. It is often the case, in actions of this character, that the sting of the words used is found in the imputation or inference which they convey, and were intended to convey. There may be a covert or hidden meaning which could only be fully understood by the community where the publication was made. Words used in a publication, even when not actionable in and of themselves, may become so when spoken of the business, profession, or occupation of the person to whom they were directed. In addition to authorities cited in former opinion, see Fitzgerald v. Robinson, 112 Mass. 371, 381; Morasse v. Brochu, 151 Mass. 568, 574, 577, 25 N. E. 74; Ellsworth v. Hayes, 71 Wis. 428, 434, 37 N. W. 249. If there was any error committed by the court, it was in charging the jury that the words in the former part of the notice "were susceptible of two different meanings, one harmless and the other defamatory," instead of stating that the language used in the notice was libelous per se. The jury by their verdict found that the words used were defamatory. They had the whole case, with all of its surrounding facts and circumstances, before them. I am unwilling to say that their conclusion, impartially and fairly arrived at, is not supported by the facts. The defendants had the opportunity to show, if they could, that the words used by those who read the notice were understood by them in a harmless, and not defamatory, sense. No such testimony was given. Hearne v. De Young, 119 Cal. 670, 678, 52 Pac. 150, 499, is relied upon by defendants as establishing the fact that the court erred in allowing plaintiff to introduce witnesses living in the community, who knew both parties, who read the notice, to give testimony as to their understanding of the meaning of the words contained in the notice. It does not go to that extent. There the witnesses "knew nothing of the parties or the circumstances, save what they gathered from the publication. Their conclusions were based alone upon reading of the article, and under such conditions the jurors were as competent to arrive at a correct conclusion as to the meaning of the publication as were these witnesses." The prin-

ciple decided in that case contains an element of fact that does not exist in this case, and is not in opposition to the ruling of this court in the admission of evidence.

3. No instructions were given to the jury which by any ingenuity of counsel can be construed as being in opposition to the definition of a libel as contained in section 4672, Gen. St. Nev. Moreover, that section refers to criminal actions, and was not intended to limit or deny the right of plaintiff in a civil action to recover damages for published words which tend to, and do, injure a man in his trade, business, or occupation.

4. The charge given by the court was intended to cover all of the essential points which had any controlling effect in this case, in such a manner as to be instructive to the jury. If it did, it was unnecessary to repeat the same in the language asked for by counsel. Unless the charge as given was radically wrong, it cannot be said that the court erred in refusing to give any of the numerous instructions asked by defendants' counsel. I am of opinion that the charge of the court in its entirety is correct.

5. Finally it is claimed that the verdict is too large, that it is "out of all reason, and is so excessive as to cause the court to cut the same down to a nominal sum only." The argument is that the loss in the profits of plaintiff's business was very slight; but the jury were called upon, if they believed the notice to be defamatory, to assess the damage and injury to plaintiff's reputation as well as loss and damage to his business. The jury were instructed that:

"Damages are the indemnity recoverable by a person who has sustained an injury to his reputation by the wrongful or malicious act of another or others. You should allow the plaintiff such damages, if from the instructions and evidence you believe him to be entitled to recover, as will fully compensate him for all injury he has received, resulting from the publication, as in your honest belief and best judgment will be reasonable, fair, and just. No more, no less."

Under the facts of this case, I am unable to say that the damages were so excessive as to indicate any passion or prejudice on the part of the jury. I decline, for the reasons stated, to disturb the verdict. The motion for a new trial is denied.

WORLD'S COLUMBIAN EXPOSITION CO. v. REPUBLIC OF FRANCE.

(Circuit Court of Appeals, Seventh Circuit. October 3, 1899.)

No. 488.

1. REHEARING—PRACTICE IN CONSIDERING PETITION.
   By the practice of the circuit court of appeals, only the judges who joined in rendering a decision are responsible for the granting or refusing of a petition for rehearing.

2. REVIEW ON APPEAL—ACTION TRIED TO COURT.
   On the trial of an action at law in a circuit court without a jury, by written stipulation, as in an action tried to a jury, either party may by motion present the question of his right to a judgment as a matter of law upon the whole evidence; and on appeal an adverse ruling on such a motion

may be reviewed, and the entire evidence, presented by bill of exceptions, may be considered by the circuit court of appeals for that purpose.

8. CONTRACTS—EXEMPTION FROM LIABILITY FOR NEGLIGENCE.
The provision contained in the regulations promulgated by the World's Columbian Exposition Company, and made known to all intending exhibitors, that the corporation would in no way be responsible for losses of any kind, however originating, was not against public policy, and was valid to exempt the company from liability for losses due to negligence, to the extent, at least, of any negligence not directly chargeable to the directors or managing officers of the company, and not of a distinctly gross, wanton, or willful character; and such regulation formed an essential part of every contract between the company and an exhibitor arising from the placing of goods on exhibition.

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

Edwin Walker, for plaintiff in error.
William Burry, for defendant in error.

Before BROWN, Circuit Justice, and WOODS and JENKINS, Circuit Judges.

WOODS, Circuit Judge. By the practice of this court, only the judges who joined in rendering a decision are responsible for the granting or refusing of a petition for a rehearing. While therefore technically true, it is not a ground of just criticism, "that in cases like the present, under the act of congress establishing the court (31 C. C. A. v., 90 Fed. v.) and under rule 27 (31 C. C. A. cxviii., 90 Fed. cxviii.), a petition for a rehearing may be granted when a majority of the court were not present at the original hearing, and could not be familiar with the oral argument submitted at such hearing." In this instance the petition for a rehearing was filed after the death of Judge Showalter, who prepared the opinion of the court as reported (33 C. C. A. 333, 91 Fed. 64), and the rehearing was ordered upon the recommendation of the other judges who were present at the hearing and concurred in the decision. Upon consideration of the petition, they were not willing, and the court now, after reargument, is not content, to abide by the holding that the declaration is so defective as to be incurable by verdict; and the question recurs whether the case, as presented, is reviewable.

By written stipulation a trial by jury was waived. No exception was saved to the admission or exclusion of evidence, nor to any ruling of the court during the progress of the trial; but at the end of the trial the plaintiff in error excepted to, and has assigned error upon, the refusal of the court to find the following proposition, submitted in connection with special findings of fact which the court was asked, but refused, to adopt:

"The court holds, as a conclusion of law, that the plaintiff's exhibits remained in the Manufactures Building on and after January 1, 1894, solely and exclusively for the convenience and benefit of the plaintiff, without benefit either direct or indirect to the defendant; that whatever care the defendant assumed to exercise over said exhibits was entirely and wholly gratuitous; and that the defendant cannot be held liable for the damages charged, except gross negligence on the part of the defendant be proven, and, there being no

evidence in the record showing or tending to show gross negligence upon the part of the defendant, the plaintiff cannot recover."

This, it is objected, is a mixed proposition of law and fact; but we are of opinion that the matters of fact referred to are either undisputed or immaterial, and that in legal effect the proposition is an assertion that the entire evidence is not sufficient to justify a finding for the plaintiff. The bill of exceptions purports to contain all the evidence offered by either party, and whether it is sufficient to sustain the finding is a question of law. It is true that, generally speaking, it may be more a question of fact than of law whether proven negligence is of one degree or another; but, on the facts of this case, we deem it determinable as a matter of law whether there was a right of recovery, and will treat the proposition submitted to the court, though not expressed with entire accuracy, as sufficient to present that question. This court, by clause 4 of its rule 24 (31 C. C. A. cxvii., 90 Fed. cxvii.), "at its option may notice a plain error involving the merits of the case, though not assigned or specified, and though the question be not saved according to the strict rules of practice, if it be apparent of record that the point was contested and not waived in the court below." It has often been declared that in cases at common law, tried without a jury, "a bill of exceptions cannot be used to bring up the whole testimony for review, any more than in a trial by jury" (Norris v. Jackson, 9 Wall. 125); but, properly understood, the rule applies only when the evidence is conflicting, or when the inferences deducible therefrom are doubtful. In trials by jury it is competent for a party to move for a peremptory instruction on the ground of an essential lack of evidence to justify an adverse verdict, and in a trial by the court without a jury there is the same right to challenge the sufficiency of the evidence to warrant an adverse finding. "If the finding," said the supreme court in Martinton v. Fairbanks, 112 U. S. 670, 672, 5 Sup. Ct. 322, "depends upon the weighing of conflicting evidence, it was a decision on the facts, the revision of which is forbidden to this court by section 1011 [of the Revised Statutes]. If the question was whether all the evidence was sufficient in law to warrant a finding for the plaintiff, he [the defendant] should have presented that question by a request for a definite ruling upon that point." See, also, Insurance Co. v. Folsom, 18 Wall. 237, and St. Louis v. Western Union Tel. Co., 148 U. S. 92, 13 Sup. Ct. 485.

The facts in this case are numerous, but in no essential respect uncertain. The plaintiff in error was incorporated on April 9, 1890, under the statute of Illinois entitled "An act concerning corporations," and the acts amendatory thereof, for the object of the "holding of an international exposition or world's fair in the city of Chicago and state of Illinois to commemorate on its 400th anniversary the discovery of America." Its capital stock, at first $5,000,000, afterwards was increased to $10,000,000. The name first adopted was later changed to "World's Columbian Exposition." It will be called, for convenience, the "Exposition Company."

The chief provisions of the act of congress of April 25, 1890, under which the exposition was instituted and held, are set out in the

statement of the case of World's Columbian Exposition v. U. S., 18 U. S. App. 42, 6 C. C. A. 58, 56 Fed. 654, in which the respective relations of the United States and the local corporation to the enterprise were considered, in so far as involved the question whether the exposition should be open on Sundays. The title and sections 2, 5, 6, and 10 of the act (26 Stat. c. 156) read as follows:

"An act to provide for celebrating the four hundredth anniversary of the discovery of America by Christopher Columbus, by holding an international exposition of arts, industries, manufactures, and the products of the soil, mine and sea, in the city of Chicago, in the state of Illinois."

"Sec. 2. That a commission, to consist of two commissioners from each state and territory of the United States and from the District of Columbia, and eight commissioners-at-large, is hereby constituted to be designated as the World's Columbian Commission."

"Sec. 5. That said commission be empowered in its discretion to accept for the purposes of the World's Columbian Exposition such site as may be selected and offered, and such plans and specifications of buildings to be erected for such purpose, at the expense of and tendered by the corporation organized under the laws of the state of Illinois, known as 'The World's Exposition of Eighteen Hundred and Ninety-Two': provided, that said site so tendered, and the buildings proposed to be erected thereon, shall be deemed by said commission adequate to the purposes of said Exposition; and provided, that said commission shall be satisfied that the said corporation has an actual bona fide and valid subscription to its capital stock, which will secure the payment of at least five millions of dollars, of which not less than five hundred thousand dollars shall have been paid in, and that the further sum of five million dollars, making in all ten million dollars, will be provided by said corporation in ample time for its needful use, during the prosecution of the work for the complete preparation for said Exposition.

"Sec. 6. That the said commission shall allot space for exhibitors; prepare a classification of exhibits, determine the plan and scope of the Exposition, and shall appoint all judges and examiners for the Exposition, award all premiums, if any, and generally have charge of all intercourse with the exhibitors and the representatives of foreign nations. * * * "

"Sec. 10. That whenever the president of the United States shall be notified by the commission that provision has been made for grounds and buildings for the uses herein provided for, and there has also been filed with him by the said corporation, known as 'The World's Exposition of Eighteen Hundred and Ninety-Two,' satisfactory proof that a sum not less than ten million dollars, to be used and expended for the purposes of the Exposition herein authorized, has in fact been raised or provided for by subscription or other legally binding means, he shall be authorized, through the department of state, to make proclamation of the same, setting forth the time at which the Exposition will open and close, and the place at which it will be held; and he shall communicate to the diplomatic representatives of foreign nations copies of the same, together with such regulations as may be adopted by the commission, for publication in their respective countries, and he shall, in behalf of the government and people, invite foreign nations to take part in the said Exposition and appoint representatives thereto."

The proclamation of the president, issued on December 24, 1890, contained the following:

"Whereas, satisfactory proof has been presented to me that provision has been made for adequate grounds and buildings for the uses of the World's Columbian Exposition, and that a sum not less than $10,000,000, to be used and expended for the purposes of said Exposition, has been provided in accordance with the conditions and requirements of section 10 of an act entitled 'An act to provide for celebrating the four hundredth anniversary of the discovery of America by Christopher Columbus, by holding an international exhibition of arts, industries, manufactures and the product of the soil, mine and sea, in the city of Chicago, in the state of Illinois.' Approved April 25, 1890. Now,

therefore, I, Benjamin Harrison, president of the United States, by virtue of the authority vested in me by said act do hereby declare and proclaim that such international exhibition will be opened on the first day of May, in the year eighteen hundred and ninety-three, in the city of Chicago, in the state of Illinois, and will not be closed before the last Thursday in October of the same year. And, in the name of the government and of the people of the United States, I do hereby invite all the nations of the earth to take part in the commemoration of an event that is pre-eminent in human history and of lasting interest to mankind, by appointing representatives thereto, and sending such exhibits to the World's Columbian Exposition as will most fitly and fully illustrate their resources, their industries, and their progress in civilization. In testimony whereof," etc.

This invitation was communicated in the regular way to the French government early in the ensuing February, and by letter of March 5, 1891, the secretary of state announced to the director general of the Exposition Company "the formal acceptance by the government of France of the president's invitation to participate in the Chicago Exposition of 1893."

On November 5, 1891, the secretary of the treasury issued regulations relative to free importation of articles for exhibition, embracing the following rules:

"Rule 10. Articles sent by foreign governments to the Exposition, which are used solely for government purposes and are not intended for sale, will be admitted to entry at the exterior port of arrival on certificates of the proper foreign commissioner, without the production of invoice. But it is desired that the estimated value of each package shall be stated on the certificate or bill of lading, in order that the pecuniary responsibility of the transportation company may be fixed."

"Rule 12. The buildings and spaces set apart for the purposes of the Exposition are constituted 'constructive bonded warehouses and yards,' and all foreign articles placed therein under the supervision of the customs officers will be treated the same as merchandise in bond."

"Rule 16. The articles after having been received in the Exposition will remain under the custody of the customs officers, and must not be removed from the place assigned without a permit from the collector of customs or the officer who may be designated by him to grant such permit. In no case shall such articles be released from the custody of the customs officers unless the same shall have been regularly withdrawn for consumption, for warehouse, or for export."

General rules and regulations under date of January 23, 1893, signed, "George R. Davis, Director General," were published, of which numbers 7 and 20 were as follows:

"Rule 7. Reasonable precautions will be taken for the preservation of exhibits; but the World's Columbian Exposition will not be responsible for any damage to, or for the loss or destruction of, an exhibit, resulting from any cause."

"Rule 20. Immediately after the close of the Exposition, exhibitors must remove their effects, and complete such removal before January 1st, 1894. Goods then remaining will be removed and disposed of under the direction of the World's Columbian Exposition."

On June 21, 1893, the board of directors of the Exposition Company adopted the following resolution, which was never revoked:

"Resolved, that George R. Davis be recognized as director general by this corporation, subject, however, to the express right at any time of the board of directors or its executive committee to revoke such action."

An official circular was issued, under date of December, 1891, containing twenty-five "General Regulations for Foreign Exhibitors," of which the following are pertinent here:

"(5) Before November 1, 1892, the foreign commissions must furnish the director general with approximate plans showing the manner of allotting the space assigned to them, and also with lists of their exhibitors, and other information necessary for the preparation of the official catalogue."

"(9) If products are intended for competition, it must be so stated by the exhibitor. If not, they will be excluded from the examination by the international juries."

"(13) The World's Columbian Exposition will take precautions for the safe preservation of all objects in the exhibition, but it will in no way be responsible for damages or loss of any kind, or for accidents by fire, or otherwise, however originating.

"(14) Favorable facilities will be arranged by which exhibitors or foreign commissions may insure their own goods. Foreign commissions may employ watchmen of their own choice to guard their goods during the hours the Exposition is open to the public, subject to the rules and regulations of the Exposition.

"Note. A thoroughly equipped fire department will protect the buildings and exhibits, and a large police force will maintain order. The entire Exposition grounds will be under the immediate supervision of the city of Chicago and of the state of Illinois. A guard equal to any possible contingency is thus provided; the municipal authority being upheld, if necessary, by the state troops, and the state by the army of the United States, so that no apprehension need arise as to losses resulting from lawlessness."

"(23) Immediately after the close of the Exposition, exhibitors shall remove their effects, and complete such removal before January 1, 1894. Goods then remaining will be removed and sold for expenses, or otherwise disposed of under the direction of the World's Columbian Exposition."

"(25) All communications concerning the Exposition will be addressed to the Director General World's Columbian Exposition, Chicago, Illinois, U. S. A."

These regulations were submitted to all exhibitors at the time of the allotment of space, and were in force when the exhibits were installed. The director general made all allotments of space both to domestic and foreign exhibitors, and, desiring to get the representative nations in the center of Manufactures Building, assigned there "one hundred thousand feet to each of the nations, Great Britain, Germany, America, and France." The French consul, at or before the time of accepting the allotment, propounded to the director general written interrogatories, of which the fourth and ninth, and the answers thereto, were read in evidence, and are as follows:

"(4) On the other hand, the same section (13) says the Exposition will take precautions for the safe preservation of objects, but will in no way be responsible for damage or loss, or for accidents by fire or otherwise. What are the precautions spoken of going to be? Answer. Protection will consist of a thoroughly equipped fire department, and a large police force."

"(9) About any other losses to be incurred otherwise than by fire, under what jurisdiction and police regulation is the international exhibit going to be placed? Are the grounds and buildings going to be treated for public protection like U. S. warehouses, subject to the federal laws and courts, or under state and municipal laws of police? Answer. Foreign exhibits will be under the immediate charge of officers of the U. S. government. The entire Exposition grounds and buildings will be under the immediate jurisdiction of the municipality of the city of Chicago and the state of Illinois. A police force and guard, equal to any possible contingency, will be provided. Under our system of government, the authority of the municipality is upheld by the state, and the state by the general government, so that no apprehension need arise

as to losses resulting from acts of lawlessness; such an occurrence being, at most, a very remote possibility."

These are the facts in evidence on which must be determined what measure of diligence the plaintiff in error became bound from the beginning to exercise in order to protect exhibits from harm; and, before proceeding to the circumstances of the loss which occurred, it is well to consider that question. It is not contended that at the time of the loss greater diligence was obligatory than at any time before, and we do not find it necessary to inquire whether after January 1, 1894, a less degree of care than before that date was required. If the case turned upon that question, it would involve the inquiry to what extent the Exposition Company was responsible for the failure of the defendant in error to remove its exhibits before the injury was suffered, and, the evidence on the point being conflicting, the finding of the court could not be reviewed.

What obligation did the plaintiff in error incur to the French republic or to other exhibitors, or under what duty did it come, for a breach of which it may be held responsible? Distinct notice was given to all proposing to make exhibits, and especially to the French consul, that the Exposition Company would take precautions for the safe preservation of all objects in the exhibition, but would "in no way be responsible for damage or loss of any kind, or for accidents by fire, or otherwise, however originating." Yet, for reasons stated in its opinion (83 Fed. 109), the court below held it to be the law of the case "that the management of the Exposition was under legal obligations to safeguard by the highest intelligence and protection compatible with the ephemeral character of the buildings the exhibits of the plaintiff, the French republic and the French citizens, and that such obligation is not escaped by the exempting clauses contained in the regulations promulgated by the director general." The position asserted in the brief for the defendant in error is that the relation between the parties "was plainly that of bailee and bailor"; "that it was a bailment made by defendant in error with plaintiff in error at the request of, and for the sole use and benefit of, the latter, and so continued until the damage was done. It was the bailment known as a 'commodatum.'" The declaration, however, can hardly be deemed to present the case on that theory, though in each count there is an averment that the plaintiff's goods were put on exhibition at the request and for the profit and benefit of the defendant, "without recompense or reward to said plaintiff moving from said defendant or any other person." That is not equivalent to an allegation that the part taken by France in the Exposition was not intended for the benefit of the republic or of the French people. The French exhibits, like all from abroad, came into the Exposition with a pecuniary value attached to each article. Some of the articles were intended for sale, and some were sold before removal, and while others, including all that were injured, were there for exhibition only, yet with those for sale they constituted but one exhibit and one bailment, if bailment there was. The idea of calling the French exhibit a loan to the Exposition is hardly possible. Seven hundred thousand dollars of public money

was expended by the republic in making it, and, even if it could be called a loan to the Exposition, it would be difficult to believe that it was made solely for the benefit of the local corporation, and without thought for commercial advantage and for the glory of France. There was at most a bailment for the benefit of both parties, under which, but for the provision against liability, the bailee would have been responsible for a failure of ordinary care. If it were necessary to define more accurately the measure of responsibility, in the absence of a stipulation on the subject, the nearest analogies, perhaps, would be found in the decisions concerning agricultural societies. Like such societies, the World's Columbian Exposition owed a duty to the visiting public to render its grounds and buildings reasonably safe for all persons in lawful attendance; yet in Phillips v. Society, 60 Wis. 401, 19 N. W. 377, where a visitor was hurt while stepping over a revolving shaft in use by the society, it was held that the plaintiff could recover only for a failure to exercise ordinary care. See, also, Brown v. Society, 47 Me. 275; Dunn v. Society, 46 Ohio St. 93, 18 N. E. 496. The more general holding seems to be that such organizations are private corporations (2 Am. & Eng. Enc. Law, 19), but in some states, including Illinois, they are treated as public or quasi public bodies (Society v. Hunter, 110 Ill. 155). In this case it was said that the reorganization of the company as a joint-stock company did not render it a corporation for private gain or profit, or change its character from a public to a private institution. Yet in that instance it was true, as it is of every such society, and as this court in the World's Columbian Exposition Case, 18 U. S. App. 42, 164, 6 C. C. A. 74, 56 Fed. 670, declared of the Exposition Company, that it "was organized for pecuniary gain." To the end of obtaining the money to pay expenses, that was necessarily so; but that there was from the beginning no intention or expectation of making gains beyond, or even approximately equal to, the expenses of the Exposition, the well-known facts admit of no doubt. But whether, upon general principles, such societies owe the same duty to a member or an exhibitor as to a stranger, coming within their gates, to protect his person and property from harm, we need not determine. If the rule should be so established, and certainly if it becomes known that only the highest intelligence and care consistent with the situation will exempt from liability, men may be expected to be slow to devote their energies and money to such enterprises, unless, indeed, by express disavowal or stipulation the risks which are necessarily incident thereto can be escaped.

Is there good reason why the notice given by the Exposition Company to exhibitors, that it would "in no way be responsible for damages or loss of any kind, * * * however originating," should not be given full effect according to its terms? We perceive none. Reference has been made to the doctrine, which is familiar as applied to common carriers, that public policy forbids contracts for exemption from liability for negligence, and a passage has been cited from Cooley on Torts (page 687) to the effect that the reasons which forbid such contracts "apply universally, and should be held to defeat all contracts by which a party undertakes to put another at the

mercy of his own faulty conduct." It is not the province of a text writer, any more than of a court, to cover by a dictum the entire range of possibilities in the application of a doctrine. The expression quoted is faulty, in that it assumes that every contract for exemption from the consequences of negligence necessarily implies an effort or undertaking of the party "to put another at the mercy of his own faulty conduct." That is perhaps so when the stipulated exemption is in favor of a natural person, who is to perform the contract without the employment of an agent, but it is not so when the exemption is in favor of a corporation, which can act, or of a person who proposes to act, only by agents; and it is easy to suggest many possibilities of contracts against liability for the negligence of agents or servants under circumstances admitting of no conceivable consideration of public policy to the contrary. Indeed, there is no apparent reason for declaring invalid a provision in the articles of any partnership or private corporation to the effect that the partnership should not be liable to a member, or the corporation to a stockholder, for the negligence of any employé or agent, unless, perhaps, the agent be a vice principal, and whether there should be that exception is by no means clear. Many of the clubs existing in the larger cities of the country are conducted much in the manner of hotels. Are they liable, even without provision in the articles of incorporation to the contrary, to members for losses suffered while in attendance? There is certainly no reason in public policy against a provision in the by-laws or constitution of such a club against such liability. Indeed, what policy of the law is there against an agreement between the stockholders of a hotel company, or a Pullman or Wagner Palace-Car Company, that there shall be no corporate liability to a stockholder for any loss or injury suffered by reason of the negligence of an employé or servant of the company? Whatever may be determined to be the proper answer to any of these suggestions, we have no doubt of the validity of the exempting clause here in question, to the extent, at least, of any negligence not chargeable directly to the board of directors or managing officers of the Exposition Company, and not of a distinctly gross or wanton or willful character. Since such negligence is not charged in any count of the declaration, this review might stop at this point, without inquiry into the evidence, or into the character or degree of negligence which the evidence tends to show. It being undeniable that the plaintiff in error gave notice to defendant in error that it would in no event be liable for any damage or loss, however caused, the relation between the parties is essentially different from that declared upon; and the variance is so radical, perhaps, as to make recovery, on the declaration as it is, impossible. "In framing a declaration in an action on the case," as was said in our first opinion herein, "the state of facts upon which the legal obligation or duty alleged to have been violated arose must be shown." The exempting clause being a fact in the case, no statement of the relation in which the parties stood to each other can be adequate which does not include that fact. So, too, of the contention advanced at the last hearing, that it was only necessary for the plaintiff to aver the delivery of the

goods, and a failure of the bailee to return them in good condition, the burden of showing an excuse being on the defendant; but, in order to have put the case in that posture, it was necessary to have alleged facts showing a bailment of that character, and in an attempt to do so, on a full statement of the facts disclosed in evidence, the pleader must have encountered a serious, if not insuperable, obstacle, both in the notice given, that the Exposition Company would not be responsible for any loss, and in the custom-house regulations, which put it out of the power of the management, without prior action of custom-house officers, to return, or to change the place of deposit of, foreign exhibits.

The fact has not been overlooked that the reservation against liability for loss or damage was preceded by the statement that the Exposition Company would "take precautions for the safe preservation of all objects in the exhibition," and that in the appended note it was said, "A thoroughly equipped fire department will protect the buildings and exhibits, and a large police force will maintain order," etc. When the entire note is taken into consideration, in connection with the very explicit provision against liability for any loss or damage, however caused, it is evident that there was no intention to express a contract obligation on the part of the company to establish and have ready upon every emergency a well-equipped fire department, police force, etc. The purpose was simply to announce the intention of the management, with the aid of the city authorities, and those of the state and of the United States, if necessary, to do the things stated; but for the performance of that intention they pledged only their good faith, stimulated necessarily by high motives and a desire for the success of the enterprise, but unaffected by pecuniary responsibility for failure.

This brings us to a consideration of the evidence, without reference to the pleadings: "The several acts of negligence, which in themselves," according to the brief for the defendant in error, are supposed to "constitute such affirmative negligence as renders plaintiff in error liable," are summarized in the brief as follows:

"First, the removal or dismantling of the high-pressure engines or apparatus, thereby disabling the fire department and rendering the standpipe useless; second, the diminution in the number of guards, by which irresponsible and evil-disposed persons could not be properly watched and guarded against; third, the free admission of any and all persons to the grounds before the removal of the exhibits; fourth, the diminution in the number of fire engines, leaving an entirely inadequate protection against fire; fifth, the failure to furnish promptly and seasonably the cases in which the goods were to be packed for removal, and which were in the custody of the defendant; sixth, the failure to provide cars for the removal of plaintiff's exhibits in due time after the close of the Exposition; seventh, the failure to promptly protect plaintiff's exhibits after the fire had started, or to remove them to a place of safety; eighth, the refusal to permit plaintiff's agents and employés, after the fire had started, to protect its exhibits or remove them to a place of safety."

Chief stress has been placed upon the first and fourth propositions, and they will be considered last.

The number of guards was greatly reduced after the close of the Exposition, but there is no ground for saying that the number retained was less than was supposed to be necessary, and it does not

appear that the loss suffered was attributable to the reduction. Guards were kept in all the buildings, but that "tramps and vagrants nested within their walls" we find no evidence in the record, except that after the 1st of January, 1894, when the gates of the park could no longer be kept closed, such characters came in large numbers upon the grounds. The fire originated in the Casino, where five guards were stationed, and, while the origin of the fire is not explained, there is no evidence that it was caused by tramps; and, if it were, further proof would be necessary to impose liability upon the plaintiff in error. The free admission of any and all persons to the grounds before the removal of the exhibits it was not in the power or duty of the management to forbid or control. If there was a failure to furnish the cases in which the goods were to be packed, or to provide cars for their removal, the failure was not a proximate cause of the fire nor of the consequent loss. If there was a failure promptly to protect the plaintiff's exhibits after the fire had started, or to remove them, or a refusal to permit the plaintiff's agents and employés to protect or to remove them to a place of safety, the responsibility was with the fire department and the guards or other subordinate employés, whose conduct at the time the management could not, and prudently would not, have attempted to control. The evidence shows that the guards and police were busy in guarding the doors of the Manufactures Building against crowds pushing for entrance, and that, with the others, two or three agents of the plaintiff were for a time denied admission. That the removal of goods out of danger was not authoritatively forbidden is demonstrated by the fact that the most valuable part of the exhibit was removed; and the uncontradicted testimony of Mr. Higginbotham, the president of the Exposition Company, is that he arrived upon the ground shortly before nine o'clock, and a few minutes later entered the Manufactures Building, where he remained until the fire was under control, and that "he observed no attempt on the part of those in control of the exhibits to remove them," and that nothing was said to him about removal. Even if removal was possible and was prevented, it was the result of the confusion and stress of the situation, and in no reasonable view could it be deemed to supply the ground for an action for damages. All these matters, whatever otherwise might be their merits, are within the fair scope of the exemption from liability, of which all exhibitors had timely notice, and, besides, were warned to provide against the obviously very great risks of the situation by employing watchmen of their own choice and by insuring their goods.

The same considerations are conclusive against liability for "the dismantling of the high-pressure engine or apparatus," and "the diminution in the number of fire engines." The high-pressure engine belonged to exhibitors, who dismantled it for the purpose of removal, as they had a right to do; and the only possible duty of the management was to replace it with an adequate substitute, if one was needed to keep the standpipe ready for an emergency. Such a substitute was not needed. The proof shows that it became necessary in December to let the water out of the pipe in order to prevent

freezing, but that it was practicable at any time to return the water therein to the requisite level "under such pressure as could have been imparted by a fire engine"; and, according to the opinion of the court below, if that had been done "the presence of two or three guards on the roof, distributing the water over the walks, would have prevented the ignition, and thus totally prevented the injury to the French exhibits." It was not until near four hours after the fire began, and twenty-five or more fire engines had been brought upon the ground, that the board walk on the roof of the Manufactures Building began to be in obvious danger; and there was therefore ample time to have attached to the standpipe an engine,—the floating engine was perhaps the most available,—and to have been ready for the emergency when it came. At a later hour, when the walk had ignited, but when there was yet time to extinguish the flame before it reached the French exhibits, the fire chief or marshal was urged by an employé of the defendant to connect an engine with the standpipe; but no attempt in that direction was made, and the blame manifestly is with the fire department, and not with the management of the Exposition. Again, there was in the Manufactures Building a supply of fire extinguishers, with which, but for the cold, the effect of which on extinguishers does not appear to have been understood, incipient fires in the walk might have been extinguished. The fire was finally extinguished, after doing the damage complained of, by carrying up long lines of hose,—a fact which demonstrates that the water could have been forced up the standpipe by the pressure of a fire engine,—and, if hose had been carried up immediately upon the change of wind which brought danger to the Manufactures Building, the burning of the walk and of the exhibits below would have been prevented. There are other pertinent circumstances, but it is enough to state our conclusion that, if there was fault of the Exposition Company in respect to the arrangements for forcing water through the standpipe, it was by no means of such a character as not to be covered by the stipulation for exemption from liability. The plaintiff in error never had upon the grounds more than eight fire engines of its own,—a number manifestly inadequate to meet probable emergencies. The reliance always and necessarily was upon aid from the fire department of Chicago, and that aid in this instance was furnished with notable promptness. It is not shown nor is it probable that, if the number of engines kept on the grounds had remained undiminished, the number brought promptly or finally into action would have been greater or more efficient. Whatever fault there was in the management of the engines, in respect to the Manufactures Building, occurred after they were on the ground, and for that fault the Exposition Company was not, and could not have been, responsible, since its engines, whether few or many, were, when in action, like those of the city, under the control of the fire marshal of the city. The guards, too, acted under the direction of the police.

It is important to observe that in respect to all the matters complained of which had a direct relation to the safety of the exhibits, the reduction in the number of guards and fire engines, and the

dismantling of the engines and pumps connected with the standpipe, no agent of the defendant in error, and no exhibitor or other person, made complaint of what was done, or suggested that other precautions against fire or other danger was necessary.

The judgment below is reversed, and the cause remanded, with direction to grant a new trial.

RICHARDSON v. SWIFT & CO.

(Circuit Court of Appeals, Seventh Circuit. October 3, 1899.)

No. 582.

1. TRIAL—DIRECTION OF VERDICT.
   The rule that, where there is doubt of the right of a party to go to the jury, the doubt should be resolved in favor of the right, is especially applicable when the issue is one of negligence, which ordinarily must be determined by inference from the circumstances proved, rather than upon direct evidence.
2. MASTER AND SERVANT—ACTION FOR PERSONAL INJURY—FAILURE TO INSTRUCT SERVANT.
   Plaintiff, an employé in a packing house, was taken from his accustomed work, and directed to feed a sausage machine with chopped meat, which was shoveled into a hopper about a foot in depth above the revolving knives. As the meat did not seem to be feeding properly, the hopper being nearly full, plaintiff placed his hand upon it to press it down. The meat below had fed into the machine, leaving a crust formed across the top, which broke when plaintiff touched it, and his hand went through the space into the machine, resulting in his injury. It appeared that the formation of such crusts was of occasional occurrence, but plaintiff had no knowledge of it. *Held*, that the question whether the master was negligent in failing to inform plaintiff of such fact was not one of law, although the facts were not disputed, but, rather, of mixed law and fact, to be determined by the jury under proper instructions.

   Jenkins, Circuit Judge, dissenting.

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

Ira C. Wood and William Garnett, Jr., for plaintiff in error.

O. W. Dyes, for defendant in error.

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

WOODS, Circuit Judge. James F. Richardson, the plaintiff in error, was the plaintiff in the action, which was brought to recover for personal injury incurred while in the service of the defendant in error, Swift & Co., at Kansas City. The court directed a verdict for the defendant, and on that action error is assigned.

Summarized according to the declaration and the evidence, the case is this: The plaintiff was called away temporarily from his accustomed work, which did not expose him to the dangers of contact with machinery, and put to feeding fat pork, already so finely cut as to be in a mushy state, into the hopper of a sausage grinder, using a shovel for the purpose. Skilled or experienced men were

commonly employed to do that work, and they knew, but the plaintiff did not know, and when assigned to this work was not informed, of the occasional formation of thin crusts of meat in the hopper above the knives. The plaintiff, while at work, observed that the meat was standing without apparent movement within two inches of the top of the hopper, which was about a foot deep, and, supposing it to be packed and clogged in the narrow passage near the knives, put his left hand upon it or into it for the purpose of pushing it down. The mere crust, which was actually there, broke at his touch, and with it his hand went down, was caught and cut off, and his arm drawn in and so mangled that amputation above the elbow was necessary. Shortly after he was hurt, the plaintiff subscribed a statement which in some particulars was inconsistent with his testimony.

In directing the verdict, the court said:

"There is no claim in this case, or at least no foundation for a claim, of any defect in the grinding machines which were used there; and the only claim which is made, practically, of neglect on the part of Swift & Co., is in the fact that the plaintiff was not instructed with regard to the liability of the meat (this fine class of meat used for the Diamond B sausage) * * * to form a skim or surface. He admits that he knew of the danger which would exist if his hand got down to the worm. He placed his hand upon the crust to force it down, or work it down, whichever it might have been, and made a miscalculation. His hand dropped down or slipped down, and it was an accident for which the defendant, Swift & Co., cannot be held chargeable."

The question is a close one, but we think the case should have been left to the jury. While the plaintiff knew the location of the knives, and the danger involved in thrusting or allowing his hand to go to the bottom of the hopper, his testimony was that he knew nothing of the formation of crusts of meat in the hopper, and of the peculiar danger on that account to which he was exposed. Whether the defendant was guilty of actionable negligence in not having informed him of that phase of danger, and whether the plaintiff was himself free from contributory fault, were questions of fact, which, under proper instructions, should have been submitted to the judgment of the jury. In a recent case we have said that, when there is doubt of the right of a party to go to the jury, "the doubt should be resolved in favor of the right" (Nyback v. Lumber Co., 90 Fed. 774); and the suggestion is especially applicable when the issue is one of negligence, or the like, which ordinarily must be determined by inference from the circumstances proved, rather than upon direct evidence. We dissent from nothing to be found in the opinion in Cole v. Railway Co., 71 Wis. 114, 37 N. W. 84, and other cases cited. In no case of which we have knowledge has it been held, and we do not hold, that the mere fact that the employer requests his employé to perform a temporary work, outside of his ordinary employment, is a violation of any duty which he owes to the employé. Whether it be, depends always upon the circumstances. In the language of the opinion in the Cole Case:

"If the particular work ordered to be done is of a dangerous character, and one which requires peculiar skill in its performance, and the person directed to perform such work has not the requisite knowledge or skill for doing the work with safety, and such want of skill or knowledge is known, or might be rea-

sonably supposed to be known, to the employer, in that case the direction of the employer to do the work might be justly held to be a violation of the duty which he owes to his employé, even though the employé undertook to do the work without objection or protest on his part."

It is of little or no significance that the plaintiff in error was called away from his accustomed work. The defendant is liable on the proofs, if at all, not for failure to inform him of the ordinary dangers of the work to which he was assigned, but for the failure to warn him of the special danger, which, for the present purpose it is assumed, was of a character which a man of ordinary experience and intelligence was not likely to understand or apprehend. Whether it was of that character was for the jury to say. It is not correct to say of the plaintiff that he "knew it was dangerous to put his hand into the hopper while the worm was revolving." If the hopper had been full of meat, as it seemed to be, there would have been no necessary danger; and, if he had known of the condition or of the possibility of the condition of the meat being as it was, he could, with caution, have inserted his hand without the least probable risk. The question of the negligence of the master cannot be determined as a matter of law. There may be little or no dispute about the facts and circumstances in evidence, but whether the inference of mixed law and fact shall be one way or the other can rarely be so clear, and was not in this case so clear, as to justify a withdrawal of the question from the jury.

Much testimony was taken, and something has been said in argument, about the location of the sausage machines so near the wall that they could not have been fed from the side next to the wall, but we do not perceive actionable matter in that alone. If the plaintiff is not entitled to complain that he was not properly informed of the peculiar danger which has been considered, he is left, it would seem, without ground for saying that he did not assume whatever risk was involved in being compelled to stand on one side rather than the other of the machine. In that respect there was no concealment of fact or of probable consequences.

In respect to the amended counts of the declaration to which demurrers were sustained, if there was error, it has not been shown to be material. Under the remaining counts, or some of them, the evidence offered was admissible. The judgment below is reversed, with direction to grant a new trial.

BAKER, District Judge (concurring). When a master takes a servant from his accustomed employment and puts him to a service with which he knows he is unacquainted, and which service involves a hidden danger, which is known to the master, or which by the exercise of ordinary care he might have known, and which is unknown to the servant, it is the master's duty to warn the servant of such hidden danger. The jury would have been authorized to find that the formation of a thin surface of meat near the top of the hopper, with nothing between it and the revolving knives at the bottom of the hopper, constituted a hidden danger. The plaintiff may well have believed that the meat formed a compact mass from its surface

down to or near the knives, and that it would require considerable force to press it down upon them, and that such pressure could be applied with safety. The shape of the hopper, broad at the top and narrow at the bottom, was well calculated to induce such a belief. In my opinion, the evidence was such as to make it a question of fact for the jury whether the danger was a hidden one, whether it was known or ought to have been known by the defendant and was unknown to the plaintiff, and whether the defendant was not at fault in failing to warn the plaintiff of such hidden danger, and whether the plaintiff was without contributory fault. For these reasons, I agree that the judgment should be reversed and a new trial awarded.

JENKINS, Circuit Judge (dissenting). I am unable to concur in the judgment of the court, and for the following reasons:

1. The plaintiff in error at the time of his injury was a man of mature years and of ordinary intelligence. He had been in the service of the defendant in error in and about its works for a period of two years. He had been employed in the room where he met his injury for two months prior thereto. He knew generally the character of the machines used, although not employed in their operation. He was temporarily called from his usual work into that room to feed one of the hoppers. The revolving worm or knives in which his hand and arm were caught were, to his knowledge, situated one foot below the top of the hopper. Under such circumstances, there was no duty devolving upon the master to inform the servant of the dangers incident to the service. Reed v. Stockmeyer, 34 U. S. App. 727, 20 C. C. A. 381, and 74 Fed. 186; Logging Co. v. Schneider, 34 U. S. App. 743, 20 C. C. A. 390, and 74 Fed. 195; Cole v. Railway Co., 71 Wis. 114, 37 N. W. 84; Bailey, Mast. Liab. 220, and cases cited. I have no contention with the doctrine that the master is bound to disclose a hidden danger known to the master, and which he knows is unknown by the servant, but I cannot understand that that rule should apply here. The servant knew that it was dangerous under any circumstances to put his hand into the hopper while the worm was revolving. The supposed hidden danger was the formation of an arched crust of meat, with a space between it and the revolving knives,—formed probably by the pressure of the meat upon the converging sides of the hopper, not allowing all of the meat to be served to the revolving knives. This probably rendered it a little more dangerous to press down or stir up the meat in the hopper with the hand, but it was dangerous at any time to use the hand in pressing down or stirring up the meat. I do not understand that it is the duty of the master to warn the servant how he may do a manifestly dangerous thing with the least hazard to himself.

2. The plaintiff in error, in my judgment, was manifestly guilty of negligence contributing to his injury. He knew it was dangerous to put his hand within the hopper while the worm was revolving. It was manifestly dangerous to press down the meat with the hand during the revolutions of the worm. He should have used some implement for that purpose, and the shovel with which he supplied the meat to the hopper was a fit instrumentality. It was mere reckless-

ness to stir up or press down the meat in the hopper in close proximity to the revolving knives.

3. The case rests upon uncontroverted testimony. The circumstances and manner of the accident are detailed by the plaintiff in error. The facts are fully disclosed, and there are no inferences to be drawn. Under such circumstances, the question of liability of the master is one of law, to be determined by the court, and is beyond the province of a jury to decide. It is for them to determine dispute of fact, not the liability which the law imposes upon ascertained fact. Upon the record here, the defendant in error either did or did not owe the plaintiff in error the duty of warning. If it owed that duty, it is liable, unless the plaintiff's negligence contributed to the injury. If it did not owe that duty, it is not liable. That question of liability, I think, is one which the court should determine.

STEWART et al. v. MORRIS et al.

(Circuit Court of Appeals, Seventh Circuit. October 3, 1899.)

No. 591.

1. REVIEW ON APPEAL—INSTRUCTIONS—IMMATERIAL OMISSIONS.
   If the trial court omits to state in its charge on which party rests the burden of proof of an issue, and counsel does not call its attention to the omission, it cannot be regarded by the appellate court as of sufficient gravity to require a reversal of the judgment.
2. SAME—EXCEPTIONS AND ASSIGNMENTS OF ERROR ON INSTRUCTIONS.
   When an instruction is claimed to carry an implication beyond what is expressed, the exception thereto, under the rules of the circuit court of appeals, should state the particular meaning or implication objected to, and the specification of error must also set out the language of the instruction.

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

Samuel P. McConnell, for plaintiffs in error.

C. H. Aldrich, for defendants in error.

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

WOODS, Circuit Judge. This is the second writ of error in this case. 60 U. S. App. 232, 32 C. C. A. 7, and 88 Fed. 461; 60 U. S. App. 557, 32 C. C. A 203, and 89 Fed 290. The bill of exceptions shows that counsel for the plaintiffs, who are here the plaintiffs in error, upon the delivery of the court's charge to the jury "excepted specifically to each of the following propositions of law stated in said charge":

(1) "The rule of law is that an agent is not bound in a transaction if he acts for, and is understood as acting for, a principal, disclosed at the time as the principal in the transaction; but the mere fact that in the course of these transactions he names a principal or a person for whom he may be acting is not sufficient to exempt him from liability if he chooses subsequently to contract in his own name as principal, and assumes the position of principal in the transaction."

(2) "If, on the other hand, it appears from the testimony that Mr. Overstreet, acting for the plaintiffs, told Mr. Cassell that the cattle were owned by Wilson, and, further, so acted and conducted himself that Mr. Cassell, representing Nelson Morris & Co., was bound to understand that they were simply representing this man Wilson, and not themselves, going along and taking no part except that of buyers' [sellers'] agents for Wilson, then the set-off is not sustained, because it would be a transaction by them simply as agents."

(3) "If you find that they (Cash, Stewart & Overstreet) so conducted themselves that they were understood, and properly understood, by Mr. Cassell, representing Nelson Morris & Co., as the principals, then you must ascertain the amount of damages suffered by Nelson Morris & Co."

The disputed point in the case was whether Cash, Stewart & Overstreet were principals, or merely agents, in selling to Nelson Morris & Co. at the National Stock Yards at East St. Louis, in December, 1890, 557 live cattle, brought there for sale by W. D. Wilson, and afterwards found to have been under a chattel mortgage. The defendants in error, having been compelled to pay the debt secured by the mortgage, pleaded the amount paid as a set-off against the undisputed demand of the plaintiffs in error, who, it is conceded, are the successors, and bound by the obligations, of Cash, Stewart & Overstreet.

The first proposition is objected to as meaning that, even though the jury believed the transaction to have been one of agency and so understood by the parties, yet the plaintiffs in error made themselves liable as principals subsequently by presenting to Nelson Morris & Co. a bill in their own name, and collecting thereon the price of the cattle. The instruction carries no such implication, and another part of the charge made it impossible for the jury so to understand it.

The contention in respect to the second and third propositions is that by implication they imposed upon the plaintiffs in error the burden of proving that they acted in the transaction as agents, and not as sellers, and besides required that their position be established by stronger proof or greater certainty than was necessary. Neither of the propositions is in itself erroneous. If the facts were as supposed in each, the legal conclusion stated necessarily followed. The objection is that the word "bound" means more than should have been required. The word, as used, we think meant, and was intended by the court, and probably was taken by the jury, to signify, no more than "ought" or "bound in reason." If counsel for the plaintiffs in error feared a misapprehension on the part of the jury, it was his privilege and duty, before the jury retired, to move for a qualification or explanation of the charge, both in respect to the degree of certainty required and in respect to the location of the burden of proof. Neither of the propositions, it is clear, was intended to touch the latter point; and if the court by oversight, or because it had settled the question in the presence of the jury by awarding the opening and closing of the argument to the defendants in error, omitted to state in the charge on which party was the burden of an issue, and counsel did not observe or deem it worth while to call to the attention of the court the omission, this court cannot regard the matter as of sufficient gravity to require a reversal of the judgment. The third proposition is not only right in itself, but it admits of no implication against the plaintiffs either in

respect to the burden or degree of proof. If the plaintiffs so conducted themselves that they were "properly understood" by the other party to be acting as principals, the reasonable and necessary conclusion was that they intended to act in that character.

While we have considered the objections to these parts of the charge on their merits, it is proper to observe that the exceptions thereto were not saved nor the errors specified in the assignment of errors in the manner required by the rules of this court. By rule 10 the party excepting must "state distinctly the several matters of law in the charge to which he excepts." To comply with that requirement, it may be enough sometimes merely to quote the language of that part of the charge which is supposed to be erroneous. That will do if the language quoted expresses a single proposition of law with unambiguous directness, but if the quotation embraces different propositions, or, like those now before us, is supposed to carry implications beyond or outside of what is expressed, it is intended by the rule that the exception shall state the particular meaning or implication,—the exact proposition of law objected to; and then, to enable this court to determine whether the language of the court embodied that proposition, either expressly or by implication, it is necessary that the language be brought up in the bill of exceptions, and be set out totidem verbis, as required by rule 11, in the specification of error. As recently amended, the rule also requires that the specification of error "shall state distinctly the grounds of objection to an instruction given." These rules, if carefully and intelligently followed, will accomplish the purpose of their adoption, namely, that this court shall not be compelled to consider questions not brought to the attention of the lower court. One is told what hidden figure to search for in a puzzle picture, but who, on looking at either the exceptions or the specifications of error in this record, would suspect that there was involved a question of the burden of proof, or of the significance of the word "bound," or of the effect of a bill of sale made out hours after the transaction, as evidence that the seller named was in fact the seller, and not an agent for a disclosed principal? Other rules, like the provision in rule 24 that the specifications of error in the brief of the plaintiff in error shall be followed with a reference to the portions of the record on which the question is raised, were intended merely for the convenience of the judges, and may be disregarded with less risk to the party's standing in court. The judgment below is affirmed.

LANGAN v. ÆTNA INS. CO.

(Circuit Court, N. D. Iowa, Cedar Rapids Division. September 14, 1899.)

INSURANCE — CONSTRUCTION OF POLICY — OPTION TO REPAIR — ELECTION — APPRAISEMENT.

A fire insurance policy contained a provision, relating to both personal property and buildings insured, that in case of loss or damage the amount of the same should be ascertained or estimated by the parties, or, in case of disagreement, by appraisers to be selected, and that, when so estimated, and proof of loss made, the same should be payable 60 days after receipt

of such proof, but that "it shall be optional, however, with this company, to take all or any part of the articles at such ascertained or appraised value, and also to repair, rebuild, or replace the property lost or damaged * * * within a reasonable time on giving notice within 30 days after receipt of the proof herein required of its intention so to do." It further provided that the company should not be held to have waived any provision or condition of the policy "by any act or requirement or proceeding relative to the appraisal." *Held*, that the estimate or appraisal was a preliminary to, or a part of, the final proof of loss required, and that participation by the company in an appraisal to ascertain the damage done to an insured building did not constitute an election on its part to pay such damage in money, which precluded it from thereafter exercising its option to rebuild or repair on notice given within 30 days after the award of the appraisers was made.

At Law. Action on a policy of fire insurance. Heard on motion to strike out parts of reply.

R. C. Langan and Walsh Bros., for plaintiff.

George S. Steere and Hayes & Schuyler, for defendant.

SHIRAS, District Judge (orally). From the discussion had in this case upon the motion to strike out parts of the reply it is made clear to the court that there is involved in the issues a question of law, the decision of which will materially aid counsel in determining the evidence to be introduced in the further progress of the case; and, as the parties have been heard upon this question of law, the court will indicate the views taken thereof at the present time. The action is based upon a policy of insurance issued by the defendant company upon a brick dwelling house owned by plaintiff, and situated in the city of Clinton, in this state. During the lifetime of the policy a fire happened, greatly injuring the building. Notice thereof was given to the company; appraisers were appointed to estimate the amount of the loss,—the parties not being able to agree thereon; an award fixing the amount of the loss was made and signed by two of the appraisers, and 30 days from the signing thereof the company, in writing, notified the insured that it elected to repair the injured building. The question of law now presented to the court is whether, under the terms of the policy, it was open to the company to repair or rebuild the injured premises, after having participated in an appraisement, the purpose of which was to ascertain and determine in money the amount of the loss caused by the fire to the premises insured. On behalf of the plaintiff it is claimed that if the company undertakes, in connection with the insured, to ascertain and determine the amount of the loss through the medium of an appraisement, it thereby loses its right to repair or rebuild the premises; that under the terms of the policy it is not open to the company to ascertain through an appraisement the amount in money of the loss it may be called upon to pay, and then to elect whether it will pay this amount or whether it will repair the premises in lieu thereof; that this election to repair the property must be exercised before the company takes any steps, under the provisions of the policy, for ascertaining the amount in money of the damage to the property insured; and that, if the company unites with the insured in the appointment of appraisers for the purpose of ascertaining the amount of the loss, such appraise-

ment being had, such action must be held to be an election on the part of the company to indemnify the insured by a money payment. The determination of the question thus presented is dependent upon the construction of the terms of the policy, which forms the contract between the parties, the portions of which, pertinent to the question, are as follows: In the body of the policy it is declared that:

"The company shall not be liable beyond the actual cash value of the property at the time any loss or damage occurs, and the loss or damage shall be ascertained or estimated according to such actual cash value, with proper deduction for depreciation, however caused, and shall in no event exceed what it would then cost the insurer to repair or replace the same with material of like kind and quality. Said ascertainment or estimate shall be made by the insured and this company, or, if they differ, then by appraisers, as hereinafter provided; and, the amount of loss or damage having been thus determined, the sum for which this company is liable pursuant to this policy shall be payable sixty days after due notice, ascertainment, estimate, and satisfactory proof of loss have been received by this company, in accordance with the terms of this policy. It shall be optional, however, with this company to take all or any part of the articles at such ascertained or appraised value, and also to repair, rebuild, or replace the property lost or damaged with other of like kind and quality within a reasonable time, on giving notice within thirty days after receipt of the proof herein required of its intention so to do; but there can be no abandonment to this company of the property described."

In a subsequent clause it is provided that:

"This company shall not be held to have waived any provision or condition of this policy, or any forfeiture thereof, by any act or requirement or proceeding relative to the appraisal, or to any exceptions herein provided for."

In construing contracts of insurance against fire it must be borne in mind that they are not contracts for the payment of a specific sum of money named, but are contracts of indemnity, whereby the company agrees to make good to the insured, up to the limit of the amount named in the policy, any loss or damage caused by fire to the property insured, by a payment in money, or by repairing, replacing, or rebuilding the property injured or destroyed. The mode in which the indemnity shall be given is usually left to the option of the company, which in each case, after a right to indemnity has accrued to the insured, must determine, within the time allowed it by the terms of the policy, whether it will repair or rebuild the property injured or pay in money the ascertained amount of the loss. It is not questioned in this case that under the terms of the policy issued by the company this right of election as to the mode of indemnifying the insured in case of loss by fire is secured to the defendant, the insurance company, but it is claimed that it must make the election before entering upon an appraisal of the loss caused by the fire; or, in other words, the contention of the plaintiff is that, if the company calls for an ascertainment of the extent of the damage caused by the fire to the insured property, or unites with the property owner in an appraisement of the damages, such action must be deemed in law to be an election on its part to pay the loss in money, and that the company cannot afterwards elect to make good the loss by replacing, repairing, or rebuilding the injured property or premises. The proceedings to be taken in case of a fire injuring or destroying property covered by insurance in the defendant company are clearly pointed

out in the policy, which forms the contract of the parties. Upon the happening of the fire it is made the duty of the insured to give notice thereof to the company, and to take proper charge of the property injured. Then the amount of the loss or damage is to be ascertained or estimated, it being expressly declared in the policy that "said ascertainment or estimate shall be made by the insured and this company, or, if they differ, then by appraisers." Under the former part of this clause in the policy, in order to establish a right to claim indemnity from the company, it is necessary that the insured shall have the amount of the loss or damage ascertained, and then to furnish proof thereof to the company. The ascertainment of the amount of the loss must be had in one of the modes provided for in the policy itself, to wit, either by the parties agreeing on the amount, or by having the same ascertained by appraisers; and by the express terms of the policy this ascertainment of the amount of the loss, either by agreement or by appraisement, forms an essential part of the proof which must be furnished to the company as a condition precedent to the right to maintain an action against the company, unless the furnishing thereof is waived by the company. Hamilton v. Insurance Co., 136 U. S. 242, 10 Sup. Ct. 945; George Dee & Sons Co. v. Key City Fire Ins. Co. (Iowa) 73 N. W. 594.

Turning now to the contract of the parties, what do we find therein provided as the steps to be taken upon the happening of a fire? In the policy it is provided that, in case loss or damage is caused to the insured property by fire, the insured shall forthwith give notice thereof to the company, and shall take all proper steps to protect the injured property from further damage. Then it is provided that the amount of the loss shall be ascertained either by the parties agreeing on the amount, or, in case they differ, then by an award of appraisers appointed in the mode pointed out in the policy; and, the amount of the loss having been thus determined, and satisfactory proof of the loss having been furnished to the company, then, in 60 days after receipt of such proof, the company becomes bound to pay the amount of the loss, it being, however, further provided that it shall be optional with the company to repair, replace, or rebuild the property lost or destroyed within a reasonable time, on giving notice of its intention so to do within 30 days after receipt of the proof required by the terms of the policy. Is there any possible doubt that the company, when it executed the policy in suit, had the option to fulfill its contract of indemnity, in case of loss, by either a money payment or by repairing or replacing the injured property? The plaintiff does not claim that this right to choose between two methods of performance was not secured to the company by the terms of the contract, but the contention is that, by entering into an appraisement in order to ascertain the amount of the loss, the company then elected between the two modes of performance, and could not afterwards exercise the right to repair the building. According to this contention, the company is compelled to make its election before joining with the insured in any steps looking to the ascertainment of the extent of the damage to the property insured; but what does the policy provide with respect to the time within which the company may elect to re-

place or repair the property? It is therein recited that "it shall be optional, however, with this company, to take all or any part of the articles at such ascertained or appraised value, and also to repair, rebuild, or replace the property lost or damaged with other of like kind and quality, within a reasonable time, on giving notice within thirty days after receipt of the proof herein required of its intention so to do." Clearly, there is thus secured to the company the right to elect to replace or repair the injured property within a period of 30 days from some named time or event. When does the 30-day period begin to run? Not from the date of the fire, nor from the date when the first notice thereof is given to the company, but from the date of "the receipt of the proof herein required." What proof is thus referred to? Can the reference be to any other matter save the proof provided for in the preceding sentence,—being the proof necessary to be furnished as a condition precedent to the maintenance of a suit, and which is required to be furnished in order to start the running of the 60-day period which must elapse after the receipt of proof by the company before the money payment becomes due and payable? The policy clearly points out the proof that must be furnished in order to fix a liability upon the company, and then, in effect, it provides that within 30 days from the receipt of this proof the company may give notice of its intention to replace or repair the injured property, and, if it does not give such notice, then in 60 days from the receipt of the proof it must pay the proper amount in money. Under the terms of this policy there is no other time designated for the beginning of the 30-day period within which the company has the right to give notice of its intent to replace or repair the injured property than the receipt of the proof of loss, and the only proof of loss provided for in the policy is that which, when furnished, will enable the insured to maintain an action against the company if the company does not meet the obligation on its part. This proof includes the ascertainment of the amount of the loss either by the agreement of the parties or by appraisement when they cannot agree. In order to set either or both the periods of 60 and 30 days secured to the company to running, it is necessary for the insured to furnish the proof required by the policy. These periods are intended to be set to running at one and the same time, and by one and the same event, to wit, the receipt by the company of the completed proofs of loss called for by the policy. Under a policy worded as the one under consideration, how can the insured terminate the election secured to the company of indemnifying the insured for a loss suffered by either replacing or repairing the property or by paying the amount in money? Can the company be compelled to make its election in any other way than by the insured furnishing the proofs of loss called for by the policy? In what way can the insured bring to an end the 30-day period within which the company may elect to repair, replace, or rebuild, except by furnishing completed proofs of loss to the company, thus setting the time to running? If, in order to secure the completed proofs of loss, it is requisite that an appraisement should be had, upon what ground can it be successfully maintained that if the company, as it is its duty to do, unites with the insured in

procuring an appraisement of the damages, the company thereby waives its right to determine, within 30 days after the receipt of the completed proof, whether it will replace or repair the injured property, or pay the damages in money? The argument is that, when the company unites with the insured in an appraisement of the damages, it thereby elects to pay the amount of the loss in money, but this construction of the contract certainly does violence to the language of the policy. Thus, in the body of the policy are found the words providing for the ascertainment of the loss by appraisers if the parties do not agree, the furnishing the completed proofs, and the obligation to pay within 60 days thereafter; and then follows the sentence already quoted, in which it is said, "It shall be optional, however, with this company to take all or any part of the articles at such ascertained or appraised value, and also to repair, rebuild, or replace the property lost or damaged. * * *" The word "however" is here used in its conjunctive sense of "nevertheless" or "notwithstanding," and its reference is to the preceding sentence, the meaning thereof being that, notwithstanding the provision in the preceding clause, providing for payment in money within 60 days after receipt of the proofs of loss, it is optional with the company to elect to repair, replace, or rebuild the injured property, provided it gives notice of its intention so to do within 30 days after the receipt of the proofs. That it was not the intent of the parties to contract that, if an appraisement was had in order to ascertain the amount of the loss, such act should be deemed to be an election on part of the company to pay in money, is further evidenced by the clause found therein which recites that "this company shall not be held to have waived any provision or condition of this policy, or any forfeiture thereof, by any act or requirement or proceeding relative to the appraisal." If the contention of plaintiff be sustained that the entering into an appraisal must be held to be a waiver on part of the company of its right to fulfill its contract of indemnity by replacing or repairing the damaged property, then the foregoing clause is rendered of no avail. This provision of the contract was evidently intended to secure to the company the right to have the amount of the damages caused to the insured property ascertained by an appraisal, without thereby losing any of its rights secured to it by the contract; yet it is now contended that, properly construed, the contract means that if the company does call for or unite in an appraisal of the damage, it thereby loses the right to replace or repair the property,—a right clearly provided for in the contract. That this cannot be held to be the true meaning of the clause securing to the company the option to replace or repair the injured property is evidenced by the other provisions therein found. This clause covers insurance upon personal as well as real property, and secures to the company an option in cases of loss to either kind of property. Where personalty is insured, it is provided, in case of injury thereto, that the company has the option to take any of the articles at such ascertained or appraised value; the meaning thereof being that the value of the articles of personal property is to be ascertained as it was before the fire, and the value thereof in their damaged condition, and then the company has the option to take the dam-

aged articles at the valuation fixed thereon, being in that event bound to replace the articles with others of like kind and quality, or to pay the insured the value of the articles before the fire injured them. This option in case of insurance upon personalty is secured to the company in the same clause or sentence of the policy that gives to the company the right to repair the building in cases of insurance upon realty, and the time within which these options may be exercised is the same in both instances, to wit, within 30 days from receipt of proofs by the company. Certainly, it must be true that in cases of insurance upon personalty the ascertainment by appraisement of the extent of the damages caused by a fire does not deprive the company of its option to take the damaged articles at the appraised value, and if an appraisement does not defeat the option secured to the company in a case of insurance upon personalty, why should it be held to have that effect in a case of insurance upon realty? The clause under consideration deals with both kinds of insurance in the same sentence. After providing for an appraisement, it is declared that it shall be optional with the company to take all or any part of the articles at the ascertained or appraised value, "and also to repair, rebuild, or replace the property lost or damaged with other of like kind or quality." This part of the sentence includes both realty and personalty. In case articles of personalty are injured or destroyed, they may be replaced with others of like kind and quality. In case a building is damaged or destroyed, it may be repaired or rebuilt. This part of the clause secures to the company the right to make good its contract of indemnity by replacing the personalty and by repairing or rebuilding the realty. For illustration: A policy of insurance of the form of that now under consideration is issued, covering, as frequently happens, a building and its contents, being articles of personalty. A fire happens, injuring the building, and destroying part of its contents and injuring the remainder. An appraisement is had for the purpose of ascertaining the extent and amount of the loss and damage to the building and its contents. The appraisers award that part of the personalty is a total loss, fixing the amount of the loss, and part is damaged, being of a certain value, and that the building has been injured in a given amount. Upon the receipt of proof of this appraisement, and before the lapse of 30 days, the company, in writing, notifies the insured that it elects to take the damaged personalty at the appraised value, and to replace the destroyed and injured personalty with other of like kind and quality, and that it elects to repair the injured building. Is it open to the insured to say that by entering into the appraisement the company had secured the right to take the damaged personalty at the appraised value, but had lost the right to replace the personalty by other articles of like kind and quality? The contention is that by calling for an appraisement the company indicates its intention to elect to make a money payment, instead of replacing or repairing the property, and that by uniting in an appraisement it makes the election, and is bound thereby. Certainly, the terms of the policy do not declare the act of appraisement to be an election between the two modes of performance open to the

company. The policy requires the ascertainment of the amount of the loss, either by agreement or by an appraisement, as part of the completed proofs, and then provides that within 30 days after the receipt of the proofs the company may elect to replace the destroyed property. Is it not clear that the company will ordinarily be better prepared to intelligently exercise the option to perform its contract of indemnity by making a money payment, or by replacing the injured or destroyed property, after the extent of the loss and damage have been ascertained in the mode provided for in the policy, than if it is compelled to make the election before it is permitted to ascertain the extent of the loss which it is called upon to make good? Is there any good reason, founded in public policy or otherwise, that prevents the parties from agreeing that the company shall not be compelled to elect between the two modes of performance until the amount of the loss or damage has been ascertained either by agreement or by appraisement? Unless forbidden by statute or by some well-recognized principle of public policy, it must be true that the company has the right to secure to itself the privilege of performing its contract of indemnity by a money payment, or by replacing or repairing the destroyed or injured property, and to designate in the policy the time within which this lawful right of election may be exercised. In the policy issued by the defendant company it is provided that in case of loss it is optional with the company to discharge its liability either by a money payment or by replacing or repairing the destroyed and injured property, and the mode and time within which the company may exercise its election as to the manner of performance are clearly pointed out. If it elects to replace or repair the property, it must so notify the insured, in writing, within 30 days after the receipt of the proof required to be furnished to the company, and, if such notice is not given, it is held to elect to indemnify the insured by a money payment. It seems clear that this is the fair and reasonable construction of the terms of the policy, which evidences the contract of the parties, and I should not hesitate in so holding were it not for the cases of Elliott v. Insurance Co., 79 N. W. 452, decided by the supreme court of Iowa, and McAllaster v. Insurance Co., 50 N. E. 502, decided by the court of appeals of the state of New York, which are relied upon by plaintiff as sustaining the construction contended for by him. In the Elliott Case, as appears on the face of the opinion, the terms of the policy did not provide that action taken in the way of an appraisement should not be held to be a waiver of any of the conditions of the policy, and in the course of the opinion the court held that the case of Platt v. Insurance Co. (Ill. Sup.) 38 N. E. 580, cited by defendant, was not in point, because in that case the policy provided that arbitration should not affect the rights of either party, and therefore, in the Elliott Case, the supreme court of Iowa did not have under consideration the exact point presented by the terms of the policy now in suit. In the McAllaster Case, however, the court of appeals of New York had before it a policy of the same form as the one in question in this action, and its decision is, therefore, directly in point, and the conclusion therein reached fully sustains the contention of the plaintiff herein,

it being held that "a resort to arbitration by the company is an election to make payment in money." In view of the fact that the construction I should place on the terms of the policy does not accord with the conclusion reached by the New York court of appeals, it is greatly to be desired that the question should be settled by the circuit court of appeals, especially in view of the fact that there are several cases pending between the parties in which this question is involved, and I therefore trust counsel will unite with the court in preparing the record in such shape that the question may be speedily and inexpensively considered before the appellate court.

CHESAPEAKE & O. R. CO. v. HENNESSEY.

(Circuit Court of Appeals, Sixth Circuit. October 3, 1899.)

No. 665.

1. MASTER AND SERVANT—ASSUMED RISK—HANDLING DEFECTIVE CARS.
A switchman employed by a railroad company in switch yards at the end of a division, where trains are inspected and defective cars taken out and placed on side tracks for repair or removal to the shops, and whose daily duty it is to couple and handle such defective cars, assumes the extra risk due to their defective condition, and which is necessarily incident to his employment.

2. SAME.
Where it was a part of the regular duties of a switchman to handle defective and broken cars, which were taken from trains and placed upon special side tracks used for the purpose, the mere presence of a car on such tracks was notice to him that it was probably defective, which cast upon him the risk in handling it, and the duty of examining it for the particular defect, although sound cars, improperly loaded, were occasionally placed on the same tracks.

3. SAME—INSTRUCTING SERVANT—LIMITS OF MASTER'S DUTY.
Where a servant has notice of the general risks and dangers of his employment, such as that many of the cars which he is required to handle as a switchman are defective, the master is not guilty of negligence in failing to notify him of each particular defect, as such duty, if required, is one necessarily devolving on fellow servants, for whose particular acts of negligence the master is not responsible.

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

James M. Hennessey was foreman of a switching crew employed in the yard of the Chesapeake & Ohio Railroad Company at Russell, Ky. While engaged in making a coupling in the yard of the company, he sustained an injury. This suit was brought to recover damages for the injury so sustained. Russell was the end of a division. All cars passing there were inspected. For this purpose two inspectors were employed. As many as six or eight hundred cars pass Russell each day. When a car was found to be defective, it was marked on the sides "Shop." This signified to the yard master that the car must not proceed, but must be taken out of the train, and placed on the shop or repair tracks. These were two in number, and known as tracks "8 and 9," or "Shop" or "Repair" tracks. These were spur tracks, and were entered only from the western end. Each track held about 25 cars. Cars, when placed on these shop tracks, were cut so that each car stood separated by two or three feet from every other car. Cars, when placed on these tracks, were inspected by the foreman of repairs. If the defect was one which could be repaired at Russell, it was repaired where it

stood. If so seriously defective as to be more advantageously repaired at Huntington, which was near by and the location of the general shops of the company, it was chalked, "Huntington Shop," "Transfer." This meant that the car was to be forwarded to Huntington, as too defective for repair at Russell. The foreman of repairs determined whether the repair should be made at Russell or Huntington. It was the business of the switching crews to take all cars marked "Shop," or otherwise withdrawn from use, and place them on the shop tracks. It was likewise their duty to pull out from the shop tracks all cars which had been repaired, or which were to be sent to Huntington for repairs, and place all such cars upon proper tracks for forwarding. This was done under the general order and direction of the yard master. Cars which had been repaired were chalked by the foreman of repairs "O. K.," and were locally called "O. K.'d cars." A blue flag was placed upon the car at the western end of these shop tracks. This meant that repairs were going on, and that no engine or moving car was to come in contact with the cars on such tracks while the blue flag was up. Once a day, and sometimes oftener, this blue flag was taken down by direction of the yard master, and all cars O. K.'d or chalked for Huntington were pulled off by the switching crews, and placed on proper tracks to be carried to destination. Mixed in with O. K.'d cars would be cars not yet repaired. This necessitated the coupling of all the cars standing on the track, the pulling out and separation of cars to go on, and the "kicking back" of cars not yet repaired. There were two switching crews employed in this yard. Hennessey had been employed on one of these crews for about three years. At the time of his injury, he was foreman of one of the crews. All the switching necessary in the yard was done by these crews. This involved the making up of trains and the disintegration of such as had at Russell their terminus. It also involved the handling of all defective or improperly loaded cars, and the handling of the cars standing on the shop tracks for the purposes already mentioned. It was also the business of the inspectors to order out of trains all cars which appeared to be improperly loaded, and detain them to have loading readjusted. Improperly loaded cars were also placed on the shop tracks, when there was room, and their loading there corrected. There was some conflict in the evidence as to whether such improperly loaded cars were marked "Shop" or not. Hennessey was engaged in "pulling" the cars on repair track No. 9 at 4:15 p. m., January 30, 1897, when he was injured. The two cars at the rear or east end of that track were numbered, respectively, 10,845 and 14,694. The latter was the rear car, and had been O. K.'d. Car 10,845 was the next car, and was a flat car loaded with bridge stone. This car (No. 10,845) arrived in the yard at noon, January 28th, from a point west of Russell, and was destined to a point east of Russell. This car on the 29th was seen upon a track called the "Pit Track," which led only to a gravel bank. While on that track it was seen by Hennessey, though he was not nearer to it than 125 feet. He says that from where he saw it he could see that the stone with which it was loaded was projecting over one end some 2 or 2½ feet. That car, on the night of the 29th, was placed upon the shop track, where Hennessey next saw it just as he was about to couple it to the car next east, being the empty O. K.'d gondola car No. 14,694. Hennessey and another, by direction of the yard master, were coupling the whole train of cars standing on repair track No. 9, in order to get out the O. K.'d cars to be put in trains and forwarded. They began to couple from the west or front end of the track, and had coupled all but the last two cars. Hennessey passed down along the cars until he reached the gondola, when he placed a link in its drawhead, and stood waiting for the approach of car No. 10,845. It came toward him slowly. He saw, he says, that it was the car he had seen on the pit track the day before, and that its load projected over the east end. He stooped to avoid the projecting stone, and guide the link into the slot of its drawhead. The link missed the slot, struck the surface of the drawhead above the slot, bent, and crushed his fingers. This mishap was due to the fact that the drawhead of the car was from two to three inches below the drawhead of the stationary car in which he had pinned the link. This difference in the height of the two drawheads was due to the defective condition of car No. 10,845. Upon subsequent examination, it appeared that five of the six sills

running lengthwise under the floor of the car had been broken, causing the floor to sag to one side, and one end some two or three inches, carrying down with the sagged end the drawhead in which Hennessey undertook to place the link he was guiding. Hennessey says that he had not observed this defective condition of this car, and supposed it was simply a defectively loaded car, and had been put on the shop track for that reason. He says the projection of the load over the drawhead and the cloudiness of the evening prevented him from seeing the condition of the drawhead. There was no evidence as to why this car had been stopped at Russell, other than that deducible from its condition, its load, and the track on which it was placed. Shortly after the accident the car was found to be chalked, "Huntington Shop," "Transfer," but there was a conflict in the evidence as to whether it had been so marked before or after the accident. There was a verdict for the plaintiff below. The railroad company has sued out this writ of error.

A. M. J. Cochran, for plaintiff in error.

T. N. Ross, for defendant in error.

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

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

If the railroad company is liable to Hennessey, upon the undisputed facts of this case, it must be either because it was negligent in permitting the car in question to be and remain in the damaged and dangerous condition it was when Hennessey, in the course of his duty, undertook to couple it to another car, or because it was negligent in not giving to Hennessey notice of that condition before allowing him to make the coupling.

1. Was the company responsible for the condition of the car which Hennessey was hurt in coupling? There is no positive evidence as to when or how the car was damaged or its load displaced. But whether the car had been damaged on the road or in the yard, or the load become displaced before or after it reached the yard, the car had in fact been withdrawn from use, and placed upon the tracks devoted to damaged or improperly loaded cars. The presumption is that it was placed there, not only on account of its displaced load, but also because of its defective condition. In the view we take of the principles of law which govern the case, it is unimportant whether it was placed there for both reasons or only one, and equally unimportant whether the damaged condition had been discovered by the inspector before it was sent to the shop track or not. The fact is, a badly damaged car, with a badly displaced load, displaced, presumptively, as a consequence of the defective character of the car, was standing upon a track devoted primarily to damaged cars. What was the significance of the fact that this car was standing upon the shop or repair track? Hennessey was an old employé. He had worked in this yard for about three years, and was the foreman of his crew. He knew the uses to which tracks 8 and 9 were devoted. That occasionally a car neither defective nor badly loaded was found upon that track is of no moment. The primary use of those tracks was for the storage and repair of damaged cars. From six to eight hundred cars went through this yard every day. They were there stopped and inspected. Cars damaged were taken out

from the trains, and placed on one or the other of these tracks. When full, as sometimes happened, such cars were temporarily placed on other tracks. The evidence was that from six to twenty cars were found defective and stopped each day. Hennessey was employed as a switchman in this yard, and it was part of his duty to handle these damaged cars. He might find such cars on any of the tracks. He knew that the great majority of those standing on the repair tracks had been placed there because they were defective. To get out cars from that track was a part of his duty. It was a duty of each day. To get out cars which had been repaired involved the coupling together of the whole train of separated cars. Among the repaired cars, his experience advised him, were cars too badly damaged to be repaired at Russell, and which it would be his duty to get out and place where they would be transferred to the general shops at Huntington. So he knew that there would be found on the track cars not yet repaired, which would have to be put back after getting out the repaired cars. Manifestly, his duty involved the handling of cars not fitted for use and dangers not incident to the ordinary work of one engaged in the ordinary operation of a train of cars. That a railway company is under obligation to its employés to exercise every reasonable precaution to see to it that damaged cars are not admitted into its trains is well established. Hough v. Railway Co., 100 U. S. 213; Railroad Co. v. Herbert, 116 U. S. 642, 6 Sup. Ct. 590; Railway Co. v. Archibald, 170 U. S. 665, 18 Sup. Ct. 777; Felton v. Bullard (decided by this court May 15, 1899, and not yet officially reported) 94 Fed. 781. That employés may ordinarily rely upon this being the case is also elementary. The rule stated is but an application of the general rule that the master personally owes to the servant the duty of using care and caution in providing for his use reasonably safe instrumentalities of service. Felton v. Bullard, cited above; Hough v. Railway Co., 100 U. S. 213; Gardner v. Railroad Co., 150 U. S. 349–355, 14 Sup. Ct. 140; Shear. & R. Neg. § 194. This, as to railway companies, involves the duty of inspection and of removing from trains all cars found defective. Unless damaged cars are removed from the trains wherein they have become damaged, and placed where they can be repaired, how is the master to provide reasonably safe cars to those servants who are engaged in the operation of his trains, and who have a right to rely upon the master to see that defective cars are not admitted to its trains or continued in use after they become damaged? The rule is well settled that if the work of the employé consists, in whole or part, in dealing with damaged or defective cars, and which, by the very nature of his occupation, he must know, or have reason to know, are unsafe and dangerous, he voluntarily assumes the risk and hazards which are incident to the duty he has engaged to perform. It is not a case where dangerous or defective instrumentalities are supplied by the master to be used in his work, and where notice of such danger should be given, but a case where the instrumentalities to be handled and worked with or upon are understood to involve peril and to demand unusual care. In such cases, the risk is assumed by the servant as within the terms of his contract,

and compensated by his wages. Arnold v. Canal Co., 125 N. Y. 15, 25 N. E. 1064; Yeaton v. Railroad Corp., 135 Mass. 418; Watson v. Railway Co., 58 Tex. 434; Fraker v. Railway Co., 32 Minn. 54, 19 N. W. 349; Kelley v. Railway Co., 35 Minn. 490, 29 N. W. 173; Flanagan v. Railway Co., 45 Wis. 98; Flannagan v. Railway Co., 50 Wis. 462, 7 N. W. 337; Railroad Co. v. Ward, 61 Ill. 130.

In Narramore v. Railway Co. (decided at this term of this court) 96 Fed. 301, Taft, circuit judge, used the following language in defining this doctrine of assumption of risk:

"Assumption of risk is a term of the contract, express, or implied from the circumstances of the employment, by which the servant agrees that dangers of injury obviously incident to the discharge of the servant's duty shall be at the servant's risk. In such cases, the acquiescence of the servant in the conduct of the master does not defeat a right of action on the ground that the servant causes or contributes to cause the injury to himself, but the correct statement is that no right of action arises in favor of the servant at all; for, under the terms of the employment, the master violates no legal duty to the servant in failing to protect him from dangers the risk of which he agreed expressly or impliedly to assume. The master is not, therefore, guilty of actionable negligence towards the servant."

2. But it is said that this car was not marked "Shop," and that it was the custom and usage of the yard to thus designate defective cars. This involves the question as to whether the master personally owes to his servants engaged voluntarily, as an ordinary and expected part of their work, in the handling of cars which are defective, and therefore dangerous, the duty of giving personal notice as to the particular car which is defective. The fact that this yard was an inspection point, and that great numbers of broken cars were left there because of their broken and dangerous condition, was known to Hennessey and his co-laborers in the yard. That his duty was to handle such cars, as well as sound cars, is not disputed. Thus, he was daily engaged in a work and at a place which required him to look out for cars which, from their condition, were dangerous to handle. The fact that the defects might not always be obvious, or that some other servant whose duty it was to designate the particular cars which were damaged might neglect that duty, or might insufficiently give notice, constituted part of the very risk incident to the kind of work in which he had voluntarily engaged. The general usage of the yard seems to have been to designate damaged cars in two ways,—by marking on the side of the car in chalk the word "Shop," and by placing the car upon the tracks devoted to broken and badly-loaded cars, and which for one or the other reason had been withdrawn from use. Assuming, in view of the conflict of evidence, that this car had not been marked "Shop," was that a default in duty which the master personally owed to Hennessey, or was it the neglect of a fellow servant? That a car inspector, in respect of the duty of admitting to the trains of the company cars which are defective and dangerous, or in excluding from such trains cars which become dangerous, is the representative of the master, and not the fellow servant of employés engaged in the operation of trains, is well settled. Felton v. Bullard, cited above. But that rule has no application here. Whether the car inspector employed

in this yard had in fact inspected this car, and retired it from use, is not disclosed by any positive evidence. The facts that it was badly damaged, as well as that its load had become displaced, were very obvious facts. That the car had been stopped at Russell, though destined for a point beyond, and had been placed upon the shop track, raises a plain presumption that the car had been withdrawn from use by the inspectors, or some other authority, because of its condition. The result to be accomplished by inspection had happened. The car was withdrawn from use, and placed where a car so withdrawn should be placed under the rule of the yard. The neglect to mark the car "Shop" was a neglect of another part of the general practice or usage of the yard,—a neglect of a detail of the duty of the inspector or other servant who had withdrawn this car from use, and caused it to be placed where Hennessey found it.

In Arnold v. Canal Co., 125 N. Y. 15, 18, 25 N. E. 1064, "the rule and custom of the business in the yard was to chain up or prop up a defective drawhead which had fallen below its proper level, in order to make the couplings meet." This was not done in Arnold's case, and he sustained his hurt, as he claimed, because of the absence of this sort of notice. The court said: "That was a detail of the servant's work in the yard, and not the master's duty to the servant."

In Yeaton v. Railroad Corp., 135 Mass. 418–420, there was a practice for the yard master to give notice to the switchmen of the defective condition of cars which they were called upon to move. Yeaton was an old employé, and much engaged in handling broken cars in the yard, and accustomed to receive personal notice, but also accustomed to examine for himself. The court said:

"Notice was expected to be received in such cases, but he was also in the habit of looking for himself. It was incident to a service of this description that broken cars might sometimes be put in the wrong place in the yard, and that insufficient notice of defects in them, and of their being put in the wrong place, might be given. These are omissions of notice in respect to matters of detail, which cannot be given in advance, and which are not like an omission to give instructions to an inexperienced hand as to the general dangers to which his service will expose him. The duty of giving notice which rests upon a master in such case was recognized and upheld in the case of Wheeler v. Manufacturing Co., 135 Mass. 294. The distinction between the two cases is plain. The one is a notice of the nature of the risk and peril to be incurred in the course of the employment; the other is a notice of the special danger which springs out of a particular fact, which, in its details, cannot be anticipated. The danger arising from the attempt to move a particular car which may happen to come into the yards for repairs, like the danger which would arise from an attempt to split upon a circular saw a particular warped board, is one which, is the nature of the case, it is impossible for a master to point out on every occasion when the workman may be called upon in the course of his employment to use such material. If there was a neglect in such case to give such information to the plaintiff as ought to be given by one upon whom the duty has been devolved by the master, such neglect is to be treated as that of a fellow servant, and the risk of it must fall within the ordinary rule; because it was an incident to the service which the plaintiff undertook that broken cars might be put in the wrong place in the yard, and that insufficient notice of the defects in them might be given. This is not like a case where dangerous or defective machinery is supplied by a master for a servant to use in his work, and where notice of such danger or defect ought to be given; but it is a case where

the material to be handled and to be worked upon is understood to involve risk and the necessity of care. There was no negligence upon the part of the defendant in sending broken cars for repairs to the yard where the plaintiff was at work. This was a proper place for them. There was no negligence in omitting to give notice to the plaintiff that broken cars were to be sent to this yard for repairs, and that his employment included the duty of handling and moving them. All this he knew already. What he did not know was that this particular car was broken, and that broken cars which were sent for repairs might be found in that part of the yard where this car was. While not disposed to relax the strictness of the rule which requires a master to give fair and reasonable information and instruction to a young, ignorant, or inexperienced servant, as to the perils incident to his employment, we cannot find any warrant, either on principle or on authority, for extending it to a case like the present. Upon the undisputed facts, the risk was one which the law cast upon the plaintiff."

To the same general effect are the cases of Fraker v. Railway Co., 32 Minn. 54, 19 N. W. 349, and Railway Co. v. Ward, 61 Ill. 130.

But, aside from this question that the neglect to mark this car with the word "Shop" was the negligence of a fellow servant, there remains the fact that the warning given by the presence of this car upon the track devoted primarily to damaged cars was in itself a notice to Hennessey, which he could not disregard without assuming all the consequences. That sometimes cars were placed on these shop tracks which were not defective is of no significance, in view of the general uses to which those tracks were devoted. In view of the general duty which rested upon Hennessey to handle damaged as well as sound cars in this yard, he had no right to assume that any car found upon these shop tracks was undamaged. He says he did not see its drawhead, and could not well do so on account of the overreaching load. Yet he assumed its drawhead was in good condition, and, without personal inspection, undertook the coupling. If this car had been in use, he would be justified in assuming, where the defect was not obvious, that the master had discharged his duty in excluding from use all cars which were dangerous by reason of some defect. But this presumption did not exist in reference to this car. The defect was one very easily discovered. The slightest inspection would have advised an experienced brakeman like Hennessey that the end of the car was sagged, and the drawhead below its proper level. Under such circumstances, he assumed the risk, and has no right to say that he relied upon the master's obligation to furnish him safe instrumentalities.

This case was tried upon a totally wrong conception of the principles of law applicable. The request at the conclusion of the whole of the evidence for an instruction to find for the plaintiff in error should have been given. The risk incident to the coupling of this car as a defective car was assumed by the defendant in error. He was also grossly negligent in assuming, without examination, that the drawhead of the car in question was sound. Under no reasonable view which could be taken of the case could there have been a verdict in favor of the defendant in error. Reverse the case, and remand for a new trial.

HUTCHINGS v. LAMSON et al.

(Circuit Court of Appeals, Seventh Circuit. October 3, 1899.)

No. 579.

1. LIMITATION OF ACTIONS—PLEADING.
Unless a declaration shows affirmatively a case outside of all exceptions declared in a statute of limitations, the question of limitation cannot be raised by demurrer, but the facts which exclude the exceptions must be set up by plea.

2. SAME—WHAT LAW GOVERNS.
The general rule is that in respect to the limitation of actions the law of the forum governs, and, while the courts will enforce a limitation established under the law of another state, when applicable, they will not do so to the exclusion of the law of the forum.

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

E. F. Thompson, for plaintiff in error.
David M. Kirton, for defendants in error.

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

WOODS, Circuit Judge. This action was brought by the plaintiff in error, Charles F. Hutchings, executor of the last will of George Fowler, against S. Warren Lamson and Lorenzo J. Lamson, co-partners as Lamson Bros., for the purpose of enforcing against them a statutory liability as stockholders in the Cherokee Brilliant Coal & Mining Company, a corporation organized under the laws of Kansas. The declaration, as amended and added to, contained special counts, designed to show the statutory liability according to the theory approved by this court in Rhodes v. Bank, 24 U. S. App. 607, 13 C. C. A. 612, and 66 Fed. 512, and also the appropriate common counts. To the special counts the court sustained demurrers (82 Fed. 960), and afterwards dismissed the action for failure of the plaintiff to file a sufficient bill of particulars with the common counts. Pending the consideration of the motion to dismiss for the reason stated, the plaintiff asked, but was denied, leave to take a nonsuit. Of the numerous specifications in the assignment of error those in form to be considered are upon the ruling on the demurrer, the requirement of a bill of particulars with the common counts, the denial of a nonsuit, and the dismissal of the action.

If the right to a nonsuit at any time before the jury retires, or, when a jury is waived, before judgment entered, be conceded, it is said the plaintiff was not harmed, because, the case having been dismissed as it was by the court, he is at liberty to bring another action. If that be so, it were certainly better to have avoided the question by conceding to him his rightful way out of court. Whether there was error in this respect we need not decide. The demurrer to the special counts of the declaration was both general and special. It was sustained, as the opinions of the court in the record show, on the ground that the action was barred by limitation of time, both under

the statute of Kansas, where the right of action originated, and that of Illinois, where the action was brought. The ruling was erroneous, since both statutes contain exceptions. Unless a declaration shows affirmatively a case outside of all exceptions declared in a statute of limitations, the facts which exclude the exceptions must be set up by plea, and the question cannot be raised by demurrer.

It is urged by the defendant in error that the counts to which the demurrer was sustained were bad for other reasons, but that argument, in so far as it rests on matters deemed important, calls for a reconsideration of our opinion in Rhodes v. Bank, supra, from which we are not disposed, on any of the grounds suggested, to depart. It has been approved in Whitman v. Bank, 51 U. S. App. 536, 28 C. C. A. 404, and 83 Fed. 288.

The contention of the plaintiff in error that the Kansas statute of limitations alone can have any application to the case is manifestly not tenable. The general rule is that in respect to the limitation of actions the law of the forum governs, and while the courts will enforce a limitation established under the law of another state, when applicable, it does not do so to the exclusion of the law of the forum. It would involve serious and possibly absurd consequences, if it were established that a right of action created and governed by the law of Kansas could be enforced in Illinois after the time when, by the law of the latter state, the action had been barred. The cases cited show that the law of Kansas, if applicable, will be enforced in Illinois, but they do not say nor imply that a like or different limitation by the statute of Illinois may not apply. The cases referred to are Bank v. Francklyn, 120 U. S. 756, 7 Sup. Ct. 757; Pollard v. Bailey, 20 Wall. 527; Terry v. Tubman, 92 U. S. 156; Same v. Anderson, 95 U. S. 628; Carrol v. Green, 92 U. S. 509; Andrews v. Bacon, 38 Fed. 777.

The judgment below is reversed, and the cause remanded with direction to overrule the demurrer to the special counts of the declaration.

ROSENPLANTER v. PROVIDENT SAV. LIFE ASSUR. SOC. OF NEW YORK.

(Circuit Court of Appeals, Sixth Circuit. October 3, 1899.)

No. 695.

1. LIFE INSURANCE—FORFEITURE FOR NONPAYMENT OF PREMIUMS—NOTICE UNDER NEW YORK STATUTE.

   Under Laws N. Y. 1877, c. 321, which requires a life insurance company to mail a notice to a policy holder at least 30 days before the maturity of a premium, to entitle it to declare a forfeiture for default in payment of such premium when due, a notice mailed on the 1st of September of a premium maturing October 1st is ineffectual, and the policy remains in force notwithstanding a failure to pay such premium until terminated by a subsequent notice of the default, and giving 30 days thereafter for payment, as required by the statute.

2. SAME—CONSTRUCTION OF POLICY—TERM CONTRACTS.

   A policy of life insurance which by its terms is to remain in force for one year, but is renewable from year to year thereafter, during the life

of the insured, on payment of the stipulated premiums, except as reduced by the application of the surplus and guaranty fund of the company, although it gives the insured a continuing interest in such fund, is a "term insurance contract for one year or less," within the meaning of Laws N. Y. 1892, c. 690, which expressly repeals Laws 1877, c. 321, and excepts such term contracts from those requiring notice for their termination on account of nonpayment of premiums.

3. SAME—FORFEITURE FOR NONPAYMENT OF PREMIUMS—REPEAL OF STATUTE.
A term contract of life insurance for one year, governed by the laws of New York, was made in 1889, and became subject to the statute of 1877, relating to forfeitures. Prior to the repeal of such law, in 1892, there had been default in the payment of renewal premiums, which, by the terms of the policy, rendered the insurance forfeited, but, by virtue of the statute, it remained in force, owing to the failure of the company to serve the required notice. After the repeal of such law, and the enactment of the new law of 1892, which excepted such policies from those requiring notice before forfeiture, there were further defaults in the payment of maturing premiums. *Held* that, as to all premiums maturing after the repeal of the law of 1877, the policy was not affected by such law, but became forfeited on the nonpayment of such premiums in accordance with its own provisions.

4. CONSTITUTIONAL LAW—IMPAIRING OBLIGATION OF CONTRACTS—REPEAL OF STATUTE.
Laws N. Y. 1877, c. 321, providing that no life insurance company should declare a policy forfeited for nonpayment of premiums until it had given the insured a prescribed notice, did not become a part of contracts of insurance made while it was in force, but merely suspended the operation of the provisions of such contracts declaring forfeitures until the required notice was given; hence the repeal of such statute left the contracts made by the parties in full force, and was not an impairment of their obligation.

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

This was an action upon a policy of life insurance. The defendant demurred to the declaration. The demurrer was sustained, as not stating a good cause of action. 91 Fed. 728. From the judgment thereon the plaintiff sued out this writ of error.

W. D. Wilkerson, for plaintiff in error.
Frank P. Posten, for defendant in error.

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

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

The declaration shows that the contract of insurance upon which the suit was brought was made April 1, 1889. In consideration of the premium paid and stipulated to be paid, the insurance society agreed to pay the plaintiff, Mary A. Rosenplanter, the wife of the insured, Carlos G. Rosenplanter, the sum of $10,000 within 90 days after acceptance of satisfactory proof of the death of said Carlos G. Rosenplanter, "provided such death shall occur before 12 o'clock on the 1st day of April, 1890." The said contract further obligated the society "to renew and extend said insurance upon like conditions during each succeeding year of the life of the insured from the date thereof upon the payment of the annual renewal premiums

for the actual age attained by said insured, in accordance with the schedule printed on the next page of said policy, for each one thousand dollars insured, except as reduced by the application of the surplus and guaranty fund, such payments to be made in semi-annual equivalents, payable on 1st days of October and April, respectively, in each succeeding year." But it was further provided in said policy that, if "the mortality in this society shall continue as favorable in the future as it has been in the past in the largest and best companies, this insurance will be extended and renewed, during the whole expectation or probable lifetime of the within-named insured, at the rate of premium charged for the first year only of this policy." It was also a term of the policy that failure to pay when due any semiannual equivalent "will terminate the policy," and that, "subject to the stipulations regarding payment of premiums," the policy should, if the death occurred two or more years after its date, "be incontestable, except for fraud in obtaining this policy." The form of the policy is not at all like that construed in Insurance Co. v. Statham, 93 U. S. 24, where it was said: "These policies did assure the life of the party named in a specific amount for the term of his natural life." The policy here involved is an agreement for a policy of insurance from year to year, and the payment of an annual premium only paid for an insurance for a single year. The extension of the policy for a succeeding year depended upon compliance with the terms and conditions in respect of a further premium payment to be made by the insured. "It was," to quote the language of the court of appeals of New York in McDougall v. Society, 135 N. Y. 551–553, 32 N. E. 251, where a policy in essentials much the same was involved, "a contract for an insurance for the term of one year only, providing, however, by its terms, for its renewal for successive years upon compliance by the assured with the conditions named." Nevertheless, the terms upon which it might be renewed by the payment for succeeding years of the same rate of insurance charged for the first year only, notwithstanding the higher rate chargeable for the greater age of the insured, and the growing interest of the assured in the surplus premiums paid by him which go to form a reserve or accumulated fund operating to reduce subsequent premiums, gave to the insured an interest in the contract beyond the mere insurance for the term of a current year. We shall therefore assume that this contract was within the meaning and protection of chapter 321 of the New York Laws of 1877. McDougall v. Society, 64 Hun, 515, 19 N. Y. Supp. 481. That statute was in force when this policy issued. Among other things, it provided that:

"No life insurance company doing business in this state shall have power to declare forfeited or lapsed any policy hereafter issued or renewed by reason of non-payment of any annual premium or interest, or any portion thereof, except as hereinafter provided. Whenever any premium or interest due upon any such policy shall remain unpaid when due, a written or printed notice stating the amount of such premium or interest due on said policy, the place where said premium or interest should be paid, and the person to whom the same is payable, shall be duly addressed and mailed to the person whose life is assured"

Omitting the description of the part of the notice for the payment of an unpaid premium, and declaring a forfeiture if the notice is not complied with, the final proviso reads:

"Provided, however, that a notice stating when the premium will fall due, and that if not paid the policy and all payments thereon will become forfeited and void, served in the manner hereinbefore provided, at least thirty and not more than sixty days prior to the day when the premium is payable, shall have the same effect as the service of the notice hereinbefore provided for."

The contract in question is a New York contract, and specifically provides that "at all times and places" it "shall be construed to be a contract made in the city of New York."

The declaration avers that the insured paid the semiannual premium for April 1, 1889, and the semiannual premium due October 1, 1889, and the semiannual premium due April 1, 1890, and the semiannual premium due October 1, 1890, and the semiannual premium due April 1, 1891; but that he did not pay the semiannual premium due October 1, 1891, or the semiannual premium due April 1, 1892, or the semiannual premium due April 1, 1893, or the semiannual premium due October 1, 1893, or the semiannual premium due April 1, 1894; and that the insured died September 5, 1894, leaving six semiannual premiums due and unpaid. The averment of the declaration is that, notwithstanding the nonpayment of said last six semiannual premiums, the policy was in force at the death of the insured, by force of the said New York statute of 1877. The further averment is that the said insurance society "did mail the notice required by the said statute on the 1st day of September, 1891, to the insured," of the semiannual premium due and payable October 1, 1891, but that said notice was mailed only 29 days prior to October 1, 1891, and not at least 30 days prior to the maturity of a premium, as required by the said statute, and that no other notice in respect to that premium, nor any of those which subsequently accrued, was ever given or mailed. In consequence of this noncompliance with the said statute, it is contended that the said policy was in full force and effect at the date of the death of the insured.

The learned judge who presided in the circuit court yielded to the authority of the case of Hicks v. Insurance Co., 9 C. C. A. 215, 60 Fed. 690, and reported as Rae's Ex'rs v. Insurance Co., 20 U. S. App. 410, decided by the United States circuit court of appeals for the Second circuit, and held that the day upon which this notice was mailed should be excluded in the computation of time, and hence that it had not been mailed 30 days prior to the day when the premium due October 1, 1891, fell due, and that the society was in no better position than it would be if no notice had been mailed. The opinion of the Second circuit court of appeals is based upon the decisions of the courts of New York, and involved the construction of the same New York statute here under consideration. Accepting this opinion as an authoritative interpretation of the law of New York, we concur in holding that the notice given was not the notice required by that law, and was ineffectual to terminate the contract, under the provisions in respect to the forfeiture or lapsing of New York contracts

of insurance made subject to the provisions of the act of 1877. The notice required by the act of 1877 might be either a notice of the time when a premium would fall due or of a default in the payment of a premium. If given before default, the requirement is that the notice shall be mailed "at least thirty and not more than sixty days prior to the day when the premium is payable." If given after a default has been made, the requirement is equally specific that it shall be a notice that a premium is due and unpaid, and that if not paid within thirty days "after the mailing" of such notice the "policy and all payments thereon will become forfeited and void." The same section also provides that, "in case the payment demanded by such notice shall be made within the thirty days limited therefor, the same shall be taken to be in full compliance with the requirements of the policy in respect to the payment of said premium or interest, anything to the contrary notwithstanding; but no such policy shall in any case be forfeited or declared forfeited or lapsed until the expiration of thirty days after the mailing of such notice."

The notice given before the premium fell due was insufficient, and no notice whatever was given after the nonpayment of that premium. The effect of the prohibition against declaring a forfeiture of the interest of the assured under the contract was to keep the policy alive as a valid subsisting insurance, notwithstanding the stipulations of the parties to the contrary. The duration of the policy, so long as it was dominated by the statute, was not dependent upon the payment of premiums on the day named therein, but upon payment within 30 days after the statutory notice should be given. The only way in which the policy could be terminated under the statute was by the failure of the insured to pay his premium upon notice "mailed" 30 days before the premium was due, or by a notice of default and demand for payment within 30 days after mailing such notice. Baxter v. Insurance Co., 119 N. Y. 450–455, 23 N. E. 1048.

But for the subsequent act of May 18, 1892, there could be no serious doubt that this policy was in force at the date of the death of the insured, no effectual statutory notice having been given. Chapter 690 of the Revision of the Statutory Laws of New York, approved May 18, 1892, is a general act revising the whole law of the state of New York in respect of insurance corporations, and expressly repeals all of chapter 321 of the act of 1877. By section 92 of that act it is provided:

"Sec. 92. No Forfeiture of Policy Without Notice. No life insurance corporation doing business in this state shall declare forfeited, or lapsed, any policy hereafter issued or renewed, and not issued upon the payment of monthly or weekly premiums, or unless the same is a term insurance contract for one year, or less, nor shall any such policy be forfeited, or lapsed, by reason of nonpayment when due of any premium, interest or installment or any portion thereof required by the terms of the policy to be paid, unless a written or printed notice stating the amount of such premium, interest, installment, or portion thereof, due on such policy, the place where it should be paid, and the person to whom the same is payable, shall be duly addressed and mailed to the person whose life is insured, or the assignee of the policy, if notice of the assignment has been given to the corporation, at his or her last known post-office address, postage paid by the corporation, or by an officer thereof, or per-

son appointed by it to collect such premium, at least fifteen and not more than forty-five days prior to the day when the same is payable.

"The notice shall also state that unless such premium, interest, installment, or portion thereof, then due, shall be paid to the corporation, or to a duly appointed agent or person authorized to collect such premium by or before the day it falls due, the policy and all payments thereon will become forfeited and void except as to the right to a surrender value or paid-up policy as in this chapter provided.

"If the payment demanded by such notice shall be made within its time limited therefor, it shall be taken to be in full compliance with the requirements of the policy in respect to the time of such payment; and no such policy shall in any case be forfeited or declared forfeited, or lapsed, until the expiration of thirty days after the mailing of such notice.

"The affidavit of any officer, clerk or agent of the corporation, or of anyone authorized to mail such notice, that the notice required by this section has been duly addressed and mailed by the corporation issuing such policy shall be presumptive evidence that such notice has been duly given."

Section 291 of this act provides that no right acquired or accrued, or penalty or forfeiture incurred, prior to October 1, 1892, should be affected by the repeal of the laws theretofore in force, but otherwise manifestly subjects policies then in force to the act of 1892, in respect of payment of premiums thereafter falling due. This act of 1892 excepts from its terms policies which are "term insurance contracts for one year or less." The policy in suit is, as we have endeavored to show, a term insurance contract for one year, and therefore falls within the exception of the section. McDougall v. Society, 135 N. Y. 551–556, 32 N. E. 251; Baldwin v. Society (Sup.) 48 N. Y. Supp. 463. At least three semiannual premiums fell due after the passage of this act of 1892. If this act did not require that notice should be given prior to the falling due of any premium, or notice of any default in payment, as did the act of 1877, then no notice was necessary, except such notice as the contract itself requires.

In the case of Baldwin v. Society, supra, there was involved a policy issued in 1885. It was kept alive by payments of premiums until January, 1895. A call for a premium due February 9, 1895, was sent out. The assured died February 19, 1895, without having paid the premium thus called. It was, among other things, contended by the counsel for the beneficiary that this notice was not a sufficient compliance with the terms of this act of 1892, the act in force when the premium fell due. To this the court replied by saying:

"The policy, however, falls within the exception of the section,—that is, it is either a policy issued upon the payment of a monthly premium, or it is a term insurance contract for a year or less, in which case no notice is necessary; and in this view we are sustained by the decision of the court of appeals in McDougall v. Society, 135 N. Y. 551, 556, 32 N. E. 251. Judgment should be entered for the defendant."

It is not a question as to whether this policy was "one issued or renewed" after the passage of the act of 1892. It had been kept alive by force of the act of 1877 so long as that statute regulated the subject of forfeitures and notices. When the act of 1877 was repealed by the act of 1892, the whole subject was thereafter regulated only by the latter act. If it did not prescribe some notice in respect to the forfeiture of policies for the term of one year, the only notice

which the insured could demand in respect of premiums which should fall due thereafter would be such notices as the contract itself prescribed or which had otherwise become a term of the agreement between the parties. In this view of the case, the policy lapsed by reason of the nonpayment of the premiums which fell due after the passage of the act of 1892, notwithstanding no notice was given.

But the very zealous and learned counsel for the beneficiary have very strongly urged that, as this contract was made while the act of 1877 was in force, the provisions of that act became so incorporated into the contract as to become a part of the contract itself, and that the provisions of the act of 1877, prohibiting a forfeiture of the interest of the insured in the policy without a notice, according to the terms and conditions of the statute, became as much a term and stipulation of the policy as if inserted therein by the parties themselves. Upon this assumption, they insist that the act of 1877 could not be altered or amended or repealed so as to subject the contract to forfeiture without the statutory notice, as such repeal or amendment would impair the obligation of the contract. To this we cannot agree. The contract which the parties themselves made was one for an insurance for a single year, with the privilege of renewal for succeeding years upon condition of the payment of an additional premium upon the day named in the policy. Failure to renew it according to the condition of the contract put an end to the policy, without more ado. So with respect to the payment of the second half of the yearly premium. If not paid when due, the contract was thereby terminated. The act of 1877 interposed, and for the benefit of the insured provided that the stipulations of the contract in respect to the termination of the policy should not be enforced unless notice of a certain character had previously been given by the insurer. The statute did not provide that the interest of the insured shall not be forfeited upon failure to renew the policy by the payment of the stipulated premium, but that the forfeiture should not be declared or be effective unless the default in the payment of the stipulated premium should occur after a particular notice had been given prior to the stipulated day of payment, or a default should continue after a particular notice and demand for payment had been given. Thus the law stepped in, and in effect said: "You shall not enforce the stipulations into which you have entered in respect to the effect of a default in payment of premiums, unless you first comply with this statute by giving the notice herein required." The subsequent repeal of this statute does not impair the obligation of the contract in respect to premiums which should mature thereafter. The repeal simply permits the contract into which the parties had entered to be enforced according to its own terms and conditions. "The laws with reference to which the parties must be assumed to have contracted * * * were those which, in their direct or necessary legal operation, controlled or affected the obligations of such contract." Insurance Co. v. Cushman, 108 U. S. 51–65, 2 Sup. Ct. 236. Laws repealing laws which prevent the operation of contracts otherwise within the competency of the parties, and permit their enforcement according to their terms, have never been regarded as

laws impairing the obligation of contracts, or as an impairment of vested rights. Insurance Co. v. Cushman, 108 U. S. 51–65, 2 Sup. Ct. 236; Ewell v. Daggs, 108 U. S. 143, 2 Sup. Ct. 408; Gross v. Mortgage Co., 108 U. S. 477, 2 Sup. Ct. 940; Butler v. Association, 97 Tenn. 679, 37 S. W. 385; Curtis v. Leavitt, 15 N. Y. 15, 85; Lewis v. McElvain, 16 Ohio, 347; Trustees v. McCaughy, 2 Ohio St. 152; Cooley, Const. Lim., side pages 293–378.

Judge Hammond, who heard this case below, very admirably answered the argument that the act of 1877 so entered into the contract as to make its repeal an impairment of its obligations, by saying:

"If the provisions of the statute as to notice had been written in the policy as agreements of the parties, that would have been their contract, and, of course, the law could not make another contract for them. Wherefore, it would be enforced by the courts as the agreement of the parties; but the statute did not undertake to make a contract of insurance for the parties. It was only a statutory regulation for the government of insurance companies, compelling them to give notice as required by the act of the nonpayment of premiums before they would be allowed to declare a policy forfeited according to its stipulations. It was a regulation that the legislature had a right to make. It was a beneficent regulation for the relief against a forfeiture created under the contract, which it was entirely competent for the legislature to withdraw, alter, or amend, as to it might seem best. Surely, if we turn the principle contended for the other way, its operation would be denied by the plaintiff and her counsel. That is to say, if an insurance company should contend that at the time of the passage of the act it had already issued a policy defining the terms of forfeiture, and that it was not within the power of the legislature to impair the obligation of that contract by importing into it a different stipulation or provision as to the conditions of forfeiture, the beneficiaries would deny that such legislation unconstitutionally impaired the obligation; but, if the legislature has the power to import into an existing contract such a regulation for giving notice without impairing the obligation of the contract as to the insurance company, it has the right to take it away by repeal, without impairing the obligation as to the beneficiary."

In Gross v. Mortgage Co., 108 U. S. 477–488, 2 Sup. Ct. 946, the validity of a mortgage was involved which had been made at a time when the mortgage was invalid under the existing local law, but which was subsequently validated. The validating act was said to be repugnant to the constitution of the United States, as impairing the obligation of the contract. To this the court said:

"That the act in question is not repugnant to the constitution, as impairing the obligation of a contract, is, in view of the settled doctrines of this court, entirely clear. Its original invalidity was placed by the court below upon the ground that the statutes and public policy of Illinois forbade a foreign corporation from taking a mortgage upon real property in that state to secure a loan of money. Whether that inhibition should be withdrawn was, so far at least as the immediate parties to the contract were concerned, a question of policy, rather than of constitutional power. When the legislative department removed the inhibition imposed, as well by statute as by the public policy of the state, upon the execution of a contract like this, it cannot be said that such legislation, although retrospective in its operation, impaired the obligation of the contract. It rather enables the parties to enforce the contract which they intended to make. It is, in effect, a legislative declaration that the mortgagor shall not, in a suit to enforce the lien given by the mortgage, shield himself behind any statutory prohibition or public policy which prevented the mortgagee, at the date of the mortgage, from taking the title which was intended to be passed as security for the mortgage debt. We repeat here what was said in Satterlee v. Matthewson, 2 Pet. 380, and, in substance, in Watson

v. Mercer, 8 Pet. 88, that 'it is not easy to perceive how a law, which gives validity to a void contract, can be said to impair the obligation of that contract.'"

In Ewell v. Daggs, 108 U. S. 143–151, 2 Sup. Ct. 413, a statute which declared all contracts voidable for usury was repealed. It was held that the repeal of the statute deprived the debtor of the statutory defense, and was valid, as not impairing the obligation of the contract. Touching the objection to the repeal of such statutes as depriving existing contracts of a statutory defense, the court said:

"Independent of the nature of the forfeiture as a penalty, which is taken away by a repeal of the act, the more general and deeper principle on which they are to be supported is that the right of a defendant to avoid his contracts is given to him by statute, for purposes of its own, and not because it affects the merits of his obligation; and that whatever the statute gives under such circumstances, as long as it remains in fieri, and not realized by having passed into completed transaction, may, by a subsequent statute, be taken away. It is a privilege that belongs to the remedy, and forms no element in the rights that inhere to the contract. The benefit which he has received as the consideration of the contract, which, contrary to law, he actually made, is just ground for imposing upon him, by subsequent legislation, the liability which he intended to incur. That principle has been repeatedly announced and acted upon by this court. Read v. City of Plattsmouth, 107 U. S. 568, 2 Sup. Ct. 208; and see Lewis v. McElvain, 16 Ohio, 347; Johnson v. Bentley, Id. 97; Trustees v. McCaughy, 2 Ohio St. 152; Satterlee v. Matthewson, 16 Serg. & R. 169, same case, in error, 2 Pet. 380; Watson v. Mercer, 8 Pet. 88. The right which the curative or repealing act takes away in such a case is the right in the party to avoid his contract, a naked legal right, which it is usually unjust to insist upon, and which no constitutional provision was ever designed to protect. Cooley, Const. Lim. 378, and cases cited."

There was no error in sustaining the demurrer to the plaintiff's declaration, and the judgment is accordingly affirmed.

WRIGHT v. BRAGG.

(Circuit Court of Appeals, Seventh Circuit. October 3, 1899.)

No. 574.

1. TRIAL TO COURT—FINDINGS.

In an action at law tried to the court without a jury on a written stipulation of the parties, a circuit court may make either special findings or a general finding, but cannot make both; and, where special findings are made, one stating a conclusion of law on the general issue is not to be regarded as a general finding.

2. REVIEW ON APPEAL—ACTION TRIED TO COURT.

The only recognized exception to the statutory rule (Rev. St. § 700) that when the court, on the trial of an action at law without a jury, by stipulation, makes a special finding, a review is limited to rulings of the court in the progress of the trial, and of the sufficiency of the findings to support the judgment, is that a party may insist on a finding in his favor on the ground that there is a total lack of evidence to support a contrary finding, or, if he have the burden of the issue, on the ground that the evidence in his favor is adequate, unimpeached, and without conflict or uncertainty; and, when a motion on such ground is made before the finding is made or entered of record, an adverse ruling thereon, if proper exception is saved, may be reviewed.

8. EXAMINATION OF WITNESS—IMPEACHING TESTIMONY—RIGHT OF COUNSEL TO INSPECT LETTER.

Where a witness on cross-examination is asked if he did not write a statement shown him, contained in a letter, which standing alone is inconsistent with his testimony in chief, and admits having written it, it is the privilege of counsel introducing the witness to inspect the entire letter for other statements which may explain or qualify the expression admitted; and the denial of such inspection, where the testimony of the witness is material, is prejudicial error.

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

Denis F. Cash, for plaintiff in error.

Edward S. Bragg, for defendant in error.

Before WOODS and JENKINS, Circuit Judges.

WOODS, Circuit Judge. The declaration in this case is in trover for the recovery of possession of a note and mortgage. The action was brought by James H. Farnsworth against Phinelan B. Haber, but on the defendant's motion, and showing that he had possession only as executor of the last will of Eliza O. Farnsworth, the payee of the note and mortgage, and that Ella Wright claimed to be the devisee and owner thereof under the will, the latter was substituted as defendant in the case, appeared and answered, and joined the plaintiff in a written stipulation for the trial of the case by the court without a jury. On suggestion of the death of James H. Farnsworth and of the appointment of Edward S. Bragg as administrator, the name of the latter as defendant in error has been substituted.

The court made the following special finding of facts, and gave judgment thereon for the plaintiff:

"(1) That one Eliza O. Farnsworth, then being the owner and in possession of the note and mortgage described in the declaration, made and delivered to her to secure the principal sum of five thousand ($5,000) dollars, with interest at five per cent., by one A. Ver Bryck, dated October 30, 1894, and recorded in the office of the register of deeds in Fond du Lac county, in the state of Wisconsin, on November 21, 1894, did on the 17th day of November, 1894, make and execute before and in the presence of two attesting witnesses, who subscribed their names thereto as such, an assignment in writing, under her hand and seal, to James H. Farnsworth, the plaintiff, of said note and mortgage, which said assignment was in the usual form, without condition, reservation, or limitation, reciting the sum of five thousand ($5,000) dollars as a consideration therefor, and acknowledged the receipt thereof, which assignment was also properly acknowledged for record, and thereafter, on the same day, delivered the same to James T. Greene, to be held for said plaintiff. (2) That said James T. Greene, the depositary, was at the time of said delivery to him acting in some matters as the agent for Mrs. Eliza O. Farnsworth, and continued to act for her in such matters up to the time of her death, but during all such time kept the said note and mortgage and assignment separate and distinct from the papers of said Eliza O. Farnsworth in his possession, and not commingled or tied up in bundles or packages with them, but in an envelope separate and distinct by itself. (3) That James T. Greene, upon the presentation to him by one P. B. Haber, who was the original defendant in this action, on the 18th day of November, 1895, after the death of Mrs. Eliza O. Farnsworth, of the order hereinafter recited, delivered the said note and mortgage to him, but refused to surrender or give up the assignment of said note and mortgage, though requested so to do, and afterwards, on the 25th day of June, 1896, caused the same to be recorded in the office of the register of deeds in said county of Fond du Lac. (4) That Mrs. Eliza O. Farnsworth

died on the 15th day of November, 1895, and James T. Greene died some time in 1897, after the recording of said assignment, which paper, with the official indorsement of its record thereon, came to the hands of the plaintiff from the representatives of Greene's estate. (5) That defendant offered in evidence the following proof: That on the 10th day of November, 1895, Mrs. Eliza O. Farnsworth gave an order in writing, signed by her and addressed to Mr. Greene, as follows: 'Please deliver to Mr. P. B. Haber the five thousand dollar note of Mr. A. Ver Bryck and a note of Mr. Tretlow, as well as any and all papers and securities you may hold in your possession belonging to me, moneys included.' And also that on the same day she, in her last sickness, from which she died on the 15th of November following, made a last will and testament, which had been duly probated, containing in it a purported bequest of the note and mortgage in controversy, in words and figures following: 'I give and bequeath to my beloved niece, Ella Wright, of Cincinnati, Ohio, five thousand dollars ($5,000), the same being in one promissory note executed by Mr. A. Ver Bryck, and secured by a real-estate mortgage; said note being now in the possession of James T. Greene, of the city of Fond du Lac, Wisconsin, to whom the same was given at the time of my departure for the South in the year 1894. Any indorsements or assignments of said note are hereby canceled and revoked.' Each and both of which recitals were received by the court qualifiedly, but neither of them was admitted as evidence to explain or vary the transaction of the assignment. (6) The following indorsement in the handwriting of James T. Greene upon the envelope in which the said note, mortgage, and assignment were kept by said Greene was given in evidence by the defendant: 'Nov. 17, 1894. Eliza O. Farnsworth. Left with James T. Greene. In case of death, to be delivered to James H. Farnsworth or his heirs.' And also an indorsement on the note in the handwriting of said James T. Greene: 'Paid interest to Oct. 30, 1895, two hundred and fifty dollars ($250). Oct. 22, 1895. Eliza O. Farnsworth, per J. T. Greene.' (7) The note and mortgage described in the complaint, with $500 interest paid thereon, has been deposited with the court, and is now in its possession, subject to its order, and there is due upon it on the 30th day of October, 1898, $250 additional interest; and the value of the same is the principal amount stated in said note and mortgage, with the interest paid and due thereon as aforesaid. (8) That the plaintiff is the owner and entitled to the possession of said note and mortgage and interest paid thereon and secured thereby as aforesaid, and is entitled to a formal judgment for damages against the defendant, by reason of the technical conversion of the same by said defendant, for the value of the note and mortgage and interest paid thereon, and now in the custody of the court, and since accrued thereon, with interest at five per cent., and also for his taxable costs and disbursements in addition thereto; the defendant having admitted possession, demand, and value, as stated in the complaint."

The last clause was probably intended to be a statement of legal conclusion only. It should have been so expressed. U. S. v. Harris, 46 U. S. App. 653, 23 C. C. A. 483, and 77 Fed. 821. It is not to be regarded as a general finding upon the issues of the case. A finding may be either general or special, but not both. British Queen Min. Co. v. Baker Silver Min. Co., 139 U. S. 222, 11 Sup. Ct. 523; Wesson v. County of Saline, 34 U. S. App. 680, 20 C. C. A. 227, and 73 Fed. 917; Post's Adm'r v. County of Hamilton, 46 U. S. App. 260, 22 C. C. A. 128, and 76 Fed. 208; Daube v. Iron Co., 46 U. S. App. 591, 23 C. C. A. 420, and 77 Fed. 713.

The assignment of errors contains many specifications which, under the rules applicable to trials in cases at law without a jury, are unavailing. They are to the effect that the court erred in making no finding of facts which evidence admitted tended to prove, in refusing to make findings requested by the plaintiff in error, in refusing to modify the findings made in certain particulars as requested, in finding matters of evidence, and in that certain findings

are defective or do not state the whole fact. The statutory rule is that, when the court makes a special finding, "rulings of the court in the progress of the trial" may be reviewed, and "the review may extend to the determination of the sufficiency of the facts found to support the judgment." Rev. St. § 700. The only recognized exception to the rule is that in a trial by the court, just as when the trial is by jury, a party may insist upon a finding in his favor on the ground that there is a total lack of evidence to support a contrary finding, or, if he have the burden of the issue, on the ground that the evidence in his favor is adequate, unimpeached, and without conflict or uncertainty. Whether the court shall have chosen to make a general or a special finding, if in any case there is a total lack of evidence upon an essential point, or if the evidence upon the entire case or upon a controlling point is adequate, unambiguous, and without conflict, a peremptory motion by the party entitled to prevail, if made, should be sustained, and an adverse ruling, if the exception be saved, may be reviewed; but properly the motion should be made before the finding is announced, or at least before the entry thereof of record. If made later and sustained, the result probably would be a new trial, and not a new finding in favor of the moving party. Treated as a motion for a new trial, the ruling upon it would be a matter of discretion, which could not be reviewed. If satisfactory proof be made, without evidence to the contrary, of a controlling fact which is not embraced in a special finding or special verdict, the remedy is to be sought by a motion for a venire de novo. In this case no motion was made for a finding in favor of the plaintiff in error on the ground of lack of evidence to sustain a finding for the plaintiff, or on the ground of lack of evidence of a particular fact, without which a finding for the plaintiff could not stand; and if there was adequate evidence, without conflict, of any fact which the court did not include in its finding, the fact was evidentiary only, or, to say the least, if found would not have been controlling of the other facts as found.

The first, second, third and fourth specifications of error relate to rulings of the court during the progress of the trial, and must be considered. The dominant question in the case, evidently, is whether the assignment of the note and mortgage was delivered, or, to follow more closely the words of the finding, delivered to James T. Greene to be held for the plaintiff. As bearing on that question, it was important to determine whether, when the instrument was placed in his possession, Greene was Mrs. Farnsworth's agent, and, if so, what was the scope of his agency. On that point Haber, the original defendant in the case, called as a witness for the defense, had testified to the effect that Mrs. Farnsworth had a property of about $14,000, and that nearly all her business was intrusted to Greene. On cross-examination the witness was asked if he had not claimed that he was her agent and transacted her business, and, having answered "No," was shown a letter, the writing of which he admitted, and with reference to a particular passage, which alone he was allowed to read, was asked, "In that letter did you not state that she (meaning Ophelia Farnsworth) wanted to make you the residuary

legatee in her will as you had handled her property and had never charged her a cent"? to which he answered, "Yes, sir." Thereupon counsel for the defendant asked for the letter. Opposing counsel replied that he could have "that part, but not any more," and upon the court's saying, "You are entitled to read that portion which is in connection with that sentence," counsel for the defendant excepted to the ruling, and asked that the letter be submitted to the court for inspection. Counsel for the plaintiff then said to the witness: "I ask the question, did you write so and so? If you have any explanation to make, of course you can make it;" to which the witness responded: "That clause is very misleading; without the entire letter." Following this, the bill of exceptions reads:

"Defendant's Counsel: We ask an order from the court directing him to be compelled to turn it over. (Letter handed to court.) Court: I do not find anything in the letter; that is, any portion that I have looked at— Defendant's Counsel (Mr. Cash): If Gen. Bragg is so technical that he is going to insist that we look only at a little portion, I think we are entitled to have all the testimony stricken out he has asked upon this subject. Court: This inquiry is not directed to the use of this letter in any form as evidence. It is simply as a question would be asked of the witness, whether he had said to John or wrote him so and so. That is the end of the inquiry, so far as impeaching testimony is concerned. The witness admits the fact of the statement, whatever it may be worth, but the letter which they have in their hands I think you are not entitled to have produced as a whole. You can examine that portion of it on which he made the inquiry. (Defendant excepts.) Gen. Bragg: That is the only thing connected with it. Court: They have a right to examine that portion of the letter. Counsel for defendant declines to look at that portion."

Our opinion is that the ruling was erroneous. If the witness had been asked if, in a certain conversation, he had not said so and so, and had answered "Yes," it would have been competent to inquire whether in the same conversation he said something further, by which what had been admitted would be qualified or retracted; and, on the same ground of reasonableness, when the witness admitted the presence in a letter that he had written of a statement which, alone and unexplained by other parts of the letter, was in conflict with his testimony, it was the privilege of counsel of the party in whose behalf the witness had testified to inspect the letter for other statements affecting the meaning of the expression admitted, whether to be found in the immediate context or in other parts of the letter. No statement by counsel in possession of the letter concerning the relevancy of other parts should be allowed to prevent the inspection. If the witness had denied or had not admitted the part of the letter shown, he could not have been examined concerning the contents of the letter, nor could opposite counsel in that case have been entitled to look at the paper. Greenl. Ev. §§ 88, 463; 1 Phil. Ev. pp. *575, *576. It cannot be said that the testimony or the credibility of the witness in this respect is in itself immaterial, or is made so by other findings unaffected thereby. The case is in a narrow compass, turning upon the question whether the assignment was delivered, and that depending finally upon the more narrow question whether it was delivered to Greene to be held for the plaintiff. Upon that question the recording can have no bearing, because not done until after Mrs. Farnsworth's death. There

is no proof from subscribing witnesses or others of the circumstances attendant upon the execution of the instrument. It bears the notarial certificate, in proper form, that the signer acknowledged "the execution," but that in itself means that the signing and sealing in the form shown were acknowledged. The assignee was not present, nor any one chosen by him to represent him. The attestation is simply in the words, "In the presence of," before the names of the witnesses. The words "Signed, sealed, and delivered," and any equivalent, are wanting, and, if present, could only indicate an intention to deliver. The instrument was in the maker's possession when she signed it. Then it went into the hands of Greene, in order to enable him to put upon it his certificate and signature to the acknowledgment of execution. Whether it went again into the physical possession of Mrs. Farnsworth after completion, and then passed again from her to Greene, and for what purpose, or whether it remained in his possession from the time of acknowledgment, and whether accidentally or intentionally, and, if intentionally, for what purpose, no witness has said, or probably can say. Of course, if it were conclusively established that at that or another time the assignment was delivered to Greene for the plaintiff, no subsequent act or declaration of Mrs. Farnsworth or of Greene could be allowed to thwart the plaintiff's right; but, when the question is whether a delivery was intended, the act or fact supposed to constitute or show delivery cannot have the effect of excluding other evidence on the question. But for the subsequent conduct of Mrs. Farnsworth, it would be a matter of inference, and on grounds not strong or clear, that she knew that the assignment remained or had gotten into the possession of Greene. In her will she gave the note and mortgage to her niece, the plaintiff in error, and added the clause, "Any indorsement or assignment of said note is hereby canceled and revoked." She therefore had knowledge of an assignment in some form having been made, unless, as urged by the plaintiff in error, her faculties at that time were so far impaired that she was without testamentary capacity. The evidence shows beyond doubt that Greene acted to some extent as agent for Mrs. Farnsworth. He held possession of her notes, and collected or received interest on them (this note in controversy, with others), after the assignment was made, and sent money to her, including probably the interest received on this note. He kept her papers together in a box,—this note and mortgage and the assignment by themselves in an unsealed envelope; the others, "in their own envelopes." It is said by counsel for the plaintiff in error that in that box the papers of Mrs. Farnsworth only were kept, but, if that is more than an inference, we have not found the testimony. The memorandum on the envelope in which the assignment was kept was admitted in evidence without objection. Whether it was otherwise competent, we are not called upon to decide. It shows or tends to show Greene's understanding of the character and purpose of his possession. Whether it is in harmony with the court's finding, we do not decide. The difference of expression is manifest. Stress has been laid upon the recital in the assignment of a consideration of $5,000, but there is evidence in the case which, though circumstantial, leaves little or

no doubt that there was no consideration whatever, outside of a suggested promise of Mrs. Farnsworth to her deceased husband. In this state of the evidence, it is impossible to say that the error committed was a harmless one. The judgment is reversed, with direction to grant a new trial.

SKINNER v. GARNETT GOLD-MIN. CO.

(Circuit Court, N. D. California. September 6, 1899.)

No. 12,551.

1. STATUTES—TITLE OF ACT.
   Const. Cal. art. 4, § 24, providing that every act shall embrace but one subject, which shall be expressed in its title, as construed by the supreme court of the state, does not require the title of an act to be an abstract of its contents, and a provision intended to secure the enforcement of the act and the accomplishment of the general purpose of the legislation is germane to the subject-matter and valid though not enumerated in the title.

2. CONSTITUTIONAL LAW—SPECIAL PRIVILEGES—ACT AFFECTING CORPORATIONS.
   Sections 1 and 2 of the California act relating to corporations (St. 1897, p. 231), which require all corporations doing business in the state to pay their employés at least once a month the wages earned during the preceding month, and provide that the violation of such requirement shall entitle an employé to a lien for his wages on the property of the corporation, taking precedence of all other liens except recorded mortgages or deeds of trust, to an attachment, and a reasonable attorney's fee in case of a suit to collect his wages or enforce such lien, and that an unrecorded deed shall be no defense to such suit, do not discriminate unjustly against corporations, in violation of the state constitution (article 1, § 21), prohibiting the granting of special privileges or immunities to any citizens or class of citizens.

3. SAME—EQUAL PROTECTION OF LAW.
   Nor do such provisions deny to corporations the equal protection of the law, within the prohibition of the fourteenth amendment to the federal constitution.

4. SAME—DUE PROCESS OF LAW.
   Nor do such provisions deprive corporations of their property without due process of law, within the meaning of the state constitution (article 1, § 13), by interfering with their freedom to make contracts.

5. CONTRACT—AGREEMENT FOR EXTENSION ON PART PAYMENT.
   Part payment of wages due employés is not a good consideration for an agreement to extend the time for payment of the remainder.

This is an action by attachment under the California statute to recover wages from a corporation. On final hearing.

F. D. Soward and Whitworth & Shurtleff, for plaintiff.

Grove L. Johnson, Linforth & Whitaker, and W. W. Watson, for defendant.

MORROW, Circuit Judge. This is an action at law to recover from the corporation defendant for labor performed by plaintiff, and on assigned claims for labor performed by others. The defendant corporation is organized and exists under the laws of West Virginia. The action was originally brought in the superior court of the county of Sierra, state of California, and was transferred to this court upon

the petition of the defendant. For cause of action plaintiff alleges that the defendant is a corporation existing under the laws of West Virginia, possessing property and doing business in the state of California; that defendant is indebted to plaintiff in the sum of $163.78 on account of work performed by plaintiff by the month as a laborer upon defendant's mine, the Niagara Consolidated or Garnett mine, at Hepsidan, Sierra county, Cal., between January 1 and December 14, 1897; that no part of this indebtedness has been paid; that defendant is indebted to 46 other persons in various sums on account of work performed by them on defendant's mine between January 1 and December 14, 1897; that these various sums have all been assigned by these persons to plaintiff, and that no part of them has ever been paid; that the amounts due to the plaintiff and his assignors are due to them from the defendant Garnett Gold-Mining Company for wages earned by them as laborers for said defendant between January 1 and December 14, 1897, in working upon the Niagara Consolidated or Garnett mine under an agreement by which they became due and were payable monthly; that defendant promised to pay them monthly, but did not do so, and during the whole period it had no regular pay day, and no day selected therefor, within the meaning of an act of the legislature of California entitled "An act requiring every corporation doing business in this state to pay their employés and each of them at least once in each and every month the wages earned by such employé," etc. St. Cal. 1897, p. 231. Plaintiff demands judgment for the sum of $3,981.50, with legal interest thereon (7 per cent.) from December 14, 1897, and costs of suit, that an attachment issue against defendant, that plaintiff be allowed a reasonable attorney's fee of $500, and that the whole be adjudged a first lien upon the property of defendant. An attachment was issued and levied upon the property of defendant in the county of Sierra, in this state, and a lis pendens was recorded in the office of the county recorder. Thereafter the case was transferred to this court on the ground that defendant, being a foreign corporation, was a nonresident of this state. Defendant denies, generally and specifically, the allegations in the several counts of the complaint, and alleges that plaintiff and his assignors were employed by defendant under an agreement whereby they each and all agreed that they would take their pay from the proceeds of defendant's mine, which was being worked by them; that they would not ask or receive or expect that their wages would be paid monthly or regularly, or upon any day selected for that purpose, and that they would not ask or receive or expect any pay for their work done until February, 1898, and that they would not bring suit to recover pay for their work until February, 1898; denies that plaintiff is entitled to any sum as attorney's fee; and alleges that, if plaintiff is entitled to any attorney's fee for the prosecution of this action, $200 would be a reasonable attorney's fee. The essential facts are admitted by both parties. It is agreed that the amount claimed by plaintiff, namely, $3,981.50, is owed by defendant. The defendant, however, claims that as to all unpaid wages earned prior to August 23, 1897, an agreement was entered into between plaintiff and his assignors and defendant on or about October 9,

1897, by which plaintiff and his assignors agreed to wait for six months after August 23, 1897, for such unpaid wages. It is agreed that plaintiff is entitled to a judgment for all wages earned subsequent to August 23, 1897, amounting to $2,167.02, together with the legal interest thereon. With regard to the remaining sum of $1,814.48, due for wages earned prior to August 23, 1897, called "back pay," defendant claims that the action has been prematurely brought. Defendant further contends that the statute involved (St. Cal. 1897, p. 231) is unconstitutional. The title of the act the benefit of which has been claimed by plaintiff, and the constitutionality of which defendant contests, reads:

"An act requiring every corporation doing business in this state to pay their employés and each of them at least once in each and every month, the wages earned by such employé; to limit the defenses which may be set up by such corporation to assignments of wages, set-off or counterclaims, or the absence of such employés at the time of making payment, and in case of such absence the wages are payable upon demand; to prohibit assignments of wages for the purpose of evading the provisions of this act, and agreements to accept wages at longer periods than as herein provided as a condition of employment; to fix a penalty for this violation of the provisions of this act by such corporation, and to provide for the disposition of any fines recovered from corporations violating the same."

The purpose of the act is expressed in section 1, which provides that:

"Every corporation doing business in this state shall pay at least once a month each and every employé employed by such corporation in transacting or carrying on its business, or in the performance of labor for it, the wages earned by such employé during the preceding month: provided, however, that if at the time of payment any employé shall be absent, or not engaged in his usual employment, he shall be entitled to said payment at any time thereafter upon demand."

The provisions of all the sections of this act, with the exception of sections 2 and 6, are referred to in the title as quoted above. Section 2 provides:

"A violation of any of the provisions of section 1 of this act shall entitle each of the said employés to a lien on all the property of said corporation for the amount of their wages, which lien shall take preference over all other liens, except duly recorded mortgages or deeds of trust; and in any action to recover the amount of such wages, or to enforce said lien, the plaintiff shall be entitled to a reasonable attorney's fee, to be fixed by the court, and which shall form part of the judgment in said action, and shall also be entitled to an attachment against said property. An unrecorded deed shall be no defense to such actions."

Section 6 is as follows:

"All wages earned by any employés engaged in the service of any corporation in this state, shall be paid in lawful moneys of the United States or in checks negotiable at face value on demand."

The constitution of California (section 24, art. 4) declares that "every act shall embrace but one subject, which subject shall be expressed in its title." Defendant contends that, since the provisions of sections 2 and 6 of the above act are not specifically referred to in its title, these two sections are unconstitutional. The unconstitutionality of these two sections, even if established, does not invalidate

the entire act, but merely the sections involved. Section 24, art. 4, of the constitution of California, also provides:

"But if any subject shall be embraced in an act which shall not be expressed in its title, such act shall be void only as to so much thereof as shall not be expressed in the title."

In connection with which constitutional provision, see, also, Robinson v. Bidwell, 22 Cal. 379, 387; People v. Perry, 79 Cal. 105, 114, 21 Pac. 423.

It will be observed that we are not concerned with section 6 in the present controversy, and it may therefore be omitted from consideration. The subject of the act is comprised in section 1, which enacts that corporations shall pay their employés regularly each month. The other sections contain provisions designed to secure compliance with section 1, and section 2 provides a penalty for the violation of this section. Two sections in this act (sections 2 and 7) provide against violation of its provisions. Section 2 declares that "a violation of any of the provisions of section 1 of this act shall entitle each of the said employés to a lien on the property of said corporation for the amount of their wages," etc. Section 7 enacts that "any corporation violating any of the provisions of this act shall be subject to a fine not exceeding one hundred dollars, or less than fifty dollars, for each violation." It is evident that these sections are intended to enforce compliance with the regulations of the act regarding its subject comprised in section 1, and there is, consequently, no reason why their provisions should have found expression in the title of the act.

In Ex parte Kohler, 74 Cal. 38, 41, 15 Pac. 436, 437, Justice Paterson, delivering the opinion of the supreme court, said:

"However numerous the provisions of an act may be, if they can fairly be considered as falling within the subject-matter of legislation, or as proper method for the attainment of the end sought by the act, there is no conflict with the constitutional provision above quoted [Const. Cal. art. 4, § 24]. In any event, it is only where there is a clear violation of the constitution that this court is justified in declaring it unconstitutional. * * * Manifestly, the provisions of the act all fall within the subject named in its title, and are necessary and logical methods for the end desired by the legislature. The act, therefore, is not repugnant to article 4, § 24, supra."

Again, in Ex parte Liddell, 93 Cal. 633, 637, 29 Pac. 251, 252, the constitutionality of a statute was attacked upon the ground that the legislature had failed to express the subject of the act in its title. The supreme court said:

"In Abeel v. Clark, 84 Cal. 229, 24 Pac. 383, we held it was not necessary that the title of the act should embrace an abstract of its contents. The cases cited therein show that such is the view taken by the courts of other states; and on reflection it must appear that this conclusion is based upon the soundest principles of constitutional construction. It certainly was not intended that the title should be a repetition of the provisions found in the body of the bill. The object was to prevent deception by the inclusion of matters incongruous with the subject specified in the title. If the title contains a reasonable intimation of the matters under legislative consideration, the public cannot complain. It has always been the custom to state the subject of a bill in general terms, and with the fewest words, and the framers of the constitution doubtless intended the legislature to conform to that custom. Mills v. Charleton, 29 Wis. 409; Bright v. McCullough, 27 Ind. 226; People v. Mahaney, 13 Mich. 494. Numerous provisions having one general object fairly indicated

by the title may be united. Montclair v. Ramsdell, 107 U. S. 147, 2 Sup. Ct. 391. When the general purpose of the act is declared, the details provided for the accomplishment of that purpose will be regarded as necessary incidents."

See, also, Hellman v. Shoulters, 114 Cal. 150, 44 Pac. 915, and 45 Pac. 1057.

Defendant's contention, therefore, that section 2 of the statute in question (St. Cal. 1897, p. 231) is unconstitutional because there is no mention of its provisions in the title of the act, cannot be sustained, in face of the interpretation placed by the supreme court of this state upon section 24, art. 4, of the constitution.

Defendant further attacks the statute in question upon the ground that it contravenes the following provisions of the constitution of the state: (1) Section 13, art. 1: "No person shall * * * be deprived of life, liberty, or property without due process of law." (2) Section 1, Id.: "All men * * * have certain inalienable rights, among which are those of * * * acquiring, possessing, and protecting property." (3) Section 21, Id.: "Nor shall any citizen, or class of citizens, be granted privileges or immunities which, upon the same terms, shall not be granted to all citizens." (4) Fourteenth amendment to the constitution of the United States: "Nor shall any state deny to any person within its jurisdiction the equal protection of the law." Defendant contends that the statute discriminates unreasonably against corporations, and destroys the liberty and property of private contracts in several of its provisions. Section 2 of the act, supra, which provides that the violation of the provisions of section 1 shall entitle the employé to a lien on the property of the corporation taking precedence of all liens except recorded mortgages and deeds of trust, to a reasonable attorney's fee, and to an attachment, and, further, that an unrecorded deed shall be no defense to an action for the recovery of wages, is regarded by defendant as an unjust discrimination against corporations. Defendant also regards section 3 of the same statute from the same standpoint. This section limits the defenses which may be set forth by a corporation defendant in an action against it for a violation of the provisions of this act. This section, however, may be disregarded as not being concerned in the matter now at issue in this case. In support of its position defendant cities San Mateo Co. v. Southern Pac. R. Co., 13 Fed. 722, known as "The Railroad Tax Cases." That was an action for the recovery of state and county taxes claimed to be due from defendant to plaintiff for the fiscal year 1881–82. Defendant insisted that in the assessment of its property an unjust discrimination was made between its property and the property of individuals, to its disadvantage, since it "was not allowed any deduction from the valuation of its property for the mortgage thereon which is allowed for mortgages in the assessment of the property of individuals." Justice Field held that such discrimination was unconstitutional, and that corporations hold their lawfully-acquired property under the same constitutional guaranties as protect the property of natural persons. The principle involved is admirably and concisely stated as follows:

"It is sufficient to add that in all text writers, in all codes, and in all revised statutes it is laid down that the term 'person' includes or may include corporations, which amounts to what we have already said, that, whenever it is necessary for the protection of contract or property rights, the courts will look through the ideal entity and name of the corporation to the persons who compose it, and protect them, though the process be in its name. All the guaranties and safeguards of the constitution for the protection of property possessed by individuals may therefore be invoked for the protection of the property of corporations; and as no discriminating and partial legislation imposing unequal burdens upon the property of individuals would be valid under the fourteenth amendment, so no legislation imposing such unequal burdens upon the property of corporations can be maintained. The taxation, therefore, of the property of the defendant upon an assessment of its value, without a deduction of the mortgage thereon, is to that extent invalid." Id. 747.

It will be perceived that the case under discussion bears no resemblance to the case cited above. In that case there was a direct attack upon the property of corporations, an attempt to make corporations submit to a system of taxation different from that generally employed in this state, and to saddle them with more than their proper share of the burdens of state taxation. In this case no peculiar burden is imposed. The statute in question merely provides for the payment of wages already due at certain regular periods, and lays down regulations framed to secure compliance with its provisions in this respect.

Mining corporations have been the objects of legislation as such, on the part of this state, as evidenced by St. Cal. 1873–74, p. 866, St. Cal. 1880, p. 134, and St. Cal. 1897, p. 38. These statutes have directed the performance of certain duties, and the statute of 1880 imposed a penalty of $1,000 upon mining corporations violating its provisions.

The case of Miles v. Woodward, 115 Cal. 308, 46 Pac. 1076, arose under the latter statute. The court in that case said:

"If the construction which appellant puts upon the act, namely, that it applies only to those mining corporations which extract gold or silver from ores and quartz, were to be accepted as the true one, his attack upon the constitutionality of this law as being arbitrary special legislation would certainly be powerful, if not irresistible. But we cannot agree to that interpretation. The act provides for the doing of many things by the officers and agents of all mining corporations. Some of the things required to be done, such as keeping a complete set of books, showing all receipts and expenditures of the corporation, the source of such receipts and objects of such expenditures, and all transfers of stock, are acts which may be performed by, and the doing of which is therefore properly imposed upon, all mining corporations. The provision requiring the superintendent to report weekly the number of men employed by him, and the rate of wages paid to each, likewise applies to all mining corporations. * * * These requirements, from their nature, apply only to those mining corporations which extract the precious metals from ore, but they apply to all such corporations, and are as general as from the varying character of mining corporations, and of their operations, they could be made."

An act approved March 31, 1891 (St. Cal. 1891, p. 195), is entitled "An act to provide for the payment of the wages of mechanics and laborers employed by corporations." This act provides (section 1):

"Every corporation doing business in this state shall pay the mechanics and laborers employed by it the wages earned by and due them weekly or monthly, on such day in each week or month as shall be selected by said corporation."

Section 2 of this act enacts as a penalty for the violation of the provisions of this act that such violation shall entitle each mechanic or laborer to a lien on the property of the corporation, taking preference over all other liens except recorded mortgages and deeds of trust, to a reasonable attorney's fee in the event of an action to recover his wages or to enforce his lien, and to an attachment against the property of the corporation. This act has been construed in the following cases: Keener v. Irrigation Co., 110 Cal. 627, 43 Pac. 14; Ackley v. Mining Co., 112 Cal. 42, 44 Pac. 330; Slocum v. Irrigation Co., 122 Cal. 555, 55 Pac. 403.

In Keener v. Irrigation Co., the plaintiff was employed to perform labor upon certain reservoirs at different times between May 27, 1892, and June 23, 1893, in the course of which employment the wages earned by him amounted in the aggregate to $868.75. Of this he was paid by the company $378.82, whereupon he brought action to recover the balance, and have it adjudged a lien upon defendant's property. Plaintiff obtained a judgment by default, and defendant appealed. In the opinion it is said, at page 630, 110 Cal., and page 14, 43 Pac.:

"By the terms of the first section of this act, it does not apply to all corporations, but only to those who, while doing business in this state, employ laborers and mechanics by the week or month, whose wages, under the terms of their employment, are payable weekly or monthly. It does not purport to impose upon those corporations any duty or liability towards all the mechanics or laborers whom it may employ, or to create a right in favor of those of its employés whose wages are not earned or payable by the week or by the month. As a remedy sought to be enforced herein exists only by virtue of the statute, it was incumbent upon the plaintiff to bring himself within the terms of the statute, and to show that the wages earned by him were 'due weekly or monthly.' His complaint is, however, defective in this respect, and contains no allegation concerning the times at which the wages were payable, or that he was employed at weekly or monthly wages; and, from the allegations in reference thereto, it would seem that there was no agreement upon this point,—the greater part of his labor being computed by the day, and at different rates per day, for different periods during the year."

It was accordingly held that the plaintiff was not entitled to avail himself of the provisions of the act of 1891.

In the case of Ackley v. Mining Co., the plaintiff had judgment against the corporation for $397 for wages, a counsel fee of $100, and costs, taxed at $27.35, making a total of $524.35, which was declared to be a valid lien upon the property of the corporation defendant, and paramount to any lien or interest of the other defendants. The court said:

"There is no allegation or finding that the plaintiff was employed by the week or month, or that his wages were 'due weekly or monthly.'"

Then follows a citation from the case of Keener v. Irrigation Co., as quoted above, and, following that case, it was determined that the plaintiff was not entitled to avail himself of the provisions of the act of 1891.

Slocum v. Irrigation Co. was an appeal by the receivers of the corporation defendant from a judgment asserting and enforcing liens of plaintiffs upon the property of the said corporation. These liens were based upon the statute of 1891. Appellants contended that the

statute in question was unconstitutional, because, among other reasons, it was special legislation, in that it attempted to provide for the creation of liens in favor of a special class of laborers, and, as the court said, "thus attempts a mere arbitrary classification, not founded upon natural differences, or differences defined by the constitution, within the meaning of the principle as declared in Darcy v. City of San José, 104 Cal. 642, 38 Pac. 500, and other decisions of this court to the same point. This contention is correct, if the said act provides a lien only for those laborers and mechanics who are employed by the week or month, and does not provide liens for those who are not thus employed. But this court has already declared such to be the construction of the act in two cases,—one decided by one department of this court, and the other by the other department,"—citing the cases of Keener v. Irrigation Co. and Ackley v. Mining Co., supra. Chief Justice Beatty dissented from this opinion, however, holding that the statute might be held to mean "that every corporation employing laborers and mechanics is required to establish a regular pay day in each week, or in each month, as it may elect, and on that day to pay all wages then earned and due, no matter what the term of employment." As thus construed, the statute would be constitutional.

The statute of 1897 appears to dispose of the constitutional objection urged against the act of 1891. The statute of 1891 was declared unconstitutional because of its arbitrary classification of laborers, according to which those who were employed by the week or month enjoyed advantages over those not so employed. The statute of 1897 provides specifically that all employés of corporations shall be paid at least once a month, and makes no such discrimination as the statute of 1891, but entitles all employés of corporations to the same remedies. The question here is whether the statute of 1897 so discriminates between corporations and other persons as to render it unconstitutional for that reason.

A statute of Tennessee (Acts Tenn. 1883, p. 271) entitled "An act to provide for the regulation of railroad companies and persons operating railroads in this state; to prevent discrimination upon railroads in this state and to provide for the punishment for the same; and to appoint a railroad commission," approved March 30, 1883, imposed certain penalties upon corporations operating railroads for violation of the provisions of the act, and did not impose such penalties upon companies or private persons operating railroads who had violated that statute; and provided that a corporation, under certain circumstances, should be held prima facie guilty of extortion, and made no such provision in the case of persons other than corporations operating railroads. This statute was under consideration in the case of Louisville & N. R. Co. v. Railroad Commission of Tennessee, 19 Fed. 679. This was an action for preliminary injunction on the ground, among others, that the statute by authority of which defendants claimed to act was unconstitutional because of unjust discrimination against railroad corporations. In the course of the opinion of the circuit court occurred the following, quoted by defendant in the present case:

"But it does not follow that the legislature can enact statutes applicable to other kinds of property as to railroads, and therein discriminate so as to impose heavier burdens on one than are imposed on the other. Certainly they cannot so distinguish as between different railroad companies or between railroad corporations and persons operating railroads in competition with them." Page 694.

Black's Law Dictionary defines a general law in the following terms:

"A general law, as contradistinguished from one that is special or local, is a law that embraces a class of subjects or places, and does not omit any subject or place naturally belonging to such class. Van Riper v. Parsons, 40 N. J. Law, 1." "A law framed in general terms, restricted to no locality, and operating equally upon all of a group of objects, which, having regard to the purposes of the legislation, are distinguished by characteristics sufficiently marked and important to make them a class by themselves, is not a special or local law, but a general law. Id. 123."

The statute in the above Tennessee case, in the light of these definitions, was properly considered as discriminating against railroad corporations. It professed to provide "for the regulation of railroad companies and persons operating railroads in this state," and in so providing it discriminated as regards penalties and in other respects against corporations operating railroads. Such a statute cannot be regarded as parallel with the California statute under consideration, nor can the language of the learned judge above quoted be considered as applicable to the present case. The California statute imposes certain legal duties upon corporations in general, and makes certain provisions intended to secure the performance of these duties by corporations. This interpretation of the statute as not being a special law is in accord with the decisions of the supreme court of this state.

In McDonald v. Conniff, 99 Cal. 386, 391, 34 Pac. 71, 73, Harrison, J., delivering the opinion of the court, said:

"It is not necessary that a law shall affect all people of the state in order that it may be general, or that a statute concerning procedure shall be applicable to every action that may be brought in the courts of the state. A statute which affects all the individuals of a class is a general law, while one which relates to particular persons or things of a class is special. A statute regulating the rights of married women, or which affects all mining corporations, or confers rights upon municipal corporations of a certain class, or places restrictions upon all foreign corporations, is a general law. City of Pasadena v. Stimson, 91 Cal. 238, 27 Pac. 604; In re Madera Irr. Dist., 92 Cal. 316, 28 Pac. 272, 675; Wheeler v. Philadelphia, 77 Pa. St. 348; Land Co. v. Soper, 39 Iowa, 112; In re New York El. R. Co., 70 N. Y. 350; In re Church, 92 N. Y. 1; Ferguson v. Ross, 126 N. Y. 459, 27 N. E. 954."

In the case of Railway Co. v. Ellis, 165 U. S. 150, 17 Sup. Ct. 255, there was involved the constitutionality of an act of the Texas legislature providing that persons having claims against a railroad company for personal services rendered, or labor done, or for damages, or for overcharges on freight, or claims for stock killed or injured by the train of any railway company, should present the same, and, if such claim was not paid within 30 days after presentation, might institute a suit, and recover an attorney's fee, not exceeding $10, in addition to the amount of the claim and the costs of the suit. In the course of the opinion the court said:

"If it be said that this penalty is cast only upon corporations, that to them special privileges are granted, and therefore upon them special burdens may be imposed, it is a sufficient answer to say that the penalty is not imposed upon all corporations. The burden does not go with the privilege. Only railroads, of all corporations, are selected to bear this penalty. The rule of equality is ignored." And again: "Unless the legislature may arbitrarily select one corporation, or one class of individuals, and visit a penalty upon them which is not imposed upon others guilty of like delinquency, this statute cannot be sustained." And further: "It is apparent that the mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the fourteenth amendment, and that in all cases it must appear not only that a classification has been made, but also that it is one based upon some reasonable ground,—some difference which bears a just and proper relation to the attempted classification,—and is not a mere arbitrary selection. Tested by these principles, the statute in controversy cannot be sustained."

It will be observed that the Texas statute was solely directed against railroad corporations.

In the case of Railway Co. v. Paul, 173 U. S. 404, 19 Sup. Ct. 419, an action was brought in a justice's court of Arkansas by one Paul against the said railroad company, a corporation, to recover $21.80 due him as laborer, and a penalty of $1.25 per day for failure to pay him what was due when he was discharged, according to the provisions of an act of the legislature of Arkansas entitled "An act to provide for the protection of servants and employés of railroads" (Acts 1889, p. 76). The case went up to the circuit court of Saline county, which found that plaintiff was entitled to recover the sum named and the penalty. The supreme court of Arkansas affirmed the judgment (40 S. W. 705), whereupon a writ of error was brought. Chief Justice Fuller, in the course of the opinion rendered therein, said:

"The contention is that, as to railroad corporations organized prior to its passage, the act was void, because in violation of the fourteenth amendment. Corporations are the creations of the state, endowed with such faculties as the state bestows, and subject to such conditions as the state imposes; and, if the power to modify their charters is reserved, that reservation is a part of the contract, and no change within the legitimate exercise of the power can be said to impair its obligation; and, as this amendment rested on reasons deduced from the peculiar character of the business of the corporations affected and the public nature of their functions, and applied to all alike, the equal protection of the law was not denied. Railway Co. v. Mackey, 127 U. S. 205, 8 Sup. Ct. 1161." And again, on page 410, 173 U. S., and page 421, 19 Sup. Ct.: "In this case the act was passed 'for the protection of servants and employés of railroads,' and was upheld as an amendment of railroad charters, such exercise of the power reserved being justified on public considerations; and a duty was specially imposed, for the failure to discharge which the penalty was inflicted. The penalty was sustained because the requirement was valid."

The constitution of this state contains the usual provisions concerning corporations, and provides that:

"All laws now in force in this state concerning corporations, and all laws that may be hereafter passed pursuant to this section, may be altered from time to time or repealed." Article 12, § 1.

Under this provision the act of 1897 must be held as a legitimate exercise of the plenary power of the legislature to modify, by general laws, within reasonable limits, the rights and privileges which corporations of the state possess as such; and this legislation may be justi-

fied upon the ground that the purposes of the state in creating corporations will be the better accomplished by such amendment.

In the case of Railroad Co. v. Matthews, 174 U. S. 96, 19 Sup. Ct. 609, the constitutionality of an act of the legislature of Kansas providing that railway companies should be liable for a reasonable attorney's fee in addition to damages and costs in an action brought for damages by fire caused by the operation of the said railroad, was at issue. The court, citing the case of Railway Co. v. Ellis, supra, said:

"While the right to classify was conceded, it was said that such classification must be based upon some difference bearing a reasonable and just relation to the act in respect to which the classification is attempted; that no mere arbitrary selection can ever be justified by calling it classification. And there is no good reason why railroad corporations alone should be punished for not paying their debts. Compelling the payment of debts is not a police regulation. We see no reason to change the views then expressed, and, if the statute before us were the counterpart of that, we should be content to refer to that case as conclusive." Further on in the opinion the court said: "But neither the amendment [fourteenth amendment to the United States constitution], broad and comprehensive as it is, nor any other amendment, was designed to interfere with the power of the state, sometimes termed its 'police power,' to prescribe regulations to promote the health, peace, morals, education, and good order of the people, and to legislate so as to increase the industries of the state, develop its resources, and add to its wealth and prosperity. From the very necessities of society, legislation of a special character having these objects in view must often be had in certain districts,—such as for draining marshes and irrigating arid plains. Special burdens are often necessary for general benefits,—for supplying water, preventing fires, lighting districts, cleaning streets, opening parks, and many other objects. Regulations for these purposes may press with more or less weight upon one than upon another, but they are designed not to impose unequal or unnecessary restrictions upon any one, but to promote, with as little inconvenience as possible, the general good." And again (page 106, 174 U. S., and page 613, 19 Sup. Ct.): "It is the essence of a classification that upon the class are cast duties and burdens different from those resting upon the general public. Thus, when the legislature imposes on railroad corporations a double liability for stock killed by passing trains, it says, in effect, that if suit be brought against a railroad company for stock killed by one of its trains, it must enter into the courts under conditions different from those resting on ordinary suitors. If it is beaten in the suit, it must pay, not only the damage which it has done, but twice that amount. If it succeeds, it recovers nothing. On the other hand, if it should sue an individual for destruction of its live stock, it could under no circumstances recover any more than the value of that stock. So that it may be said that, in matter of liability in case of litigation, it is not placed on an equality with other corporations and individuals. Yet this court has unanimously said that this differentiation of liability, this inequality of right in the courts, is of no significance upon the question of constitutionality. Indeed, the very idea of classification is that of inequality. So that it goes without saying that the fact of inequality in no manner determines the question of constitutionality."

The doctrine of the foregoing cases leads to the conclusion that a classification of corporations imposing burdens different from those imposed upon the general public may be made without the statute encountering the prohibition of the state and federal constitutions, providing such classification is made upon reasonable grounds, and is not merely an arbitrary selection. The statute under consideration does not, in our opinion, contravene the principles of classification as laid down in the cases cited above.

Defendant's contention that the statute of 1897 unjustly discrim-

inates against corporations cannot be sustained in regard to the provisions of sections 1 and 2 of that statute. There is no discrimination involving the breach of any of the constitutional enactments invoked by the defendant. The provisions that corporations shall have a regular monthly pay day, and that the employés of a corporation shall, in the event of a violation of the provisions of section 1 by the corporation, be entitled to a lien on the property of the corporation, taking precedence of all other liens except recorded mortgages and deeds of trust, to a reasonable attorney's fee if he is obliged to bring an action at law to recover his wages, and to an attachment against the property of the corporation, and that an unrecorded deed shall not be a defense to such an action, are not such as unjustly discriminate against the defendant.

Defendant further contends that the act is unconstitutional upon the ground that it deprives the employé and the corporation of the liberty and property of making contracts, without due process of law. In the course of its argument in this respect, defendant attacks various sections of the statute of 1897 other than sections 1 and 2 of that statute. Plaintiff, however, bases his action upon these two sections, and the remaining sections may therefore be left out of consideration in this case. As far as these two sections are concerned, there does not appear to be good ground for the contention of defendant. Section 1 provides for the monthly payment of wages which have been already earned, and which are due from the corporation to the employé, and section 2 provides penalties in case such provision is not complied with. It does not appear in what respects defendant is deprived of any liberty in making contracts by reason of these enactments. They simply constitute an effort to secure the regular payment to the employé of a corporation, by such corporation, of the wages to which he is entitled by virtue of his work performed, and an effort to make his legal remedy for the irregular payment of such wages as little troublesome and as little expensive as possible. The contention of defendant as to the unconstitutionality of the statute must be denied.

Defendant also urges that the action is premature as to the sum of $1,814.48, or "back pay," claimed therein. Defendant admits indebtedness to that extent, but argues that under the terms of an agreement made by the parties on or about the 8th of October, 1897, plaintiff and his assignors agreed to wait until the following February for one half of their wages due on August 23, 1897, the other half of which "back pay" they received upon the 8th of October, 1897, at the same time that they entered into the agreement to wait. This action was commenced on December 17, 1897, prior to the time for the expiration of the alleged agreement. A copy of the pay roll of the Garnett Gold-Mining Company was admitted in evidence. This pay roll contained nine parallel columns, namely, the first column, "Names"; the second, "Total Amt. Due Wages"; the third, "Board Deducted"; the fourth, "No. of Days"; the fifth, "Cash Paid"; the sixth, "Balance Due"; the seventh, "Paid on %"; the eighth, "Bal. Payable Six Months from Aug. 23, '97"; and the ninth and last, "Received payments. Bal. Payable 6 Mos. Accepted." The plain-

tiff and his assignors signed their names in the last column. It is contended by defendant that this constitutes an agreement on the part of plaintiff and his assignors to wait until February, 1898, for the balance of the amounts due them. Plaintiff denies that any such agreement was made, and his evidence was to the effect that when he signed the alleged agreement he thought that he was receipting an ordinary pay roll. The evidence of defendant's witnesses was altogether unsatisfactory upon the point whether plaintiff and his assignors were informed of the character of the alleged agreement, and that it differed from an ordinary pay roll. But, even conceding the fact of the agreement, plaintiff urges that such an agreement, if made, is merely a nudum pactum, and can have no legal value for want of consideration. Defendant maintains that there was good consideration for the agreement, and alleges that suits have been brought for "back pay" by some of plaintiff's assignors, and that the company had informed the men that, unless the six-months extension was given, and all the suits dismissed, the company could do nothing more, and litigation would have to take its course. Defendant claims that the benefit derived by the men from this settlement was sufficient consideration to support the agreement. Section 1605 of the Civil Code of California defines "consideration" as follows:

"Any benefit conferred, or agreed to be conferred, upon the promisor by any other person, to which the promisor is not lawfully entitled, or any prejudice suffered or agreed to be suffered by such (other) person, other than such as he is at the time of consent lawfully bound to suffer, as an inducement to the promise, is a good consideration for a promise."

It cannot be maintained that plaintiff and his assignors had any benefit conferred upon them by such an agreement as is here set forth by defendant. Half of their wages was overdue, and it was the duty of defendant to pay such wages upon demand. The promise to perform that duty after an interval of six months cannot be called good consideration for the agreement. The supreme court of this state, in the case of Sullivan v. Sullivan, 99 Cal. 187, 193, 33 Pac. 862, 864, declares:

"It is well settled that neither a promise to perform a duty nor the performance of a duty constitutes the consideration of a contract."

The plaintiff is entitled to a reasonable attorney's fee, to be fixed by the court (section 2, Act March 29, 1897; St. Cal. 1897, p. 231), which shall form part of the judgment in said action. The plaintiff asks that the fee be fixed at $500. The defendant alleges that, if the plaintiff is entitled to any attorney's fee for the prosecution of this action, $200 would be a reasonable sum. I am of the opinion that the attorney's fee should be fixed at $300, and such will be the order. A judgment will therefore be entered for the plaintiff for the amount claimed, and attorney's fee of $300, and costs.

In re FIXEN & CO.

(District Court, S. D. California. September 15, 1899.)

No. 1,282.

1. BANKRUPTCY—JURISDICTION—APPOINTMENT OF RECEIVER.
Both under the express grants of authority contained in the bankruptcy act, and in the exercise of the general equity powers possessed by a court of bankruptcy, such court has jurisdiction to appoint a receiver to take charge of the property of a person against whom a petition in involuntary bankruptcy has been filed, and hold the same until the trustee in bankruptcy is appointed and qualified.

2. SAME—GROUNDS FOR APPOINTMENT.
Where, after the filing of a petition in involuntary bankruptcy against a retail trader, an application was made for the appointment of a receiver to take charge of his property until a trustee should be qualified, wherein it was alleged that he had been fraudulently induced to sell his entire stock in trade to a certain corporation for an entirely inadequate price, the major part of the same consisting of notes of such corporation, which it could not pay, and its own stock, which was worthless, and that the corporation or its vendee was rapidly selling off the stock at sacrifice prices, so that it would probably all be disposed of before a trustee could be appointed, leaving nothing for the creditors of the bankrupt but the inadequate remedy of actions for damages and for stockholders' liabilities, *held*, that the petition showed sufficient grounds for the appointment of a receiver.

3. SAME—POWERS OF RECEIVER.
Where the court of bankruptcy appoints a receiver "to take charge of the property of the bankrupt after the filing of the petition, and until it is dismissed or the trustee is qualified," as authorized by Bankruptcy Act 1898, § 2 (3), the functions of such receiver are not limited to the receipt and custody of such property as may be voluntarily surrendered to him, but it is his duty to collect and recover the property, by suit if necessary; and the court has jurisdiction, in appointing such receiver, to authorize him to institute all necessary actions at law or in equity for the recovery of the bankrupt's property.

4. SAME—APPLICATION FOR EXAMINATION OF WITNESS.
A receiver appointed to take charge of the property of a bankrupt until the qualification of a trustee has the right to apply for an order summoning designated persons to appear and submit to examination in the bankruptcy proceeding, under Bankruptcy Act 1898, § 21, providing that such order may be made upon the application of "any officer."

5. SAME—REQUISITES OF APPLICATION.
An order for the examination of a witness in bankruptcy proceedings may be made on the simple application or demand of the receiver or trustee, without any showing of the questions to be asked, or the particular facts to be inquired into.

6. SAME—REFUSAL OF WITNESS TO APPEAR.
A person who is summoned for examination as a witness in a proceeding in bankruptcy, on the application of a receiver appointed by the bankruptcy court, cannot refuse to attend or be examined on the ground that the order appointing the receiver was erroneous or improvidently made.

7. SAME—OBJECT AND SCOPE OF EXAMINATION.
Under Bankruptcy Act 1898, § 21, providing that the courts of bankruptcy may order any designated person who is a competent witness under the laws of the state to appear and be examined concerning the acts, conduct, or property of the bankrupt, it is not necessary to the ordering of such an examination that there should be a suit pending by or against the bankrupt or his estate. The examination is not intended as a means of procuring testimony pertinent to issues on trial, but its object is to

afford to creditors and the trustee or receiver full information touching the bankrupt's estate, in order that the necessary steps may be taken for its recovery and preservation.

8. SAME—EVIDENCE—RELEVANCY.
Where it is alleged that the bankrupt's stock of goods was sold by him to a certain corporation without any adequate consideration, the sale being induced by the fraud of the vendee, a receiver of the bankrupt's estate has the right, under process from the court of bankruptcy, to examine any books or documents of such corporation showing or tending to show its receipt or disposition of said stock, or in any other way relating thereto.

9. SAME—BOOKS AND PAPERS—RELEVANCY OF CONTENTS.
A person summoned by a court of bankruptcy to appear and be examined in a proceeding in bankruptcy, and to produce certain books of account and records, cannot refuse to produce the books and papers called for, or to answer questions relating thereto, on the ground that they contain nothing relating to the bankrupt's property, as this matter is not left to the opinion of the witness, but must be determined by the court.

10. SAME—DEALING WITH CONTUMACIOUS WITNESS—ADVICE OF COUNSEL.
Where a witness under examination in bankruptcy refuses to produce books called for by the summons, and to answer questions relating thereto, but does so under the direction of counsel, who in good faith advise him to pursue that course, and professes his readiness to submit to an examination if the court should hold it proper, he will not be punished as for a contempt, but the court will simply order the examination to proceed.

In Bankruptcy.

E. T. Dunning, for petitioning creditors.
John T. Jones, for witness M. N. Sheldon.
R. H. F. Variel, for Chapin-Tibbot Co.

WELLBORN, District Judge. The material facts are these: A creditors' petition was filed against said bankrupt, Fixen & Co., a corporation, August 14, 1899, and the order to show cause thereon was made returnable on the 21st day of the same month. On September 1, 1899, said corporation was duly adjudged a bankrupt, and a general reference of the cause was made. Prior to the adjudication, to wit, on August 19, 1899, on the application hereinafter mentioned, it was ordered by the court:

"That Edward W. Forgy be, and is hereby, appointed receiver herein, and that said receiver shall cause to be executed a bond in the sum of five thousand dollars, conditioned as required by law, for the faithful discharge of his duties as such receiver. And said receiver is hereby authorized to take charge of the property of said bankrupt, and to keep the same until the further order of this court. And it is further ordered that the said receiver is authorized to commence and prosecute all necessary actions for the recovery of the property belonging to said bankrupt."

The application or petition for said order alleged, among other things: That said bankrupt for many years last past, and up to and just prior to June, 1899, had been the owner of a retail store, containing a large stock of merchandise, in Los Angeles, Cal., worth $60,000, substantially all the property of said corporation. That Elias C. Chapin and seven other persons, specifically named, conspired together to, and did, organize, under the laws of the territory of Arizona, a corporation known as the Chapin-Tibbot Commercial Company, with an authorized capital of $350,000, of 3,500 shares, of $100 each, of stock, nonassessable, and the stockholders not person-

ally liable for corporate debts. That said stock was divided into common stock of $175,000 in amount, and the balance preferred stock (only common stock entitled to vote at stockholders' meetings), and that said parties subscribed for $226,700 out of a total subscription of $284,400, and that, of their subscription, $154,200 consisted of common or voting stock, out of a total of $160,000 of common or voting stock. That the officers and directors, who were Elias C. Chapin, president, John W. Tibbot, vice president, S. Goodenow, treasurer, W. M. Sheldon, secretary, J. M. Davies, J. B. Tibbot, M. N. Sheldon, and two others to petitioners unknown, also conspired, by false and fraudulent representations and fraudulent promises made to the said Fixen & Co., to procure, and did procure, from said Fixen & Co., in June, 1899, a transfer of said store and merchandise, without any adequate, sufficient, or legal consideration, and with intent on the part of the promoters, officers, and stockholders of the said Chapin-Tibbot Commercial Company to obtain said stock of merchandise, and appropriate the same and the proceeds thereof to the use of the said Chapin-Tibbot Commercial Company, without the payment of any adequate or proper consideration therefor, and to hinder, delay, and defraud the creditors of said Fixen & Co. of their just debts and obligations. That said Fixen & Co. were indebted to various creditors in the aggregate sum of about $55,000 at the time of said transfer, none of which debts were assumed by said Chapin-Tibbot Commercial Company, and by said transfer, and the want of any adequate consideration therefor, said Fixen & Co. were rendered irretrievably insolvent, and that of all the matters and things aforesaid said Chapin-Tibbot Commercial Company and the stockholders, directors, and officers thereof, then and there had notice. That said Chapin-Tibbot Commercial Company took immediate possession of said stock of merchandise and business, and from thence until the 22d day of July, 1899, sold and disposed of the same at reduced prices, and rapidly converted the same into money, for the purpose of raising funds to pay off the notes of said Chapin-Tibbot Commercial Company, amounting to $25,000, which had been given in part payment for said merchandise; only $5,000 having been paid in cash; the balance of the consideration for said transfer being worthless stock in said Chapin-Tibbot Commercial Company. That, on the day and year last aforesaid, said Chapin-Tibbot Commercial Company, being unable to meet said notes, and having no money or means of raising money upon its property with which to pay said notes, and being then and there insolvent, and to avoid attachments upon said property, illegally, and without any adequate, sufficient, or lawful consideration, transferred said stock of merchandise and business to said S. Goodenow, who took said transfer of said merchandise, then amounting to $40,000 in value, and agreed to pay and take up said notes of the said Chapin-Tibbot Commercial Company; and immediately thereafter said S. Goodenow caused to be organized a new corporation, by the name of the Goodenow-Sheldon-Fixen Company, and transferred to it the remaining portion of said stock of merchandise. That said corporation is organized under the laws of the state of California, with an authorized capital of $200,000, $75,000 of which is subscribed as follows:

S. Goodenow, 350 shares, $35,000; Willard M. Sheldon, 120 shares, $12,000; A. H. Fixen, 100 shares, $10,000; Frank N. Gibbs, 80 shares, $8,000; Millard N. Sheldon, 100 shares, $10,000,—and which said subscription embraces all the stock which has been subscribed or issued by said corporation. That said corporation has no paid-up capital, other than the stock of merchandise and good will so transferred to it as aforesaid, and that said A. H. Fixen and W. M. Sheldon are financially irresponsible. That said Goodenow-Sheldon-Fixen Company is rapidly selling and disposing of said merchandise at greatly reduced prices, and sacrificing the same. That a trustee in bankruptcy cannot, in all probability, in the ordinary course of procedure, be elected herein before some time in October, 1899, and in the meantime said stock of merchandise, or at least the substantial portion thereof, will, in all human probability, have been dissipated and disposed of, and nothing left for the creditors of said Fixen & Co., except actions for damages and stockholders' liabilities against the persons connected with said corporation, which would be inadequate remedies for the creditors of said bankrupt That it is absolutely necessary for the preservation of said bankrupt estate to take charge of the property of said bankrupt, until the trustee has qualified, by the appointment of a receiver, with authority in him to begin and prosecute all necessary actions and proceedings to recover and preserve said estate. Said receiver duly qualified on the 19th day of August, 1899.

On August 26, 1899, the court ordered:

"That M. N. Sheldon, Elias C. Chapin, John W. Tibbot, S. Goodenow, Willard M. Sheldon, J. W. McCracken, and Frank N. Gibbs be and appear before William D. Stephens, referee in bankruptcy of this court, to whom this matter is hereby referred, to be examined before him, on the 26th day of August, 1899, at 2 p. m., at the office of said referee, rooms 5–7 of the Law Building, 125 Temple street, in the city of Los Angeles, California, concerning the acts, conduct, and property of said bankrupts, Fixen & Co."

The petition for said order alleged, among other things:

"That the Chapin-Tibbot Commercial Company kept books of account showing in part, at least, its dealings and transactions with Fixen & Co., and which contain the only record of such transactions. That said receiver is investigating the facts relative to the transfer from said Chapin-Tibbot Commercial Company of the property of said bankrupt; and in such investigation, and to arrive at the facts thereof, it is essential to have access to, and an inspection of, the books and papers of said Chapin-Tibbot Commercial Company. That, after much difficulty and repeated demands, an inspection was twice obtained of the minute book of said Chapin-Tibbot Commercial Company, and the said minute book was materially altered, at the time of the last inspection thereof, from what it was at the first. That among the assets that have come into the hands and possession of said receiver is certain stock of the Chapin-Tibbot Commercial Company. That said receiver, as such, and as the owner and holder of stock in said Chapin-Tibbot Commercial Company, has repeatedly requested and demanded an inspection of the cash book of said Chapin-Tibbot Commercial Company, which is now in the custody, control, and possession of M. N. Sheldon, who is the secretary and a director of said Chapin-Tibbot Commercial Company, and is also the secretary and a director of the Goodenow-Sheldon-Fixen Company. That said receiver refers to the petition in bankruptcy herein, and to the petition for the appointment of a receiver herein, and to the other files, records, and papers in said matter, as a part hereof. That, unless an immediate and expeditious exam-

ination of said cash book and other books and papers of said Chapin-Tibbot Commercial Company can be obtained, great and irreparable injury will ensue to the trust of which your petitioner is receiver. That the statutes of California [Pen. Code, § 565] provide, 'Every officer or agent of any corporation, having or keeping an office within this state, who has in his custody or control any book, paper, or document of such corporation, and who refuses to give to a stockholder or member of such corporation, lawfully demanding, during office hours, to inspect or take a copy of the same, or any part thereof, a reasonable opportunity so to do, is guilty of a misdemeanor.' That notwithstanding your receiver and other stockholders of said Chapin-Tibbot Commercial Company have demanded an inspection of the books and papers of said last-named corporation, pursuant to said statute above quoted, nevertheless said M. N. Sheldon, upon whom said demand was made, refuses to allow any inspection of said cash book, or any of the books of said Chapin-Tibbot Commercial Company. That the following are officers and directors of said Chapin-Tibbot Company: Elias C. Chapin, president; John W. Tibbot, vice president; S. Goodenow, treasurer; M. N. Sheldon, secretary; J. W. McCracken, director; Willard M. Sheldon, director; John M. Davies, director; Frank N. Gibbs, director; and said officers are the persons chiefly instrumental in manipulating the transfer of the assets of the bankrupt to the said Chapin-Tibbot Commercial Company."

Pursuant to said order, M. N. Sheldon was duly summoned to appear as a witness and produce certain books and documents before William D. Stephens, referee in bankruptcy, who certifies in relation to the examination of said Sheldon as follows:

"I, William D. Stephens, one of the referees of said court, in bankruptcy, do hereby certify that in the course of the proceedings in said cause before me the following questions arose, pertinent to said proceedings: On the 26th day of August, 1899, M. N. Sheldon was duly summoned to appear as a witness before me, to be examined, and produce certain books and documents, as shown by the summons and return thereon hereto attached, marked 'Exhibit A.' That said M. N. Sheldon disobeyed said order and summons, by failing to produce said documents and books. Thereupon he was ordered by me to produce the cash book and journal of the Chapin-Tibbot Commercial Company before me forthwith, which he failed and neglected to do; and thereupon he was again ordered to produce said books last mentioned, before me, on August 28th, at 2 p. m. At said last-mentioned time said Sheldon brought said book into court, but refused to produce the same for examination, and refused to be examined according to law. I find that the said M. N. Sheldon is the secretary of the Chapin-Tibbot Commercial Company, and was at all times herein mentioned in the lawful possession and control of said cash book or journal of the Chapin-Tibbot Commercial Company, and the minute book and other books of account of said corporation; that the testimony of said M. N. Sheldon and Edward W. Forgy, relating to said matter, was taken down in shorthand before me by F. J. McClary, who was first duly sworn by me to correctly take the same down in shorthand and transcribe the same into longhand; that annexed hereto is the transcript of said testimony, which contains all objections, motions, appearances of counsel, and rulings by myself as referee; also, attached hereto is the summons and return thereon, to said M. N. Sheldon and others, marked 'Exhibit B.' and made a part hereof. And I do hereby certify that the said M. N. Sheldon did, in the said proceedings before me, (1) disobey the lawful order of the judge of said court, made on the 26th day of August, 1899, for the examination of said witness; (2) disobey the lawful process and writ of summons marked 'Exhibit A'; (3) neglect to produce, after having been ordered to do so, the cash book or journal of the Chapin-Tibbot Commercial Company, the same being a pertinent document; (4) refuse to be examined according to law on August 28, 1899, after having taken the oath as a witness. And the said questions are certified to the judge for his opinion and decision thereon."

Counsel for said Sheldon seek to justify his disobedience of the orders and processes above mentioned on the grounds: First, that

the order appointing a receiver was in excess of the jurisdiction of the court, and therefore said order and all proceedings had for the examination of said witness were void; second, that, conceding the general power of the court, its exercise in this instance was erroneous; third, that the books which the witness was required to produce were irrelevant. These contentions will be examined in the order of their statement.

1. The grant of power to courts of bankruptcy to appoint receivers is as follows:

"That the courts of bankruptcy * * * are hereby invested * * * with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in bankruptcy proceedings; * * * (3) * * * appoint receivers, or the marshals, upon application of parties in interest, in case the courts shall find it absolutely necessary for the preservation of estates to take charge of the property of bankrupts from the filing of the petition and until it is dismissed or the trustee is qualified; (5) authorizes the business of bankrupts to be conducted for limited periods by receivers, the marshals, or trustees, if necessary in the best interests of the estates; * * * (15) make such orders, issue such processes, enter such judgments, in addition to those specifically provided for, as may be necessary for the enforcement of the provisions of this act. * * * Nothing in this section contained shall be construed to deprive a court of bankruptcy of any power it would possess, were certain specific powers not herein enumerated." Bankruptcy Act 1898, § 2 (3), (5), (15).

These clauses unquestionably give to courts of bankruptcy ample jurisdiction in the matter of provisional receiverships. For instances of the exercise of this jurisdiction, see In re John A. Etheridge Furniture Co., 92 Fed. 329, and In re Sievers, 91 Fed. 366, affirmed in Davis v. Bohle, 34 C. C. A. 372, 92 Fed. 325. Besides the express delegation of authority above quoted, courts of bankruptcy have general equity powers (Blake, Moffitt & Towne v. Francis-Valentine Co., 89 Fed. 691), and, by virtue of these general equity powers, may, in suitable cases, appoint receivers. While the bankrupt law of 1867 contained no express provision for the appointment of receivers, still the power was exercised by the courts under that law in appropriate cases. Keenan v. Shannon, Fed. Cas. No. 7,640; Lansing v. Manton, Id. 8,077.

The contention of counsel for the witness Sheldon, that so much of the order appointing the receiver as authorized him to institute actions for the recovery of the bankrupt's estate is in excess of the jurisdiction of the court, and therefore void, has no relevancy to this hearing. It is not at all essential, as I shall show later on, to the authority for the examination of said witness, that a suit should be pending, but said examination may be for purposes entirely different from those of a trial. An order for such an examination may be made on the simple application or demand of the receiver or trustee, without any showing of the questions to be asked, or the particular facts to be inquired into. In re Howard, 95 Fed. 415. If said contention, however, were material here, the argument of counsel in its support, that a receiver appointed pursuant to subdivision 3, above quoted, has no power to institute legal proceedings, but can only take charge of property voluntarily delivered to him, is, in my opinion, unsound. The duty of a receiver is "to take charge of the prop-

erty of bankrupts." If an action at law or suit in equity is necessary to the accomplishment of that purpose, the receiver not only has the power, but it is his duty, to institute such action or suit. To say that he cannot resort to legal proceedings when necessary to take charge of the property of the bankrupt, while conceding that he may employ all other suitable agencies and instrumentalities for the purpose, is wholly illogical. Legal proceedings are sometimes the only means whereby the property of bankrupts can be preserved. Suppose that an estate consists of personal property, which has come into the hands of wrongdoers, who are about to secrete it or carry it beyond the jurisdiction of the court. Can it be seriously claimed in such a case that the receiver must sit quietly by and suffer the property to be irretrievably lost, on the ground that his functions are limited to the receipt of such property as may be voluntarily surrendered to him? The statement of the claim is its refutation. I hold that it is clearly within the jurisdiction of the court appointing a receiver in bankruptcy to authorize him to institute necessary actions for the recovery of the bankrupt's property.

2. The question whether the appointment of the receiver in the present case was providently made or not is immaterial, so far as concerns the alleged contumacy of the witness Sheldon. The order appointing the receiver being within the jurisdiction of the court, obedience to said order was and is the duty of all persons whom it affects, and disobedience thereof cannot be justified on the ground that it was erroneous. There is another aspect of the case, however, which does make the question above stated material, and it is this: If the appointment of the receiver was improvidently ordered, further proceedings thereunder ought to be arrested at once, and the order vacated. For this reason I have re-examined the petition, and am satisfied that the situation it outlines vindicates the action taken by the court thereon. It was not necessary that said petition should have disclosed absolutely grounds for equitable relief against the alleged wrongdoers. One of the objects of the appointment was to set in motion agencies of inquiry to ascertain whether or not such grounds existed. Therefore, to hold that the petition ought to have alleged the grounds would, so far as said object is concerned, practically nullify the law, which authorized the appointment to be made. Assuming the allegations of the petition to be true, which must be done on this hearing, the preservation of the bankrupt's estate seems to require an earlier investigation of the bankrupt's dealings with the Chapin-Tibbot Commercial Company than can be had through the action of a trustee regularly selected in bankruptcy. Examinations of this sort, for the purposes of ascertaining the rights and interests of the bankrupt, and perpetuating testimony for their vindication, are in some instances as essential to the preservation of the bankrupt's estate as the taking of actual possession of his property. The provisions of law for such examinations are these:

"A court of bankruptcy may, upon application of any officer, bankrupt, or creditor, by order require any designated person, including the bankrupt, who is a competent witness under the laws of the state, in which the proceedings are pending, to appear in court, or before a referee, or the judge of any state

court, to be examined concerning the acts, conduct, or property of a bankrupt, whose estate is in process of administration under this act." Bankruptcy Act 1898, § 21a.

A receiver is an officer. Id. § 1 (18).

For further provision touching the examination of the bankrupt himself, see Id. § 7 (9).

The examinations thus provided for are not intended as means of producing testimony pertinent to issues then on trial, but their object is to afford to the creditors, and the officer charged with administering the trust, full information touching the bankrupt's estate, in order that necessary steps may be taken for its possession and preservation. Coll. Bankr. pp. 205, 206; In re Earle, Fed. Cas. No. 4,244; In re Krueger, Id. 7,942; In re Lathrop, Id. 8,106; In re Stuyvesant Bank, Id. 13,582; In re Mendenhall, Id. 9,423.

In re Krueger, supra, Lowell, District Judge, said:

"In 1 Christ. Bankr. (2d Ed.) 375, the learned writer says of these examinations: 'The object in general is to compel a discovery by a confession of the party, which in every court will be evidence against himself.' In later statutes the power has generally been defined somewhat differently, but the main object and use of it have been similar. Thus, St. Mass. 1846, c. 168, § 1 (now codified in Gen. St. c. 118, § 107), and like statutes in England, authorize the courts of bankruptcy and insolvency to summon and examine persons suspected of having property of the bankrupt. In deciding a case upon the statute of 1846, Shaw, C. J., uses almost identical language with that I have quoted from Mr. Christian: 'The purpose of the statute seems to be, by a thorough investigation of the case, and an appeal to the conscience of the party suspected, to enable the assignees to judge whether they will proceed to claim such property for the general creditors, and to obtain evidence to aid them in prosecuting such claim.' Harlow v. Tufts, 4 Cush. 448, 453."

3. In view of the charges of fraud against the Chapin-Tibbot Commercial Company, I am at loss to see how it can be successfully urged that the books of said company are not within the scope of the examination authorized by law. If these charges are true, any books or documents which show or tend to show the disposition or receipt by said company of the stock of goods alleged to have been fraudulently obtained by it, or which in any other way relate to said stock, unquestionably concern the property of the bankrupt; nor can the custodian of said books be excused from their production, or answering questions in reference thereto, under a plea that the books contain nothing relating to the bankrupt's property. This matter is not left to the opinion of the witness, but must be determined by the court. The offer of counsel for the witness Sheldon to now controvert and disprove said charges, and the circumstances on which they are based, cannot be entertained. The issues thus tendered involve substantially the merits of the grounds of equitable relief which it is alleged the receiver, or trustee hereafter to be appointed, has or will have against said company, and can be properly tried only in an appropriate suit brought for that purpose.

While the refusal of the witness Sheldon to produce the cash book of the Chapin-Tibbot Commercial Company for inspection, and to answer certain questions propounded in reference thereto, was a disobedience of the order and process of this court, yet, in view of the fact that he acted under the direction of counsel, who in good faith

advised him to the course he pursued, and the further fact of his readiness, as announced by said counsel at this hearing, to submit to an examination on the matters in controversy, should the court hold such examination proper, I shall not order proceedings looking to the punishment of the witness, but simply direct his examination to be proceeded with, in conformity to the views herein expressed, at such time as the referee may appoint; notice thereof being given to the witness. For this procedure I find a precedent in Re Howard, supra, recently decided by Judge De Haven.

In re CAMERON TOWN MUT. FIRE, LIGHTNING & WINDSTORM INS. CO.

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

INVOLUNTARY BANKRUPTCY—CORPORATIONS—INSURANCE COMPANY.

A petition in involuntary bankruptcy cannot be maintained against an incorporated mutual fire insurance company organized under the act of the Missouri legislature approved March 21, 1895; such a corporation not being "engaged principally in manufacturing, trading, or mercantile pursuits," within the meaning of Bankruptcy Act 1898, § 4b, and therefore not being amenable to the statute.

In Bankruptcy.

New & Krauthoff, for petitioning creditors.

PHILIPS, District Judge. This is a proceeding in involuntary bankruptcy. Various creditors of the alleged debtor have filed a petition to have said company declared a bankrupt. The petition alleges that said company "is a corporation engaged principally in mercantile pursuits," and alleges, as the ground of the proceeding, that said company committed an act of bankruptcy, in that it made an assignment for the benefit of its creditors to one C. H. Coppinger. The company appeared and filed answer, alleging that its principal place of business is in Kansas City, Mo. It admits that it did make a general assignment for the benefit of all creditors to said Coppinger, in due form, filed in the circuit court of Jackson county, Mo., and that said assignee had qualified and taken charge of said property, and is proceeding to administer the same under the state statute. It denies that it was or is a corporation engaged principally in mercantile pursuits; and further pleads that it is a corporation organized and incorporated under an act of the general assembly of the state of Missouri approved March 21, 1895, found in the Session Acts of the State of Missouri for 1895 (page 200); that under and by virtue of said act it was incorporated for the sole purpose of mutually insuring the property of its members, and for the purpose of paying any losses incurred by any member, by assessments, as provided by its constitution and by-laws, and for no other purpose whatever; and denies its liability to be declared a bankrupt under the bankruptcy act. No jury having been demanded by the defendant, by consent of both parties the question of law involved is submitted to

the court for its determination without first referring the case to the referee.

Without presenting any evidence, it is admitted before the court by both parties that the deed of assignment was made by said company to said Coppinger within four months next preceding the filing of the petition herein, and that the defendant is a corporation organized under said act of the legislature of the state of Missouri, and was doing only such business as was authorized by said act. The sole question, therefore, for the determination of the court, is whether or not such corporation is amenable to the bankruptcy law. Bankruptcy Act, § 4b, provides that "any corporation engaged principally in manufacturing, trading, printing, publishing, or mercantile pursuits, owing debts to the amount of $1,000.00 or over, may be adjudged an involuntary bankrupt." By the act of the legislature of Missouri under which this concern was incorporated, it is expressly provided that it is "organized for the sole purpose of mutually insuring the property of members, and for the purpose of paying any loss incurred by any member thereof by assessment, as provided by their constitution and by-laws." The act further exempts the company from the provisions of the insurance laws as mentioned in chapter 89 of the Revised Statutes of Missouri of 1889, and that nothing therein shall be so construed as to impair or in any manner interfere with any rights of any such companies doing a mutual insurance business in towns and cities of this state as therein provided. It is conceded by counsel for the petitioners that, unless the company is engaged principally in "mercantile pursuits," the petition should be dismissed. It is to be observed, in the first place, that the present bankruptcy act, in this respect, is radically different from the corresponding provision of the bankruptcy act of 1867. Section 37 of that act provided "that the provisions of this act shall apply to all moneyed business or commercial corporations, and joint-stock companies." It may be conceded for the purposes of this case that the Cameron Town Mutual Fire, Lightning & Windstorm Insurance Company might have been proceeded against in bankruptcy, under the act of 1867, as "a moneyed business corporation"; but the provision of the present bankruptcy act in this particular is much more restricted, and is limited expressly to corporations "engaged principally in manufacturing, trading, printing, publishing, or mercantile pursuits." Can it be said that a company "organized for the sole purpose of mutually insuring the property of the members, and for the purpose of paying any loss incurred by any member thereof by assessment," is principally engaged in a mercantile pursuit? When the legislature changed the statute from "moneyed business or commercial corporations" to the language "principally engaged in mercantile pursuits," it is to be presumed it was done for a purpose. The word "mercantile," in its ordinary acceptation, pertains to the business of merchants, and has "to do with trade or the buying and selling of commodities." A merchant is one who traffics, or who buys and sells goods or commodities. He would be a merchant if his business consisted in buying without selling, and he might be a merchant by simply selling. The term "mercantile pursuit" necessarily carries with it the idea of traffic,—the buying of

something from another, or the selling of something to another,—and is allied to trade. This concern has nothing in its business of the character of mercantile pursuit. It can only insure the property of its own members, and raise the money for paying losses by assessments upon its members. It has no other property than that thus derived, and this property would consist in moneys or notes paid in by the members assessed for the paying of losses sustained by its members. This fund, when received, is an especial trust fund, that cannot be otherwise diverted or appropriated. It has no power to purchase or sell property of any kind, or to engage in any commercial enterprise. And, as disclosed on the face of the petition in this case, the only assets it has, or could lawfully have, would be policies issued to its members, or notes and moneys representing assessments, which are not commercial liabilities, and are neither bought nor sold. The presumption must be indulged, on these pleadings and the statement of counsel, that the corporation has confined its operations and business within the limits of the law under which it was organized. Such a concern, in the opinion of the court, is not engaged principally in mercantile pursuits, and the petition must therefore be dismissed.

KEEGAN v. KING et al.

(District Court, D. Indiana. September 27, 1899.)

1. BANKRUPTCY—TITLE TO PROPERTY—CONFLICTING JURISDICTION.
When a court of bankruptcy, having jurisdiction in the premises, through its receiver or a trustee in bankruptcy, has taken actual possession of property scheduled by the bankrupt as assets of his estate, and holds the same for administration in bankruptcy, it is not competent for a stranger, claiming to be the owner of such property, to maintain a suit in a state court against the trustee for the purpose of establishing his title and restraining the officer from selling the property. His remedy is by petition in the court of bankruptcy.

2. SAME—ENJOINING SUIT IN STATE COURT.
The court of bankruptcy, on petition of the trustee, will enjoin the further prosecution of an action brought by such claimant against him in a state court to establish his claim to the property in controversy.

In Bankruptcy. Petition by Hugh G. Keegan, as trustee in bankruptcy of the J. F. Schell Loan & Investment Company, against Sarah J. King and Caroline King, for an injunction restraining the defendants from the further prosecution of an action commenced by them against the petitioner in the superior court of Allen county, Ind. Defendants appeal from a decision overruling their plea in abatement to such petition.

Vesey & Heaton, for plaintiff.

Walpole G. Colerick and Henry Colerick, for defendants.

BAKER, District Judge. The decision of the court below overruling the plea in abatement filed to the petition of Hugh G. Keegan, trustee, is affirmed. The facts, shortly stated, are these: On March 31, 1899, a creditors' petition was filed in this court, upon which, on

April 3, 1899, the J. F. Schell Loan & Investment Company was adjudged a bankrupt, and a receiver was at the same time appointed, who took possession of the leasehold premises and of the fixtures in controversy as the property of the bankrupt, and retained possession of the same as such receiver until May 6, 1899, when the present petitioner was elected trustee of the bankrupt's estate, and the possession of said premises and fixtures was delivered by the receiver to the trustee, who has remained in actual, continuous possession of the same ever since. The receiver, under the order of this court, paid the rent of the leasehold premises to June 1, 1899, which was accepted by the defendants herein. On the ——— day of May, 1899, the trustee advertised the personal property of the bankrupt, including the fixtures in controversy, for sale on May 24, 1899. The fixtures in controversy were scheduled by the bankrupt as a part of its estate. On May 17, 1899, the defendants herein began an action in the superior court of Allen county to restrain the trustee from selling or offering to sell the fixtures, and to establish the title of the defendants to the property as against the trustee. Process was issued out of the superior court of Allen county and served on the trustee, returnable May 27, 1899. On May 20, 1899, the trustee filed his petition in this court against the defendants, Sarah J. and Caroline King, asking this court to restrain them from further proceeding with the case against him in the state court. To this petition of the trustee the defendants filed a plea in abatement, setting up the pendency of the suit in the state court as a reason why the present petition should abate.

The precise question presented upon the above facts is this: After this court has taken actual possession of property, through its receiver and trustee, as the property of the bankrupt, and has retained the actual and continuous possession of the same from a time long anterior to the commencement of the suit in the state court, is it competent for parties who claim to be the owners of the property so in the actual custody and possession of this court to maintain a suit in the state court for the purpose of settling the title and enjoining the officer of this court from proceeding to the disposition of property so in the actual possession of this court? The statement of the question would seem to carry its own answer. This court, being in the actual possession of the property in controversy, has the exclusive right to determine all conflicting claims as to the title and right of possession of the property so in its custody. The case of Freeman v. Howe, 24 How. 450, and repeated decisions of the supreme court of the United States following it, are decisive. In that case it was held that, although property had been wrongfully seized by the marshal of the United States by virtue of a writ of attachment, the rightful owner could not obtain possession of it by resort to the courts of another jurisdiction. And in Buck v. Colbath, 3 Wall. 334, 341, commenting on the case of Freeman v. Howe, supra, the supreme court say:

"We are, however, entirely satisfied with it, and with the principle upon which it is founded,—a principle which is essential to the dignity and just authority of every court, and to the comity which should regulate all questions

of conflicting jurisdiction between courts of concurrent jurisdiction. That principle is that, whenever property has been seized by an officer of a court by virtue of its process, the property is to be considered in the custody of the court and under its control for the time being; and no court has the right to interfere with that possession, unless it be some court which may have a direct supervisory control over the court whose process has first taken possession of it, or some superior jurisdiction in the premises. This is the principle upon which the decision of this court rested in Taylor v. Carryl, 20 How. 583, and Hagan v. Lucas, 10 Pet. 400, both of which assert substantially the same doctrine."

The bankruptcy act does not generally impair in any way the jurisdiction of state courts; and in cases where the officers of state courts, prior to an adjudication in bankruptcy, have seized property of the bankrupt under state process, such levy cannot be interfered with by a federal court, unless it is fraudulent or contrary to the bankruptcy act, or upon some equitable ground. The moment, however, that an adjudication of bankruptcy has been made, the title to all the property of the bankrupt, as of that date, passes to the person who is subsequently chosen trustee. From the time of the adjudication the property of the bankrupt is in the custody and under the control of the bankruptcy court. From the time such property, by the adjudication of bankruptcy, comes into the custody of the bankruptcy court, it is in custodia legis; and that court will not permit any person, even though he be an officer of a state court, acting under its process, to interfere with the custody or possession by the bankruptcy court or its officers of the property thus in its custody. And it does this upon the same principle upon which the bankruptcy court refuses to interfere with a levy lawfully made by a sheriff under process of a state court prior to the adjudication of bankruptcy, or refuses to interfere with the possession of a receiver previously appointed by a state court, or with any other person who as an officer of such court is acting under authority conferred prior to the adjudication, except in so far as the bankruptcy act provides otherwise, either expressly or by necessary implication.

The property in controversy being in the actual custody and possession of an officer of this court at the time the suit was brought in the state court, neither that court, nor any person acting under any process issued from that court, can, without the permission of this court, interfere with it; and to so interfere would be a contempt of the authority of this court. This principle is thoroughly settled by the supreme court of the United States in the cases of Peck v. Jenness, 7 How. 612, 625; Williams v. Benedict, 8 How. 107, 112; Wiswall v. Sampson, 14 How. 52; Peale v. Phipps, 14 How. 368, 374; Taylor v. Carryl, 20 How. 583, 594, 597; Freeman v. Howe, 24 How. 450; Buck v. Colbath, 3 Wall. 334. And this is true, even though the property may actually remain in the hands of the bankrupt. In re Rosenberg, Fed. Cas. No. 12,055. "A departure from this rule," as was well said by the supreme court in Buck v. Colbath, supra, "would lead to the utmost confusion and to endless strife between courts of concurrent jurisdiction deriving their powers from the same source; but how much more disastrous would be the consequences of such a course in

the conflict of jurisdiction between courts whose powers are derived from entirely different sources, while their jurisdiction is concurrent as to the parties and the subject-matter of the suit?" This court, through its receiver and trustee, having been in the actual custody and possession of the property in controversy as the property of the bankrupt before the institution by the defendants of their suit in the state court, it is clearly the duty of this court to maintain such custody and possession, and to permit no other court to interfere therewith by injunction or otherwise.

If the defendants in the present case are entitled to the possession of the fixtures as against the trustee, it is their duty to present their claim to the court in whose possession the property is, for the purpose of having the respective rights of the parties determined.

UNION SWITCH & SIGNAL CO. et al. v. PHILADELPHIA & R. R. CO. et al.

(Circuit Court of Appeals, Third Circuit. September 13, 1899.)

42, September Term, 1898.

1. PATENTS—INFRINGEMENT—RAILROAD BLOCK SIGNALING.
   The Gassett patents, Nos. 233,746 and 246,492, for electric railway signaling apparatus, which cover improvements on the preceding Robinson system (No. 130,661; reissue 5,938), consisting in the exhibition of a danger signal at the entrance of a track section until the train has passed over, not only such section, but also a determinate part of the section next in advance, are not entitled to the broad construction accorded to pioneer inventions, but must be limited to the specific purpose sought to be accomplished, which is merely to continue the signal at "Danger," as a stop signal, until the train has passed a determinate distance beyond the section; and they are not infringed by a device in which two danger signals are set at the beginning of each section, and one of which continues at "Danger," as a distant cautionary signal, during the passage of the train over the entire section in advance.
2. SAME—VALIDITY—PRIOR USE.
   The Westinghouse patent, No. 270,867, for improvements in electric circuits for railway signaling, is void, because it was in public and practical use for more than two years before the patent was applied for, and because a complete description of it was previously published in the Railroad Gazette, a trade paper having a general circulation among railroad people and those connected with railroads.
3. SAME—INFRINGEMENT—CONNECTORS FOR ELECTRIC TRACK CIRCUITS.
   The Gassett and Fisher patent, No. 227,102, for an improved connector for electric track circuits, consisting of a wire having its ends coiled around and soldered to the outer ends of studs which are driven into holes drilled in the rails to be connected, is limited to the precise construction shown, and is not infringed by a connecting device in which the wire is not wound around or soldered to the studs.
4. SAME—MEANS PATENT.
   The Means patent, No. 273,377, for a connector for electric track circuits, construed, and *held* not infringed by a device by which the connection is established directly between the rails and the connecting wire, instead of through the plugs used to fasten the wire, as shown in the patent.

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

For opinion of the circuit court, see 87 Fed. 906.

George H. Christy, for appellants.
W. H. Kenyon and R. N. Kenyon, for appellees.

Before SHIRAS, Circuit Justice, and BUTLER and KIRKPATRICK, District Judges.

KIRKPATRICK, District Judge. The bill in the case charges the defendants with infringement of certain claims in patents Nos. 233,746, dated October 26, 1880, to Oscar Gassett; No. 246,492, dated August 30, 1891, to Oscar Gassett; No. 270,867, dated January 16, 1883, to George Westinghouse, Jr.; No. 227,102, dated May 4, 1880, to Oscar Gassett and Israel Fisher; No. 273,377, dated March 6, 1883, to Charles I. Means. They relate to the automatic operation of electric signals, tending to prevent rear-end collisions of railway trains, and the means by which said signals are made operative and effective. They will be considered in the order named. It will be observed by an examination of the record and the reading of the specifications of the complainant's patents No. 233,746 and No. 246,492 that they are not in any sense pioneers in the art. Long before October, 1880, which is the date of the granting of patent No. 233,746, William Robinson obtained in the United States patent No. 130,661, dated August 20, 1872, the object of which was to operate electric signals by means of moving trains, using the rails of the track as conductors of the electric current. He divided the track into sections insulated at the ends, and created a circuit normally closed which held the "Danger" signal at "Safety." When the train entered upon the section, the electric current short-circuited through the wheels and axles of the cars, and thereby demagnetized the electromagnet which held the signal at "Safety," and caused it to be changed to "Danger." The specification of this patent also set out the means by which "any desired number of signals could be operated at different points from a single section of track." Robinson, in his British patent, dated August 29, 1879, also says: "One or more lines of wire may also be used to operate additional signals; for instance, to indicate * * * when the block signal has changed." An examination of the record discloses the fact that prior to the granting of the complainant's patents there were also other electrical devices, operated by a moving train, for the prevention of rear-end collisions, and that "Home" and "Distant" signals were in common use,—the former to warn against imminent danger; the latter placed further in the rear, to give notice that danger might be looked for at the next station. With this state of the art, Gassett, the inventor of complainant's device, in the specification of patent No. 233,746, says:

"It has been found in practice that it is frequently desirable and necessary to continue a given danger signal in action after the train which has set it in action has passed over the next section in advance of a certain part thereof, by which means an additional security is provided, especially upon dangerous portions of the road, such as sharp curves, or descending grades."

The claims of this patent which it is charged are infringed relate to the means by which this result is accomplished. They are as follows:

Claim 3: "The combination, substantially as hereinbefore set forth, of a railway track divided into two or more signal sections; a signaling apparatus actuated or controlled by an electric magnet, and placed at the entrance of each one of said signal sections; a circuit closer, controlled by a moving train, which acts to exhibit a danger signal by diverting the actuating current from the electro-magnet during the time occupied by the train in traversing the section guarded by said signal; and a circuit breaker, controlled by the moving train, which acts to continue the exhibition of said danger signal by interrupting the current through its electro-magnet during the time occupied by the train in traversing a determinate portion of the next succeeding signal section." Claim 4: "The combination, substantially as hereinbefore set forth, of a series of two or more normally closed railway signaling circuits and a series of circuit breakers, one for each circuit, each of which circuit breakers is actuated or controlled by an electro-magnet included in the next circuit of the series."

No new result is claimed to have been obtained in patent No. 246,492, but the invention relates to "an improved organization or circuit and apparatus whereby the same result may be obtained in a more reliable and efficient manner." The claim of this patent which it is charged is infringed is the third, viz.:

"The combination, substantially as hereinbefore set forth, of a secondary circuit for actuating an electro-magnet controlling the movements of a signal, two wide pendent circuit breakers placed in said secondary circuit, and two independent primary signaling circuits respectively controlling the action of the said circuit breakers, which primary circuits are themselves actuated successively by a train while traversing the signal section protected by said signal."

The expressed object of both inventions was to supplement an old device, and one well known to the art. It will be seen that the division of the track into insulated signal sections having a normally closed circuit holding the signal at "Safety," together with the breaking of this circuit by the passing of the electric current through the wheels and axles of the moving train, and thereby placing the signal at "Danger," was but the Robinson device hereinbefore referred to; while the means employed for the continuation of the exhibition of the danger signal during the time occupied by the train in traversing a determinate portion of the next succeeding signal section alone had the semblance of novelty. This continuation of the danger signal had been preshadowed by Robinson, and the principle of overlapping signals clearly set out and provided for in the patent to Henry Flad, No. 162,369, dated April 20, 1876. In no sense can it be said that Gassett was a pioneer in the art. He should be limited not only to the specific purpose which he desired to accomplish, but to the specific means which he employed.

An examination of the defendant's device shows: That he has embodied the Robinson principle, which was free to the world. In the same way he has divided the track into primary circuits, which, like Robinson's and Gassett's systems, are normally closed. To this he has added for each track section a secondary signal-controlling circuit containing the "Home" and "Distant" signals. These secondary circuits, unlike Gassett's secondary circuits, are normally open, and, when so open, cause the signal to indicate "Danger." When the train enters upon a section, the wheels and axles of the cars, by

short-circuiting the electric current in the primary circuit of that section, actuate two signals at the entrance of that section; one signal—the "Home" signal—indicating that the section is occupied, and the other—the "Distant" signal—being then merely additional thereto. As the train passes off the section, the "Home" signal is set free, but the "Distant" signal remains, to indicate to an approaching train that, while the immediately preceding section is clear, the one in advance of that is not, and therefore that caution must be exercised in observing the Home signal at the next station. The systems of the complainant and defendant differ, therefore, in purpose. The complainant sets a danger signal at the entrance of the section, and keeps it set until the train has not only passed over that section, but a determinate portion of the preceding section. It stops the following train at the entrance of the section, although the preceding train has passed entirely over it. The defendant's system permits the following train to pass upon a section so soon as the preceding train has left it, but sets a cautionary signal, bidding the engineer exercise great care in proceeding, because a train is then occupying the immediately preceding section. The purpose of the complainant's system is to stop the train, and of the defendant's to suffer it to proceed with caution. These systems also differ in the specific means employed to primarily cause, and then to continue, the exhibition of the signals after the train has left the section. Both complainant's and defendant's operate upon the Robinson principle, though the defendant does not use the specific means described in the complainant's combination. The secondary signaling circuit of the defendant's is open when there is no train on the track, while that of the complainant's is closed under the same condition. The defendant does not divide any signaling section into two subsections, as does the complainant, but has the circuit of each section entirely independent of all others. The complainant's device is provided with two independent circuit breakers in the branching secondary circuit for actuating an electro-magnet controlling the movement of the signal. These are wanting in the defendant's structure. We are of the opinion that the defendant's device in no way infringes upon the claims of the Gassett patents, as charged

It is also alleged in the bill that the defendant's device infringes upon claim 4 of patent No. 270,867, dated January, 1883, granted to George Westinghouse, Jr. The record clearly shows that the Westinghouse device was anticipated not only by a prior publication which appeared in a periodical known as the Railroad Gazette, dated March 12, 1880, and April 2, 1880, but also by the structure set up for use on the Chicago, Burlington & Quincy Railroad. It appears by the evidence that this use of the device upon the Chicago, Burlington & Quincy Railroad extended over a period of upwards of two years; that it was not merely experimental, but public and practical. It was at that time a perfected invention, set up for the purpose of sale, subject to approval, and was intended to be used as a means to promote its sale to other corporations. We are of opinion that the patent No. 270,867 is void for want of novelty.

The bill also charges infringement of claim 1 in patent No. 227,102, which is as follows:

"The combination, with a rail bored to receive it, of a wire provided at its ends with a connected driving stud to be driven into the said rail to form a continuous metallic conductor therewith for an electric current, substantially as described."

A reference to the specification shows that the invention consists in punching or drilling holes in the flanges of adjacent rails, and driving into these holes the ends of a wire connector long enough to reach them and span the rail joint, the conductor being provided at its ends with tapering driving studs a trifle larger than the holes, so that when forcibly driven in the holes they form a perfect contact. "The ends of the wire connectors are coiled around the driving stud just under their heads, and the whole end then dipped in molten solder or other suitable material." Certainly it required no invention to electrically connect disjointed rails with a wire conductor, and hold this wire in place by clamping it against the rails by means of a driven stud or bolt. Something more was needed to give patentable novelty. This was obtained by coiling the wire around the head of the driving stud, and securing it by molten solder. To this precise construction we think the complainant must be limited. The wire of the defendant's device is not wound around the stud; not soldered thereto. It does not, therefore, infringe.

The last claim and patent on which infringement is charged is claim and patent No. 273,377, viz.:

"The combination, with the conducting wire, U, of the split plug, X, and railroad track, Q, substantially as and for the purposes set forth."

It will be observed that this claim is very narrowly drawn. The specification calls for a split plug adapted to obtain spring action, so that, when the wire is inserted in the hole in the center, and the plug driven into the rail, electrical connection will be established between the wire and the rails through the plug. The electrical connection is between the wire and the plug that clamps it. In defendant's device the plug is used merely as a clamp or wedge to press the wire against the rail, and does not form a part of the electric circuit. It has none of the essentials of complainant's plug, and cannot be said to infringe the claim of this patent. The decree of the circuit court will be affirmed.

THE WESTMINSTER.

(District Court, E. D. Pennsylvania. October 4, 1899.)

1. PRACTICE IN ADMIRALTY—METHOD OF TAKING DEPOSITIONS.
Rev. St. § 866, authorizing any of the courts of the United States to issue commissions to take depositions "according to common usage," does not require a court of admiralty to conform to the practice in the state courts, and it may by rule provide a different method for taking depositions.

2. SAME—REPRESENTATION OF ADVERSE PARTY.
Under rule 40 in admiralty of the district court for the Eastern district of Pennsylvania, which permits parties to attend the examination of witnesses whose testimony is taken on commission, either personally or by their proctors, if the adverse party desires to be represented at such an examination he should furnish the name and address of his representative to the party taking out the commission, or to the commissioner, or file the same with his cross interrogatories, in which case it will be the duty of the commissioner to give such representative notice.

In Admiralty. On motion to suppress depositions. Denied.

John F. Lewis and Horace L. Cheyney, for libelant.
Henry R. Edmunds and Convers & Kirlin, for respondent.

McPHERSON, District Judge. A commission to take testimony in London was recently issued at the instance of the claimant, and interrogatories and cross interrogatories were duly filed by the parties. The commission was executed by the vice consul, and his return shows that during the examination of the witnesses the managing clerk of a firm of English solicitors appeared, to watch the proceedings on behalf of the claimant, and that no one was present on behalf of the libelant. The motion to suppress the depositions is based upon the presence of the clerk during the examination, coupled with the fact that no notice was given to the libelant of the time and place when the testimony was to be taken. It is argued that section 866 of the Revised Statutes is the only source of the court's authority to issue the commission in question, and that this section requires the testimony to be taken in accordance with "common usage"; such usage, it is further argued, being the practice prevailing in the courts of Pennsylvania, which forbids an attorney or agent of the party taking out the commission to be present during the examination of the witnesses, under penalty of vitiating the proceedings. Hollister v. Hollister, 6 Pa. St. 449, is cited as evidence of the practice in the state courts. Assuming the Pennsylvania usage to be as just stated, I do not regard it as controlling in the present instance. In my opinion, section 866 does not require a court of admiralty to conform to the practice in the state courts. Section 914, which provides that "the practice, pleadings and forms and modes of proceeding in civil causes * * * in the circuit and district courts shall conform, as near as may be, to the practice, pleadings and forms and modes of proceeding existing at the time in like causes in the courts of record of the state within which such circuit or district courts are held, any rule of court to the contrary notwithstanding," expressly excepts from the operation of

the section "equity and admiralty causes." So far as proceedings in admiralty are concerned, the reason is plain. There are no like causes in the state courts, and therefore there is no practice to which, in the interest of uniformity, the admiralty courts should be required to conform. When, therefore, section 866 provides that "any of the courts of the United States may grant a dedimus potestatem to take depositions according to common usage," while it may be conceded, in accordance with the decisions in Buddecum v. Kirk, 3 Cranch, 293, U. S. v. Cameron, 15 Fed. 794, and Jones v. Railway Co., Fed. Cas. No. 7,486, that "common usage" means the usage prevailing in the courts of the state in which the federal tribunal is sitting, I think it is clear that the clause just quoted is so far qualified by the exception in section 914 as to relieve courts of admiralty from such compliance with state practice as may be imposed upon a federal court of law. Of the cases cited, one was an action of debt, the second was a criminal proceeding, and the third was a civil suit apparently at law. Neither decision, therefore, rules the question now under consideration. No doubt a court of admiralty might see proper to conform its own practice in the taking of depositions to the practice prevailing in the state courts; but this is a matter of discretion, and, if its rules provide a different method, I see nothing in the Revised Statutes to prevent.

Upon the point now in controversy, the rules of this court are as follows: Rule 40 declares that "parties may attend the examination of witnesses, either personally or by their proctors; and where the proceeding is under the 31st rule [which provides for the taking of testimony in the city or county of Philadelphia] they may exhibit their interrogatories seriatim as the examination advances; but such interrogatories shall be in writing, and shall be propounded to the witness by the commissioner, and shall be noted in his return." Rule 41 provides that "parties or their proctors may, moreover, present to the commissioner, during the progress of the examination, such notes of exception and other matters as they may require to be reported by him to the court"; and rule 42 guards against possible abuses by adding: "But no party or proctor shall interfere during the examination otherwise than is allowed by the two preceding rules; and irregularities in this behalf shall be noted by the commissioner and reported by him to the court." The meaning of these rules is plain. They authorized the presence of the clerk at the examination before the vice consul, and there is no averment or proof of any other interference with the proceedings. If the libelant desired to be represented at the examination, the name of its representative should have been given to the claimant, or to the commissioner. In future it may be desirable for the parties to file with their interrogatories or cross interrogatories the name and address of the attorney or agent to whom notice of the time and place of the examination should be given. If this is done, it will be the commissioner's duty to notify such person. The motion to suppress the depositions must be denied.

THE GLENESSLIN.

(District Court, D. Oregon. September 14, 1899.)

No. 4,462.

SEAMEN—LIEN FOR WAGES.

Except in the cases provided for in Rev. St. § 4527, where shipping articles have been signed, and a seaman is thereafter unwarrantably discharged by the master, there can be no lien as for wages unless services have in fact been rendered. A seaman engaged for a voyage, but not signed or shipped, has no lien for wages or for expenses incurred.[1]

This was a suit in rem to recover wages and expenses incurred by libelants on the faith of an engagement to ship as seamen on the ship Glenesslin.

John Ditchburn, for libelants.
J. C. Flanders, for claimants.

BELLINGER, District Judge. The libel alleges that on the 19th day of June, 1899, the master of the Glenesslin, through his agents, employed the libelants as seamen to serve upon the ship from the port of Portland to a port in South Africa; that libelants were at the time in San Francisco, and that it was understood and agreed that the ship would pay the cost of their transportation from San Francisco to Portland, and the cost of their board and lodging from said 19th of June until they should go aboard said ship; that thereafter the master employed other sailors. The libel is brought to recover the cost of passage from San Francisco, and the cost of board and lodging, and also for wages for the voyage for which the libelants expected to ship. The testimony shows that Frank Turk and Patrick Lynch were engaged by the master of the Glenesslin to go to San Francisco, and secure a crew for the ship, and that they engaged libelants for that purpose, and brought them to Portland. Turk and Lynch advanced the money required for libelants' traveling expenses. No shipping articles were signed, and there is no claim that services were rendered. Where services have not, in fact, been rendered, there can be no lien as for wages, except in the cases provided for in section 4527 of the Revised Statutes, where a shipping agreement has been signed, and the seaman is thereafter unwarrantably discharged by the master. In such cases a sum equal to one month's wages may be recovered. This is not such a case. There is no question in the case as to whether Turk and Lynch, who went to San Francisco at the instance of the master, and rendered service and expended money in bringing a crew to Portland for the Glenesslin, are entitled to a lien for such services and expenditures. They are not parties, and nothing is claimed on their account. The libel is dismissed.

[1] As to maritime liens for supplies and services generally, see note to The George Dumois, 15 C. C. A. 679.

COWELL v. CITY WATER-SUPPLY CO. et al.

(Circuit Court, S. D. Iowa, E. D. September 9, 1899.)

No. 221.

1. REMOVAL OF CAUSES—JURISDICTION OF PARTIES—RESIDENCE.
A defendant may waive the provision of the judiciary act (25 Stat. c. 866, § 1) which entitles him to be sued in the district of his residence; and where he is sued in a court of a state in which neither he nor the plaintiff resides, and removes the cause to the circuit court of the United States in such district, the plaintiff, having elected to institute the suit in such state court, cannot object to such removal on the ground that defendant is not a citizen or resident of the district, and that, therefore, the court would not have had original jurisdiction of the suit.

2. FEDERAL COURTS—VENUE—LOCAL SUITS.
A suit to cancel a mortgage on real estate is of a local nature, and may be maintained in a federal court of the district where the property is situated, where there is the requisite diversity of citizenship and amount involved to give it jurisdiction, without regard to the residence of the parties.

3. SAME—JURISDICTION—AMOUNT IN DISPUTE.
In a suit to set aside a conveyance of property, and mortgages given thereon, the value of the property and rights which will be affected if the relief prayed for is granted, and not the value of complainant's interest in the property, constitutes the amount in dispute, for the purpose of determining the jurisdiction of a federal court.[1]

In Equity. On motion to remand.

Blake & Blake, for plaintiff.
W. A. Underwood and Wm. McNett, for defendants.

WOOLSON, District Judge. Plaintiff's motion to remand must be overruled, because:

1. Although none of the parties plaintiff or defendant are citizens of this state, and therefore, on mere question of diverse citizenship, if suit had originally been brought in this court, this court, as against their protest, would not have jurisdiction of the parties defendant, yet the defendants may, if they will, waive the provision of the statute requiring them to be sued in the district of their residence. Ex parte Schollenberger, 96 U. S. 369, 378; Railway Co. v. McBride, 141 U. S. 127, 11 Sup. Ct. 982; Trust Co. v. McGeorge, 151 U. S. 129, 14 Sup. Ct. 286; Jewett v. Trust Co., 45 Fed. 801. In this case the defendants, by their petition for removal of case, have formally requested that this suit be placed within the jurisdiction of this court, and thus waived the provision of the statute above referred to. If the court from which the case was removed had jurisdiction of the parties, this court after removal has jurisdiction of them. O'Donnell v. Railroad Co., 49 Fed. 689, 692.

2. Plaintiff, having instituted this suit within this district, though in the state court, has thereby elected to have the suit litigated within the boundaries of this district. He had the right thus to elect, so

[1] As to jurisdiction as determined by the amount in controversy, see note to Auer v. Lombard, 19 C. C. A. 75, and, supplementary thereto, note to Tennent-Strimbling Shoe Co. v. Roper, 36 C. C. A. 459.

far as he is concerned, to have the suit here tried. While the suit is pending in the state court the defendants could not object to jurisdiction of that court on the ground that none of such defendants were citizens or residents of the state of Iowa. If plaintiff could bring his action in the state court, and defendants were powerless in said court to stay or dismiss the same because of their being citizens and residents of other states, it must necessarily follow, if plaintiff's contention be upheld (viz. that defendants cannot remove the case to this court, because they are severally not citizens or residents within this district), that as to subject-matter, confessedly within the jurisdiction of this court, these nonresident defendants are forbidden to litigate the same in this court, but must submit to such litigation in the state court. In this respect such contention of plaintiff largely nullifies the jurisdiction of the federal courts, as heretofore generally exercised, as to controversies between citizens of different states in actions removed from the state courts, where none of the parties are citizens of the state and residents of the district in which the action was commenced in the state court. Duncan v. Associated Press, 81 Fed. 417; Long v. Long, 73 Fed. 369; Bank v. Pagenstecher, 44 Fed. 705.

3. But the subject-matter of the suit, to wit, cancellation of mortgages upon real estate within this district, is of a local nature, and therefore is properly brought within this district, wherein the property—the real estate so mortgaged—is situated (Northern I. R. Co. v. Michigan Cent. R. Co., 15 How. 232, 242); and, as such, the suit, if the amount in controversy is sufficient, could originally have been instituted in this court (Northern I. R. Co. v. Michigan Cent. R. Co., supra), with the parties plaintiff and defendant as now named in the bill (Curt. Jur. U. S. Cts. 137; Single v. Manufacturing Co., 55 Fed. 553, 555).

4. The "amount in dispute" herein, exclusive of interest and costs, exceeds $2,000. Plaintiff, according to his bill, is the owner of one bond, of face value of $1,000, with coupons attached, issued by the Iowa Water Company, and secured by trust deed upon real estate situated within this district. The trust deed securing his and other bonds was foreclosed in this court, the property (water-supply plant) sold, deed therefor executed to purchasers on confirmation by the court of such sale, a deed by said purchasers executed to the City Water-Supply Company (incorporated under a reorganization plan), and two mortgages aggregating $475,000, in bonds secured, were executed upon the property which had been so sold. Plaintiff now asks this court (1) to cancel the deed so executed to the City Water-Supply Company, and confirmed by this court, the property therein conveyed being claimed in this bill to be of the value of $524,000; (2) to cancel the two mortgages from said City Water-Supply Company upon said property, securing said $475,000 bonds; (3) to declare said reorganization scheme illegal and set it aside; and (4) to establish in plaintiff, as his property, a $1/325$ interest in said property, or, failing in that, to have judgment against defendants for $1/325$ part of $524,000. If plaintiff is successful in the first relief demanded, what is the result? A conveyance of property by him

declared to be of the value of over a half million dollars is set aside, two mortgages on said property are canceled, and bonds with face values aggregating nearly a half million of dollars are made valueless, so far as the bonded security is concerned, and plaintiff is decreed to be owner of 1/325 of said property. If the relief demanded may be the test, manifestly the matter in dispute vastly exceeds $2,000 in its extent. And, if the allegations of the bill are true, there has occurred a breach of the covenants contained in the exhibited conveyance of said entire water-plant property from the bondholders' committee to the City Water-Supply Company. But it is argued that an amount less than $2,000 is in dispute, because by the payment of less than $2,000 the bond held by plaintiff can be paid off, and his right to maintain this suit thereby extinguished. But why should the amount which will extinguish plaintiff's right as a bondholder be taken as the test of value of the matter in dispute? It will not be claimed that a proper test is, what will plaintiff take in discharge of his claim? An offer of settlement by plaintiff would not be taken as a test. He does not ask in his bill that his bond be paid off. The bill is on the theory that he proposes to retain his bond and pursue his asserted rights thereunder. If, then, the test is to be the value of the relief demanded, the matter in dispute herein involves vastly more than the jurisdictional amount. Had plaintiff brought an action at law against these defendants to recover the value of this bond and the coupons held by him, manifestly he would have prayed judgment for the amount claimed as due thereon. That would be the measure of his interest. And the matter in dispute (removal being sought, with no pleading filed, other than his petition) would be determined from the allegations of the petition. Hilton v. Dickinson, 108 U. S. 165, 2 Sup. Ct. 424; Bowman v. Railroad Co., 115 U. S. 611, 6 Sup. Ct. 192.

Various phases of the question under consideration have appeared in the adjudicated cases. Berthold v. Hoskins, 38 Fed. 772, involved the validity of a tax sale for $41.85, and tax deed issued thereunder. The matter in dispute was accepted by Judge Hill as the value of the real estate against which the taxes were levied. In Lehigh Zinc & Iron Co. v. New Jersey Zinc & Iron Co., 43 Fed. 545, plaintiff, then in the full and peaceable possession of certain ore lands, and claiming complete title thereto, brought suit for injunction to restrain defendants from instituting certain threatened suits attacking plaintiff's title, etc. To the objection that the matter in dispute was of less value than jurisdictional amount, for the reason that if plaintiff's title was complete, and the grounds of the threatened attack not well founded, no pecuniary damage could accrue to plaintiff, because such suit must fall, as groundless, Judge Green responded:

"I think the proper criterion of the 'value of the matters involved in the controversy' is to be found in the value of the property, the possession or enjoyment of which will be affected by the litigation. For the purposes of this suit, I should not hesitate to hold that the whole value of the property, the possession and enjoyment of which is imperiled by the threatening acts of defendant, is the measure of the matters put in controversy by it. If any other test than this should be substituted, very many suitors would be de-

barred from seeking the protection of the federal courts, and those tribunals would be stripped of a very important branch of their hitherto acknowledged jurisdiction, especially upon their equity side. * * * It may, indeed, be true that the claims of the defendant to the property in possession of complainant are groundless. It may be held that the deeds, leases, agreements, and adjudications of the courts, upon which and from which the complainant bases and claims its right, are invulnerable to any attack which, in pursuance of its threats, the defendant may make. That will appear at the end of the litigation. But the 'matter in controversy' is not the result of the litigation, but the property which will be affected by that result, and its value is the value which does or does not confer jurisdiction as it may be summed up."

In Lee v. Watson, 1 Wall. 339, the supreme court have said:

"By 'matter in dispute' is meant the subject of the litigation,—the matter for which the suit is brought, and upon which issue is joined, and in relation to which jurors are called and witnesses examined."

Therefore the character of the action becomes material, and at times controlling, on the question of jurisdiction as founded on amount in dispute. The claim for damages in actions based on torts, or for a money judgment if based on a claim for contract debt, are illustrations of this principle. But it has been held by the supreme court that a suit to quiet the title to parcels of real property, or to remove a cloud therefrom, by which their use and enjoyment by the owner are impaired, is brought within the cognizance of the court, under the statute, only by the value of the property affected. Parker v. Morrill, 106 U. S. 1, 1 Sup. Ct. 14; Smith v. Adams, 130 U. S. 175, 9 Sup. Ct. 566. And where there is sought, as in pending bill, the cancellation of a conveyance, and of trust deeds securing hundreds of thousands of dollars, it would seem that the test of jurisdiction is the value of the result reached, if relief be decreed as in the bill prayed, as was held by the supreme court in Railroad Co. v. Ward, 2 Black, 485. Had plaintiff sued at law to recover of the trust company and the other defendants the damages done to him by the acts in bill complained of, the test would have been the damage in good faith claimed. That would probably have been the amount due on bond and coupons at commencement of the action. But such action at law would not have attacked the conveyances of the property, nor the trust deed under which the outstanding bonds were issued. Hence, at law, the value of these last named could not have been considered in the question of jurisdiction, for their status would remain unchanged. But in this suit in equity the main relief prayed is the declaring null and void the foreclosure decree, on which the conveyances are founded, and the master's conveyance to the bondholders' committee, and the conveyance from this committee to the City Water-Supply Company (the reorganized company), and also the trust deed securing over $400,000 bonds. With such sweeping prayer for relief, and with such relief possible thereunder in this suit, there must be a far different test of jurisdiction than the test properly applicable in the law action just described. Ordered that motion to remand be overruled, to which plaintiff excepts.

WABASH RY. CO. v. LUMLEY.

(Circuit Court of Appeals, Sixth Circuit. October 3, 1899.)

No. 669.

EQUITY—REFORMATION OF RELEASE—LACHES.

A court of equity will not refuse to reform a release in aid of an action at law for a personal injury on the ground of laches in commencing the suit, where a reasonable excuse is shown, and it does not appear that the delay will result in the loss of material evidence to the defendant in the action.

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

J. E. Ingersoll and Samuel T. Douglass, for appellant.

E. L. Thurston and Harvey D. Goulder, for appellee.

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

LURTON, Circuit Judge. This is a bill to reform a release under seal. A demurrer going to the whole bill was sustained, and the bill dismissed. Upon a former appeal to this court that decree was reversed, and the cause remanded, with directions to overrule the demurrer. The opinion of this court is reported in 43 U. S. App. 476, 22 C. C. A. 60, and 76 Fed. 66, and may be referred to for the general facts of this case. The present appeal is from a final decree, upon pleadings and evidence, reforming the release according to the prayer of the bill. Many reasons have been assigned for reversing the present decree. Many of the points pressed are foreclosed by the former opinion of the court, which we have no disposition to question, even if open for reconsideration. We shall confine ourselves to errors assigned which are not determined in the former appeal.

1. It is said that Lumley should not be granted reformation of the release in question, because of his long delay. Lumley was hurt in October, 1890, and executed the release in question within a few days thereafter. This bill was filed in February, 1895. It is said that this is undue delay, and would result in great injustice if after such a length of time the appellant should now be compelled to defend an action for the injury adjusted by the release in question. Lumley's action at law for damages might have been brought at any time within six years. As matter of fact he brought an action early in 1894, which he dismissed, but renewed in July, 1894, after making a tender of the amount he had received for the release. The latter action came on for trial January, 1895, whereupon the railroad company pleaded this release in bar. The plaintiff thereupon offered evidence tending to show that the settlement evidenced by the release related only to certain specific injuries known and considered at the time, and that he was assured by the company's surgeon, whose opinion as to the character and extent of his injuries was relied upon by both parties, that his shoulder was not involved, save sympathetically. He also offered to show that he was misled by this opinion,

and that in fact his shoulder had sustained a grave, independent injury, from which he lost the use of his arm, and that neither party knew or considered this independent injury, or intended the release to cover more than the injuries then known, and the direct consequences thereof. This evidence was rejected upon the ground that the release was under seal, and could not be set aside at law for either fraud or mistake. The court thereupon permitted a mistrial to be entered, and the cause continued, on condition that a bill should be filed in equity to reform the release. It is now said that it would be a great injustice to set aside or reform this release, after a delay of four years, because four witnesses to the circumstances under which the injury was sustained have died, and the company thus deprived of their evidence. These persons were employés of the company at the time of the accident, and engaged at the time in or about the yard of the company where Lumley was hurt. But the very witness who proves that these persons are dead, and were at the time of Lumley's injury employed in or about the place of the accident, proves conclusively that neither Parrott nor Richardson knew anything of the circumstances of the accident, and that he could not say that Green knew anything of material interest. It is shown that the company habitually took the written statements of all employés acquainted with any particulars of an accident, and that these statements were filed away. Of the four deceased employés, only one of them (Harry Faes) gave a statement. This is a strong circumstance against the materiality of the other three as witnesses for the appellant. Faes is dead, and he gave a statement. It is not shown that that statement is lost, nor is there any evidence tending to show the materiality of anything known to Faes. A court of equity may refuse relief, in the exercise of its inherent powers, where it is sought after an unreasonable delay, and where the probability is that injustice would be done in the particular case, through the loss of evidence due to lapse of time; and this independently of any statute of limitations. Abraham v. Ordway, 158 U. S. 416, 15 Sup. Ct. 894; Whitney v. Fox, 166 U. S. 637, 17 Sup. Ct. 713. But the loss of material evidence is not shown by the evidence in this record, and it is not even made probable that injustice will result in the trial of the merits of the questions if the equitable relief here sought shall be granted. It is said, also, that one Kniffen, a witness to the release, has died. This does not appear in the record, but rests upon an ex parte affidavit. To rebut it, counsel for appellee, in an equally incompetent way, assert that Kniffen was examined as a witness upon the trial at law as to the circumstances under which this release was executed; and his evidence, as taken by a stenographer, is set out in the brief. If we open our ear to irregular evidence of Kniffen's death before the trial of the equity case, it must be equally open to the fact that his evidence could have been legally reproduced on the trial of the present issue. Neither is the delay in commencing suit altogether unaccounted for. It was months after the execution of the release before Lumley fully realized the great injury his shoulder had sustained. When he did, he at once wrote to the company's surgeon, and insisted that he had been misled, and should

not be held to the terms of his settlement. This letter was placed in the hands of the railroad company by the surgeon, which was thus notified of the probability of suit. Lumley was a resident of Canada, and a mechanic dependent wholly on his labor. His injury caused frightful and long-continued suffering, and deprived him of the ability to work clear down to the time of his suit. His poverty thus operated to prevent suit as promptly as might have been otherwise expected. Upon the whole case, we are not satisfied that any such laches is shown as would justify a court of equity in refusing to reform a release which, in the very nature of the circumstances, could never have been intended to include so serious an independent injury as that for which he has sued.

2. It is next said that Lumley was guilty of contributory negligence in being in the stock car, and that he ought to have been in the caboose provided for stockmen. It is also said that he was negligent in standing in the open door of the car, and was hurt by the closing of the door as a consequence of the jar produced by the ordinary contact between cars when brought together to be coupled. If the facts were so undisputed as to show that there was no merit in his action, a court of equity might properly refuse its aid in the prosecution of the suit at law. But no such undisputed state of facts is here shown as would justify a refusal to reform the release which stands in the way of his legal action. Lumley's evidence, if credited, tends to make a case of negligence in making up this train, and also tends to show that at the time of his injury he was in the discharge of his duty in being where he was. There is no error, and the decree will be affirmed.

LAUER et al. v. COVENANT BUILDING & LOAN ASS'N.

ASHMORE et al. v. ISELEY et al.

(Circuit Court, W. D. North Carolina. September 29, 1899.)

BUILDING AND LOAN ASSOCIATIONS—INSOLVENCY—STATUS OF BORROWING STOCKHOLDERS.

Under the law as settled by the courts of North Carolina, the fact that a stockholder in a building and loan association is a borrower does not change his relations to the association as a stockholder. In case of its insolvency, he is not relieved from liability to contribute equally with other stockholders to its losses, and is not entitled to a cancellation of his mortgage on payment of the mortgage debt, or to receive a surplus remaining in case the property is sold under the mortgage until the final adjustment of the accounts between the association and its stockholders.

In Equity. Supplemental opinion. For former opinion, see 96 Fed. 62.

SIMONTON, Circuit Judge. The opinion in this case filed on August 9, 1899, was directed exclusively to the discussion of the relations between the defendants and the Covenant Building & Loan Association as borrower and lender. The principle upon which the account in this aspect should be taken between them has been settled. But the defendants are stockholders in the associa-

tion, and as such are liable to the creditors of the association, and also must contribute with the other stockholders. They have had advanced to them the supposed par value of their shares, and have enjoyed the use of this part of the assets of the association. This, however, does not relieve them from the obligation of stockholders, nor would exact justice be done if they escape all such liability simply upon the repayment of the advance loaned to them. In deciding this case the court has followed the law as laid down in North Carolina. The supreme court of that state has used no uncertain language respecting the responsibility of a borrowing stockholder to the creditors and to the other stockholders. The whole doctrine is laid down in Thompson v. Association, 120 N. C. 420, 27 S. E. 118. The court below had entered an order that no mortgage or trust deed made for the benefit of the association shall be canceled or marked satisfied by the trustee or receiver until the final adjustment of the account between the borrowing members and the association is made under the order of court. This was excepted to, as operating to prevent the mortgagor or borrowing member or trustor from settling with the association upon payment of the amount justly due by him. The supreme court, overruling this exception, say:

"It is contended that the residue is the appellant's money, and there is no reason why it should not be paid to him at once. But, as reasonable as this appears to be, it is not true, for the reason that it leaves out of consideration the fact that the appellant is a member of the association as well as a debtor; that, as such member, his indebtedness is a trust fund for the benefit of the other members of the concern as well as for himself, and that his liability cannot be known until it is ascertained to what amount the association is insolvent."

This ruling was sustained in Meares v. Davis, 121 N. C. 126, 28 S. E. 188, and illustrated. The rubric is as follows:

"A stockholder of an insolvent building and loan association, who was also a borrower of its money on mortgage, is not entitled to have the excess of the proceeds of the sale of his mortgaged property over the mortgage debt paid to him when his pro rata share of the deficiency in the assets of the concern is equal to such excess."

See, also, Meares v. Duncan, 123 N. C. 203, 31 S. E. 476.

Such being the rule in North Carolina, let a final order be prepared adjusting the mortgage debt according to the principles of the former opinion, and directing that the proceeds of sale, after providing for this debt, be held subject to the further order of this court, and, in case this debt be adjusted without a sale, that no cancellation of the mortgage and no satisfaction be entered thereon until it is ascertained in what amount the association is insolvent, and, consequently, what contribution must be made by stockholders.

CUTTER v. IOWA WATER CO. et al.

(Circuit Court, S. D. Iowa, E. D. October 9, 1899.)

1. EQUITY PLEADING—BILL OF REVIEW.
   A bill filed by one not personally a party to a prior decree of the court, attacking the validity of such decree and asking its vacation because of matters outside of the decree itself, and not alleged to have been newly discovered, is not a bill of review.
2. SAME—MULTIFARIOUSNESS.
   A bill seeking the vacation of a decree and of subsequent proceedings based thereon, as void, is not multifarious because it alleges, as grounds of such invalidity, fraud on the part of parties to the decree, and also invalid action by the court; both charges being directed to the same end,—the establishing of the invalidity of the decree,—and the same parties defendant being required to each.
3. SAME—INCONSISTENT PRAYERS.
   A bill is multifarious which contains prayers in the alternative which are antagonistic,—one asking the setting aside of a decree and subsequent proceedings based thereon, on the ground that the decree is void, and the other asking relief based on the decree as valid,—since in the latter aspect the allegations of the bill tending to show the invalidity of the decree are not only immaterial, but opposed to the prayer. In such case the bill is one of alternative cases, and not a case for alternative relief.
4. LACHES—ACQUIESCENCE BY BONDHOLDER IN DECREE OF FORECLOSURE.
   A holder of bonds secured by trust deed, who knowingly permits the trustee to conduct foreclosure proceedings in such a fraudulent manner as to render the decree and sale thereunder void, without making any objection or calling the court's attention to the facts, is guilty of such laches as will, if unexcused, preclude him from maintaining a suit to set aside such decree and sale.

In Equity. On demurrer to bill.

The bill herein is lengthy. It attempts, with considerable of detail, to recite various matters in connection with a foreclosure suit lately pending in this court, wherein one of the defendants herein, the Farmers' Loan & Trust Company, was, as trustee, plaintiff, and another defendant herein, the Iowa Water Company, was, with others, defendant. Various matters pertaining to the mortgage foreclosed, the water-plant property against which said foreclosure was brought, and the bonds secured by said trust deed, are also set up. Collusive and fraudulent acts on the part of said trustee are attempted to be charged, and consequent damage to plaintiff herein. Without attempting to reproduce it in detail, the bill: (1) Recites the execution on April 15, 1887, of a trust deed by the Iowa Water Company, a corporation operating a water-supply plant at Ottumwa, Iowa, in favor of said Farmers' Loan & Trust Company, in the sum of $400,000, upon the property, rights, and franchises then owned or that might thereafter be acquired by said Iowa Water Company; that plaintiff, Cutter, is the owner of 15 of the 400 bonds provided for in said trust deed; that, default having occurred in past-due interest, said trustee upon July 11, 1894, instituted in this court foreclosure proceedings under said trust deed, and procured the appointment of a receiver for said water-supply plant, which said proceedings progressed to foreclosure decree on February 19, 1897, for $349,000 principal, and $69,810 unpaid coupons, sale of said plant, and deed to the purchasers at said sale. (2) Alleges that said foreclosure suit was instituted and conducted under direction of defendants herein, Potter, Smith, Sandford, and Mills, "as a self-selected committee," who invited the bondholders to intrust to such committee the possession of the bonds and the management of said litigation, and that in all its proceedings said trustee "was entirely subservient to the wishes and dictation of said committee." Annexed to the bill is the circular issued by said committee, wherein they invite deposit of bonds, and announce the general plan under which said committee will proceed and reorganization be had, if a majority of the outstanding bonds

are deposited for action thereunder. (3) Attacks said foreclosure decree as void because entered without proof of amount of bonds then outstanding; because such decree by its terms required parties defendant within 20 days from its said entry to pay the amounts therein found to be due, with costs of complainant as trustee, counsel fees, compensation to receiver, etc., whereas the amount of such counsel fees, compensation, etc., was not fixed by the court until long after the expiration of said 20 days, and no extension of time for such payment was made after same were so fixed. (4) Alleges that, in pursuance of a settled purpose on part of said bondholders' committee to depreciate the value of the property and to debar bidders from bidding at said foreclosure sale, said committee, in collusion with said trustee, attacked said decree as null and void because in the proceedings leading to said decree the judge of the court before whom said proceedings were pending was a brother-in-law of the special master to whom said case was referred, and that said committee in pursuance of said purpose issued two circular letters exhibited with the bill, the first of which—dated June, 1897—assumes to state the situation and prospects for the future, and outlines with much of detail the plan of reorganization proposed by the committee, and the second of which declares the plan of reorganization theretofore by the committee proposed as operative and in full force. (5) Attacks the sale under said foreclosure decree as not made on date named in master's notice of sale, but on second day thereafter; that said plant property, though costing said water company over $430,000, was bid off by said bondholders' committee at the nominal sum of $75,100, for which a deed approved by this court was delivered to said committee; that unproven coupons were accepted as part purchase price; that the entire property of said grantor in trust deed was sold as an entirety, and without a prior incumbrance thereon being designated; that said decree, by collusion of counsel for said committee and counsel for said trustee, was so drawn as to permit uncertain and undetermined amounts to be asserted against the proceeds, and as to state incorrectly the prior incumbrance on such plant property, in violation of the trust imposed on said trustee and on said committee. (6) Alleges that interveners in said foreclosure proceedings appealed from said decree to the circuit court of appeals, and said court on January 17, 1898, by a divided court, affirmed said decree. (7) Alleges that a balance of $1,507.79 remaining in the hands of the receiver, which was revenue produced by said property during the receivership, was paid over to said committee. (8) Alleges that, while said water-plant property was struck off to said committee at the said nominal price, yet said committee before bidding at said sale had arranged to convey said property to defendant the City Water-Supply Company, and did so convey within five days after receiving deed from the master, for the consideration of $524,000, in fraud of plaintiff, and to his damage. (9) Alleges that but 44 bonds, inclusive of the 15 bonds of this plaintiff, were proven up in said foreclosure proceedings and entitled to share in proceeds of said foreclosure; that plaintiff is therefore entitled to $^{15}/_{44}$ of such proceeds, whereas defendants wrongfully deny to plaintiff any further sum than $1,538.70; and it is also alleged that sufficient funds were not deposited with the clerk to perform the terms of said foreclosure decree. (10) Avers that the reference by this court of issues in said foreclosure suit to Judge Babb, as special master, was in violation of law, and null and void, in that said special master and the judge of this court had married sisters, and that the action by said special master taken, the confirmation thereof by this court, and all proceedings based thereon, are null and void, and that the said affirmance by the circuit court of appeals of the action of this court in said foreclosure matter by a divided court deprived plaintiff of property without due process of law, and in violation of his constitutional rights. (11) Recites that two mortgages, respectively securing bonds in the sum of $150,000 and $325,000, have been executed to the defendant Continental Trust Company, as trustee, on said water-plant property (the exhibits show such trust deed to have been executed by the City Water-Supply Company, to whom the bondholders' committee, upon receipt of the master's deed therefor, conveyed said water-plant property), and said mortgages are duly of record, but that said rights thereunder of said trustee are inferior to plaintiff's rights, etc. (12) The relief prayed is that decree declare null and void said foreclosure proceedings, and the decrees and orders entered therein, the said sale

by the special master, and his conveyance thereunder, and plaintiff be declared to be the owner of $^{15}/_{44}$ of said entire property; that, if same are not decreed null and void, then that the actual purchase price be deemed to be $524,000, and that plaintiff be decreed to own a $^{15}/_{44}$ interest therein; that the mortgages to said Continental Trust Company be declared null and void as to plaintiff; and for other relief as may be equitable.

W. E. Blake, for plaintiff.

W. A. Underwood and Wm. McNett, for defendants.

WOOLSON, District Judge (after stating the facts as above). 1. The first point to be considered relates to the nature of the bill. The demurrants insist it is, in part at least, a bill of review, and as such insufficient, in that it does not set out the decree attacked, and was filed without leave first had. Plaintiff insists it is not a bill of review. Plaintiff, in his individual capacity, was not a party to the original suit. And this suit is not brought "to reverse or modify a decree, that has been signed and enrolled, for error in law apparent on the face of the decree, or on account of new facts discovered since publication was passed in the original case, and which could not by the exercise of due diligence have been discovered or used before the decree was made." Fost. Fed. Prac. § 354; Story, Eq. § 403. The pending bill attacks the decree because of matters outside of the decree itself. It makes no attempt either to show that plaintiff herein was not fully aware of the proceedings of which this bill makes complaint, or to set up newly-discovered facts impeaching the foreclosure proceedings.

2. Is the pending bill multifarious in its charges of fraud as to trustee and bondholders' committee, and its charges of invalid action on the part of the court and those acting under its direction? "By 'multifariousness' 'is meant the improperly joining in one bill distinct and independent matters, and thereby confounding them; as, for example, the uniting in one bill of several matters, perfectly distinct and unconnected, against one defendant, or the demand of several matters of a distinct and independent nature against several defendants in the same bill.' Story, Eq. Pl. § 271. In Daniell, Ch. Prac. 335, it is said in explanation of this that 'it may be that the plaintiffs and defendants are parties to the whole of the transactions which form the subject of the suit, and nevertheless those transactions may be so dissimilar that the court will not allow them to be joined together, but will require distinct records.'" Walker v. Powers, 104 U. S. 245, 251. Yet "the principle of multifariousness is one very largely of convenience." U. S. v. American Bell Tel. Co., 128 U. S. 315, 352, 9 Sup. Ct. 91. As a result naturally to be expected, "there is, perhaps, no rule established for the conduct of equity pleadings, with reference to which (whilst as a rule it is universally admitted) there has existed less of certainty and uniformity in its application than has attended this relating to multifariousness. This effect, flowing, perhaps inevitably, from the variety of modes and degrees of right and interest entering into the transactions of life, seems to have led to a conclusion rendering the rule almost as much of an exception as a rule, and that conclusion is that each case

must be determined by its peculiar features." Shields v. Thomas, 18 How. 253, 259, quoted and approved in Brown v. Deposit Co., 128 U. S. 403, 410, 9 Sup. Ct. 129.

With regard to the charge of multifariousness in the pending bill, so far as such bill relates to any one defendant, the remarks of the supreme court in Brown v. Deposit Co., 128 U. S. 412, 9 Sup. Ct. 130, are pertinent:

> To support the objection of multifariousness, because the bill contains different causes of suit against the same person, two things must concur: First, the grounds of suit must be different; second, each ground must be sufficient, as stated, to sustain the bill.

And again:

> The case against one defendant may be so entire as to be incapable of being prosecuted in several suits, and yet some other defendant may be a necessary party to some portion only of the case stated. In the latter case the objection of multifariousness cannot be allowed to prevail.

As to a bill wherein many parties are made defendants, the supreme court, in the opinion from which I have just quoted, state:

> It is not indispensable that all the parties shall have an interest in all the matters contained in the suit. It will be sufficient if each party has an interest in some material matters in the suit, and they are connected with the others.

Applying these clearly-stated principles to the pending bill, we find that the pleader has attempted to direct the bill primarily against the foreclosure decree, under his contention that such decree is null and void. In so doing, he felt compelled to make recital of the various steps leading up to such decree, whether these were taken in or out of court, by the bondholders' committee or the trustee; but all relate to the attempted setting aside of the decree, and are claimed to have entered into, and to be a part of, the matters because of which the decree is alleged to be void. In this view, the charges of fraud on the part of the trustee, in whose name the foreclosure proceedings were pending, are not antagonistic to the allegations of invalid action by the court, so that the two may not stand together in the one bill. The same parties must be defendants therein, if separate suits were instituted to have the decree declared null and void,—one suit based on said alleged fraudulent conduct of trustee, the other suit on alleged invalid action of court. If convenience is to be a largely controlling test, then the convenience of the parties is served, without injury to them, by having these matters litigated in the same suit. So, also, as to the matters attacked which occurred after entry of decree. Their alleged invalidity is based on the alleged invalidity of the decree, and the parties necessary to the bill attacking the decree are so interested in the attack on those subsequent matters as that they are not improperly made defendants to the latter attack. To this latter attack other parties are made defendants; that is, the reorganized water-plant owner, and the trustee of the bonds issued under such reorganization. I do not see any good reason for holding that these other parties are improperly joined in a suit which thus attacks the decree whereon their rights are so largely based. In other words, though all of the parties to this suit do not have the same interest in every material feature of

the suit, yet each "has an interest in some material matters in the suit, and they are all connected with the others." The main recitals of the bill relate to and affect the alleged invalidity of the decree, or are dependent thereon. There is little, if any, of the evidence which may be introduced to prove the allegations of the bill, as to the decree being void and the grounds thereof, which will not concern and affect the rights of each of the parties made defendants herein. Around the alleged invalidity of the decree are grouped the rights and interests of all the parties. That some of these parties were not immediately concerned in or parties to some of the transactions stated in the bill will not justify the court in declaring the bill to be multifarious, if they were concerned in and parties to some transactions stated, with which the other transactions are connected as a part of the general matters stated and relief prayed in the bill. Said Mr. Justice Harlan, at circuit, in Sheldon v. Packet Co., 8 Fed. 769, 770:

> As a general rule, the court will not compel parties to incur the expense, vexation, and delay of several suits, where the transactions constituting the subject of the litigation, or out of which the litigation arises, are so connected by their circumstances as to render it proper and convenient that they should be examined in the same suit, and full relief given by one comprehensive decree. A different rule would often prove to be both oppressive and mischievous, and could result in no possible benefit to any litigant whose object was not simply to harass his adversary.

And later in the opinion the learned justice approvingly quotes from the opinion of Chancellor Kent in Brinkerhoff v. Brown, 6 Johns. Ch. 139, the following:

> It thus appears from the bill that all the defendants were not jointly concerned in every injurious act charged. There was a series of acts on the part of the persons concerned in the company, all produced by the same fraudulent intent, and terminating in the deception and injury of the plaintiffs. The defendants performed different parts in the same drama, but it was still one piece, the entire performance, marked by different scenes; and the question now occurs whether the several matters charged are so distinct and unconnected as to render the joining of them in one bill a ground of demurrer. [Various authorities reviewed.] The principle is that a bill against several persons must relate to matters of the same nature, and having a connection with each other, and in which all the defendants are more or less concerned, though their rights in respect to the general subject of the case may be distinct.

It may be noted, in addition to what has before been stated as to the pending bill, that the stockholders in the reorganized water-plant company, the defendant City Water-Supply Company, and bondholders of bonds issued by it under the trust deed of which defendant Continental Trust Company is trustee, are largely and almost entirely the persons who held the bonds under the trust deed which was foreclosed in the suit whose decree is attacked herein.

3. In determining the question of multifariousness, I find greater difficulty with reference to matters involving the relief prayed. The prayers for relief are antagonistic; one being based on the theory of invalidity of the decree, and resulting, if successful in its entirety, in vacating sale thereunder, conveyance thereafter of the reorganized plant, and trust deed executed thereon. The other is based upon the theory of the decree as valid, and resulting, if successful in its entirety, in establishing on such valid decree the asserted rights and inter-

ests of plaintiff in the reorganized water-plant property, or proceeds of sale. If the latter prayer stood alone in the bill, a large part of the contents of the bill would be immaterial and opposed to the prayer, and stricken out on exceptions, since it would in no wise be pertinent to or tending to establish the theory on which the relief is prayed. The relief prayed in pending bill is in the alternative. If this relief were not antagonistic in the alternative, and were based on the same state of facts, the bill might not be multifarious (Story, Eq. Pl. § 42); for then, the facts being proven, the relief granted would depend upon the conclusion which the court would draw from such proven facts. But no state of facts can maintain the decree as null and void and also as valid. In the pending bill, if the charges of fraud, collusion, etc., are proven (assuming the same to rise to the grade which might justify the court in declaring the alleged invalidity of the decree), the alternative or last-prayed relief could not be granted in any part, or in the direction it points, since that relief is antagonistic to such proven fraud, and is based on the decree being valid.

Shields v. Barrow, 17 How. 130, was a suit to set aside an agreement for fraud. An amendment was filed to the bill, which prayed specific performance. Justice Curtis, in the opinion therein rendered, said:

> So that the bill thereafter presented not only two aspects, but two diametrically opposite prayers for relief, resting upon necessarily inconsistent cases; the one declaring that the court would declare the contract rescinded for imposition and other causes, and the other that the court would declare it so free from all exceptions as to be entitled to its aid by a decree for specific performance. * * * A bill may be originally framed with a double aspect, or it may be so amended as to be of that character; but the alternative case stated must be the foundation for precisely the same relief.

In St. Louis, V. & T. H. R. Co. v. Terre Haute & I. R. Co., 33 Fed. 440, 448, Circuit Judge Gresham applied this same general principle where the bill prayed that a lease be declared void, and also contained the alternative prayer for an accounting of the money due by the terms of the lease, should it be declared valid; and the court held the bill to be multifarious.

The circuit court of appeals, Seventh circuit, in Merriman v. Railroad Co., 12 C. C. A. 275, 64 Fed. 535, considered with much fullness, as applied to that case, the principle here under discussion. As found by that court, the bill included a prayer to redeem, and also a prayer to acquire bonds issued on the property sought to be redeemed in first alternative of the prayer. Thus the first relief prayed was on the theory that the plaintiff was entitled to acquire and appropriate as its own, through such redemption, the property upon which were based the bonds, which in this latter prayer were recognized as validly issued, but which would have no security if such property were redeemed. The court declare (page 290, 12 C. C. A., and page 550, 64 Fed.):

> Thus construed, the bill states two inconsistent causes of action, and the right to recover upon one theory is destructive of the right to recover on the other. Such a bill cannot be maintained. It would be multifarious and self-contradictory. * * * It is urged by counsel for appellants that a bill is

not multifarious, and may well be maintained, where, upon a given case, there is a prayer for consistent alternative relief. The rule is undoubtedly well settled that upon a given case there may be prayer for consistent alternative relief. But we do not understand that alternative and inconsistent cases may be stated in the bill, coupled with prayers for alternative and inconsistent relief. If the appellants' case was solely that the Eastern Illinois Company has no title to the property of the Danville Company, they might pray for various forms of alternative relief consistent with that case; but they cannot in the same bill make a case that it has no title, and also a case that it has title, and then ask for inconsistent relief according to the different cases thus made. Such course of procedure we do not understand is warranted by the doctrine of alternative relief. Such are alternative cases, and not cases for alternative relief. They are inconsistent, for a decree of one of these forms of relief would proceed upon a theory fatal to the other form of relief.

If it be claimed that the facts as alleged in the pending bill support but the one theory or prayer for relief, viz. that the decree, deed, etc., attacked are null and void, then it must follow that the alternative relief, based on validity of decree, has no proper place in the bill, and should be stricken therefrom before defendants are required to answer. But if, as may be assumed from the recognized ability of counsel, and by his signature thereon approving same, and as counsel for plaintiff contends, the bill is so framed as that it will support the relief decreed, whichever of the alternative prayers may thus be granted, then it must follow that the bill is one "of alternative cases, and not a case for alternative relief," as the latter is commonly understood. In this regard the bill is multifarious, and defendants should not be required to plead thereto until it is purged of such multifariousness.

4. The question of laches on the part of plaintiff, so forcibly urged by defendants, may present controlling features. There is no statement or suggestion in the bill that plaintiff was ignorant of the matters as to which he now complains, while such matters were transpiring. While it is undoubtedly true that the plaintiff trustee in the foreclosure suit was, as such trustee, the representative therein of the present plaintiff, it cannot be that plaintiff herein was in any wise prohibited from making known to this court the alleged fraud of the trustee while it was in progress. Good faith towards the court should have prompted this plaintiff to have promptly made known to the court the bad faith of the trustee and his wrongful collusion with others, if such bad faith and collusion existed, as now charged. It is not necessary to state here what would have been the action of the court had such suggestions thus been made. It is sufficient that this court possessed the power to arrest the further perpetration of such fraud as soon as the same became manifest to the court, and to prevent its being carried to its consummation. The situation in which the bill presents the present plaintiff does not commend itself to the court; for, in the absence of any statement that he was at the time ignorant thereof, the court must assume that, with the knowledge that what he now charges as fraud and collusion on the part of the trustee was then occurring, he permitted the same to proceed unchallenged, and the court by its action and decree to fasten this fraud upon the property, and confirm as valid the results of such fraud, and, further, permitted those actively and knowingly partici-

pating in such fraud to convey the water-plant property, and thereafter the execution of trust deeds and issuance of a large amount of bonds thereunder, without in any wise attempting to prevent the same. The like general considerations apply to what plaintiff now alleges to be invalid action of the court, whereby he claims the decree in said foreclosure suit is null and void. Where was plaintiff while such alleged invalid proceedings were in progress? Interested, as he now claims, because of his being a bondholder under the trust deed then being foreclosed, why did he not promptly appear in court, and present to the court the question of what he now insists was such invalid action, taken by the court at the instance of plaintiff's trustee, as that the final result in the foreclosure suit is thereby made null and void? In any amendment to be made to the bill, plaintiff should state the facts avoiding what now constitute these laches on his part, if such facts exist.

5. I do not deem it necessary to attempt to decide the remaining point of demurrer, as to whether the bill sufficiently presents fraud, until the bill is shorn of its present objectionable features, which have just been considered and determined. Manifestly a far different state of facts is necessary to support a decree which shall declare the former decree null and void, from those necessary to support a decree which shall declare such former decree valid, and establish the rights and interests of plaintiff thereunder. Until the relief prayed is distinctly set out, so that the court may be clearly advised, the task is useless to attempt to determine whether there is such equity in the bill as that it may be maintained. When the court is advised as to the relief which plaintiff demands, it may then examine the bill to ascertain whether the facts pleaded would sustain such relief. But the court must decline to examine the bill for the purpose of determining whether, under the facts pleaded, a decree for relief can in any wise be maintained in some portion of the broad realm of equity.

From the foregoing it necessarily follows that the demurrers to the pending bill must be sustained. Ordered accordingly, and plaintiff excepts.

ROSE v. CONTINENTAL TRUST CO. et al. TOLEDO, ST. L. & K. C. R. CO. v. SAME. HAMLIN et al. v. TOLEDO, ST. L. & K. C. R. CO. et al.

(Circuit Court of Appeals, Sixth Circuit. October 10, 1899.)

Nos. 640, 641, 673.

On Petition for Rehearing. For original opinion, see 36 C. C. A. 155, 95 Fed. 497.

LURTON, Circuit Judge. The petitions to rehear filed by the Toledo, St. Louis & Kansas City Railroad Company and others joining therein, and the independent petition filed by Dana A. Rose, have been considered, and must be dismissed. They present no questions which have not heretofore been argued and fully considered, and

which are not covered either expressly or by the principles upon which our opinion proceeded.

The contention of petitioner Rose that his fourth and fifth assignments of error have not been passed upon is erroneous. The assignments referred to are to the action of the court in striking out his objections filed to the claim of the Continental Trust Company and of the committee of bondholders filed in the administration suit. Rose's objections were filed in his character as a holder of certain shares of preferred stock. He was not a party, save as represented either by the corporation or Hamlin and others, as representing the preferred shareholders as a class. We held, upon grounds not necessary to be restated, that he had no status as a party with the right to assert independent defenses either by way of cross bill or otherwise. His answer to the Hamlin cross bill and his cross bill were filed without leave of the court, and his application to become an active party defendant to the Hamlin cross bill was denied. This denial was not subject to appeal. The mere fact that he was a stockholder gave him no right to appear and defend either the administration suit, the foreclosure suit, or the Hamlin cross bill. The corporation represented the general stockholders, and leave was granted preferred stockholders to present their rights and make general defense through Hamlin and those who should become complainants with him as a class representing the whole class of preferred stockholders, having rights common with Hamlin. Rose declined to make himself a co-complainant with Hamlin, as he might have done under the order of the circuit court, and was therefore not entitled to present his individual objections to claims filed in either of the suits. When an order shall be made directing all holders of preferred shares to present their stock for participation in the fund which may be going to that class of stockholders, a very different question may arise, if he shall then before the master present objections to preferred stock presented by others for participation in the fund going to such shareholders as a class. That question we have not passed upon, and do not now pass upon. It is sufficient to say that his interest as a shareholder did not justify his claim that each and every shareholder might severally contest claims filed against the corporation. The petitions are dismissed.

In re HULITT.

(Circuit Court, S. D. Ohio, W. D. October 4, 1899.)

No. 5,323.

NATIONAL BANKS—DISTRIBUTION OF ASSETS IN INSOLVENCY—RIGHTS OF SHAREHOLDERS.

Where a number of the shareholders of a national bank in good faith paid an assessment made to comply with a requirement of the comptroller to make good an impairment of the bank's capital, although such assessment was invalid because made by the directors instead of by the stockholders, on the insolvency of the bank, and the winding up of its affairs by a receiver, after outside creditors are paid, such paying shareholders are

entitled to be treated as creditors as against the nonpaying shareholders, and repaid the amounts so paid, before general distribution of the remaining assets among all the shareholders.

Henry M. Huggins, for receiver.
Steele & Sams, Ben B. Nelson, and E. N. Huggins, for stockholders.

THOMPSON, District Judge. This is an application by John Hulitt, receiver of the First National Bank of Hillsboro, Ohio, for instructions as to his duty in respect to the claims of certain shareholders to be reimbursed for an assessment paid by them under section 5205 of the Revised Statutes of the United States.

On the 25th day of April, 1896, the following notice was given to the bank by the comptroller of the currency:

"Treasury Department, Office of Comptroller of the Currency.

"Washington, D. C., April 25, 1896.

"Whereas, it appears to the satisfaction of the comptroller of the currency that the capital stock of the First National Bank of Hillsboro, Ohio, has become impaired to an extent which makes necessary an assessment of fifty thousand dollars ($50,000.00) upon the shareholders of said association to make good such deficiency: Now, therefore, notice is hereby given to said association, under the provisions of section 5205 of the Revised Statutes of the United States, to pay the said deficiency in its capital stock by assessment upon its shareholders, pro rata, for the amount of the capital stock held by each; and if such deficiency shall not be paid, and said bank shall refuse to go into liquidation, as provided by law, for three months after this notice shall have been received by it, a receiver will be appointed to close up the business of the association, according to the provisions of section 5234 of the Revised Statutes of the United States. In testimony whereof I have hereunto subscribed my name and caused my seal of office to be affixed to these presents, at the treasury department, in the city of Washington and District of Columbia, this 25th day of April, A. D. 1896.

"[Signed] James H. Eckels,
"[Seal.] Comptroller of the Currency.

"To the First National Bank, Hillsboro, Ohio."

Thereupon, on the 27th day of April, 1896, the directors adopted a resolution making the assessment. Between the 27th day of April, 1896, and the 16th day of July, 1896, the shareholders, representing 545 shares of the capital stock, paid their proportion of the assessment, amounting to $27,250, but the other shareholders refused to pay their part thereof. On the 16th day of July, 1896, the bank, being wholly insolvent, suspended payment; and on the 22d day of July, 1896, it was placed, by the comptroller of the currency, in the hands of John Hulitt, as receiver. Afterwards, the receiver, under instructions from the comptroller of the currency, brought suit in this court to recover, from the nonpaying shareholders, their proportion of the assessment. But the court held that the assessment should have been made by the shareholders, and not by the directors, and that the attempted assessment by the directors was therefore illegal, and dismissed the bill. Afterwards an assessment was made by the comptroller of the currency, under section 5151 of the Revised Statutes, which was paid. Ninety per cent. of the debts of the bank have since been paid, and there is money enough in the hands

of the receiver to pay the remainder, leaving quite a large surplus for distribution to the shareholders. The shareholders who paid the first assessment claim to be creditors of the trust to the extent of that payment, but, under an agreement with certain of the shareholders, have waived the right to reimbursement until the general creditors of the bank are paid in full. They insist, however, as against the nonpaying shareholders, that they should be reimbursed for the moneys paid by them under that assessment, before final distribution is made to all the shareholders. They have presented their claims to the receiver, but the receiver has refused to allow them, unless instructed so to do by the court.

The comptroller of the currency advised the bank that its capital stock had been impaired to the extent of 50 per cent., and required it to assess its shareholders in that amount to restore the loss. And I think it is fair to assume that the action of the comptroller was based on knowledge of the condition of the bank (derived through the department examiners and inspectors) more thorough and complete than that of any of the shareholders, save those who were its directors and officers, and in control of the management of its affairs. And no question is made but that the paying shareholders paid the assessment in good faith, believing that the capital stock was impaired to the extent of 50 per cent.; that the assessment was legal and binding on all the shareholders; and that its payment would restore the loss, and save the bank. Yet, in fact, the entire capital stock had been lost, the assessment was illegal, and, within the three months allowed for its payment, the bank suspended payment, and was placed, by the comptroller of the currency, in the hands of a receiver, and the purpose for which the assessment was made wholly failed.

The assessment was illegal, but, as a matter of fact, the paying shareholders did not know that the law required it to be made by the shareholders instead of the directors, and did not know that, if paid in full, it would be wholly insufficient to restore the actual loss which the bank had sustained; and while, in view of their relation to the bank and their means of knowledge, their ignorance in these respects might not avail them as against the creditors of the bank, yet, as between them and the nonpaying shareholders, there certainly can be no application of the doctrine of voluntary payments, which will entitle the nonpaying shareholders to participate, on equal terms, with the paying shareholders, in the distribution of the fund remaining after the creditors have been paid,—a fund which was in part created by the contributions of the paying shareholders. These moneys were received by the bank to and for the use of the paying shareholders, and could not, in equity and good conscience, be retained by the bank. The paying shareholders became creditors of the bank, so far, at least, as the nonpaying shareholders are concerned.

In the case of Winters v. Armstrong, 37 Fed. 508, Winters subscribed to an increase of the capital stock of the Fidelity National Bank of Cincinnati, and paid the amount of the subscription into the bank. The increase, however, was not approved by the comptroller

of the currency, and never became valid and effective. Judge Jackson, at page 522, says:

"Winters could have recovered his deposit made on his subscription as against the association, and he is entitled to its allowance as a valid claim against the assets of the bank in the hands of the receiver, so far as anything disclosed by the pleadings appears. Subscribers may not in every case recover back deposits paid on subscribing for shares in contemplated corporations, or proposed increases of capital, where the scheme of incorporation or the proposed change proves a failure. In some cases, the right of recovery will depend on the meaning and intention of the parties as expressed in the subscription agreement. If, for instance, it appears to have been the intention or understanding of the parties that the deposit made on the subscription should be used and applied towards the furtherance or accomplishment of the scheme, and it is so applied, the subscriber may not be able to recover it upon the failure of the enterprise. When, however, such deposits are made in order to comply with some statutory requirement, and without any intention on the part of the subscribers or right on the part of the corporation to otherwise apply the same, then, upon failure of the scheme, the subscribers are entitled to have their entire deposits returned."

In Armstrong v. Law, 27 Wkly. Law Bul. 100, the syllabus reads as follows:

"L. borrowed money of the Fidelity National Bank on his promissory note. About the same time the stockholders of the bank, of which L. was one, resolved to increase the capital stock of the bank, and L. paid to the bank the amount of his shares of such increased capital stock. Before the bank received the necessary authority from the comptroller of the currency, under section 5142, Rev. St. U. S., for such increase of stock, and before, therefore, such increase became effective, it became insolvent, and was placed by the comptroller of the currency into the hands of a receiver, who demanded of L. payment of the note executed by him to the bank. L. claimed that the amount paid by him into the bank for the proposed increase of its capital stock was a proper set-off pro tanto against his note, and tendered to the receiver the difference in amount of his note and his payment on account of increase of stock. Upon refusal of such tender, L. brought suit, asking that the receiver be required to accept said sum, and deliver to L. his said note. Held, that the amount paid by L. on account of such proposed increase of capital stock of the bank, which had never become effective, was a proper set-off pro tanto against the note held against him by the bank."

In Witters v. Sowles, 32 Fed. 130, it is said, at page 138, that:

"The executor appears to have delivered to the bank, while its failure was impending, stocks and securities belonging to the estate, to an amount much larger than the amount of these shares, which were disposed of by the bank in payment and security of claims against it. He sets up in his answer that this was done upon an understanding that the property should be restored by the bank, if it survived, and applied on an assessment, if it failed, and one should be made. And he now claims that so much of this property or its proceeds as is necessary should be applied upon this assessment, and bar further recovery. He claims, upon the evidence, that this understanding was had, with the bank examiner as well as with the officers of the bank. This assessment is for the purpose of paying those who were creditors of the bank at the time of its failure. That property went to pay others not creditors at the time of the failure, so far as it did pay them. The delivery of the property may have created a liability of the bank. If so, the assessment upon this and the rest of the stock would go ratably upon that and the other liabilities, if proved and established."

The court refused to set off the claim of the executor against an assessment upon him, under section 5151, saying:

"The assessment never was due to the bank, and does not belong to it. The assessment belongs to the creditors of the bank, and is recoverable by the receiver, only for the purpose of ratable distribution among them."

Judge Ranney, in Ellis v. Trust Co., 4 Ohio St. 651, says:

"The action is brought for money had and received, and it lies in all cases where one has the money of another which he cannot in equity and good conscience retain. It lies, therefore, for money paid by mistake, or upon consideration which has failed; because, in such case, the plaintiff did not intend to give his money to the defendant, and the latter cannot conscientiously retain money for which he has given no equivalent."

These cases tend to support the view of the case at bar just presented.

But, in any event, upon the facts of this case, the court would hold, for the purposes of distribution among the shareholders, that the assessment attempted to be made by the directors, and which was paid by the shareholders who have been designated as the "paying shareholders," was an "assessment," within the meaning of section 3 of "An act authorizing the appointment of receivers of national banks and for other purposes," as amended March 2, 1897 (29 Stat. 600–602), which provides that when "the comptroller of the currency shall have paid to each and every creditor of such association, not including shareholders who are creditors of such association, whose claim or claims as such creditor shall have been proved or allowed," the comptroller of the currency shall call a meeting of the shareholders to decide whether the receiver or an agent to be selected by them shall thereafter wind up the affairs of the bank, and, whether wound up by the receiver or an agent, that—

"The proceeds of the assets or property of any such association which may be undistributed at the time of such meeting, or may be subsequently received, shall be distributed as follows: First, to pay the expenses of the execution of the trust to the date of such payment; second, to repay any amount or amounts which have been paid in by any shareholder or shareholders of such association upon and by reason of any and all assessments made upon the stock of such association by the order of the comptroller of the currency in accordance with the provisions of the statutes of the United States; and, third, the balance ratably among such stockholders in proportion to the number of shares held and owned by each. Such distribution shall be made from time to time as the proceeds shall be received and as shall be deemed advisable by the said comptroller or said agent."

When, therefore, the claims of the creditors are all satisfied, then the receiver, or an agent selected by the shareholders, will be required to distribute the remainder of the proceeds of the assets of the bank in accordance with the provisions of the statute just quoted; and I therefore instruct the receiver to allow the claims presented to him, for moneys paid under the assessment made by the directors, as claims or assessments to be paid or refunded before the final distribution to all the shareholders. I think, however, that payment of the claims of Samuel P. Scott and Joseph H. Richards should be withheld to await the final disposition of case No. 5,092, now pending in this court, wherein Charles E. Bell and others are plaintiffs, and Samuel P. Scott, Joseph H. Richards, and others are defendants, in which it is sought to recover from them the entire losses of the bank, on the ground that said losses were caused by reason of their miscon-

duct and negligence in the management of the bank; and, should judgment be rendered against them in that case, they will be entitled to credit thereon for the amount of the payments made by them under the assessment of April 27, 1897.

MAHONEY v. CITY OF HELENA et al.

(Circuit Court, D. Montana. August 20, 1899.)

No. 541.

NUISANCE—OBSTRUCTION IN STREET—LIABILITY FOR PERSONAL INJURY.

A receiver of a water company cannot be held liable in damages for a personal injury received by a person in tripping and falling over the top of a stop box which projected above the surface of the ground on the part of a street used for sidewalk purposes, where the box when constructed was placed flush with the surface of the sidewalk, as required by a city ordinance, and its projection was caused by the removal of the sidewalk from around it by some one other than the water company or its receiver.

On Demurrer to Complaint.

T. J. Walsh, for plaintiff.

Clayberg, Corbett & Gunn, for defendants.

KNOWLES, District Judge. This is an action brought by Mary E. Mahoney against the defendants, the city of Helena and James H. Mills, as the receiver of the Helena Consolidated Water Company, to recover of them damages on account of an injury she received by tripping upon a stopcock or stop box connected with a service pipe belonging to said water company. She alleges that on account of this accident she fell and received the serious injury described in her complaint. This said stopcock or stop box was located near the intersection of Broadway and Ewing streets, in the city of Helena, Mont. The part of the street where this stopcock was situated was on the side occupied as a sidewalk. The said Mills was a receiver of said water company, appointed by this court, and as such had charge of the property of said company, and was operating the same at the date of said injury. The defendant Mills demurred to the complaint herein, and set forth as a ground thereof that the said complaint did not set forth, as to him, a cause of action. The complaint sets forth an ordinance of the city of Helena which provides as follows:

"The said Helena Consolidated Water Company shall have the right to put a stopcock in each service pipe below the sidewalk near the curb, and at its own proper cost and expense, and shall box the same securely, and place the cover flush with the sidewalk, and may turn off the water from any premises," etc.

It then appears in the complaint that the said water company put in a stopcock in the said sidewalk at the place aforesaid, in accordance with the provisions of said ordinance, and subsequently the said Mills, as a receiver of said company, used and maintained the same. And it is further alleged:

"That more than a month prior to the 18th day of June, 1898, the sidewalk which had for a long time prior thereto existed about and around the said stopcock and stop box, which said stopcock is an iron pipe extending from the service pipe beneath the ground to a point at the surface, securely boxed, the cover being level with the surface of the said sidewalk as it had heretofore existed, had been torn up and taken away, by reason of which the said stop box had been, during all of said time, to wit, more than one month, negligently allowed by said defendants to remain protruding above the surface of the said street, and immediately in the path traversed by a large number of persons daily, to a height of about twelve inches."

It is alleged that the plaintiff had no knowledge of this obstruction in the street, and tripped upon the same as she was passing in the nighttime; and that the same existed at a point where foot passengers were liable to pass. The question is here presented as to whether the said Mills can be charged with maintaining this obstruction in said street. If he did, under the rules of the common law he might be liable for any damage occasioned thereby; for it might be considered as a public nuisance in a public highway. It appears, however, that the stopcock was properly placed in the first instance, in accordance with the city ordinance, and that its cover was flush with the sidewalk. It does not appear that Mills removed the pavement from around the same, or had anything to do with such removal. It is not stated who removed the same. It was the duty of the city of Helena to repair this sidewalk. Under the statute law of Montana (see section 4703, Pol. Code), it is provided that such a city as Helena "has such powers as are incident to municipal corporations not inconsistent with the laws of the United States or the state." And section 4800 of said Political Code gives to the city council of such cities as Helena the power "to lay out, establish, open, alter, widen, extend, grade, pave or otherwise improve streets, alleys, avenues, sidewalks, parks and public grounds, and vacate the same." Under such powers there can be no doubt but that it is the duty of the city of Helena to repair its sidewalks when they have been damaged or removed. In Barnes v. District, 91 U. S. 540, it is held "that a municipal corporation holding a voluntary charter as a city or village is responsible for its mere negligence in the care and maintenance of its streets. To the same effect are the cases of City of Chicago v. Robbins, 2 Black, 418; Nebraska City v. Campbell, Id. 590; Webster v. City of Beaver Dam, 84 Fed. 280; Saulsbury v. Village of Ithaca, 46 Am. Rep. 122. It is claimed that Mills should have lowered this stopcock to the level of the street after the pavement was removed. I cannot see that this was his duty. He had the right to suppose the city would perform its duty and replace the removed sidewalk in a reasonable time. If he had lowered it, and the sidewalk had been replaced, he might then have been charged with maintaining a public nuisance at that point until it was raised. It does not seem to be claimed that he was required to replace the removed pavement, or that he had the right to do it. He had no rights, as a receiver of said company, in the streets of Helena, save those given the company by city ordinances. If he had removed the pavement it would have been his duty to replace it, but otherwise he would have no right to replace the same. It does not appear that the grade of

the sidewalk had been changed. Some one removed it; it is not stated who. In the case of State v. Rankin, 16 Am. Rep. 737, it is said:

"While it is true that the defendant would be liable if his obstruction of the creek by his pond and dam was in itself the cause of the injuries complained of, yet, if the consequences are to be attributed to the acts of others so affecting his property that it becomes a public nuisance, it would not appear consistent with justice or propriety that he should be held to responsibility."

This view commends itself to me. The party who removed the pavement from around the said defendant's stopcock made it a public nuisance, and it was neither the duty of Mills, nor his right, to replace that pavement, but the duty of the city of Helena. I do not think the case of Lon M. Robinson against James H. Mills, receiver, tried in the district court of this state, involved the same considerations as are here presented. If there was any nuisance presented in that case, the defendant created the same in the first instance. The demurrer is sustained.

MATHESIUS v. BROOKLYN HEIGHTS R. CO.

(Circuit Court, E. D. New York. October 4, 1899.)

1. RAILROADS—CONTRACT OF GUARANTY.
   It is within the powers of a railroad company to become guarantor of a contract made by a construction company for the services of an engineer to be rendered in the construction of its road, and it is not relieved from liability by a subsequent change in its plans by which the services are not required.
2. DAMAGES—BREACH OF CONTRACT—EVIDENCE.
   In an action for breach of contract, in which the claim for damages is based on a liability incurred in reliance on such contract, defendant cannot defend on the ground that such liability is barred by limitation.
3. SAME—CONTRACT OF EMPLOYMENT.
   The measure of damages for the breach of a contract of employment by the employer is prima facie the sum stipulated to be paid for the services, and the burden of reducing the damages by proof of other earnings by the employé rests on the employer.
4. SAME—MEASURE OF DAMAGES.
   Defendant contracted with a third party for plaintiff's services, agreeing to pay therefor a stipulated sum. In reliance on such contract, the third party employed plaintiff, and obligated itself to pay him for the services to be rendered thereunder, and, defendant having refused to accept such services, it assigned the contract to plaintiff, who brought suit for its breach. *Held*, that defendant could not require the liability of plaintiff's assignor to him to be determined by litigation to establish the measure of damages, but that, in the absence of proof in reduction of damages, plaintiff was entitled to recover the sum stipulated to be paid by the contract.

On Motion by Defendant for a New Trial. Denied.

Levi W. Naylor (George H. Beattys, of counsel), for plaintiff.
Sheehan & Collin (Mr. Collin, of counsel), for defendant.

THOMAS, District Judge. The Covered Tube Cable Railway Company, a corporation organized to develop a specific tube system relating to railway construction, obtained on March 4, 1886, an

interest in a certain right of way through Montague street hill, which is an extension of Montague street, in the city of Brooklyn, N. Y. The Wall Street Ferry Railroad Company, by contract with the cable company, qualifiedly succeeded to this right, and also became on May 15, 1888, the owner of the right or license to use the "covered tube cable railroad system," and also obtained certain consents of abutting property owners to the construction and operation of a railroad on Montague street. These corporations seem to have been in practical alliance, and the plaintiff, who was a civil engineer, and the inventor of the covered tube cable system, was the president of the cable company, and vice president of the Wall Street Ferry Railroad Company. Later the Brooklyn Heights Railroad Company sought to own and to operate a railway over Montague street, with a terminus at the Wall Street Ferry. But no railway could be built without obtaining rights of way and consents equivalent to those held by the two corporations first mentioned. Therefore the Brooklyn Heights Railroad Company, having, through those in control of it, promoted the formation of the Montague Construction Company, contracted with such company to build a railway over the desired line. Three legal obstacles were in the way: (1) The procurement of the right to build the road from the local authorities, and the purchase of the franchise; (2) the obtainment of the constitutional consent of the abutting property owners; (3) the acquisition of the right of way over Montague street hill. The Wall Street Ferry Company held conditional ownership of the last-named right, and also had certain consents of the abutting property owners. Hence the Brooklyn Heights Company contracted directly with the cable company and the Wall Street Ferry Company for the purchase of the right of way over Montague street hill on December 31, 1889; and on the same date the Montague Construction Company obtained from the Wall Street Ferry Railroad Company an assignment of the latter's license to use the covered tube system in the construction of the railway, while on the succeeding January 3, 1890, the Montague Construction Company obtained from the Wall Street Railroad Company an assignment of the consents of the abutting property owners. The Brooklyn Heights Railway Company in this manner obtained, through itself or its subsidiary company, all the public and private rights of the cable company and Wall Street Ferry Company which those companies could confer; but it had no plans for the covered tube, nor did it command the necessary skill for the execution of such plans in the construction of the road. To obviate this difficulty the Montague Construction Company on the same 31st day of December, 1889, contracted with the Covered Tube Cable Railway Company for the procurement of such plans and such engineering skill at an agreed price. By the stipulation the cable company should receive $5,000 for the plans, and should employ the plaintiff for the entire work at the general sum of $7,500, which sum the construction company undertook to pay the Wall Street Ferry Company. The Brooklyn Heights Railway Company on the same day guarantied performance by its construction company. Pursuant to such con-

tract the cable company entered into an agreement with Mathesius whereby it engaged his services for the entire work at such specified sum of $7,500, and thereby assumed a liability that has never been discharged. The $5,000 was paid for the plans, but a balance of $4,000 remains unpaid of the $7,500 so as above stipulated to be paid, and for this sum, with interest, the court directed a verdict for the plaintiff. The motion for a new trial is now under consideration. The only condition mentioned in and modifying the contract in question relates to the purchase of the franchise by the Brooklyn Heights Railroad Company. There is no other condition mentioned, and the law implies none. The Brooklyn Heights Company had employed the construction company to build the road. The construction company, to forward the construction of the railway, bought certain appropriate plans of another corporation, and contracted with it to provide labor necessary to make such plans effective. The main company guarantied the payment. This was within the exercise of its legitimate powers. If a contractor purchase material or engage labor to build a railroad, the railway company is competent to assure the person agreeing to furnish the labor or material that he shall be paid therefor. But it is urged that it was an implied condition that the liability of the contracting parties should end, provided the railroad company decided to employ some other plan. It is true that the railroad company may control its own plan, but when the construction company arranges for labor or material for a certain plan, and the railroad company guaranties the fulfillment of such contract, an election as regards the other contracting party arises, to use such plan. The railroad company is at liberty to change its plan, but not at the expense of third persons, of whom it has engaged labor and material. If a construction company engage for construction work peculiarly formed iron columns, usable for a particular plan, the guarantying railroad company would not be excused from payment therefor upon the plea that it thereafter elected to build its road by a system not requiring such material. If a construction company engage an engineer whose skill relates to a system of construction adapted for the use of compressed air, the guarantying railroad company would not be excused from paying for such engaged services upon the plea that it had concluded to employ an electrical plant, in the construction of which such engineer's ability would not be serviceable. The conclusion is that the contract was lawful, and was a due exercise of the defendant's corporate powers. The contract was broken without apparent excuse. The cable company could maintain an action therefor, and the plaintiff has succeeded to its rights.

The final question relates to the damages recoverable. It is claimed that "the contract for the services of Mathesius was countermanded before the time had arrived, or at least promptly on the arrival of the time for the rendition of such services," and "that no part of the services of Mathesius for which the construction company was to pay the cable company a total of $7,500 were ever actually rendered by Mathesius." Notwithstanding such attempted

countermanding of the contract, there was no impairment of the defendant's liability. The cable company had solemnly engaged to pay the plaintiff $7,500 for the work, and had received from the construction company and paid the plaintiff $3,500. Now, it is urged that the cable company has suffered no damages, (1) because there is no evidence that the cable company has paid the plaintiff the $4,000, or suffered damage to that amount; (2) that the plaintiff's claim against the cable company was outlawed. The honorable recognition and payment of its debts is permitted to the cable company. It is not required to escape a moral obligation by shielding itself behind the statute of limitations. Hence, it owes the plaintiff $4,000 and interest, unless it can show (and the burden is on it to show) that the plaintiff obtained other employment that saved him from all pecuniary injury. The primary obligation of an employer who has prevented performance by the person employed is the sum stipulated for the service; and, while this sum may be diminished by proof of earning elsewhere, such proof must be furnished by the person who would rid himself in whole or in part of his pecuniary obligation. Howard v. Daly, 61 N. Y. 362; Taylor v. Bradley, 39 N. Y. 129, 141; Crawford v. Publishing Co., 22 App. Div. 56, 47 N. Y. Supp. 747. The defendant's contention is that the cable company must litigate the question with the plaintiff, and thereby establish his damages. No rule of law places such a burden upon the cable company, and should not. The construction company did not indemnify the cable company up to a certain limit. It covenanted to pay; it covenanted to pay a definite gross sum; and the promise was conditionless, so far as concerns any question here. The contract with the cable company was, "You employ Mathesius for the whole work for the full sum of $7,500, and the construction company shall pay you that sum." It is not necessary for the cable company to show that it cannot escape payment, or to what extent it may escape payment. It is for the defendant to establish that the liability assumed at its instance no longer exists, or that it has been diminished. In a case like that at bar, the amount which would have been received if the contract had been kept is the measure of damages if the contract is broken. Wicker v. Hoppuck, 6 Wall. 94. The law on this subject is illustrated by the following cases: Rector, etc., v. Higgins, 48 N. Y. 532; Belloni v. Freeborn, 63 N. Y. 383, 390; Kohler v. Matlage, 72 N. Y. 259; Maloney v. Nelson, 144 N. Y. 182, 186, 187, 39 N. E. 82; Bank v. Cumings, 149 N. Y. 360, 44 N. E. 173; Jackson v. Port, 17 Johns. 479; Ex parte Nogus, 7 Wend. 499. The construction company prevented performance by the cable company, and may not visit upon the latter company all embarrassments arising from such conduct.

No other question raised demands discussion. The motion for a new trial is denied.

VAN SICLEN v. BARTOL et al.

(Circuit Court, E. D. Pennsylvania. October 6, 1899.)

COSTS—RECOVERY OF LESS THAN FIVE HUNDRED DOLLARS.

When a plaintiff in an action at law or a suit in equity for a money decree recovers less than $500, exclusive of costs, under Rev. St. § 968, he cannot recover his costs, and may, in a case where the court has discretion in the matter, be taxed with the defendant's costs.

Motion by Defendants Concerning Costs. The facts appear in 95 Fed. 793.

John W. Weed and Frank R. Shattuck, for complainant.
Wm. C. Hannis, for respondents.

McPHERSON, District Judge. I think this motion must prevail in part. Section 968 of the Revised Statutes was not called to my attention upon the hearing, and the decree for costs was entered without considering its provisions. I have since examined the cases referred to by counsel upon the argument of this motion, and some other cases bearing upon the subject, and have come to the conclusion that under such a state of facts as is now presented the statute leaves the court no option.

If a plaintiff seeks a judgment at law or a decree in equity for the payment of money, and fails to recover as much as $500, exclusive of costs, he must pay his own costs, at least, and may (where the court has a discretion in the matter) be compelled to pay also the costs of the defendant. Where the chief object of the bill is not to obtain a money decree, but some other form of relief, the test of the plaintiff's right to recover costs may perhaps be different. In the present case a money decree is the sole object of the bill; the plaintiff is the only person entitled to the benefit of such decree, no other bondholders having joined in the proceeding; and the sum recovered is less than $500. The plaintiff must therefore be denied the right to recover his costs, but I decline to impose upon him the costs of the defendants.

The decree will be modified so as to stand for $181, with interest from October 3, 1895, but without costs of suit.

RYAN et al. v. MUTUAL RESERVE FUND LIFE ASS'N.

(Circuit Court, N. D. Iowa, W. D. October 21, 1899.)

LIFE INSURANCE—TERMINATION OF CONTRACT—REFUSAL TO PAY ASSESSMENTS.

Where the holder of a life insurance policy in a mutual company refused to pay a mortuary call, and announced to the company that he had "quit" on account of dissatisfaction with an increase in the rate of assessments, such action terminated the contract, and there can be no recovery on the policy on his subsequent death, regardless of the question of the legality of the company's action in increasing the rate of assessment.

At Law. This was an action on a certificate of insurance issued by defendant on the life of Cornelius D. Ryan.

F. E. Gill, Ellis & Ellis, and E. S. James, for plaintiffs.
Wright, Call & Hubbard, Hayes & Schuyler, and S. T. Tyng, for defendant.

SHIRAS, District Judge. From the evidence adduced in this case, it appears that on June 17, 1886, Cornelius D. Ryan, then residing at Jackson, Neb., had issued to him a so-called "certificate of membership" in the Mutual Reserve Fund Life Association, a corporation created under the laws of the state of New York, in the sum of $10,000, the same to be paid to the children of Cornelius D. Ryan from the death fund of the association, in accordance with the provisions of the certificate, in 90 days after receipt of due proof of the death of Cornelius D. Ryan during the continuance in force of the certificate of membership; it being further therein expressly provided that, if any of the payments stipulated to be made by the member were not paid when they came due, then the certificate should be null and void. The payments provided for in the certificate are threefold, to wit, the admission fee, the annual dues, and assessments to be made from time to time by the board of directors to create and maintain the death fund and reserve fund. Upon a certificate for $10,000 the admission fee is fixed at $30, and the annual dues at the rate of $2 per $1,000, or $20 in all; and in the certificate issued to Cornelius D. Ryan the annual dues were made payable on or before the 17th day of June in every year during the continuance in force of the certificate of membership. It further appears from the evidence that the admission fee, the annual dues, and the several assessments ordered by the board of directors were paid by Ryan from 1886 up to the year 1898. On February 1st of that year an assessment at the rate of $2.37 per $1,000, or $23.70, was called for from Ryan, and in reply thereto he addressed to the company the following letter:

"Jackson, Nebraska, February 9, 1898.

"Dear Sir: I am in receipt of mortuary call No. 96, on policy 47,945, $10,000,—$23.70. This is an increase of $3.20. In 1895 my age of assessment was advanced 5 years, and now 6 years more, making an advance of 11 years, or a very appalling advance in rate. From your resolution, I interpret it to mean that hereafter you will assess all members at their attained age. Am I right? If such is the case, and you will assess them according to the table of rates on back of call No. 96, it would cost me, in the next 35 years or my expectancy of life, $2,100 for each $1,000 insured, or three times what it will cost for a paid-up policy in any of the old-line companies. Can it be possible that you intend to pursue such an unjust and arbitrary course? I have paid to you on policy 47,945 about $1,600 on the promises made by you that insurance would be much cheaper than in the old-line companies, but, should your plans change, I should consider that amount obtained by false pretenses. Insurance in the Banker's Life has not increased any in the past 14 years. On the contrary, my insurance in that company was less last year than it was 9 years ago. Another great injustice you will do your policy holders is that in their old age, when insurance in other companies will be greatly enhanced, you put a price on your insurance greatly beyond the cost of what it would have been had they commenced in other companies at the same time they did in yours. Can you tell me what my insurance will cost me for the next 30 to 35 years? Can you give me a positive statement of cost, or can you change this policy for another in which you can guaranty absolutely a level premium during life? I want to know, now, what I will have to pay. I have a letter from you dated 1895, in which you said you were in hopes that you

would not have to increase rates again during the existence of my policy, and here it is only 2½ years when you have advanced it 20%.

"Please answer promptly, and oblige, C. D. Ryan."

Under date of March 16, 1898, the company addressed Ryan in a letter as follows:

"New York, March 16, 1898.

"Cornelius D. Ryan—Dear Sir: We beg to call your attention to the fact that the sum of $23.70, past due under the terms of your policy No. 47,945, has not been received by the Mutual Reserve Fund Life Association, and the policy has therefore lapsed. The executive committee of this association have power to reinstate a delinquent member at any time within one year for good cause shown, and upon satisfactory evidence of good health, and upon payment of all amounts overdue on account of said policy. Remittances may be made by valid check, draft, post-office or express money order, payable to the order of the Mutual Reserve Fund Life Association. It is certain that safe insurance, with better security, at cheaper rates, cannot be obtained from any life insurance company in the world. The fact that you have permitted your insurance with this association to terminate does not preclude our consideration of renewing membership, and we therefore earnestly invite you to forward the amount past due, with a view of reinstating your policy in accordance with our rules and regulations. In case your policy should not be reinstated, the money forwarded to apply on the above account, as herein suggested, will be returned upon your written request, duly received at this office. May we ask you to kindly favor us with your reasons for lapsing, written on the form inclosed, to the end that we may have an opportunity of replying, in order to correct any possible misunderstanding; thus retaining, what we prize equally with your membership, your friendly feeling and good wishes on behalf of the Mutual Reserve. Thanking you in advance for the courtesy of an early reply, I am,

"Very truly yours, Charles W. Camp, Secretary."

To this communication Ryan sent the following reply:

"Jackson, Nebraska, March 26, 1898.

"Mutual Reserve Fund Life Ass'n, New York, N. Y.—Dear Sir: Yours of March 16th rec'd. I do not want my policy No. 47,945 reinstated. I am fully convinced that your company is one of the greatest fakes of the age. I have contributed $1,600 in honest money to it, and I don't want to continue putting my money into a rat hole. I have been speaking with people who at the age of 63 years pay $65 per $1,000 per annum to your company, and yet you claim that your company is one of the cheapest consistent with safety, etc. If I had insured in one of the old-line companies at the time I entered your company, I could now have a paid-up policy for $3,300 for the money I have thrown away upon your company. I am informed that you do not receive any new members into the old class, but you assess the old members for a sufficient sum to meet the death losses of that class, with 25% reserve and expenses added. Now, suppose that all of the members of this class die, or let their policies lapse, except 3, who are insured for $10,000 each; now, in the event of death of one of these members, the other two would be assessed $5,000 each, and when the other died the remaining members would have to pay $10,000 more, or if two died at the same time the remaining members would have to pay $20,000. I feel, I presume, as the other members do, that my money has been obtained by false promises. The scheme of the company is to insure members at a low rate while young, and, when they arrive at an age when there is danger, to assess them at such appalling increase that they will quit, probably at an age when they cannot get insurance elsewhere. These are a few of the reasons I have quit. I have lost a good deal of money by it, with not a dollar in return. Suppose a man should have the misfortune to live to be 85 or 90 years, a member in your company, what would he have to pay? If you can name a member of your company 80 years of age, and if he don't verify my statements here made, I will apologize.

"Very truly, C. D. Ryan."

So far as the evidence discloses, this letter ended the correspondence between the parties, and Ryan did not pay the mortuary call for $23.70 made upon him, nor did he pay the annual dues of $20, payable June 17, 1898. He died July 21, 1898, and the company having refused to pay the sum called for in the certificate, on the ground that the same had lapsed and become null and void before the death of the insured, the present action was brought on behalf of the plaintiffs, who are the children of the deceased.

On behalf of the plaintiffs it is claimed that while the company had the right to increase the amount of the mortuary calls made from time to time, if there was need so to do in order to meet the demands upon the death fund, yet this could only be lawfully done by following the mode pointed out in the certificate of membership and the provisions of the constitution and by-laws of the association as they were in force at the date of the issuance of the certificate sued on; and that as the assessment made under date of February 1, 1898, was not levied against him on the basis of his age at the time he obtained his certificate, but on the basis of his age at the date when the assessment was levied, it was illegally assessed, and a forfeiture cannot be predicated on the failure to pay an assessment thus estimated on a wrong basis. The question, however, is not upon the strict legal right of the company to calculate its mortuary calls on the certificate issued to Ryan on one basis or another, and to declare the policy forfeited if the call was not paid, but whether Ryan, by his own acts, had terminated the contract with the association, during his lifetime; for if, for any reason, it was not in force at the date of Ryan's death, then plaintiffs cannot recover in this action.

If it be assumed, for the sake of the argument, that the company could not rightfully base its mortuary calls against Ryan on any other age than that he had attained to when the certificate was issued, the fact remains that it claimed the right to advance the age, and thus to increase the amount of the assessment, when necessary so to do. When the demand for the payment of the call was made upon Ryan, it was open to him to contest the legality of the call as made, and by a proper proceeding in court he could have obtained a judicial interpretation of the contract of insurance; but this he did not do, but, on the contrary, he chose to exercise another right, which was open to him, and that was to terminate the contract relation between himself and the association. The letter of March 26th clearly shows that this was the course he intended to take. The case is not one wherein the company is seeking, after the death of the insured party, to establish a right to declare the contract of insurance forfeited by reason of a failure to meet some of its requirements; but the question is whether the insured did not, during his lifetime, affirmatively put an end to the contract, so that it had, by his action, been terminated before his death. In the letter of February 9th, after drawing a comparison between the promises made to induce taking the insurance and the constantly increasing demands made upon him, he continues: "Can you tell me what my insurance will cost me for the next 30 to 35 years? Can you give me a positive statement of cost, or can you change this policy for another in

which you can guaranty absolutely a level premium during life? I want to know now what I will have to pay." It is evident that no satisfactory response to these inquiries was made to Ryan, and when the company, in the letter of March 16th, called his attention to the fact that he had not paid the mortuary call for $23.70, and urged him to continue his insurance in the association by being reinstated as a member, he replied, under date of March 26th: "Yours of March 16th rec'd. I do not want my policy No. 47,945 reinstated. I am fully convinced that your company is one of the greatest fakes of the age. I have contributed $1,600 in honest money to it, and I don't want to continue putting my money into a rat hole. * * * These are a few of the reasons I have quit." In accordance with these sentiments, thus vigorously expressed, Ryan did not pay the call for $23.70, nor did he pay the annual dues of $20, which, if the policy had continued in force, would have become due June 17, 1898. No other conclusion can be drawn from his letters and from his acts than that he had become dissatisfied with the association, and had "quit," and, that being the case, the contract of insurance was at an end between the parties; and having been thus terminated by the act of Ryan himself, before his death, the plaintiffs cannot recover thereon. Judgment for defendant.

In re FIELDING.

(District Court, W. D. Missouri, W. D. October 6, 1899.)

BANKRUPTCY—COMMISSIONS OF REFEREE AND TRUSTEE—DIVIDENDS.

Under Bankruptcy Act 1898, §§ 40, 48, providing that referees and trustees in bankruptcy shall be entitled to receive commissions on "sums to be paid as dividends" by the estates administered by them, these officers are not entitled to commissions on disbursements made in payment of those creditors who are entitled, under the act, to priority of payment, and to full satisfaction, before distribution to general creditors begins, the sums paid to these preferred creditors not being "dividends," within the meaning of the law.

In Bankruptcy. On question certified by referee in bankruptcy.

PHILIPS, District Judge. The administration of this estate has reached the point of declaring a final dividend and closing the trusteeship. The report of the trustee shows that the aggregate amount of funds of the estate which came into his hands is $70,487.99. The expenses of the administration and claims entitled to priority and which have been paid or ordered paid amount to $4,695.81. The question now presented for determination is, on what sum of the estate is the per centum of commission of the referee and trustee to be calculated? Is it on the whole fund coming into the hands of the trustee, or is it to be limited to the residue after deducting the expenses of administration and the preferred claims? These questions must be answered by the statute as the sole book of reference.

Section 40 (a) of the bankrupt act declares:

"Referees shall receive as full compensation for their services, payable after they are rendered, a fee of ten dollars deposited with the clerk at the time the petition is filed in each case, except when a fee is not required from a voluntary bankrupt, and from estates which have been administered before them one per centum commissions on sums to be paid as dividends and commissions, or one half of one per centum on the amount to be paid to creditors upon the confirmation of a composition."

Section 48 (a) declares that:

"Trustees shall receive, as full compensation for their services, payable after they are rendered, a fee of five dollars deposited with the clerk at the time the petition is filed in each case, except when a fee is not required from a voluntary bankrupt, and from estates which they have administered, such commissions on sums to be paid as dividends and commissions as may be allowed by the courts, not to exceed three per centum on the first five thousand dollars or less, two per centum on the second five thousand dollars or part thereof, and one per centum on such sums in excess of ten thousand dollars."

Section 64 (a) directs that the amount of all taxes legally due and owing by the bankrupt shall be paid by the trustee on the order of court. Subsection (b) declares what claims and expenses shall have priority, "to be paid in full out of bankrupt estates," and the order of their payment. The taxes are to be paid in full, and the priority claims are also to be paid in full, in the order named in the statute. Until these are paid, there is no fund to be divided among the general creditors. In other words, the term "dividends" can have no application to the priority claims, for the reason that the statute directs them to be paid out of the estate in full, seriatim, before the matter of declaring and paying dividends arises. This is made clear by the succeeding section 65 (a), which declares that "dividends of an equal per centum shall be declared and paid on all allowed claims, except such as have priority or are secured." It may be conceded that said section 65 (a), strictly speaking, does not undertake to define what a dividend is, but it unmistakably indicates what, in the legislative mind, was meant by the term "dividends." It is an express declaration that in this respect claims having priority are identical with secured claims, neither of which is subject to a declaration and payment of the equal per centum. In Re Ft. Wayne Electric Corp., 94 Fed. 109, it is held that the referee is not entitled to commissions on claims of secured creditors, as they are not dividends within the meaning of the statute. The same statute which declares that no dividends shall be declared and paid on secured claims makes a like declaration in respect of claims entitled to priority. As the commissions to be paid to the referee and trustee are a per centum "on sums to be paid as dividends," etc., it would seem logically to follow that, where no dividends are to be declared and paid, no commissions for the referee and trustee can be predicated. Both in common and legal parlance the term "dividends" implies a portion of a fund divided among several owners. Bouvier defines it primarily as "a portion of the principal or profit divided among several owners of a thing." Black, in his Law Dictionary, defines it primarily as "a fund to be divided. * * * In bankruptcy or insolvency practice, a dividend is a proportional payment to the creditors out of the insolvent estate." In either case the definition carries

with it the idea of the division of a fund owned by several parties, and the dividend is the aliquot portion of the estate of the common owners. In the claims entitled to priority there can be no common or proportionate ownership to be ascertained as the subject of dividends, as such claims are to be paid in full, as an entirety, in the order named in the statute. No notice of claims entitled to priority is required to be given to the creditors, as they are to be paid in full directly; and the general creditors therefore have no participation or interest in this fund, as it is not the subject of dividends. No commission or per centum can be deducted from the priority claims, for the reason that they are to be paid in full. Therefore, if commissions should be allowed on the aggregate amount of the estate coming into the hands of the trustee, the whole burden of such commissions would fall upon the general creditors, part of which commissions would be based upon a fund which never became the subject of dividends; thereby still further diminishing the distributive shares of the general creditors. Under the act of 1800 (section 47) compensation for ministerial officers was allowed by the court, and the amount thereof was discretionary with the court. The act of 1841 (section 6) authorized the courts to prescribe a tariff of fees and charges, without fixing the compensation in any other way. The act of 1867 (section 28) allowed the assignee a graduated per centum on the moneys "received and paid out"; in other words, his commission was predicated upon all moneys received and paid out by him, no matter whether as preferred or general funds. And by section 47 of that act the register was allowed fees dependent upon his work and time. Such fees were paid him by the clerk out of a deposit of $50, made when the petition was filed. By the amendatory act of 1874 these fees were cut in two. The provisions of the act of 1898, giving to the referee and trustee a per centum on "dividends," are, therefore, quite significant. The statute in other respects, as in section 56 (b), indicates that congress distinguished between claims secured and entitled to priority and general creditors. It declares that "creditors holding claims which are secured or have priority shall not, in respect to such claims, be entitled to vote at creditors' meetings, nor shall such claims be counted in computing either the number of creditors or the amount of their claims, unless the amounts of such claims exceed the values of such securities or priorities, and then only for such excess."

It has been suggested that, inasmuch as the trustee has a duty to perform in making out warrants or checks for the payment of priority claims, and the responsibility of this fund passing through his hands, he ought to be entitled to a commission as compensation. If this argument be valid, it must apply equally to all the classes of priority claims as to any one. The costs of preserving the estate, to be first paid, would likewise be subject to the commission, with which the referee has nothing to do; as also to the filing fees paid by the petitioning creditors in involuntary cases, with which neither the referee nor the trustee has anything to do, as these fees are deposited with and paid out by the clerk under order of court.

It is also suggested that the term "dividends," as employed in

section 66 of the act, respecting the disposition of dividends remaining uncalled for after a certain lapse of time, applies as well to preferred claims as to those of general creditors. The answer to this must be that it was not contemplated by the lawmakers that priority claims would remain uncalled for. The cost of administration, attorney's fees, wages due workmen and servants, and the like, could hardly have been expected to lie long uncalled for. To those familiar with the incidents following the administration of the bankrupt act of 1867, the purpose of the provisions of said section 66 is quite obvious. It occurred under that act elsewhere, no doubt, as in this district, that dividends declared in favor of general creditors of the bankrupt, which were covered into the court registry or depository, remained uncalled for by the distributees for a great number of years; and this fund in some of the depositories was quite large. As this fund had not for so long a period been called for by the designated distributees, the question arose as to whether or not the courts ought not to hold that this seemingly abandoned fund, in equity, should either be distributed pro rata among the creditors who had not been paid in full, or returned to the bankrupt. But the better opinion seemed to be that such a contingency was a casus omissus of the bankrupt act; which section 66 of the act of 1898 sought to remedy. Its phraseology strengthens the argument that the term "dividends" employed in this statute pertains solely to the fund to be distributed pro rata among the general creditors. The uncalled-for dividends are to "be distributed to the creditors whose claims have been allowed, but not paid in full," etc. As no dividends could arise until after the claims entitled to priority have been paid in full, "the creditors whose claims have been allowed, but not paid in full," are clearly the general creditors.

The court is impressed with the fact that the conclusion reached by it may be a hardship upon the referees and trustees under certain conditions, but such considerations should be addressed to the legislative branch of the government, and cannot control the judgment of the court in applying the statute as congress has made it. The answer to the question submitted is that the per centum of commissions of the referee and trustee cannot be based upon the disbursements made in payment of claims entitled to priority, but must be limited to dividends and commissions on the residue of the estate.

In re FT. WAYNE ELECTRIC CORP.

WORDEN v. COLUMBUS ELECTRIC CO.

(District Court, D. Indiana. October 11, 1899.)

No. 7.

1. BANKRUPTCY—ALLOWANCE OF CLAIMS—PREFERRED CREDITOR.
Under Bankruptcy Act 1898, § 57g, providing that the claims of creditors of a bankrupt who have received preferences shall not be allowed unless they surrender their preferences, a creditor who has actually received a preference cannot have his claim allowed without surrendering the pref-

erence, notwithstanding the fact that he had no knowledge or cause to believe that a preference was intended.

2. SAME—PREFERENCES—PAYMENT OF MONEY.

Payment of a debt in money is a transfer of property, within the purview of Bankruptcy Act 1898, § 60a, providing that a debtor shall be deemed to have given a preference if, being insolvent, he has made a transfer of any of his property, and the effect of the enforcement of such transfer will be to enable one of his creditors to obtain a greater percentage of his debt than other creditors of the same class.

In Bankruptcy.

Breen & Morris, for Worden.

Robertson & O'Rourke, for Columbus Electric Co.

BAKER, District Judge. The petition to reconsider the decision of this court is overruled. This court has held that a trustee could not recover back from a creditor, to whom a payment had been made on a valid pre-existing debt, the money so paid, unless it was shown that the payee had reasonable cause to believe that a preference was thereby intended. The court further held that clause e of section 67 did not apply to such preferential payment. Blakey v. Bank, 95 Fed. 267. This case, however, throws no light on the question involved in the present controversy. The bankruptcy act, in clause g of section 57, provides that the claims of creditors who have received preferences shall not be allowed unless such creditors shall surrender their preferences. Knowledge or cause to believe that a preference was intended is not included as an element of the preference which shall work a disallowance of the claim. If a preference has actually been received by the creditor, the statute, without regard to the creditor's knowledge or cause to believe that a preference was intended, is peremptory that such preference must be surrendered or his claim must be disallowed. The bankruptcy act, in clause a of section 60, provides that "a person shall be deemed to have given a preference if, being insolvent, he has * * * made a transfer of any of his property, and the effect of the enforcement of such transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of his creditors of the same class." The insolvent cannot give a preference unless the creditor receives it. In this case the creditor, if its claim is allowed, will receive a greater percentage of its debt than other creditors of the same class, if it may retain the payment received by it and still prove for the residue of its claim. It is urged that a payment of money is not a transfer of property, within the purview of clause a of section 60. This contention is unsound. Money is property, and the payment of money works a transfer of property from debtor to creditor. Besides, clause 25 of section 1 of the bankruptcy act expressly includes payment as one of the specified methods of transfer. These views are supported by Coll. Bankr. p. 285, and In re Knost, 1 Nat. Bankr. News (Aug. 1, 1899) p. 403 (Hicks v. Knost, 94 Fed. 625).

In re DAUBNER.

(District Court, D. Oregon. August 24, 1899.)

No. 85.

1. BANKRUPTCY—EXEMPTIONS—HOMESTEAD.
Under Bankruptcy Act 1898, § 70, providing that a trustee in bankruptcy shall be vested with the title of the bankrupt to his property, except as to "property which is exempt," land acquired by the bankrupt under the United States homestead law cannot be subjected, in the bankruptcy proceedings, to the payment of any debt contracted by him before the issuance of the patent for such land, it being exempt as to all such debts by the terms of the homestead act (Rev. St. § 2296).

2. SAME—GROWING CROPS.
Crops growing upon the homestead of a voluntary bankrupt at the time of his adjudication are not exempt, but will pass to his trustee in bankruptcy for the benefit of the creditors.

In Bankruptcy. On review of rulings of referee in bankruptcy.

J. T. Hinkle, for bankrupt.

Charles H. Carter, for trustee in bankruptcy.

BELLINGER, District Judge. The bankrupt claims a homestead of 160 acres of land, with growing crops, as exempt under the state homestead law, excepting as to two claims in favor of the First National Bank of Pendleton,—one of which is evidenced by a note dated November 1, 1892, and the other by a note dated April 27, 1893,—the state homestead law not having gone into effect until after the making of the latter note; and this much is conceded by the trustee. But it is claimed further for the bankrupt that the homestead is exempt as to these debts of the bank under the homestead law of the United States. That law contains this provision: "No lands acquired under this chapter shall in any event become liable to the satisfaction of any debt contracted prior to the issuing of the patent therefor." Rev. St. § 2296. The patent in this case was issued October 13, 1898. It is provided by the bankrupt law that title, except in so far as it is to property which is exempt, shall vest in the trustee to all property which, prior to the filing of the petition, the bankrupt could, by any means, have transferred, or which might have been levied upon and sold under judicial process against him; and the trustee contends that, inasmuch as the bankrupt could have disposed of this property prior to the filing of the petition, it is therefore not exempt as homestead; that the bankrupt act modifies the homestead law so as to exclude bankrupts from the benefit of its provisions. But the words in the latter act, "except in so far as it is to property which is exempt," used with reference to the title which is vested in the trustee by operation of law, show that it was not the intention to vest title to property like this in the trustee. Section 70 of the bankrupt law plainly says: "The trustee" shall "be vested by operation of law with the title of the bankrupt" "to all property which, prior to the filing of the petition, he could by any means have transferred," "except in so far as it is to property which is exempt." The property in question was at the time exempt, and against this clause in the bank-

rupt law it cannot be held that congress intended by that law to modify the homestead law of the United States. As to the growing crops, I conclude that they are not exempt in case of voluntary bankruptcy. In re Coffman, 93 Fed. 422. While, for many purposes, growing crops are held to be a part of the realty, yet in many cases they have been treated as personalty, and held liable to attachment or execution and levy and sale. Upon a sale of the land the growing crops, unless reserved, would pass to the purchaser, but they are capable of reservation and of mortgage and sale by the owner of the land, and when such owner voluntarily goes into bankruptcy he must be held to intend that such of his property and rights as are the subject of disposition by him, and are not expressly exempt, shall vest in the trustee for the benefit of creditors. Such crops are the fruits of the bankrupt's industry, or of his investment of money, or both. It would be productive of great injustice if the owner of a homestead is permitted to spend his money in planting crops upon exempt land, and then between seed time and harvest procure a discharge in bankruptcy, and so reap what was sown at the expense of creditors. By such a device the bankrupt might secure a discharge from his debts, and retain his property, with its increase, and the bankruptcy law be made an instrument of fraud. The rulings of the referee are affirmed.

In re LEIGH et al.

(District Court, D. Colorado. September 19, 1899.)

No. 222.

BANKRUPTCY—LIENS—UNRECORDED MORTGAGE.

Where the law of the state provides that a mortgage of chattels shall not be valid, as against creditors of the mortgagor, if not recorded, or if it permits the mortgagor to retain, use, and sell the property affected, a mortgage which is open to these objections will not create a lien entitling the mortgagee to the possession of the property as against the trustee in bankruptcy of the mortgagor, though it would have been good as against the bankrupt himself.

In Bankruptcy. On review of decision of referee in bankruptcy.

This was a petition by a creditor of the bankrupt, exhibiting a chattel mortgage given by the bankrupt to secure a promissory note, covering a part of the stock in trade of the bankrupt. The chattels affected were in the possession of the trustee in bankruptcy, as assets of the estate. The petition prayed for leave to take possession of the mortgaged property and sell the same for the purpose of satisfying said note. The petition in bankruptcy was filed after the maturity of the mortgage, and before it was recorded. Possession was never taken or attempted to be taken by the mortgagee. The trustee, by his attorney, filed a demurrer to the petition, alleging as grounds of demurrer that, by reason of the failure to record the mortgage and take possession thereunder at maturity, the same was void as against the trustee in bankruptcy and the general creditors of the bankrupt. Mills' Ann. St. Colo. §§ 2027, 2028. It appeared that the mortgage was given within four months prior to the filing of the petition in bankruptcy. But it was conceded on the argument of the case before the referee that it was given in exchange for other security, and was therefore not an illegal preference. It was also conceded that the mortgage was valid as between the parties thereto, and that the transaction was free from any fraudulent intent on their part.

Patterson, Richardson & Hawkins, for petitioner.
Thomas H. Hardcastle, for trustee.

HALLETT, District Judge (orally). There was an argument some days back upon a ruling made by the referee, which ruling was brought into this court for review. Leigh Bros. were dealers in typewriting machines, and while they carried on business they made a chattel mortgage upon a portion of their stock to secure an indebtedness due to W. T. Branch. There were several mortgages in succession, some part of the indebtedness being paid from time to time, and the mortgage now in controversy is given to secure what was due in May, 1899. The mortgage in controversy (and all of them, apparently) was not recorded; and the question raised by the demurrer to the petition of Branch, who asked to have his mortgage allowed and sustained, and to have possession of the property described in it, is whether one claiming in good faith under an unrecorded mortgage at the time of the bankruptcy can have the property which is conveyed by the mortgage. The question is stated by the referee in this way:

"W. T. Branch filed his petition herein, exhibiting a chattel mortgage given by the bankrupt firm to secure its note to him, covering certain property in the possession of the trustee in bankruptcy, and praying for permission to take possession of and sell said mortgaged property for the purpose of satisfying said loan. The trustee filed a demurrer to said petition upon the ground that it appeared that said mortgage had never been recorded, and no possession taken thereunder, and that the same was therefore void as against the trustee in bankruptcy. The referee sustained the demurrer, to which ruling the petitioner has filed an assignment of errors, and prays for a review."

The referee delivered an opinion, which is returned with the papers, and which discusses the question very fully and fairly, and I think that he has reached a correct conclusion.

In my judgment, the whole matter is determined by the first clause of section 67 of the bankrupt act; that is, clause a, which reads as follows:

"Claims which for want of record or for other reasons would not have been valid liens as against the claims of creditors of the bankrupt, shall not be liens as against his estate."

Under the law of this state as expounded by the supreme court of the state, the petitioner's chattel mortgage was not a valid lien against the creditors of the estate. It was not valid, for one reason, because it was not recorded; for another reason, that it permitted the sale of the stock of Leigh Bros. under its terms, and that has been declared by the supreme court to be sufficient in itself to void a chattel mortgage. It was suggested by counsel for the petitioner in argument that a part of the business of Leigh Bros. was to rent machines, and I understood him to say that it ought to be assumed that these machines were for renting. But I think that is not reasonable. The principal business of Leigh Bros. was apparently the selling of typewriters, and if, incidental to that, they sometimes rented typewriters, I do not think that fact would enable us to say that the machines mentioned in this mortgage were such as were reserved for renting. Under the bankruptcy act, a mortgage

or other security is to have the construction which is given it by the courts of the state under the law of the state; and, as this mortgage would not be valid against the creditors of the estate under the law of the state, it is not valid under this clause of the bankruptcy act. There is another clause which is much to the same effect. It is clause e of section 70:

"The trustee may avoid any transfer by the bankrupt of his property which any creditor of such bankrupt might have avoided, and may recover the property so transferred or its value, from the person to whom it was transferred, unless he was a bona fide holder for value prior to the date of adjudication."

Under the mortgage as interpreted by the courts of the state, Mr. Branch was not a holder of this property at all, nor was he a bona fide holder. Under this clause, the trustee is especially empowered to avoid a transfer which a creditor of the bankrupt might avoid. I believe the position of the referee to be correct, and therefore it is affirmed.

In re RIDER.

(District Court, N. D. New York. October 6, 1899.)

1. BANKRUPTCY—COMPOSITIONS—CONSTRUCTION OF STATUTE.
   The provisions of the bankruptcy act prescribing the requisites of a composition with creditors are to be strictly construed as against those who seek by this means to deprive nonassenting creditors of their right to have the debtor's property administered upon and distributed in the ordinary course of bankruptcy proceedings.
2. SAME—REQUISITES OF COMPOSITION.
   Under Bankruptcy Act 1898, § 12, a composition, to be valid, must have been offered by the bankrupt to all of his creditors, whether or not they have proved their debts at the time of the offer, and all must have a reasonable opportunity to consider it, and thereafter it must be accepted by a majority in number and amount of all creditors whose claims have then been allowed.
3. SAME.
   Where a bankrupt, at the first meeting of his creditors, offered a composition to certain of the creditors whose debts had been allowed at that meeting and procured their acceptance of it, and the accepting creditors were a majority in number and value of those whose claims had been allowed at the time they accepted, but not a majority of those whose claims had been allowed at the time of the hearing on the question of confirming the composition, and there was no general notice to creditors of the terms of the proposed composition, *held*, that the composition should not be confirmed.
4. SAME—DEPOSIT OF COSTS.
   The court will not confirm a composition offered by a bankrupt to his creditors where the money deposited by him to cover the cost of the proceedings is not sufficient in amount.

In Bankruptcy. On motion to confirm composition.

At the argument it was conceded that the accepting creditors did not represent a majority in number and amount of all the creditors whose claims have been allowed, but only such a majority of those whose claims were allowed at the first meeting of creditors. At the date of the argument, September 19th, not less than 30 creditors had proved their debts aggregating $8,554, and but 12 or 13 creditors representing $4,210 had signed the composition agreement.

The claims of Holmes Rider, the father of the bankrupt, for $2,600, and of his mother-in-law for $446, are included in the above amount of $4,210. The referee, who has made a most careful and exhaustive return upon the law and facts, reports as follows: "At that session of April 15th the bankrupt was examined by his creditors. * * * After such examination and partly during the session of the meeting, but not as a part of the proceedings thereof, the bankrupt presented the proposed written composition herein to 11 of the 15 creditors in attendance, whose claims aggregated $3,745.44 of the $4,089.02 proved and allowed at that time, all of whom accepted the composition in writing at that time and place by instrument dated that day." It does not appear that the paper was presented to the remaining four creditors who had proved their debts. It was not presented to the general creditors at all and they had no formal information that a composition was on foot, except the notice that it would be presented to the court for confirmation. The composition proposed was to pay 30 per cent., one-third in cash, one-third in four months and one-third in six months. The deferred payments were to be evidenced by the notes of the bankrupt indorsed by his father. There is a marked dispute as to the value of the bankrupt's estate, the contesting creditors insisting that it will pay much more than 30 per cent. The referee recognizes the possibility that this contention is well founded, but is of the opinion "that if the composition could be paid wholly in cash and without any part thereof being deferred, the creditors will realize more from a confirmation thereof than they will to have the estate administered in bankruptcy." Owing to the long delay occasioned by the contest the notes originally deposited are not now available as some of them have already become due. The amount deposited by the bankrupt for costs is also inadequate. The financial responsibility of Holmes Rider is assailed, but the referee finds that he is worth from $7,000 to $8,000 over and above his present liabilities.

Isaac S. Signor and Thomas A. Kirby, for bankrupt.
Frank J. Hone, for objecting creditors.

COXE, District Judge (after stating the facts as above). The effect of a composition is to supersede the bankruptcy proceedings and reinvest the bankrupt with all his property free from the claims of creditors. As an abstract proposition, considered for a moment apart from the provisions of the statute, it is entirely clear that a condition so plainly in derogation of common-law rights should not be permitted, unless it is reasonably certain that the creditors approve and that they will fare at least as well as they would were the estate administered in the usual course. It would be manifestly unfair and opposed to the basic principle of our institutions to permit a minority to dictate terms to a majority and compel them, in invitum, to take what the bankrupt chooses to offer, or nothing. Indeed, it has been considered a somewhat dangerous exercise of legislative power to compel even a minority to surrender all claim upon the debtor's estate at the dictation of the majority. Certainly no previous law has permitted a minority to force a compromise. Always the safeguard of a majority against favoritism and fraud has been preserved. The amendment of 1874 to the law of 1867 provides that "such resolution shall, to be operative, have been passed by a majority in number and three-fourths in value of the creditors of the debtor assembled at such meeting, and shall be confirmed by the signatures thereto of the debtor and two-thirds in number and one-half in value of all the creditors of the debtor." 18 Stat. 183, c. 390, § 17. A law which compels a creditor, against his will, to accept in discharge of his debt just what the debtor sees

fit to offer, should be strictly construed. Loveland, Bankr. p. 549; In re Shields, Fed. Cas. No. 12,784.

The present law should be construed in the light of similar prior enactments and any doubt should be resolved against those who seek to deprive creditors of the right to have the debtor's property applied to the payment of his debts. Nothing short of an absolutely plain and unambiguous provision will convince the court that congress intended for the first time, it is thought, in the history of bankruptcy legislation to vest such unusual and dictatorial powers with a minority of the creditors. It may be assumed that the language of section 12 is not as perspicuous as could be desired, but, read as a whole, the intention of congress seems plain to permit a compromise only when sanctioned by a majority in number and amount of the creditors whose claims have been allowed, after due notice to them of the bankrupt's proposition. If the construction contended for by the bankrupt be accepted it will lead to most inequitable results. Take, for illustration, a case where there are thirty creditors and only three have proved their debts, for equal amounts, at the time the composition is offered. If the bankrupt obtains the consent of two of them the composition must be confirmed, although the remaining twenty-eight creditors may be in open opposition.

Section 12 is easily capable of a construction compatible with the intent and purpose which has always ruled proceedings of this kind. After the bankrupt has been examined and filed a list of his creditors he "may offer terms of composition to his creditors." This plainly implies that the offer should be made to all his creditors whether they have proved their debts or not. It is not essential that proofs shall be made before, or at, the first meeting. They may be made at any time within a year after the adjudication and it is not necessary that they shall be filed, in the first instance, with the referee. Section 57, c. n.

After the terms are thus made known to all the creditors they have a reasonable time to decide whether they will accept the offer or not. But in order to qualify themselves to vote upon the proposition they are required to prove their claims. The reason for this is obvious; it excludes from the voting all but bona fide creditors; it excludes all those who are too indifferent to present their claims and all whose claims are unliquidated, fictitious or exorbitant; it gives all creditors notice no matter what may be the nature of their claims and permits them to qualify, if they desire to do so, and assent to the compromise or oppose it, or, if they so elect, they may simply withhold their assent. After a fair opportunity has been given to all and the requisite majority of those whose claims have been allowed have accepted it in writing an application to confirm the composition may be filed. Even then the composition may be rejected if the judge be convinced that it is not for the best interests of the creditors.

A construction which permits the bankrupt to select a time when but few creditors have proved and then to present his terms only to such creditors as he believes to be friendly to his interests, keeping the general creditors in the dark until he has obtained a majority of

the few who have proved, is contrary to the intent and spirit of the law. It would enable a few active and friendly creditors on the spot so to manipulate the proceedings that the necessary majority could be secured while distant creditors were wholly ignorant of the proposed settlement. That the supreme court entertain views similar to the foregoing may be inferred from form No. 60 (18 Sup. Ct. xlvi.), adopted pursuant to general order 38 (Id. x.).

Without pursuing the subject further the court is constrained to deny the application to confirm this composition. The reasons for this conclusion may be briefly stated as follows:

First. It is not approved by a majority in number and amount of creditors whose claims have been allowed.

Second. No notice was given to the general creditors of the bankrupt.

Third. The composition was not presented to all the creditors whose claims were allowed.

Fourth. At the present time the consideration deposited is not in form to be distributed.

Fifth. The amount deposited as costs is inadequate.

Motion denied.

In re RIDER.

(District Court, N. D. New York. October 6, 1899.)

1. BANKRUPTCY—PROOF OF CLAIMS—REVIEW OF DECISION OF REFEREE.
   On the question of allowing or disallowing a claim offered for proof against the estate of a bankrupt, the referee in bankruptcy has a large measure of discretion; and his decision on a question of fact will not be reversed by the judge, unless manifestly contrary to the weight of the evidence.

2. SAME.
   Where a claim offered for proof against the estate of a bankrupt by his father was thoroughly investigated by the referee, and allowed as valid and genuine, the judge will not expunge the proof on the application of other creditors, who contend that fraud is presumable from the relationship of the parties, and attempt to support such presumption only by certain unimportant variances in the evidence.

In Bankruptcy. On application to expunge proof of debt filed by Holmes Rider, a creditor.

Isaac S. Signor and Thomas A. Kirby, for proving creditor.
Frank J. Hone, for contesting creditors.

COXE, District Judge. Holmes Rider, the father of the bankrupt, proved a claim for $2,600.74. On motion of certain creditors the allowance of the claim was reopened and the question of its validity was carefully investigated by the referee, who finds the claim to be a valid and subsisting one. The matter is brought here upon a motion to expunge and upon exceptions to the findings of the referee, who has certified the question under general order No. 27 (89 Fed. xi.), and rule No. 23 of this court. Section 57 of the act, general order No. 21 (89 Fed. ix.), and rule No. 20 of this court, were intended to vest, and do vest, a wide discretion with the referee in the al-

lowance and disallowance of claims. This is as it should be, and the judge will not interfere with a decision of the referee upon questions of fact unless convinced that it is manifestly against the weight of evidence. The referee has the advantage of seeing the witnesses and, with the knowledge gained from the general administration of the estate and everyday contact with the parties, he is far more competent than the judge to determine these questions correctly. It would be an intolerable burden upon lawyers and laymen alike were a practice encouraged which permits an appeal to the judge whenever a dispute arises upon the facts over the amount at which a creditor's claim is allowed. In the present instance the principal accusation against the claim is based upon the relationship of father and son existing between the bankrupt and the creditor. This fact demanded closer scrutiny than is required in the case of ordinary claims and such an examination appears to have been given by the referee. He reports that he is convinced that the claim is a bona fide one and represents money actually loaned to the bankrupt. Against the positive testimony of the bankrupt and the creditor are placed certain inconsequential variances in the proof, by which it is sought to strengthen the presumption of fraud which the contesting creditors insist arises from the existing relationship. The court would not be warranted in overthrowing the referee's conclusion upon such unsubstantial grounds. It is enough that the referee after a thorough examination discovered no fraud and believes the claim to be genuine. The application to expunge is denied.

In re ROME PLANING MILL.

(District Court, N. D. New York. October 4, 1899.)

No. 190.

1. BANKRUPTCY—ACTS OF BANKRUPTCY—GIVING PREFERENCE.
   Creditors filing a petition in involuntary bankruptcy against their debtor, alleging, as an act of bankruptcy, that he has transferred property with intent to give a preference, must assume the burden of proving the transfer of property, the debtor's intent to prefer a creditor, and his insolvency at the date of the transfer, except (as to the last requirement) when the respondent fails to produce his books and papers and submit to an examination, thereby incurring the obligation of proving his own solvency.
2. SAME—INTENT OF PARTIES.
   Where a transfer of property by an insolvent debtor with intent to prefer a creditor is made the basis of a petition in involuntary bankruptcy against him, the intent of the debtor is alone material. It is not necessary to show the intent with which the creditor received the transfer of property, nor that he had reasonable cause to believe a preference was intended.
3. SAME—PRESUMPTION OF INTENT.
   Where a petition in involuntary bankruptcy charges the debtor with having transferred property with intent to give a preference, his intent to prefer may be presumed from the fact of his having made a transfer of a large part of his property, while insolvent, to a single creditor; and when this is shown the burden is on the debtor to show that he was ignorant of his insolvency, and had reason to believe he could pay his debts in full.

4. SAME—SUFFERING OR PERMITTING PREFERENCE.
Upon a petition in involuntary bankruptcy under Bankr. Act 1898, § 3, subd. 3, the petitioning creditors must assume the burden of proving that a preference was obtained by a creditor through legal proceedings; that the debtor suffered or permitted the preference, and did not vacate or discharge it at least five days before a sale or final disposition of the property affected; and that he was insolvent at the time the preference was obtained. Proof that he was insolvent at the time of filing the petition is insufficient.

5. SAME—CO-OPERATION OF DEBTOR.
In order to commit an act of bankruptcy by suffering or permitting a creditor to obtain a preference through legal proceedings against him, it is not necessary that the debtor should do any affirmative act. It is enough if he remains passive and supine, and allows his property to be taken by one creditor at the expense of the others.

6. SAME—"LEGAL PROCEEDINGS."
In Bankr. Act 1898, § 3, subd. 3, providing that it shall be an act of bankruptcy if an insolvent debtor shall suffer or permit a creditor to obtain a preference through "legal proceedings," the words quoted mean any proceeding in a court of justice, interlocutory or final, by which the property of the debtor is seized and diverted from his general creditors.

7. SAME—TIME OF FILING PETITION.
Under the provision of the bankruptcy act that it shall be an act of bankruptcy if a debtor, who has suffered a creditor to gain a preference through legal proceedings, does not vacate the preference "at least five days before a sale or final disposition of the property affected," creditors who seek to have him adjudged bankrupt on this ground need not wait until a sale has taken place. If the debtor, five days before the advertised day of sale, has not discharged the preference, creditors may then file a petition against him, and, on a proper showing, have the sale enjoined.

In Bankruptcy.

Risley & Love, for creditors.
Isaac J. Evans, for bankrupt.

COXE, District Judge. This is a proceeding in involuntary bankruptcy, the petition having been filed November 1, 1898. An amended petition was filed December 2, 1898, and, the alleged bankrupt having answered, the issues were referred to the referee to ascertain and report the facts. The matter now comes before the court upon the petitioners' motion to confirm the referee's report and upon exceptions filed by the alleged bankrupt.

Two acts of bankruptcy are alleged in the petition: First. That the alleged bankrupt permitted certain creditors to obtain judgments against it on the 17th day of October, 1898, levy upon its property and sell the same at public auction. Second. That the alleged bankrupt held title to its real estate under a land contract from the Oneida County Savings Bank and on the 31st day of October, 1898, it "suffered the contract to be forfeited to the Oneida County Savings Bank when the company was insolvent with a view * * * of cheating, hindering, delaying and defrauding creditors of the said Rome Planing Mill and to give and secure to them a preference as against all the creditors of the Rome Planing Mill, contrary to an act," etc.

Whether the petition alleges an act of bankruptcy under section 3, subd. 2, may, perhaps, be doubted, but the point is not mooted in the brief submitted for the alleged bankrupt.

There has, I think, been some misapprehension regarding the law

applicable to this controversy. The two clauses of section 3, par. a, involved, are subdivisions 2 and 3. Subdivision 2 provides that an act of bankruptcy by a person shall consist of his having—

"Transferred, while insolvent, any portion of his property to one or more of his creditors with intent to prefer such creditors over his other creditors."

In order to succeed under this subdivision the petitioners must prove: First. A transfer of the debtor's property to a creditor. Second. The debtor's intent to prefer such creditor. Third. The insolvency of the debtor at the date of the transfer. The burden of proof is upon the petitioners except in the contingency provided for in paragraph d of section 3, where a presumption of insolvency is raised against a debtor who refuses to produce his books and papers and submit to an examination. In the present case the debtor has complied with the requirements of the law in this regard and no presumption of insolvency exists.

The meaning of the word "transferred" is defined in section 1, subd. 25, of the act as follows:

" 'Transfer' shall include the sale and every other and different mode of disposing of or parting with property, or the possession of property, absolutely or conditionally, as a payment, pledge, mortgage, gift or security."

The intent which it is necessary to establish is that of the debtor. It is not important that the intent of the creditor to whom the preference is given should be shown; whether or not he had reasonable cause to believe that a preference was intended is immaterial. The debtor's intent to give a preference may be presumed from a transfer, while insolvent, of a large portion of his property to a single creditor. When this is proved the burden is upon him to show that he was ignorant of his insolvency and had reason to believe that he could pay his debts in full. Toof v. Martin, 13 Wall. 40. The debtor's insolvency must be shown at the date of the transfer. The provisions of paragraph c (section 3) relate only to subdivision 1 of paragraph a. It is not a defense, therefore, to a petition alleging acts of bankruptcy under subdivisions 2, 3, 4, and 5, to prove solvency at the date of filing the petition. George M. West Co. v. Lea, 174 U. S. 590, 19 Sup. Ct. 836.

"Insolvency" is defined in section 1, subd. 15, as follows:

"A person shall be deemed insolvent within the provisions of this act whenever the aggregate of his property, exclusive of any property which he may have conveyed, transferred, concealed, or removed, or permitted to be concealed or removed, with intent to defraud, hinder or delay his creditors, shall not, at a fair valuation, be sufficient in amount to pay his debts."

Section 3, subd. 3, provides that an act of bankruptcy by a person shall consist of his having—

"Suffered or permitted, while insolvent, any creditor to obtain a preference through legal proceedings, and not having, at least five days before a sale or final disposition of any property affected by such preference vacated or discharged such preference."

In order to succeed under this subdivision the petitioners must prove: First. That a preference was obtained by a creditor through legal proceedings. Second. That the debtor suffered or permitted the preference and did not vacate or discharge the preference at

least five days before a sale or final disposition of the property affected. Third. That the debtor was insolvent at the time the preference was obtained. The burden of proof is upon the petitioners precisely as under the preceding subdivision. The debtor's intent is not made an ingredient. It is enough that the creditor has obtained a preference and that the debtor has permitted it to remain undischarged. What was the debtor's intent regarding the matter is wholly immaterial. It is not necessary that he should do any affirmative act. If he remains passive and supine and permits his property to be taken by one creditor at the expense of the others he has "suffered or permitted" a preference to be obtained; this is enough. The present act differs from the act of 1867 where the language used (section 39) is "procure or suffer." The same words "procured or suffered" are found in section 60, par. a, of the present act, relating to preferred creditors, and it may be that a preference obtained through legal proceedings described in subdivision 3 of section 3 cannot be voided by the trustee pursuant to section 60; but that permitting such a preference constitutes an act of bankruptcy, there can be little doubt. In re Reichman, 91 Fed. 624. The words "legal proceedings" used in subdivision 3 of section 3 have reference to any proceedings in a court of justice, interlocutory or final, by which the property of the debtor is seized and diverted from his general creditors. The observations regarding proof of insolvency under subdivision 2 are equally applicable to subdivision 3. It is not necessary that the creditor should wait until a sale has actually taken place. It would be a strange construction of an act designed to save and protect the debtor's estate, to hold that it can only be set in operation after the estate has been plundered and dissipated. The debtor has until five days before the day the sale is legally noticed in which to vacate or discharge the preference. If he has not done so at that time the creditor may proceed and file a petition and, upon a proper showing, may enjoin the sale. The act of bankruptcy is not consummated until the expiration of the time in which the debtor may vacate or discharge the lien and the last day for doing this is five days before the day a sale of the property is advertised. In the case of a judgment, therefore, the petitioners must prove the entry of the judgment, the issue of an execution, the levy thereunder and the debtor's insolvency at the time of the judgment and levy. They must also prove that the property was actually sold at execution sale or that the sale was advertised for a day certain and that the debtor had permitted the levy to stand until the sale was but five days distant.

The referee finds that the Rome Planing-Mill Company was insolvent November 1, 1898, when the petition was filed. He also finds that the company's real estate "had been taken by said Oneida County Savings Bank, under its contract, and surrendered by the alleged bankrupt, and not available as assets of the corporation for the payment of its debts." As a conclusion of law he finds that the company while insolvent permitted certain of its creditors to obtain a preference through legal proceedings. I am constrained to hold that the facts found by the referee are insufficient to support an

adjudication. Regarding the disposition of the company's real estate no one of the ingredients necessary to constitute an act of bankruptcy is found by the referee. He fails to find that there was a transfer of the real estate by the company to the bank, that the company was insolvent at the date the bank took possession or that the transaction was preferential. The referee's conclusion that the company should be adjudged a bankrupt is based wholly upon its action in permitting its property to be taken on judgment and execution. Indeed, it would appear from the petitioners' brief that their principal reliance is based upon the facts relating to the judgments and sale. As before stated it is necessary for the petitioners to prove the judgments, the levy, the sale and the insolvency on October 17th, the date of the judgments. The referee finds all of these facts except the insolvency. The finding that the company was insolvent November 1st does not meet the requirements of the statute. The company might have been solvent on October 17th and hopelessly insolvent two weeks later. Having in mind that the crucial question under subdivision 3 is the debtor's insolvency at the moment the preference is obtained, it is clear that an adjudication cannot be made where this element is lacking. It is thought that the matter should be referred back to the referee as a special master, under rule 30 of this district, for a finding upon the question whether or not the Rome Planing Mill was insolvent on the 17th of October, 1898. Adjudication depends upon an affirmative answer to this question.

Should the petitioners desire to rely upon the alleged act of bankruptcy under subdivision 2 it will, of course, be necessary for them to prove and for the referee to find: First. That there was a transfer of the real estate to a creditor. Second. Insolvency at the time of the transfer. Third. Intent to prefer such creditor over the debtor's other creditors.

It is not at all surprising that there should have been some misunderstanding as to the law. This was one of the first involuntary petitions filed in this district. At that time there was a wide diversity of opinion as to the true construction of paragraphs a and c of section 3. It was not until the spring of the present year that the discussion was set at rest by the decision of the supreme court in the Lea Case, supra. Reference ordered.

In re KROSS.

(District Court, S. D. New York. October 5, 1899.)

1. BANKRUPTCY—ATTORNEYS' FEES IN VOLUNTARY CASES.

Under Bankruptcy Act 1898, § 64, subd. b, par. 3, the attorney of a voluntary bankrupt may be allowed a fee, payable out of the estate, for such professional services as were necessary to enable the bankrupt to bring his case properly before the court, secure an adjudication and reference, surrender his estate, and perform his duties for the benefit of creditors, and receive his discharge if entitled to it. The fee is not necessarily to be restricted to such services as were specially beneficial to the estate, or rendered primarily in its interest.

2. SAME—SERVICES OF COUNCIL.

Fees allowed out of an estate in bankruptcy for services rendered to the bankrupt as counsel should be confined to services rendered during the bankruptcy proceeding proper, excluding previous consultations or advice, and should not include compensation for any unnecessary attendance as counsel at examinations or other hearings, nor for services rendered to the bankrupt in litigation over the question of his discharge, unless where such aid to the bankrupt became necessary without any fault or misconduct on his part.

3. SAME—AMOUNT OF ALLOWANCE.

In simple cases of voluntary bankruptcy, with small assets and few creditors, and no opposition running into substantial litigation, $30 will be a reasonable fee to be allowed to the bankrupt's attorney for professional services rendered up to the application for discharge, with a docket fee of $20 for procuring the discharge, when there is no substantial opposition to its being granted. This allowance may be increased when the assets of the estate are large, or its condition involved, or creditors very numerous, or the proceedings complicated, and still further increased in contested cases.

In Bankruptcy. On hearing of a question certified by the referee as to the allowance of a fee to the bankrupt's attorney.

Otto H. Droege, for bankrupt.

BROWN, District Judge. The question has been certified to me by the referee in charge of the above case, whether an attorney's fee should be allowed and paid out of the assets to the bankrupt's attorney under section 64, subd. b, par. 3, in the absence of any special benefit of those services to the estate. Ex parte O'Connell, 92 Fed. 889. The act of 1867 contained no such provision.

The practice has obtained to some extent among the referees in this district, to allow an attorney's fee in such cases, and this practice seems to me to be in accordance with the intent of the act. The "necessary cost of preserving the estate" is provided for by paragraph 1, which is not only separate from paragraph 3, but has a higher order of priority of payment than paragraph 3. When the services of the bankrupt's attorney have been necessarily sought and rendered in getting in or preserving the estate, they are included in paragraph 1, and are entitled to that priority of payment. The further provisions of paragraph 3 must be designed for something different; and nothing in this paragraph indicates that the attorney's fee there provided for is to be restricted to services beneficial to the estate or rendered primarily in its interest. On the contrary, it is stated to be "for professional services actually rendered * * * to the bankrupt." This shows that what is contemplated is a service rendered primarily to the bankrupt rather than to his estate; while it is also equally a benefit to creditors by putting the estate in course of an equal distribution in bankruptcy without still greater expense to them. Its association also with the allowance of a similar fee "for services rendered to the petitioning creditors," in involuntary cases, as well as for services "to the bankrupt" in such cases, while performing the duties prescribed by the act, indicates a common purpose, and that there should be no such distinction as to allow the fee in the one class of cases and exclude it in the other. Among the first and most im-

portant duties specially enjoined by the act upon the bankrupt in involuntary cases that presumably require an attorney's services, are those stated in paragraph 8 of section 7, viz.: the preparation and filing of schedules of his property and creditors, with all the particulars there specified. In voluntary cases, the same schedules are required to accompany the petition; and ordinarily bankrupts are unable to prepare such papers properly, or to comply with the rules and orders pertaining thereto, except by the aid of a professional attorney. This clause of paragraph 3, therefore, indicates the general nature of the services for which a fee is designed to be allowed; viz. those professional services which presumably are necessary and indispensable to the bankrupt to enable him to perform the duties required of him by the act for the benefit of creditors on the one hand, or to secure his own correlative right to a discharge on the other.

The circumstance that the allowance of this fee is associated with "the cost of administration," seems to me of little or no adverse weight. Strictly and narrowly construed, the words "cost of administration" might not alone include such a fee, but be restrained to the expense of handling the estate, converting it into money, and distributing it. But paragraph 3 evidently means to enlarge the scope of this clause by adding, that it shall "include one attorney's fee for services actually rendered to the petitioning creditors * * * or to the bankrupt in voluntary cases." Such a charge is, moreover, germane to the subject, and if not strictly a part of the "cost of administration," is so closely akin to it as to be fairly included in the same order of preferred expenses; since the court cannot administer an estate without acquiring jurisdiction over it, and jurisdiction can only be acquired through a voluntary or an involuntary petition, for either of which an attorney's services are ordinarily indispensable.

This construction is further sustained by subdivision d of section 60, which provides that the "payment of money or transfer of property to an attorney or counselor for services to be rendered in contemplation of the filing of a petition by or against a person * * * shall be re-examined by the court * * * and held valid only for a reasonable amount to be determined by the court, the excess to go to the trustee."

While by the general terms of the act, the debtor is required to turn over all his unexempt property to the trustee, an exception is here created in favor of an attorney, to a reasonable amount, for services to be rendered to the debtor in bankruptcy; although this is valid so far only as subsequently approved by the court. The charges to be "approved" are, I cannot doubt, for the same services which the "fee" is designed to be allowed for under section 64, subd. b, par. 3. Both paragraphs are to be construed together, so that it becomes immaterial in the result whether the attorney obtains his compensation in the first instance from the bankrupt under section 60, refunding what, if anything, is disallowed by the court, or whether he waits for an allowance by the court under section 64. The latter is evidently the more convenient and

desirable practice; and considering that prior payment for an attorney's services to the bankrupt is expressly allowed by section 60, I cannot agree to any such construction of the act as would deprive the attorney of a proper compensation for a necessary service, merely because he did not take it out of the estate at his own estimate in advance.

I have already stated the general nature of the services which I think are designed to be covered by the allowance. In voluntary cases they are such as are indispensable to enable the bankrupt properly to bring his case into bankruptcy, surrender his estate, and perform his duties for the benefit of creditors on the one hand; and to receive his discharge, if entitled to it, on the other. Section 64 speaks only of an attorney's fee; while section 60, subd. d, uses the word "counselor" also. The services contemplated by both are doubtless for the most part those of an attorney only, as distinguished from the services of "counsel." They include the preparation of the necessary legal papers, procuring the adjudication and reference, bringing the debtor before the referee for such subsequent proceedings as may be required, making in due time the application for discharge, attendance before the judge and referee, as may be needful, and throughout the proceedings keeping himself informed of their progress and giving such attention to the essential steps in the bankrupt's behalf as will secure to him a regular and valid discharge. These are the ordinary attorney's duties.

I am not prepared to say, however, that services as counsel in aid of the bankrupt in litigations over his discharge are to be wholly excluded, when such aid has become necessary without the fault or misconduct of the bankrupt himself. Considering that all attorneys in this country are counselors also, and that the latter term is used in section 60, I should not be inclined to construe the words "attorney's fee" in section 64 in the narrowest and strictest sense, so as to exclude necessarily such services by counsel as were really required. But, for obvious reasons, claims on this ground should be admitted only most sparingly and with great caution; and they should be confined to services during the bankruptcy proceeding itself, excluding previous consultations or advice, as well as all unnecessary attendance as "counsel" in the course of the proceeding.

Ordinarily I cannot regard attendance by counsel for the bankrupt at all the various examinations as necessary. The restraints on discharge being confined to acts either criminal or most plainly fraudulent and wrong, the honest and straightforward debtor has rarely need of "counsel," unless falsely attacked, when professional aid may become proper and necessary, and should then be compensated. There is often, however, too much interference and objection by the bankrupt's attorney in the ordinary examinations in behalf of creditors, which operates in every way injuriously. "Services" of this kind should of course be ignored; and the much more common "service" in aiding the bankrupt to conceal, justify or extenuate questionable acts or transactions, must be equally excluded; since it is not "reasonable," under section 60 or section 64, to charge the estate, to the detriment of creditors, for services in extricating

or endeavoring to extricate or shield the bankrupt from difficulties caused by his own questionable conduct.

In the simpler class of cases, to which as I understand the present case belongs, where the creditors are not numerous and the assets are small, and with no opposition running into any substantial litigation, $30 may be fairly adopted as ordinarily a reasonable attorney's fee for the first branch of the proceedings; and an ordinary federal docket fee of $20 be allowed in addition for the second branch of the proceeding in procuring the bankrupt's discharge, where that has been obtained without any substantial opposition. Where the creditors are very numerous, or the assets large, or the situation of the estate or the proceeding itself is more complicated, as in co-partnership cases, the allowance should be larger, according to the greater labor and care involved; while in contested cases a further allowance may, I think, be granted for such services as the referee shall find were necessary, subject to the qualifications above stated. In the present case an attorney's fee may, therefore, be allowed.

In re WRIGHT et al.

(District Court, D. Massachusetts. October 4, 1899.)

No. 454.

BANKRUPTCY—TIME FOR APPEAL—REHEARING.

When the district court, in a controversy between a trustee in bankruptcy and a creditor of the estate, has rendered a decree on the merits adverse to the trustee, and the latter, without culpable neglect, has lost his right of appealing therefrom by the expiration of the time limited by Bankruptcy Act, § 25a, the district court may grant a rehearing, on his petition filed thereafter, for the purpose of reviving his right of appeal.

In Bankruptcy. On petition for a rehearing. For former opinion of the court, see 95 Fed. 807.

Thatcher B. Dunn and James A. Stiles, for trustee in bankruptcy.
George S. Taft, for Worcester county.

LOWELL, District Judge. In this matter the court rendered a decision July 21, 1899, and the decree was entered on that day. The questions involved were important, the sum of money involved was considerable, and an appeal by the unsuccessful party was expected. Owing to a series of mishaps, which it is not necessary to rehearse, no appeal was taken by the trustee within the 10 days mentioned in section 25a of the bankruptcy act. The court is satisfied that the delay was not caused by the culpable neglect of the trustee or his counsel. As soon as might be after the expiration of the 10 days, the trustee filed in this court a petition for a rehearing, avowedly with the object of regaining by means of a rehearing the right of appeal which he had lost by the expiration of time. The court is satisfied with its original decision upon the merits of the case, and will not grant a rehearing in order to give those merits further consideration. To grant a rehearing upon the pretense

of reconsidering the merits of the case, but really to revive the petitioner's right of appeal, would be the employment of an unworthy fiction. The record should show the true purpose for which the rehearing was sought and granted. On the other hand, if it is within the power of this court to revive the petitioner's right of appeal by granting a rehearing expressly for that purpose, the court is disposed to take appropriate action to that end. The question presented, therefore, is this: Can the district court grant a motion for a rehearing filed after the expiration of 10 days from the date of the decree involved? The question just put seems to be decided in favor of the court's jurisdiction in Stickney v. Wilt, 23 Wall. 150, 164. In that case a party filed his petition in the circuit court for the review of a decree of the district court in bankruptcy. The circuit court decided in his favor, and the other party appealed to the supreme court, which decided that the proper remedy for an erroneous judgment of the district court concerning the matter in question was by appeal to the circuit court, and not by petition for review and revision. The supreme court therefore remanded the case to the circuit court with directions to dismiss the petition for review. The decision of the supreme court was rendered after the time allowed for an appeal from the district court to the circuit court; but, in delivering the opinion of the supreme court, Mr. Justice Clifford said:

"Unable to refer the appellee to any legal remedy as matter of right, under the present pleadings, it seems to be proper, in the judgment of the whole court, to suggest that it may be that the district court will grant a review of the decree rendered in that court, if a proper application is presented for that purpose, which would lay the foundation, if it be granted, in case of an adverse decision upon the merits of the case, for a regular appeal to the circuit court."

From this remark it seems to follow that the supreme court considered that the district court would be justified in granting a review of its own decree for the purpose of allowing that decree to be appealed from, although the application for review was presented after the time for appeal had expired. The trustee's petition for a rehearing, which may be treated as a petition for review, is granted as of this date. On October 10, 1899, let a decree be entered allowing proof of the claim of the county of Worcester as a debt entitled to priority.

In re COBB.

(District Court, E. D. North Carolina. October 4, 1899.)

1. BANKRUPTCY—RIGHTS OF SECURED CREDITOR.

A trustee in bankruptcy is vested by law with title to all the assets of the bankrupt, including securities in the hands of a creditor as collateral; and such creditor has no right to hold the securities until paid the amount of his debt, nor to sell or cancel them, or realize on them by the aid of a court or otherwise, independently of the bankruptcy proceedings, but he must surrender them to the trustee, who has sole authority to reduce them to money, and the claim of the creditor to priority of payment out of the proceeds will be adjudged and administered in the bankruptcy court, which alone has jurisdiction of the matter.

2. SAME—PREFERENCES.

Where a creditor of an insolvent banker, having about $1,300 on deposit with him, was applied to by him for a loan of money, and verbally agreed that the balance of his account should be used as part of such loan, and supplied the debtor with $1,900 more in cash, and received from him (though he had not demanded them) securities worth $7,000, to be held as collateral, and within four months thereafter the debtor was adjudged bankrupt, *held* that, as to the $1,300, the transaction was a preference voidable under the bankruptcy act, being a transfer of property to secure a pre-existing debt, but as to the $1,900, the transfer being in good faith and for a present fair consideration, the creditor was entitled to be paid in full out of the proceeds of the securities.

In Bankruptcy.

The referee certifies the following findings of fact and conclusions of law for review:

"That on the 12th day of October, 1898, J. Haywood Sawyer having on deposit with the bank of Guirkin & Co. the sum of $1,302.70, the firm of Guirkin & Co., then doing a general banking business, and desiring to obtain a loan of $3,000 or more, made application to said Sawyer for a loan of such amount; that G. W. Cobb, a member of the firm of Guirkin & Co., was informed by said Sawyer that he had on hand in the applicant's bank the sum of $1,302.70, and that he would and could obtain for him an additional sum of $1,900; that this amount of $3,202.70 was accepted by said Cobb for Guirkin & Co., and which, at the time of its acceptance by said Cobb, tendered and delivered certain collateral securities to the said Sawyer to secure said loan, but without previous demand or agreement therefor; that the sum of $1,302.70, then on general account in said bank to the credit of J. Haywood Sawyer, was verbally ordered paid over to said bank, and that the additional sum of $1,900 was paid to said Cobb, for the use of said bank, in cash; that thereafter, to wit, on the 19th day of October, 1898, the said Guirkin & Co., being insolvent, made a general assignment for the benefit of creditors; that J. Haywood Sawyer was employed as counsel for Guirkin & Co., bankers, whenever his services as counsel and attorney were required."

The referee's conclusions of law were as follows:

"From the foregoing facts I find, as a conclusion of law, that the said Guirkin & Co., through G. W. Cobb, to relieve themselves from financial embarrassment, borrowed the said sum of $3,200.70 from J. Haywood Sawyer, and at the time gave as security therefor the collaterals referred to in the testimony taken in this cause; that the entire sum so loaned the firm of Guirkin & Co. was for a present consideration, and that the transaction, from all the evidence, I find to be free from fraud in fact, and the loan so made was advanced in good faith to the debtors of Guirkin & Co. to enable them to further carry on their business for which the security above mentioned was taken; that the said J. Haywood Sawyer, though the attorney for said Guirkin & Co., was not fixed with knowledge of the insolvency of said bank constructively, as such attorney, nor was he fixed with any actual knowledge thereof. And I find that the said Sawyer was a purchaser in good faith, and for a fair consideration, and said transaction free from fraud. I therefore find that the said J. Haywood Sawyer is entitled to retain the said securities until therefrom he shall be paid the full sum of $3,200.70, with interest at six per cent. from the said 12th day of October, 1898, until paid; that, from the evidence of the commissioner filed in this cause, I find that said collaterals so deposited for said loan amount to the sum of about $7,000. All of which is respectfully submitted.

"L. J. Moore, Referee in Bankruptcy."

E. F. Aydlett and G. W. Ward, for appellant.

J. Haywood Sawyer, for appellee.

PURNELL, District Judge. The referee fails to find as a fact, which is shown by the testimony, that on the day of the transaction

under consideration there was less than $500 of currency on hand, or to consider the further fact, heretofore found by the court and evident from the record, that George W. Cobb was the only member of the firm of Guirkin & Co.; and in making the assignment the act of bankruptcy for which both George W. Cobb individually, and as surviving partner of Guirkin & Co., was liable, the adjudication was made as to both, or Cobb acting in the dual capacity. Bray v. Cobb, 91 Fed. 102. The assignment was by George W. Cobb, individually and as surviving partner of Guirkin & Co., and not a general assignment by Guirkin & Co. There is no evidence that Guirkin & Co. was a corporate body, but the firm seems to have been doing a private or individual banking business. The question to be considered is not whether the creditor, J. Haywood Sawyer, has a lien, or can retain the collaterals or security until he is paid; for it is familiar learning, and conceded in the argument, that, whatever priorities, liens, or rights he may have, they must be administered in the bankruptcy court. After an adjudication in bankruptcy, the bankrupt court takes jurisdiction of the estate and all matters pertaining thereto, and will administer the same to a final settlement. Parties having or claiming an interest in the bankrupt estate must submit them to the bankruptcy court. Blum v. Ellis, 73 N. C. 293; Withers v. Stinson, 79 N. C. 341; In re Gutwillig, 34 C. C. A. 377, 92 Fed. 337; Davis v. Bohle, 34 C. C. A. 372, 92 Fed. 325. The trustee is vested by law with the estate, and could by a proper action recover possession of the securities in possession of any one as collateral, subject to any valid lien such person might have on the proceeds of such securities. The vesting of title gives him constructive possession of the property the instant the title passes. Such property is then brought into the bankruptcy court in its entirety, and under its protection, as fully as if actually brought into the visible presence of the court. No other court and no person acting under process can, without permission of the bankruptcy court, interfere with it, and to so interfere is a contempt. The trustee is an officer of the court, and his possession, actual or legal, is the possession of the court. Taylor v. Carryl, 20 How. 583; Shields v. Coleman, 157 U. S. 168, 15 Sup. Ct. 570; Porter v. Sabin, 149 U. S. 473, 13 Sup. Ct. 1008; Freeman v. Howe, 24 How. 450; Loveland, Bankr. § 150.

The conclusion of law by the referee, "That the said J. Haywood Sawyer is entitled to retain the said securities until therefrom he shall be paid the full sum of $3,202.70," etc., is reversed. The nature of the securities delivered to Sawyer as collateral, as claimed, is not disclosed by the testimony; but he could not legally collect, realize on, or cancel the same, but, whatever their nature, they must be surrendered to the trustee, who alone is authorized to reduce the same to money, and the rights of claimant to a priority to the proceeds thereof will be duly adjudged and administered in this court. This court alone has jurisdiction.

This case might rest here until the creditor has surrendered the preference claimed, as provided he must do, in section 57g, before his claim can be allowed and the cause again presented for review; but as it is to the interest of the parties to close the estate, and it is

presumed claimant, being an attorney, will comply with the law, the real question may be adjudicated on the record now before the court. It would be useless circumlocution to require the case to be sent up a second time, on probably the same record.

The question is not whether Sawyer can retain the securities given him, claimed as collateral, but whether he is entitled to priority in the proceeds thereof for the payment of his debt or any part thereof, and, if a part, how much. In solving this question it is necessary to determine the relationship of the parties. As to the $1,302.70, it appeared on the books of Guirkin & Co., or G. W. Cobb banking as Guirkin & Co., as a deposit, or the balance of a deposit. A deposit is a naked bailment of goods or funds to be kept for the depositor without reward, and to be returned when he shall require it. In the case of deposits with a banker, the relation of the banker with his customer is that of debtor and creditor, and does not partake of a fiduciary character. In case of loss or failure the legal remedy of the depositor is an action of debt. The balance could not be reached by a bill in equity, as there is no trust raised. The banker is not liable for interest, unless expressly contracted for. This is familiar law, for which authorities are abundant. On the morning of the day before the transaction, Sawyer was simply a creditor of Guirkin & Co., or G. W. Cobb doing business as Guirkin & Co., without security. Had he drawn his check for the amount of the balance due him ($1,302.70), there was not enough currency (less than $500) in the banking house to have paid it. He knew Cobb was short of currency, for he told him he needed money, but it does not appear he knew how short he really was. But he did not draw a check. He simply said to Cobb, in effect, "use my deposit, or the balance to my credit." Could this change a pre-existing debt to a loan for a present consideration? The account had been running for several months. The first balance shown in the evidence is January 3, 1898, and a balance of $2,000 June 3, 1898. The balance was a pre-existing debt, and there is nothing in the facts shown or found to warrant the conclusion that the mere words or acts of the parties could change its nature, to give a priority for the amount in a distribution of the assets of the estate in bankruptcy. It appears there was no express contract, no note or memorandum given or made, no transfer of the collaterals, whatever they were (which does not appear); nor does it appear that an assignment, if made, should have been recorded. Cobb simply handed over the securities. Sawyer did not demand or seem to desire them. It was a loose way of doing business, and an implied contract as to this balance being secured is too indefinite, under the circumstances, to give it legal effect. When, where, and upon what did the two minds come together? The parties do not say, and the court cannot. If there was no contract, express or implied, no transfer or assignment, Sawyer was a naked bailee. But, putting it on the strongest ground (that there was an implied contract; that the securities were such as did not require a written transfer and registration thereof, and were given to Sawyer as collateral security for the $1,302.70), it was a preference given a creditor, within four months of the adjudication, for a pre-existing

debt. Section 60, subd. b, Act July 1, 1898. The statutory provision is not based on the knowledge of the creditor, but the condition of the debtor. The acts mentioned in this section are not such as were forbidden by the common law, or generally by the statutes of the states; nor are they acts which in their nature are immoral or dishonest. In order to carry out the spirit of the bankrupt system,—an equal division of the bankrupt's property among his creditors,—congress has adopted a conventional rule to determine the validity of these preferences. It has prescribed a limit of four months. Any transfer made within that time is fraudulent and voidable. It is not so because such preferences are morally wrong, but because the act says they are. Bean v. Brookmire, Fed. Cas. No. 1,168. Even payment may be avoided, though made in what seems the ordinary course of business, and others may not, though made out of it. Seven days after the transaction the assignment was filed for registration (it may have been in preparation before). Cobb, in the dual capacity, was evidently insolvent, and the circumstances were such as to put Mr. Sawyer, his attorney, on inquiry. It was an unusual transaction,—giving $7,000 in securities, unasked, for a debt, including the cash, $1,900, of less than half that amount. Being a preference within four months for a pre-existing debt,—Cobb being insolvent,—it is void, and Sawyer is not entitled to a priority in the proceeds of the securities given him as detailed in the testimony. The bankrupt law (section 67e) provides:

"That all conveyances, transfers, assignments, or incumbrances of his property, or any part thereof, made or given by a person adjudged a bankrupt under the provisions of this act subsequent to the passage of this act and within four months prior to the filing of the petition, with the intent and purpose on his part to hinder, delay, or defraud his creditors, or any of them, shall be null and void as against the creditors of such debtor, except as to purchasers in good faith and for a present, fair consideration," etc.

It is not every transfer or incumbrance which falls under the ban of this section. Transfers made in good faith for a present, fair consideration, and transfers of property exempt from execution, cannot be avoided. As was said in Tiffany v. Lucas, 15 Wall. 421, construing a similar section in the act of 1867:

"Clearly all sales are not forbidden. It would be absurd to suppose that congress intended to set the seal of condemnation on every transaction of the bankrupt which occurred within six months of bankruptcy, without regard to its character. A policy leading to such a result would be an excellent contrivance for paralyzing business, and cannot be imputed to congress without an express declaration to that effect. The interdiction applies to sales for a fraudulent object, not to those for an honest purpose. The law does not recognize that every sale of property by an embarrassed person is necessarily in fraud of the bankrupt act. If it were so, no one would know with whom he could safely deal; and, besides, a person in this condition would have no encouragement to make proper efforts to extricate himself from difficulty."

On the day that the $1,900 was loaned, Cobb was in financial distress, individually and as Guirkin & Co. He probably knew he was on the verge of financial disaster, but had not openly failed. He went to his lawyer and told him he needed $3,000 or $3,500. If Sawyer knew or had reasonable grounds to suspect his condition, and, to aid him in his efforts to save himself or his bank from fail-

ure, lent him the money, and took, though he did not demand, securities as a pledge, it was a present, fair consideration, would fall within the exception, and not be a violation of the bankruptcy act. The distinction, at last, is one of intent and bona fides. A man really insolvent, fearing failure, but not having openly failed, and hoping to overcome his business difficulties, violates no provision of the bankrupt law by pledging his property for money lent him in good faith; the money being lent at the time the pledge is made, and the lender having no reason to suppose otherwise than that the loan is to give effect to hopes the debtor might well cherish under such circumstances. Tiffany v. Institution, 18 Wall. 376; Clark v. Iselin, 21 Wall. 360. The pledge seems to have been excessive, if the securities are solvent,—$7,000 for $1,900,—but this can make no material difference. Sawyer is entitled to a priority in the proceeds of such securities, when the same are surrendered to the trustee and by him reduced to money as provided in the statute, for the repayment of $1,900, and legal interest (6 per cent.) from October 12, 1898, until paid. As to the pre-existing debt of $1,302.70 he will share pro rata with other creditors in the distribution of the estate. If such securities are not surrendered to the trustee, that officer will take such proceedings as he may be advised, to recover the same.

In re JEFFERSON.

(District Court, D. Washington, E. D. September 22, 1899.)

1. EXAMINATIONS IN BANKRUPTCY—COMPETENCY—WIFE OF BANKRUPT.
   Where the law of the state provides that a wife shall not be examined as a witness for or against her husband without his consent, nor as to any communication made to her by him during the marriage relation, the wife of a bankrupt, under examination as a witness in the bankruptcy proceedings, cannot be required to disclose any communications made to her by her husband respecting his property or his income.
2. SAME—PRIVILEGED COMMUNICATIONS—CONSTITUTIONAL LAW.
   To compel the wife of a bankrupt, under examination as a witness in the bankruptcy proceedings, to disclose confidential communications made to her by her husband in regard to his property or his income, would be contrary to the fourth amendment to the constitution of the United States, prohibiting "unreasonable searches and seizures."

In Bankruptcy. Hearing on objections to questions propounded by an attorney representing creditors to the wife of the bankrupt, on her examination as a witness in the bankruptcy proceedings.

William G. Graves, for petitioner.
H. M. Stephens, for creditors.

HANFORD, District Judge. This is a case of voluntary bankruptcy, and an inquiry is being prosecuted before the referee by creditors, with the object of uncovering a supposed fraudulent concealment of assets and income, in the progress of which the wife of the petitioner, having appeared as a witness, and being interrogated by counsel for creditors, gave an affirmative answer to a question whether, from conversations with her husband, she knows what his business is,

what his income is, and what money he makes or receives from various sources. Thereupon the attorney for the creditors propounded the following questions:

"From what he has said to you, what do you know about it? What, if anything, has Mr. Jefferson said or communicated to you with reference to his business or his income since your marriage to him? When he would get his monthly income, would he turn that over to you?"

Te each of said questions counsel for the petitioner objected on the ground that in this state a wife cannot be examined as a witness against her husband without his consent, and communications made by a husband to his wife are privileged.

Section 21 of the bankrupt law provides that:

"A court of bankruptcy may, upon application of any officer, bankrupt, or creditor, by order require any designated person, including the bankrupt, who is a competent witness under the laws of the state in which the proceedings are pending, to appear in court or before a referee or the judge of any state court, to be examined concerning the acts, conduct, or property of a bankrupt whose estate is in process of administration under this act."

This leaves the question as to whether the wife of a bankrupt is a competent witness to testify concerning his acts, conduct, or property to be determined by reference to the laws of the state in which the proceedings are pending, provided the state laws are not repugnant to the constitution of the United States. Counsel for the creditors insist that the inquiry now in progress resembles a proceeding in aid of an execution under the Code of this state, and on the authority of Frankenthal v. Solomonson (Wash.) 55 Pac. 754, the claim is made that the husband is not an interested party, and that he has no right to interpose an objection to the questions, and that section 1649, 2 Hill's Code, which provides that "a husband shall not be examined for or against his wife, without the consent of the wife, nor a wife for or against the husband without the consent of the husband; nor can either, during the marriage or afterwards, be, without the consent of the other, examined as to any communication made by one to the other during marriage, * * *" is not applicable in such proceedings. In the case referred to, after the return of an execution unsatisfied, a proceeding against the wife of the judgment debtor was instituted to reach property alleged to be in her possession which in fact belonged to her husband; and although the only object of the proceeding was to discover property of the husband, and seize it for the satisfaction of a debt of the husband, the supreme court of this state decided that he was not a party to the proceeding, and in the opinion the judges say, "We think it may be said [the husband] is not interested in such a sense as to preclude the examination of the wife as a witness for the plaintiff." The opinion yields assent to the authorities cited by counsel for the respondent to the point that, in cases in which both husband and wife are parties, neither can be examined as a witness by the adverse party without the consent of the other. Therefore the decision is based upon the opinion of the judges that the husband was not a party to nor interested in the proceedings, and for that reason I cannot consider it as an authority in point in this case. Mr. Jefferson is the party of record in whose favor the proceeding was instituted, and against whom the inquiry is directed.

Whatever interest he may or may not have in money or other property involved is not the only matter to be considered. He certainly has an important interest in the result of the inquiry, by reason of the effect which may be given to it in the determination of the question whether or not he may have the benefit of the bankruptcy law by being discharged from liability for his debts, or, if any evidence tending to prove that he has attempted to conceal fraudulently any assets belonging to his estate shall be elicited from competent witnesses by this inquiry, it will have to be considered by the court upon the hearing of his application for a discharge. The case is not within the rule laid down in Frankenthal v. Solomonson, but is fairly within the statute as interpreted by the supreme court in that case.

There is another reason for sustaining the objections, which is controlling. The fourth amendment to the constitution of the United States declares, "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated." Of what avail is it to protect a man in his person, house, papers, and effects, if the members of his family may be dragged before an inquisition, and compelled, on pain of incarceration in a common jail, to divulge the confidential communications made to his wife? The unreasonableness of such a proceeding consists in its tendency to destroy that confidence between husband and wife necessary to harmony and happiness in the marriage relation, which it is the policy of the law to hold sacred, and in the strong temptation to commit perjury to which it must necessarily expose a woman during coverture. In the argument it has been urged that the inquiry is necessary to prevent fraud and injustice, but the same argument would be equally potent in favor of the right to search the persons of a bankrupt and his wife, and ransack their home, to find hidden wealth. The rights of creditors are important, but they do not outweigh the interest which the public has in preserving the peace and happiness of families. For these reasons I hold that all communications which Mr. Jefferson may have made to his wife respecting his income or property are privileged. Objections sustained.

In re THOMAS.

(District Court, D. Washington, S. D. September 25, 1899.)

BANKRUPTCY—HOMESTEAD EXEMPTION—RIGHTS OF MORTGAGEE.

When a mortgage, recognized as valid in the bankruptcy proceedings, covers an undivided fractional part of the real estate out of which the bankrupt claims his homestead exemption, the court will not order the trustee to partition the land as between the bankrupt and the mortgagee, and set apart to the former a designated portion, to be held by him as his homestead in severalty and free from the mortgage, as this would change, and might impair, the security of the mortgagee. But the bankrupt may apply for an order to sell portions of the land not actually occupied as a homestead, and apply the proceeds in payment of the mortgage.

In Bankruptcy. By a stipulation, the bankrupt and the trustee of his estate submit to the court for decision the question as to the right of the bankrupt to have a partition of his real estate, as against

mortgagees holding mortgages upon an undivided five-eighths thereof, so that there might be set off to him a homestead clear of liens. Application for partition denied, with leave to apply for an order to sell land not occupied as a homestead, and apply the proceeds to the payment of the mortgages.

H. J. Snively, for bankrupt.

Whitson & Parker, for trustee.

HANFORD, District Judge. At the time of instituting these proceedings, the petitioner was residing in a house situated upon block 22 of Schanno's addition to Yakima City, and he still resides there with his family. That block, together with block 21 of the same addition and an adjacent tract of 40 acres, is community property of the petitioner and his wife, and is incumbered by several mortgages which they executed in the year 1894. The mortgages do not affect the entire estate, but only an undivided five-eighths thereof. By the appraisement which has been made, the value of the property is estimated as follows: Block 21, $100; block 22, with improvements thereon, $1,900; 40-acre tract, with improvements thereon, $4,560. The exemption law of this state allows a homestead, including the family dwelling house and the land on which it stands, not exceeding in value $2,000, and the trustee has awarded to the petitioner as his homestead said blocks 21 and 22, subject to the existing liens. The petitioner claims that, under the provisions of the bankruptcy law, he is entitled to have his exemptions "set apart," and therefore it is a necessary part of these proceedings to partition the real estate between the mortgagees and him, and set apart a designated portion, worth not more than the value of his unincumbered interest in the whole, as his homestead, to be held by him in severalty and free from the mortgages.

The mortgagees have not proved their debts, nor appeared to contest this claim, but, without hearing them in opposition, it appears to me to be a plain and incontrovertible proposition that the court has no right to impair the security which they hold, nor to discharge any part of the property from the liens thereon, until the debts secured thereby shall have been paid in full. In other words, the court cannot arbitrarily substitute other security for and in place of that which the mortgagors and mortgagees contracted to give and receive. The whole of the 40-acre tract may be actually worth more than the undivided five-eighths of the several parcels, and yet not be as readily convertible into cash, nor as desirable to the mortgagees, and, until they receive what is due them, they cannot be compelled to relinquish any supposed advantage which they bargained for.

I direct that an order be entered confirming the award made by the trustee; but, in order to protect the homestead right of the petitioner as far as may be done consistently with law and justice, I will say now that an application may be made to the court for an order to sell the 40-acre tract free from liens, and upon the hearing of such an application, after due notice to all creditors, unless good cause to the contrary be shown, I will order such a sale, and direct

that so much of the proceeds as may be available and necessary for the purpose be applied in payment of the mortgage debts. So far as the proceeds of the sale will reach in that direction, the homestead will be cleared of liens, and I do not know of any other lawful method of procedure to accomplish that result.

NEUSTADTER et al. v. CHICAGO DRY-GOODS CO.

(District Court, D. Washington, E. D. September 15, 1899.)

1. BANKRUPTCY—INVOLUNTARY PETITION—INTERVENTION.
   Where the issues arising upon a petition in involuntary bankruptcy were decided adversely to the petitioners, and an order made dismissing the proceedings, no notice of the proposed dismissal being given to the other creditors, and thereafter an intervening petition was filed by creditors who had not previously appeared, charging collusion between the original parties and the introduction of false evidence, and asking for an order reinstating the case and for leave to present new evidence, *held*, that this petition could not be granted, as the time had passed for intervention, but that the said creditors might bring a new and independent petition in bankruptcy against the debtor, based on grounds existing at the time of its filing, in the prosecution of which they would not be estopped by the judgment of dismissal.
2. SAME—DISMISSAL OF PROCEEDINGS—NOTICE TO CREDITORS.
   The provisions of the bankruptcy act, that "creditors shall have ten days' notice of the proposed dismissal of the proceedings" (section 58), and that a "petition shall not be dismissed by the petitioners or for want of prosecution or by consent of parties until after notice to the creditors" (section 59), relate only tc dismissals which withdraw the case without its having been submitted to the court for decision on the merits, and not to dismissals which follow as the result of a trial or hearing on the merits.
3. SAME—OBJECTIONS TO INTERVENTION—DEMURRER.
   Where, after a petition in involuntary bankruptcy has been tried and dismissed, other creditors file a petition asking to have the case reinstated, and for leave to intervene and prosecute it, the proper method of presenting objections to such petition is not by demurrer, but by motion to strike it from the files.

In Bankruptcy.

The referee, after hearing the evidence, made findings adverse to the petitioning creditors; and, without opposition on their part, an order dismissing the proceedings was signed by the judge at chambers, no notice of the proposed dismissal having been given to other creditors. Thereupon creditors who had not previously appeared filed a petition reiterating the charges against the defendant contained in the original petition, and also alleging that the evidence submitted to the referee as to the amounts of the defendant's assets and liabilities was untrue, and that the prosecution of the case had been abandoned by the original petitioners pursuant to a collusive arrangement between them and the defendant whereby said petitioners were to secure an unlawful preference in the payment of their debts, and praying for an order reinstating the case, and for leave to introduce additional evidence. Heard on demurrers to the intervening petition filed by the original petitioners and by the defendant. Demurrers sustained.

E. H. Belden, Binkley & Taylor, and Danson & Huneke, for interveners.

Stern, Hamblen & Lund, for original petitioners.

Mount & Merritt, for defendant.

HANFORD, District Judge. The defendant's answer to the original petition admitted the giving of a mortgage as security to one of its creditors, but denied insolvency, and this issue has been tried and fully adjudicated as between all parties who were before the court at the time. As to them the judgment is final and conclusive, unless it be reversed for error or impeached for fraud; but strangers to the record are not estopped, and they cannot be hindered by it from relitigating the same questions in any lawful proceeding. The fifty-eighth section of the bankruptcy law provides that "creditors shall have at least ten days' notice by mail, to their respective addresses as they appear in the list of creditors of the bankrupt, or as afterwards filed with the papers in the case by the creditors, unless they waive notice in writing, of * * * (8) the proposed dismissal of the proceedings"; and the fifty-ninth section provides that "a voluntary or involuntary petition shall not be dismissed by the petitioner or petitioners or for want of prosecution or by consent of parties until after notice to the creditors." It is my opinion that these provisions of the law relate to dismissals which in effect withdraw the cases without submission to the court for its decision upon the merits, and there appears to be no requirement of notice, to creditors who have not appeared, of trials or hearings in involuntary cases; but, if the law does require notice to all creditors of hearings upon the merits, still the rendering of a final judgment without notice to the creditors would be an irregularity or error, the effect of which would be to make the judgment voidable or reversible as to parties to the record, and void as to others. In this case the original petitioners and the defendant have by their opposition to the petition of the interveners waived all their rights to assail the judgment, and it is contrary to good practice to permit new parties whose rights are in no way affected to come in now to disturb it. These interveners are at liberty to commence a new and independent proceeding for the assertion of their rights, and this judgment cannot be pleaded against them, for the reason that, as they were not notified, the court did not have jurisdiction to render a judgment binding them.

The fifty-ninth section gives to creditors, other than the original petitioners, the right to "at any time enter their appearance and join in the petition, or file an answer and be heard in opposition to the prayer of the petition." This provision must necessarily be construed to give the right to join in the petition only during the pendency of the proceedings. There is no right given to other creditors to come in and take the conduct of a case out of the hands of the original petitioners, and it cannot reasonably be presumed that congress intended to authorize different creditors to come in successively and retry issues which have been decided, and in that way make the pendency of involuntary cases perpetual.

It is insisted that, unless this case can be reopened, the interveners will be prejudiced, because the lapse of time since the giving of the mortgage which was specified in the original petition as an act of bankruptcy will prevent any attack upon that transaction in a new proceeding, and the preference given to the mortgagee cannot be

avoided. This may be conceded, but the rights of the parties are fixed by law, and the consequences of delay on the part of the interveners must be the same, whether they commence proceedings in their own behalf in a new case, or take up the old case at the point where the original petitioners left it; for, since the time has gone by for them to join in the original petition, they must fight their own battle, and on grounds existing at the time of their first appearance in court.

I consider that the demurrers are out of place. The objections to the petition should have been presented by a motion to strike it from the files. However, the objections to the petition are necessarily fatal, in whatever way they may be urged, and therefore the demurrers are sustained.

In re SMITH.

(District Court, W. D. Texas, El Paso Division. October 2, 1899.)

No. 7.

BANKRUPTCY—EXEMPTIONS—"WEARING APPAREL."

Where the state statute (Rev. St. Tex. art. 2397) exempts from execution all "wearing apparel" of the debtor, a bankrupt is entitled to claim as exempt a diamond stud, worth $250, habitually worn by him, during several years past, in the front of his shirt, and for the purpose of fastening the shirt together, when there are no circumstances connected with its acquisition or use tending to show fraud or bad faith towards his creditors.

In Bankruptcy. On question certified by referee in bankruptcy.

Frank E. Hunter, for bankrupt.

Z. B. Clardy, for contesting creditor.

MAXEY, District Judge. When this cause was first submitted to the court upon the certificate of the referee, it was returned for further proceedings. 93 Fed. 791. The errors of procedure having been corrected, the referee certifies the following question: "Is a diamond of the value of two or three hundred dollars, which is set as a shirt stud, and is habitually worn as such, exempt to a bankrupt, under the statute of Texas, which exempts all wearing apparel?" The trustee valued the diamond at $250, and set it apart to the bankrupt as exempt property. The referee, on the other hand, held that it constituted a part of the bankrupt's estate for distribution among his creditors. When Smith filed his petition in bankruptcy, he was a saloon keeper at El Paso, and the diamond was bought by him in 1888. The additional facts pertinent to the question submitted are embodied in the following written stipulation of counsel:

"Philip Smith, at the time he filed his petition in bankruptcy, was not a constituent of a family, and he has not been since then, and is not now, a constituent of a family. The diamond stud in question is a shirt stud, and is used by said Smith, and has been continuously worn by him in the front of his shirt, for the purpose of fastening his shirt together. The said Smith, for the past twelve or fifteen years, has not had or worn any shirts except those which open in front."

The decisions upon the question of exempting jewelry from forced sale are conflicting, and each case must depend upon its own peculiar circumstances, considered in connection with the statute to be construed. In re Steele, 22 Fed. Cas. 1202 (No. 13,346); Montague v. Richardson, 24 Conn. 338. The Texas statute, which controls the decision of this case, reserves "to persons who are not constituents of a family, exempt from attachment, execution and every other species of forced sale, * * * all wearing apparel." Rev. St. art. 2397. The statutes of some of the states exempt only necessary or proper wearing apparel, or wearing apparel not exceeding in value a named amount, or some similar modifying word or expression is used to limit the exemption. But the phraseology of the Texas statute is as comprehensive as language can make it, and, as has been seen, exempts from forced sale all wearing apparel. In this connection, it may be remarked that the exemption laws of this state are liberally construed in favor of the person claiming the exemption. Alsup v. Jordan, 69 Tex. 300, 6 S. W. 831; Green v. Raymond, 58 Tex. 80; Betz v. Maier, 12 Tex. Civ. App. 219, 33 S. W. 710. In the case last cited it is said by Chief Justice Fisher, at page 221, 12 Tex. Civ. App., and page 711, 33 S. W., that:

"These liberal views may be further pursued in other cases, notably St. Louis Foundry v. International Live Stock, Printing & Publishing Co., 74 Tex. 651, 12 S. W. 842, where it is held that the press, type, and material belonging to a firm of printers is exempt as the tools and apparatus belonging to a trade and profession, and that such exemption may be claimed by one of the individual members of the firm. A jack is exempt under the provision exempting two horses. Robinson v. Robertson, 2 Willson, Civ. Cas. Ct. App. § 254. And in Allison v. Brookshire, 38 Tex. 200, the word 'horses' in effect is held to be a generic term, and under the statute exempting two horses it was construed to embrace a mule. In Rodgers v. Ferguson, 32 Tex. 533, drays and carts are held to be included within the term 'wagon' when used in the exemption statutes. In Cobbs v. Coleman, 14 Tex. 596, an exemption of a horse is held to extend to things that would make his use beneficial, and therefore a saddle, bridle, etc., are exempt. Dearborn v. Phillips, 21 Tex. 451, decided that the exemption of a horse would include a rope. In Cone v. Lewis, 64 Tex. 333, it is held that an exemption of a wagon will include a dray; and the court there say: 'To a person pursuing the business of a drayman, such an exemption would seem particularly appropriate, and in harmony with the spirit of the statute which exempts all implements of husbandry, and all tools, apparatus, and books belonging to any trade or profession.' In Alsup v. Jordan, 69 Tex. 300, 6 S. W. 831, under the term 'household and kitchen furniture,' a piano was held to be exempt; and the doctrine is there announced that the exemption is not alone extended to those articles of furniture that are necessary to supply the wants of the family, but it extends to all furniture, useful or ornamental, that is used by the family."

These cases illustrate the extreme liberality of our courts in construing exemption laws, but no one of them involves the precise question submitted to this court for determination. What is wearing apparel? The circuit court of appeals for this circuit, speaking through Judge McCormick, defined it as follows:

"The phrase 'wearing apparel,' as used in exemption laws, has its popular sense, and includes all the articles of dress generally worn by persons in the calling and condition of life and in the locality of the residence of the person claiming the exemption. It includes whatever is necessary to a decent appearance, and to protection against exposure to the changes of weather, and also what is reasonably proper and customary in the way of ornament. A

plain gold watch, worth not more than $50, is not usually worn habitually by farmers and country merchants as an ornament; but in this day, when everything moves on schedule time, a watch is an eminently useful, if not an absolutely necessary, article of dress. We conclude that where, as in Alabama, the exemption laws embrace the homestead of every citizen, and such personal property as he may have to the extent in value of $1,000, 'and, in addition thereto, all necessary and proper wearing apparel for himself and family,' a fair construction of this last provision will include within the meaning thereof the watch worn by the appellee. Under different statutes in other states than Alabama the decisions are conflicting." Sellers v. Bell, 36 C. C. A. 513, 94 Fed. 811, 812.

It was said by Judge Hammond, in Re Steele, 22 Fed. Cas. 1202 (No. 13,346):

"It would not be doing any great violence to the meaning of the term 'wearing apparel,' as used in the bankrupt act, to include in it a gold watch of moderate value. The definition of the word 'apparel,' as given by lexicographers, is not confined to clothing; the idea of ornamentation seems to be a rather prominent element in the word, and it is not improper to say that a man 'wears' a watch or 'wears' a cane."

And in Towns v. Pratt, 66 Am. Dec. 727, the supreme court of New Hampshire employed the following language:

"Articles of jewelry, designed to be worn upon the person as ornaments, are not wearing apparel, in the popular sense of the term. As understood in its ordinary signification, it means clothing,—garments worn to protect the person from exposure,—and not articles used for ornament merely. In its original signification, the word 'apparel' may have a more extensive meaning, including not merely vesture,—habiliments for covering the person,—but all ornaments and decorations worn with the vesture."

In Sellers v. Bell and in Re Steele a gold watch was held exempt; but in Towns v. Pratt (the statute exempting wearing apparel necessary for the debtor and his family) a breastpin was held not exempt. Reference is also made to the following authorities bearing upon the subject: Frazier v. Barnum, 19 N. J. Eq. 316; Coward v. Railroad Co., 57 Am. Rep. 226; Mack v. Parks, 69 Am. Dec. 267; Richardson v. Buswell, 43 Am. Dec. 450; note to Rockwell v. Hubbell's Adm'rs, 45 Am. Dec. 251–256; Richardson v. Hall, 124 Mass. 228; In re Cobb, 5 Fed. Cas. 1123 (No. 2,920); 29 Am. & Eng. Enc. Law, 38; Thomp. Homest. & Ex. § 786 et seq.

The difficulty of reaching a satisfactory conclusion upon the question under consideration will be fully appreciated after the foregoing authorities shall have been carefully analyzed. Without attempting to explain or reconcile conflicting judicial opinions which define wearing apparel and discuss its exemption, the court is inclined to adopt the view that an article, although ornamental, may, under some circumstances, be classified as wearing apparel, while, abstractly considered, it would not be regarded as vesture. The use to which it is applied should be considered in determining its category. If worn as a mere ornament, and intended simply for display, without serving a useful purpose, it would scarcely be regarded as exempt property on the ground that it was wearing apparel. But if it be used to complete and perfect some part of the vesture, such as a shirt, would it not, although ornamental, form a part of the shirt, and hence become wearing apparel? That a shirt is wearing apparel will be readily conceded. Buttons are

necessary to complete the garment, and when sewed to the shirt form part of it. If the buttons are thus attached to the shirt, they, like the shirt itself, become wearing apparel. Why, then, should not a detached button or shirt stud, which is bona fide and continuously used for the same purpose, be assigned to a like category? What sound reason can be urged for holding the one to be wearing apparel and the other not? Both serve precisely the same useful purpose, the only difference being that in the one case the button is attached to the shirt by thread, and in the other it remains unattached, but always ready for use. No objection can be made on the ground of value, because the statute imposes no limitation as to value; nor can it be urged that the article is not necessary or proper for the reason that the statute exempts all wearing apparel, without reference to its necessity or propriety. The statute is satisfied if the debtor has acted in good faith, and has applied the article claimed to be exempt to its proper and legitimate use as wearing apparel, and no inquiry will be made as to its value or appropriateness. Upon this point the chancellor in a New Jersey case has aptly said:

"The lace shawl is wearing apparel, and by law in this state all wearing apparel is exempt from execution. Whether the shawl is of greater value than she ought to wear in her condition in life as to property cannot be inquired into. It was bought for her use before the complainant's judgment or claim. The only inquiry which could be made is whether it is held in good faith as wearing apparel, or purchased for the purpose of putting the price beyond the reach of creditors." Frazier v. Barnum, 19 N. J. Eq. 318.

The facts of the present case disclose that the bankrupt has continuously worn the diamond stud in question for the past 11 years for the purpose of fastening his shirt front, and there is nothing in the record tending to show fraud or bad faith. The circumstances of the case, considered in connection with the Texas statute, and the liberal construction placed upon it by the courts of this state, lead to the conclusion that the diamond stud owned by the bankrupt constitutes a part of his wearing apparel, and it therefore forms no part of the estate to be distributed among his creditors. The question certified by the referee will be answered in the affirmative.

UNITED STATES v. WELLS, FARGO & CO. EXPRESS.

(District Court, S. D. California. November 9, 1898.)

No. 1,077.

INTERNAL REVENUE—STAMP TAX—EXPRESS COMPANY'S RECEIPT.

Under Act Cong. June 13, 1898, Schedule A, relating to stamp taxes, which makes it the duty of every carrier to issue to the shipper or consignor, "from whom any goods are accepted for transportation," a bill of lading, to which a revenue stamp shall be attached and canceled, and providing that any failure to issue such bill of lading shall subject the carrier to a penalty, it is only when the carrier accepts a consignment for transportation that he is required to issue a stamped bill of lading; his refusal to accept goods offered for shipment does not expose him to the penalty of the act.

Action to recover a penalty under the provisions of the internal revenue law of June 13, 1898 (Schedule A, "Stamp Taxes"). Heard on demurrer to complaint.

Frank P. Flint, U. S. Atty., and F. G. Finlayson, Asst. U. S. Atty.
Graves, O'Melveny & Shankland, for defendant.

WELLBORN, District Judge. The complaint alleges that on the 11th day of July, 1898, F. J. Zeehandelaar, at the city of Los Angeles, Cal., presented to defendant a certain package, addressed to Fred L. Baker, Esq., San Pedro, Cal., and demanded that the defendant forward and transport said package to said Baker, at San Pedro, Cal., and issue to said Zeehandelaar a bill of lading, and attach thereto and cancel a stamp of the value of one cent, and that defendant refused, and still refuses, to issue said bill of lading, stamped and canceled as demanded, and that, by reason of such refusal, the defendant has subjected itself to a penalty of $50 for the benefit of the United States, according to the provisions of section 26, Schedule A, "Stamp Taxes," of the revenue law of June 13, 1898, for which penalty the plaintiff prays judgment. Defendant demurs to the complaint, upon the ground, among others, that the complaint does not state facts sufficient to constitute a cause of action. The present hearing is on the demurrer.

Counsel for both parties have assumed, in their briefs, that the question before the court is this: Does the revenue law of June 13, 1898, where it requires a bill of lading to be stamped, impose the cost of the stamp upon the express company or upon the shipper? I have carefully examined the pleadings, and am satisfied that no such question is presented. The provision of the revenue law here pertinent is as follows:

"It shall be the duty of every railroad or steamboat company, carrier, express company, or corporation or person whose occupation is to act as such, to issue to the shipper or consignor, or his agent, or person from whom any goods are accepted for transportation, a bill of lading, manifest, or other evidence of receipt and forwarding for each shipment received for carriage and transportation, whether in bulk or in boxes, bales, packages, bundles, or not so inclosed or included; and there shall be duly attached and canceled, as is in this act provided, to each of said bills of lading, manifests, or other memorandum, and to each duplicate thereof, a stamp of the value of one cent: provided, that but one bill of lading shall be required on bundles or packages of newspapers when inclosed in one general bundle at the time of shipment. Any failure to issue such bill of lading, manifest, or other memorandum, as herein provided, shall subject such railroad or steamboat company, carrier, express company, or corporation or person to a penalty of fifty dollars for each offense, and no such bill of lading, manifest, or other memorandum shall be used in evidence unless it shall be duly stamped as aforesaid."

It will be seen, from even a cursory reading of this clause, that the duty which it imposes upon the express company is to issue a bill of lading only where "goods are accepted for transportation," or "for each shipment received for carriage and transportation." The complaint not only fails to allege that the company accepted for shipment the package in question, but the implication is to the contrary. Whatever may be the liability of an express company to a shipper, on account of its refusal to accept goods offered for carriage

and transportation, such refusal is not a violation of the revenue law. The penalty of said law is incurred only where a company accepts goods so offered, and then refuses to issue for them a bill of lading. The Illinois case cited in plaintiff's brief does not apply to the case at bar, because that was not an action to recover a penalty under the revenue law, but mandamus to compel the company to perform its duty, as a common carrier, of accepting goods offered for shipment. The demurrer to the complaint will be sustained.

WILKINS v. UNITED STATES.

(Circuit Court of Appeals, Third Circuit. September 21, 1899.)

Nos. 1 and 2, March Term, 1899.

1. CRIMINAL LAW—OFFENSES AGAINST UNITED STATES.
While criminal offenses against the United States are wholly statutory, and indictments therefor must find their warrant in the provision of some statute, the fact that an act of congress creating an offense—such as the defacement or removal of revenue stamps or marks or brands—delegates to an administrative department of the government the duty of designing and preparing such stamps or prescribing such marks and brands, and making regulations governing their use, does not render their removal or defacement, when used in accordance with such regulations, any the less a statutory offense.

2. INDICTMENT—PLEADING DEPARTMENTAL REGULATIONS.
Regulations made by an executive department in pursuance of authority delegated by congress have the force of law, and the courts will take judicial notice of their existence and provisions; hence an indictment charging a violation of such a regulation, which is made an offense by statute, need not set out such regulation, but is sufficient if it avers that an act done in pursuance of such regulation was done under the requirements of law.

3. SAME—SUFFICIENCY—REMOVING BRANDS FROM OLEOMARGARINE.
The act of August 2, 1886 (24 Stat. c. 840), imposing a tax upon oleomargarine, and regulating its manufacture, sale, importation, and exportation, requires all oleomargarine to be put up in prescribed packages, and marked, stamped, and branded as the commissioner of internal revenue, with the approval of the secretary of the treasury, shall prescribe. It also makes it a criminal offense for any person to "willfully remove or deface the stamps, marks or brands on packages containing oleomargarine taxed as provided herein." In pursuance of the authority so given, regulations were made by the commissioner prescribing the marks and brands to be used on such packages, and the manner of their use. *Held*, that an indictment charging that a person, at a place and time stated, did "knowingly, willfully, unlawfully, and fraudulently remove a certain brand from a certain package then and there containing oleomargarine, to wit, sixty pounds of oleomargarine, to wit, the word 'Oleomargarine,' which was then and there required, and was then and there, under the requirements of law, branded upon the aforesaid package, then and there containing oleomargarine as aforesaid, contrary," etc., sufficiently charged an offense under the statute.

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

A. A. Hoehling, Jr., and J. M. Wilson, for plaintiff in error.
James M. Beck, for defendant in error.

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

BUFFINGTON, District Judge. This is a writ of error sued out by the defendant to review the case of U. S. v. Wilkins in the district court for the Eastern district of Pennsylvania. When the case was called for trial, defendant's demurrer to the indictment was overruled, and thereafter he was convicted, and sentence imposed. The overruling of such demurrer is here assigned for error.

We will first examine the third count, for, if it is sustained, sentence was lawfully imposed. By section 6 of an act of congress approved August 2, 1886, entitled "An act defining butter, also imposing a tax upon and regulating the manufacture, sale, importation, and exportation of oleomargarine," it is provided "that all oleomargarine shall be packed by the manufacturer thereof in firkins, tubs, or other wooden packages not before used for that purpose, each containing not less than ten pounds, and marked, stamped, and branded as the commissioner of internal revenue with the approval of the secretary of the treasury, shall prescribe; and all sales made by manufacturers of oleomargarine and wholesale dealers in oleomargarine shall be in original stamped packages"; and by section 15 that "any person who shall wilfully remove or deface the stamps, marks, or brands on packages containing oleomargarine taxed as provided herein shall be guilty of a misdemeanor, and shall be punished by a fine of not less than one hundred dollars or more than two thousand dollars, and by imprisonment for not less than thirty days nor more than six months." In pursuance of the authority thereto enabling, the following regulation was, by the commissioner of internal revenue, with the approval of the secretary of the treasury, duly made and promulgated on June 18, 1895, to wit:

"Every package of oleomargarine must, before removal from the manufactory, be branded or stenciled as follows:

" 'Oleomargarine.

" 'Factory No. District.'

"The letters and figures in the above brand must be of the following dimensions: The letters in the word 'Oleomargarine' must be not less than three-quarters of an inch in length, and all other letters and figures not less than one-half an inch in length."

The third count was as follows:

"And the grand inquest aforesaid, inquiring as aforesaid, upon their respective oaths and affirmations as aforesaid, do further present that afterwards, to wit, upon the day and year aforesaid, the said Joseph Wilkins, late of the district aforesaid, yeoman at the district aforesaid, and within the jurisdiction of this court, did, at, to wit, pier No. 24, South Delaware avenue, in the city of Philadelphia, and district aforesaid, knowingly, willfully, unlawfully, and fraudulently remove a certain brand from a certain package then and there containing oleomargarine, to wit, sixty pounds of oleomargarine, to wit, the word 'Oleomargarine,' which was then and there required, and was then and there, under the requirements of law, branded upon the aforesaid package then and there containing oleomargarine as aforesaid; contrary to the form of the act of congress in such case made and provided, and against the peace and dignity of the United States of America."

For cause of demurrer thereto the defendant maintained "that the same did not state facts sufficient to constitute any offense against the United States, and that the same was insufficient in law." Was

such objection well grounded? That federal criminal offenses are wholly statutory, and that, therefore, indictments must have legislative warrant, is clear (U. S. v. Hudson, 7 Cranch, 32; U. S. v. Coolidge, 1 Wheat. 415; U. S. v. Britton, 108 U. S. 199, 2 Sup. Ct. 531; Manchester v. Massachusetts, 139 U. S. 240, 11 Sup. Ct. 559; U. S. v. Eaton, 144 U. S. 679, 12 Sup. Ct. 764); and, moreover, that such indictment should, first, fully apprise the defendant of the charge against him, and, secondly, be such as to shield him, by plea of autrefois acquit or convict, if prosecuted a second time. That by this indictment the defendant was fully apprised of the charge against him is manifest. The brand he was charged with removing was specifically set forth as the word "Oleomargarine"; it was on a certain package; that package contained a certain article, viz. oleomargarine, and a definite quantity, to wit, 60 pounds; the removal was at a specified place, to wit, "pier No. 24, South Delaware avenue, in the city of Philadelphia," and on a certain day, to wit, "December 20, 1896." These averments gave the defendant notice of the acts with the committing of which he was charged. And the designation of time, place, article, and act were of such specific character as to avail to protect him if he should again be called to face a charge of removing the word "Oleomargarine" from a 60-pound package of oleomargarine on December 20, 1896, at pier No. 24, South Delaware avenue, Philadelphia. The defendant, therefore, being fully apprised of the charge, and the offense so specified as to shield him if charged therewith a second time, the count must be sustained, unless it fails to set forth and charge a statutory crime. The indictment charges that the defendant knowingly, willfully, unlawfully, and fraudulently removed from a package of oleomargarine a brand, viz. "the word 'Oleomargarine,' which was required, and under the requirements of law was branded thereon." Is such an act contrary to federal law? Is it a statutory crime? It will be noted that the elements of the crime are specified by the act of congress, "any person who shall wilfully remove or deface the stamps, marks or brands on packages containing oleomargarine taxed as provided herein." The elements of the crime are defined by the statute. The legislation is complete and self-sustaining as to what constitutes the crime, to wit, the removal or defacing of a stamp, mark, or brand. It is true the particular character of the marks or brands evidencing payment of the tax or authentication of the commodity are not fixed by the act, but this is a matter of executive detail in the enforcement of this revenue act, rather than of legislative action, and by the act itself such detail is confided to the executive branch, just as the particular die of our coinage, the form and style of our postage and revenue stamps, legal tender notes and bonds are not determined by congress, but are left to the respective departments. By section 6 oleomargarine shall be placed in packages, "stamped and branded as the commissioner of internal revenue, with the approval of the secretary of the treasury, shall prescribe." It would seem, therefore, that these regulations do not create the crime; the crime is not the result of them, but the most that can be said of them is that they call into being the evidence or indicia which render possible a commission of crime. In Prather v.

U. S., 9 App. Cas. D. C. 89, regulations made under this section were considered by the court of appeals of the District of Columbia. It was there said:

"The provision of the statute now before us for consideration is that the commissioner of internal revenue, with the approval of the secretary of the treasury, shall provide and furnish to the dealers a mark or brand, which does not differ in principle from a stamp, without which oleomargarine is not to be sold, and which will evidence that the tax upon it has been paid; and that any person who knowingly offers for sale any oleomargarine in any other form than in new wooden or paper packages, with the mark or brand so to be furnished by the commissioner, shall be liable to a prescribed penalty. This is no more than providing that no oleomargarine shall be sold except in packages duly branded, so as to show that the tax upon it has been paid. The brand is no more than a receipt furnished by the commissioner, or an evidence of payment given by him to the dealer. We fail to see, therefore, how the requirement of a mark or brand by the commissioner is a delegation of legislative power to that officer, any more than would be a requirement that he should give a receipt in writing that the tax had been paid."

In that case, it is to be noted, the defendant was charged with selling unstamped packages; therefore the absence of the prescribed stamp was an essential element,—one necessary to the commission of the crime. The court, however, held:

"We do not think that the criminal liability in the present instance is the creation or result of departmental or official regulation. It seems rather to fall into the category of offenses indicated in the case of Caha v. U. S., 152 U. S. 211, 14 Sup. Ct. 513, in which congress has fully declared the offense, and the departmental regulation has merely afforded the opportunity for its commission."

This is in accordance with the views expressed by the supreme court. In Re Kollock, 165 U. S. 533, 17 Sup. Ct. 446, that court stated the relation of these regulations to the crimes defined by this statute. It was there said:

"We agree that the courts of the United States, in determining what constitutes an offense against the United States, must resort to the statutes of the United States, enacted in pursuance of the constitution. But here the law required the packages to be marked and branded, prohibited the sale of packages that were not, and prescribed the punishment for sales in violation of its provisions; while the regulations simply described the particular marks, stamps, and brands to be used. The criminal offense is fully and completely defined by the act, and the designation by the commissioner of the particular marks and brands to be used was a mere matter of detail. The regulation was in execution of, or supplementary to, but not in conflict with, the law itself, and was specifically authorized in effectuation of the legislation which created the offense. We think the act not open to the objection urged, and that it is disposed of by previous decisions. U. S. v. Bailey, 9 Pet. 238; U. S. v. Eaton, 144 U. S. 677, 12 Sup. Ct. 764; Caha v. U. S., 152 U. S. 211, 14 Sup. Ct. 513. * * * The act before us is, on its face, an act for levying taxes; and although it may operate, in so doing, to prevent deception in the sale of oleomargarine as and for butter, its primary object must be assumed to be the raising of revenue. And, considered as a revenue act, the designation of the stamps, marks, and brands is merely in the discharge of an administrative function, and falls within the numerous instances of regulation needful to the operation of the machinery of particular laws, authority to make which has always been recognized as within the competency of the legislative power to confer. U. S. v. Symonds, 120 U. S. 46, 7 Sup. Ct. 411; Ex parte Reed, 100 U. S. 13; Smith v. Whitney, 116 U. S. 167, 6 Sup. Ct. 570; Weyman v. Southard, 10 Wheat. 1. * * * We concur with the court of appeals that this provision does not differ in principle from those of the internal revenue laws,

which direct the commissioner of internal revenue to prepare suitable stamps to be used on packages of cigars, tobacco, and spirits, to change such stamps when deemed expedient, and to devise and regulate the means for affixing them. Rev. St. §§ 3312, 3395, 3445, 3446, et seq."

The making of such regulations being, then, an executive act, we next inquire whether, when made, they have the force of law, and whether the courts take judicial notice of their existence. That such is the case the authorities show. In U. S. v. Eaton, 144 U. S. 688, 12 Sup. Ct. 767, it was held that rules and regulations duly prescribed had the force of law.

"Regulations prescribed by the president and by heads of departments, under authority granted by congress, may be regulations prescribed by law, so as lawfully to support acts done under them and in accordance with them, and may thus have, in proper sense, the force of law."

And in Caha v. U. S., 152 U. S. 221, 14 Sup. Ct. 513, it was held the court took judicial notice of them.

"The rules and regulations prescribed by the interior department in respect to contests before the land office were not formally offered in evidence, and it is claimed that this omission is fatal, and that a verdict should have been instructed for the defendant. But we are of opinion that there was no necessity for a formal introduction in evidence of such rules and regulations. They are matters of which the courts of the United States take judicial notice. Questions of a kindred nature have been frequently presented, and it may be laid down as a general rule, deducible from the cases, that wherever, by the express language of any act of congress, power is intrusted to either of the principal departments of government to prescribe rules and regulations for the transaction of business in which the public is interested, and in respect to which they have a right to participate, and by which they are to be controlled, the rules and regulations prescribed in pursuance of such authority become a mass of that body of public records of which the courts take judicial notice. Without attempting to notice all the cases bearing upon the general question of judicial notice, we may refer to the following: U. S. v. Teschmaker, 22 How. 392, 405; Romero v. U. S., 1 Wall. 721; Armstrong v. U. S., 13 Wall. 154; Jones v. U. S., 137 U. S. 202, 11 Sup. Ct. 80; Knight v. Association, 142 U. S. 161, 169, 12 Sup. Ct. 258; Jenkins v. Collard, 145 U. S. 546, 12 Sup. Ct. 868."

The regulation of the commissioner—of which, we have seen, courts take judicial notice—required the brand specified in the indictment to be placed on the package, and the allegation in the indictment is that the particular brand in question was one branded thereon in pursuance of the requirements of law. It follows, therefore, that the statute defining the crime, the regulation made, and the allegation in the indictment that the brand was one required by law, unite to show that the defendant was charged with the commission of an act "in violation of a public law forbidding it," and this Blackstone (4 Bl. Comm. p. 5) defines to be a crime. While the careful pleader, out of abundance of caution, might specifically recite such regulations, as we find from an examination of the indictment was done in U. S. v. Ford, 50 Fed. 467, yet the omission to plead that of which courts take judicial notice should not render the indictment so meaningless as to justify the present ground of demurrer, viz. "that the same did not state facts sufficient to constitute any offense against the United States." After mature consideration we are of opinion a statutory crime was charged in the third count, and that no error was committed in overruling the demurrer thereto. This

view renders needless a discussion of the first and fourth counts. The record will be remitted to the district court, with directions to enforce the sentence imposed.

UNITED STATES v. BERRY et al.

(District Court, W. D. Virginia. September 12, 1899.)

1. NATIONAL BANKS—OFFENSES BY OFFICERS—INDICTMENT.
Where an officer of a national bank is charged with several offenses under Rev. St. § 5209, in making at different times false entries in the books, reports, or statements of the association, such offenses may be charged in different counts of the same indictment, as provided in Rev. St. § 1024, as "acts or transactions of the same class of crimes or offenses."

2. INDICTMENTS—COUNT AGAINST PRINCIPAL AND ACCESSORY—FORM.
A count of an indictment charging one person with the commission of an offense as principal, and another as aiding and abetting its commission, is not open to the objection that it constitutes two separate counts, one against each defendant, because the formal closing, "contrary to the form of the statute," etc., is used at the close of each charge. The charges in such case are properly joined in one count, and the use of the formula at the close of the charge against the principal is surplusage, and will be disregarded.

On Demurrer to Indictment.

T. M. Alderson, U. S. Dist. Atty.
Caskie & Coleman, B. T. Crump, and W. H. Mann, for defendants.

PAUL, District Judge. This is an indictment against T. D. Berry, the president of the First National Bank of Bedford City, Va., and C. L. Mosby, the cashier of said bank. The indictment charges the defendants with violating the provisions of section 5209, Rev. St., by making false entries in the books of said bank. The indictment charges 34 false entries, and contains 68 counts. In the first, third, and every other odd-numbered count, the defendants are charged jointly with committing the offense of making false entries in the reports of the association. In the second, fourth, and every other even-numbered count in the indictment, Charles L. Mosby, the cashier, is charged with the offense of making false entries in the reports of the association, and T. D. Berry, the president, is charged with aiding and abetting him therein. One of the odd-numbered counts will serve as an illustration of all the other odd-numbered counts, charging Berry, the president, and Mosby, the cashier, jointly, with committing the offense; and one of the even-numbered counts will illustrate all of the even-numbered counts, wherein Mosby, as cashier, is charged with making the false entry, and Berry, the president, with aiding and abetting Mosby, the cashier, in making the false entry:

"Third Count. And the grand jurors aforesaid, upon their oaths aforesaid, do further present that the said Thomas D. Berry and Charles L. Mosby heretofore, to wit, on the 5th day of March, 1895, at said Bedford City, in the district and circuit aforesaid, the said Thomas D. Berry being then and there president, and the said Charles L. Mosby being then and there cashier,

of a certain national banking association then and there known and designated as the First National Bank of Bedford City, Virginia, and which said association was theretofore established and then existing and doing business under and by virtue of the laws of the United States respecting national banks, unlawfully and feloniously did make in a certain report of the condition of the said association at the close of business on a certain date, to wit, on the day and year last aforesaid (which said report was then and there made to the comptroller of the currency in accordance with section 5211 of the Revised Statutes of the United States), a certain other false entry, under the head of 'Resources,' in said report, in the words and figures following, to wit, 'Item number 11, due from state and private banks and bankers, $34,376.68,' and which said entry so made as aforesaid then and there purported to show, and did in substance and effect declare, that the amount due from state and private banks and bankers to the said association was in the sum of $34,376.68. And the grand jurors aforesaid further say that said entry so made as aforesaid was false, in this, to wit, that the amount due said association from state and private banks and bankers as aforesaid was not in the sum last aforesaid, but in a different and much greater sum, to wit, the sum of $35,770; they, the said Thomas D. Berry, president, and the said Charles L. Mosby, cashier, as aforesaid, then and there, at the time and place of so making the said entry in said report as aforesaid, well knowing the said entry to be then and there false as aforesaid, and thereby intending to injure and defraud the said association and certain persons to the grand jurors unknown, and to deceive any officer or officers of said association, and any agent appointed by the comptroller of the currency to examine the affairs of said association, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the said United States.

"Fourth Count. And the grand jurors aforesaid, upon their oaths aforesaid, do further present that the said Charles L. Mosby heretofore, to wit, on the 5th day of March, 1895, at said Bedford City, in the district and circuit aforesaid, the said Charles L. Mosby being then and there the cashier of the First National Bank of Bedford City, Virginia, and which said association was theretofore established and then existing and doing business under and by virtue of the laws of the United States respecting National Banks, unlawfully and feloniously did make, in a certain report of the condition of the affairs of the said association at the close of business on a certain date, to wit, on the day and year last aforesaid (which said report was then and there made to the comptroller of the currency in accordance with section 5211 of the Revised Statutes of the United States), a certain other false entry, under the head of 'Resources,' in said report, in the words and figures following, to wit, 'Item number 11, due from state and private banks and bankers, $34,376.68,' and which said entry so made as aforesaid then and there purported to show, and did in substance and effect declare, that the amount due from state and private banks and bankers to the said association was in the sum of $34,376.68. And the grand jurors aforesaid further say that said entry so made as aforesaid was false, in this, to wit, that the amount due to said association from state and private banks and bankers was not in the sum last aforesaid, but a different and much greater sum, to wit, the sum of $35,770; he, the said Charles L. Mosby, cashier as aforesaid, then and there, at the time and place of so making the said false entry in said report as aforesaid, well knowing the said entry to be then and there false as aforesaid, and thereby intending to injure and defraud the said association and certain persons to the grand jurors unknown, and to deceive any officer of the said association, and any agent appointed by the said comptroller of the currency to examine the affairs of said association, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States. And the grand jurors aforesaid, on their oaths aforesaid, do further present that the said Thomas D. Berry, being then and there president of the said association aforesaid, in the district and circuit aforesaid, heretofore, to wit, on the day and year last aforesaid, at said Bedford City, and within the jurisdiction of this court, unlawfully and feloniously, and with the intent aforesaid to injure and defraud the said association and certain persons to the grand jurors unknown, and to deceive any officer of said associa-

tion, and any agent appointed by the said comptroller of the currency to examine the affairs of said association, did aid, abet, incite, counsel, and procure the said Charles L. Mosby, cashier of said association, so as aforesaid to make said false entry in manner and form aforesaid, to do and commit, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the said United States."

The grounds of demurrer are thus stated by counsel for the defendants:

"That there is a fatal misjoinder, in that in some of the counts the defendants are charged jointly with offenses, and in other counts they are charged separately with a different offense or offenses; the rule being, as we understand it, that where there are two or more defendants, and two or more counts in an indictment, all of the defendants must be charged in each of the counts, and there cannot be united in one indictment a count against two or more, and, in the same indictment, a count against one of the defendants; such misjoinder of counts being fatal on demurrer, writ of error, and arrest of judgment."

The provision of section 5209, Rev. St., on which the indictment is based, is as follows:

"Every president, director, cashier, teller, clerk or agent of any association * * * who makes any false entry in any book, report or statement of the association, with intent, in either case, to injure or defraud the association or any other company, body politic or corporate, or any individual person, or to deceive any officer of the association, or any agent appointed to examine the affairs of any such association, and every person who with like intent aids or abets any officer, clerk or agent in any violation of this section, shall be deemed guilty of a misdemeanor, and shall be imprisoned," etc.

The first question to be determined is whether the 34 distinct offenses committed by making as many false entries at different times in the books of the bank can all be embraced in one indictment, or are the offenses of such a character that they must be prosecuted under a separate indictment for each false entry?

Section 1024, Rev. St., provides:

"When there are several charges against any person for the same act or transaction, or for two or more acts or transactions connected together, or for two or more acts or transactions of the same class of crimes or offences which may be properly joined, instead of having several indictments, the whole may be joined in one indictment in separate counts; and if two or more indictments are found in such cases, the court may order them to be consolidated."

The 34 false entries charged in the indictment are clearly "acts or transactions of the same class of crimes or offences." They are all covered by the same provision of section 5209, Rev. St. It is charged that the false entries were made by the same persons, the president and cashier of the bank, at different times, in the books of the same bank. The offenses are of the same grade, and the punishment is the same prescribed for each, and the offenses are provable by the same evidence; that is, by the false entries made in the books of the bank at different times. It is not difficult to find numerous decisions of the federal courts which hold that several offenses such as are charged in this indictment can be properly joined in one indictment, in separate counts, instead of having several indictments. If several indictments are found for several like offenses, the court can order them to be consolidated. There

can be no material difference in having several indictments for like offenses, which the court may order to be consolidated and disposed of in one trial, and having the same offenses set out in several counts of the same indictment.

The chief objection raised to the indictment by the demurrer is that in some of the counts T. D. Berry and Charles L. Mosby are charged jointly with the commission of certain offenses, and that in the same indictment Charles L. Mosby and T. D. Berry are charged separately and in distinct counts with having committed distinct offenses, not provable by the same evidence, and that they do not result from the same act or acts. This argument is based on the assertion that each of the even-numbered counts in the indictment, which charges Mosby, the cashier of the bank, with making a false entry, and Berry, the president of the bank, with aiding and abetting Mosby in making such false entries, is not a single count, but two distinct counts. Because the first paragraph of the count which charges Mosby, as the principal, has the conclusion, "contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States," it is insisted for the defendants that this is a distinct and complete count. It is also insisted that the succeeding paragraph, which charges Berry with aiding and abetting Mosby, is also a distinct and complete count, inasmuch as it concludes, "contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States." Each count is a separate and distinct charge, and is in effect a separate indictment. Clark, Cr. Proc. p. 288. That a principal and accessory can be included in the same indictment will not be questioned, and it is usual and proper to so proceed against them. Clark, Cr. Proc. p. 305 says:

"Where the principal and accessory before the fact are thus joined as such in the same indictment, the proper course is to first state the offense by the principal, and then aver that C. D. (the accessory), before the committing of the said felony and murder in form aforesaid, to wit, on, etc., did maliciously and feloniously incite, move, procure, aid, and abet the said A. B. (the principal) to do and commit the said felony in manner aforesaid, against the peace," etc.

This is uniformly the direction given by writers on criminal pleadings. The only difference between an indictment or count so drawn, and each of the even-numbered counts of the indictment in this case, is that the first part of the count, which charges the principal, concludes, "against the form," etc., "and against the peace and dignity of the United States." If the insertion of this conclusion had been omitted, the draftsman would have followed the form prescribed by the best writers on criminal pleading. This being so, the statement in the first paragraph of the count, that the offense is against the "form," etc., "and against the peace and dignity of the United States," need not have been inserted. These words constitute no part of the charge against the principal in the offense alleged, and the insertion was unnecessary. "It is not necessary to charge in the indictment anything more than is necessary to accurately and adequately express the offense, and, when unnecessary averments or

aggravations are introduced, they may be considered as surplusage, and as such disregarded." Whart. Cr. Pl. § 158. "The introduction of averments which are superfluous and immaterial will not render the indictment bad. If it can be supported without them, they will be rejected as surplusage." Clark, Cr. Proc. p. 178. In Frisbie v. U. S., 157 U. S. 160, 15 Sup. Ct. 586, the supreme court held that the omission to charge that the offense was contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States, is immaterial. Justice Brewer, delivering the opinion of the court, says:

"So far as respects the objection that the count does not conclude that the offense charged was 'contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States,' it is sufficient to say that such allegation, which is one of mere conclusion of law, is not of the substance of the charge, and the omission is of a matter of form, which does not tend to the prejudice of the defendant, and is therefore, within the rule of section 1025, Rev. St., to be disregarded."

In view of the authorities cited, the insertion at the end of the first paragraph in each of the even-numbered counts in the indictment of the words "against the form of the statute in such case made and provided, and against the peace and dignity of the United States" is mere surplusage, and will be disregarded. The grounds of objection stated to the indictment are untenable, and the demurrer will be overruled.

CONTINENTAL INS. CO. v. CONTINENTAL FIRE ASS'N.

(Circuit Court, N. D. Texas. October 10, 1899.)

1. TRADE-NAMES—GENERIC TERMS—"CONTINENTAL."
   The word "continental" is a generic term, the right to use which cannot be exclusively appropriated by any individual or corporation.
2. SAME—UNFAIR COMPETITION—RIGHT TO INJUNCTION.
   The Continental Insurance Company, a corporation of New York, which is usually further designated in its policies, advertisements, and literature as "of the City of New York," and has been since 1852 conducting the business of fire insurance, and is now engaged in such business throughout the United States, has acquired thereby no exclusive right to the use of the word "Continental" in connection with such business, and is not entitled to an injunction against the use of such word in the name of a Texas corporation incorporated under the name "Continental Fire Association," and which in its advertisements and printed matter uses the additional designation, "of Ft. Worth, Texas," in the absence of proof of any fraudulent intent or conduct on the part of defendant, or that the public have been deceived by the similarity of the names.[1]

In Equity. On application for preliminary injunction.

Henry & Henry, for complainant.
Armstrong & Hanger, for defendant.

MEEK, District Judge. The complainant, the Continental Insurance Company, a New York corporation, having its principal place

[1] As to unfair competition in trade generally, see note to Scheuer v. Muller, 20 C. C. A. 165; and, supplementary thereto, note to Lare v. Harper & Bros., 30 C. C. A. 376.

of business in the city of New York, brings its bill against the Continental Fire Association, a Texas corporation, having its principal place of business at Ft. Worth, Tex., seeking to enjoin the latter from doing business under the name in which it is incorporated. The complainant alleges that it was incorporated in the year 1852 as a fire insurance company, and that it has been in business ever since that time, and has built up a large and lucrative fire insurance business over the country at large and in the state of Texas; that during all of the time it has been in business it has, at a great outlay and expense, extensively advertised its business in the country at large, and in the state of Texas, and maintained many efficient and diligent agents, and, by great labor, active work, and close attention to business, caused its name to become widely known to the public in connection with the business of fire insurance; that, by the use of strict integrity and honest business methods, it has built up an extensive business, of great commercial value, and that it is entitled to reap the pecuniary benefits and advantages naturally attendant thereon; that such reputation is necessarily and inseparably connected with the name under which it has done business and by which it has been known. It alleges that the defendant incorporated under a general law of the state of Texas, in the year 1899, as the "Continental Fire Association," and has proceeded to do a general fire insurance business under its corporate name; that the name used by the defendant, by reason of the similarity of the same to that used by the complainant, is calculated to deceive the public, and people desiring to patronize the complainant, into the belief that the defendant is one and the same corporation with complainant, whereby the business of the complainant will be greatly and irreparably injured, and that the defendant will, in some measure, reap the benefit of the complainant's good will, and the business and custom acquired by it, prior to the existence of the defendant corporation; that the name selected and chosen by the defendant was fixed by it with the express design of diverting the good will and business of the complainant; that the result of such selection and advertisement of its business by the defendant will divert and injure the business of the complainant; that the public has been deceived, and are continuing to be deceived, by the defendant using the name selected by it, and, if it is permitted to continue to use said name, the complainant will suffer great and irreparable injury. The complainant tenders affidavits in support of the allegations of its bill, which abundantly support its claim to a long-continued and extensive business in the state of Texas, and that this business was created and built up in the name of the "Continental Insurance Company of the City of New York." The affidavits offered tending to show that confusion will arise in event the defendant is permitted to do business under the name in which it is incorporated, and that the business of the complainant will be diverted to the defendant, and that the defendant will reap the benefits of complainant's expenditures of money, advertising, and industry, are meager, and do not, in the opinion of the court, fully substantiate the allegations of complainant's bill.

The defendant answers, and, among other things, denies any

wrongful intent in the selection of the name under which it is incorporated, and makes profert of some of its literature, and also some of the policies issued by the complainant, showing that the defendant is advertising and seeking to do business as the "Continental Fire Association of Ft. Worth, Texas," and that the complainant is doing business as the "Continental Insurance Company of the City of New York."

The distinguishing feature of the names of the two incorporated companies is the word "Continental." It is the use of this word by the defendant which the complainant seeks to enjoin. It is the contention of the complainant that, by reason of the long-continued use of this word by it, and the fact that it has built up a large and lucrative business under this distinguishing name, it has secured a property right in said word "Continental," in connection with its incorporated name, and it is entitled to the exclusive use of the word "Continental," in connection with its insurance business, in the sections of the country where it is engaged in such business. Upon the showing made by the complainant, it might be entitled to the relief sought, were the distinguishing word of its corporate name such a one as could be exclusively appropriated in the designation or conduct of a business by a person, firm, or corporation. The word "continental" is in general and prevalent use, and means pertaining to or characteristic of a continent. As applied to or designating an insurance company, it would be descriptive of the bounds within which such company carried on its business. The scope of the business carried on by many insurance companies is continental in extent. A term which can be truthfully used by many in the description of a business or occupation cannot be exclusively appropriated by any one of them. The word "continental" is a generic term, and it is not the policy of the law to permit the exclusive appropriation of words or terms which are generic; that is, which pertain to a class of related things, and which are of general application. The right to use such words should remain vested in the public. See Mill Co. v. Alcorn, 150 U. S. 460, 14 Sup. Ct. 151, and cases there cited; also Koehler v. Sanders, 122 N. Y. 65, 25 N. E. 235; Goodyear's India-Rubber Glove Mfg. Co. v. Goodyear Rubber Co., 128 U. S. 598, 9 Sup. Ct. 166.

Counsel for complainant contends that it would have been a simple and easy matter for the incorporators of the defendant company to have selected a distinguishing name for it without having chosen a term already appropriated by a corporation engaged in a like business. This is true, and it is also true that the defendant might not suffer any serious pecuniary loss by the granting of the injunction prayed for in this cause; yet it is the opinion of the court that the incorporators of complainant, by appropriating a generic term, purely descriptive, and in general and prevalent use, and in failing either to fix upon an arbitrary term, or to draw upon the realms of fancy for a name, or to select one indicative of the origin or ownership of the business about to be launched, failed to vest complainant with a distinguishing appellation, the exclusive right to the use of which the courts could declare to be in complainant.

Relief by injunction is sometimes granted in cases where the party

enjoined is using, as a trade-mark or distinguishing name, a term which is geographical or descriptive in character, and therefore could not be exclusively appropriated by the party securing the relief, as in the case of Cady v. Schultz, 19 R. I. 193, 32 Atl. 915, where the complainant had for a trade-mark the words "United States Dental Association," which he displayed upon signs and cards, and distributed through the cities of Providence, Pawtucket, and Attleborough, so that the business of which he was proprietor became known in the city of Providence and the adjacent city of Pawtucket by that name. The defendant for a time carried on a dental business in Providence, and then removed to Pawtucket, where he opened an office, where he displayed upon the windows and walls the words "United States Dental Rooms," in close imitation of the size, shape, and color of the words used by the complainant. The relief was granted in this case, not because the complainant had the exclusive right to appropriate the words "United States" in the conduct of his dental business, but because the defendant had fraudulently and deceitfully adopted these words, and similar methods of their use, with the purpose and intention of attracting customers away from his rival to himself. Judge Douglas in his opinion in that case says: "We have no doubt from the evidence that this was the intention; indeed, this is not denied. And we can conceive of no motive for the use of these similar signs, except to take advantage of the advertisement of complainant, and induce customers to patronize the defendant." Equity frowns upon such unfair practices, and will relieve against them. Lee v. Haley, 5 Ch. App. 155; Koehler v. Sanders, 122 N. Y. 65, 25 N. E. 235, and cases there cited.

Complainant's bill contains the necessary general allegations to avail itself of this ground of relief, but the affidavits in support of this contention are quite insufficient. The literature of the complainant and defendant, which is before the court, weighs against this contention. While the word "Continental" appears on the literature and in the policies of both companies, yet the complainant is in each instance shown to be of the "City of New York," and the defendant is shown to be of "Ft. Worth, Texas." While the complainant does business in Texas, yet its home is in the city and state of New York. Almost a continent intervenes between the abiding places of these two corporations. The business of each is nearly all transacted through the medium of agents. It can hardly be contended that insurance agents will be confused and deceived as to the identity of these corporations, and mistake one for the other. On account of the marked dissimilarity of the addresses of the two companies, mail matter intended for one of them will hardly be misdirected or miscarried to the other. In short, under the existing conditions, there is little, if any, possibility of confusion arising in the minds of the insuring public by reason of the similarity between these two corporate names. The temporary injunction sought is therefore refused.

CAMBRIA IRON CO. v. CARNEGIE STEEL CO., Limited.

(Circuit Court of Appeals, Third Circuit. August 21, 1899.)

No. 14.

1. PATENTS—DISCLAIMER.
A disclaimer, to be effective under Rev. St. § 4917, must be of some material or substantial part of the thing patented, of which the patentee was not the inventor, but which he had previously claimed as new.

2. SAME—INFRINGEMENT—PROCESS OF MIXING MOLTEN PIG METAL—THE JONES MIXER.
The Jones patent, No. 404,414, claim 2, for a process method of mixing molten pig metal for the purpose of securing uniformity in its constituent parts, preparatory to its further treatment, as limited by the changes made in the application during its pendency in the patent office, does not cover the maintaining of an intermediate receptacle for storage or reservoiring purposes, but is limited to the process of mixing ununiform charges of metal from different furnaces or cupolas, for the purpose of securing uniformity of composition of the charges withdrawn, and it is not infringed by the use of a receptacle into which charges of molten pig iron are run from time to time from different furnaces, and from which the metal is withdrawn, as required for charging Bessemer converters, the primary purpose of which is to furnish a storage receptacle so that the work of Bessemerizing may proceed without interruption, the mixing which takes place therein being only incidental.

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

For opinion below, see 89 Fed. 721.

Francis T. Chambers and James I. Kay, for appellant.

P. C. Knox and Thomas W. Bakewell (Thomas B. Kerr, on the brief), for appellee.

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

KIRKPATRICK, District Judge. The bill in this case was filed by the Carnegie Steel Company, Limited, appellee, as the assignor of United States letters patent No. 404,414, granted to William R. Jones, June 4, 1889. It charges infringement, and prays for an injunction and account. The defendant, by its answer, denies infringement, and sets up want of patentable novelty.

Prior to the hearing, the complainant's counsel gave notice that he would urge infringement only of the second claim of the patent in suit, and it alone is before the court for consideration. It is as follows:

"(2) In the art of mixing molten metal to secure uniformity of the same in its constituent parts, preparatory to further treatment, the process of introducing into a mixing receptacle successive portions of molten metal, ununiform in their nonmetallic constituents (sulphur, silicon, etc.), removing portions only of the composite molten contents of the receptacle without entirely emptying or draining the same, and successively replenishing the receptacle with fresh ununiform additions, substantially as and for the purpose described."

The patent is for a process method of mixing molten pig metal, and has for its object the procurement of uniformity of the molten metal in its constituent parts, preparatory to further treatment. In order to learn the objects sought by Jones, and the means employed

to attain them, reference must be had to the specification and claim, as well as the file wrapper of the patent. The patent sets out in its title that it is for an improved method of mixing molten pig metal. "It has been found," says the patentee, "that metal tapped from different blast furnaces is apt to vary considerably in chemical composition, particularly in silicon and sulphur, and such lack of uniformity is observable in different portions of the same cast, and even in different portions of the same pig." There is a tendency of silicon and sulphur to segregate, and the consequence "is that the product of the refining process, in the converter or otherwise, in like manner lacks uniformity in these elements, and therefore often causes great inconvenience and loss, making it impossible to manufacture all the articles of a single order of homogeneous composition."

The first claim of the patent relates to the art of refining iron directly from the smelting furnace, but no such limitation is placed upon the second claim, which is now under consideration. The process therein claimed applies to "the art of mixing molten metal." By the use of the more general term, "molten metal," it seems to us that the inventor intended to and did broaden his claim so as to include in it the treatment of all molten metals, whether drawn from furnace or cupola. The natural meaning of the words "molten metal" would require that construction, and it appears from the record that it is in accordance, not only with the definition of the words furnished by scientific lexicographers and those skilled in the art, but also with the understanding of the inventor himself. In the application for a patent upon the apparatus adapted to carry out the process of the patent in suit which was filed in the patent office on the same day, Jones says: "The main feature of the present invention is, broadly, a covered preliminary receiving vessel for holding and mixing the charges of molten metal which are supplied thereto, either from a blast furnace or cupola." The tendency of silicon and sulphur to segregate themselves in molten metal is equally observable in that drawn from cupola and furnace. In both it causes the same inconvenience and loss, rendering the product of the subsequent refining processes lacking in a uniformity in these elements, and in consequence possessing a variable tensile strength. Neither can the object of the Jones invention be limited to the uniforming molten metal preparatory for its use in the Bessemer converter. The words of the claim and the specification both forbid. In the claim the inventor says he has a process which in the art of mixing molten metal will secure uniformity of the same in its constituent parts preparatory to further treatment. These words are broad enough to include a puddling furnace, an open hearth, or any treatment to which molten metal is adapted in the art, and in which it is desirable to have uniformity in its constituent parts. In the specification he declares that his object is to provide means for "rendering the product of steel mills uniform in chemical composition."

Uniformity of product is to be obtained by uniformity of the molten metal required in its manufacture. Particularly, but not exclusively, would this be true of the steel made by the Bessemer process. All the manufactured articles would be of a single order of

homogeneous composition by the elimination of the lack of uniformity in the elements of silicon and sulphur from the molten metal. It does not seem to us that the complainants limit the claim of the patent in suit by the disclaimers which they have filed. In our opinion, they do not modify or change the construction of the claim as originally granted. They do not disclaim anything. Their avowed purpose is "to limit the scope of the letters patent to the mixing of molten metal preparatory to further treatment." This we find to be the limit of the patent as originally granted. The disclaimers, therefore, do not comply with the statutory requirement that the patentee shall give up some material or substantial part of the thing patented of which he was not the original inventor. If we examine the eliminated parts of the specification, we find that they relate (1) to an example of a way in which the mixture of the molten metal may be made, and which is only one of the obvious varieties of form in which the invention may be practiced, and (2) the uses to which the mixed metal may be put in the art after the patented process has been completed. Neither of the matters erased affects the process or method of mixing molten pig metal which was the subject-matter of the patent, nor do they affect anything of which Jones claimed to be the original and first inventor. They do not, therefore, come within the limits laid down by the supreme court in Union Metallic Cartridge Co. v. United States Cartridge Co., 112 U. S. 624, 5 Sup. Ct. 475, where, speaking by Mr. Justice Blatchford, they say: "The statute expressly limits a disclaimer to a rejection of something before claimed as new."

In seeking to find out what was new in the complainant's process, and what it was he sought, we will be aided by an examination of the file wrapper. By reference to it, it will appear that the function ascribed by Jones to his intermediate receptacle was one of storage as well as mixing to a uniform standard. In the application as originally filed, the "main feature of the invention" was the "method of storing successive charges of molten metal in a receptacle before using it in converters or otherwise," and the invention claimed was the described process "whereby the character of the charges of metal so treated is equalized." The application was rejected by the patent office examiner as being completely anticipated by United States patent No. 315,587, to Witherow, April 14, 1885, and patent No. 327,425, to Witherow, September 29, 1885, as well as "Kirk's Founding of Metals. New York: 1881." Both the Witherow patents claim the combination of a blast furnace with an intermediate storage receptacle between furnace and converter, with a ladle to receive and convey to the converter a proper charge of the molten metal, while Kirk sets out the function of a large intermediate reservoir, to be used in the mixing of molten metal drawn from a cupola. In this finding of the patent office the applicant acquiesced. He made certain erasures in the specification, and substituted for the objectionable claim one which read as follows:

"The process hereinbefore described, which consists in running successive charges of molten metal into a covered receptacle provided with a heat-retaining lining, removing from time to time from said receptacle for subsequent

treatment a portion only of its molten contents, and successively replenishing such receptacle with fresh additions of molten metal for the purpose of equalizing the character of the several charges of metal drawn therefrom, substantially as described."

It will be noticed that the new claim is silent as to the storage function of the receptacle, and in the argument filed with the patent office commissioner the applicant declared that the idea of the Witherow patents was "to receive and store the molten metal for the purpose of preventing detention" in practical working, and not to mix the metal gradually, and that in those respects it differed from the Jones application, where the "distinctive idea was to have a receptacle capable of holding metal in molten condition, into which metal, it may be from several blast furnaces, is run from time to time, and from which metal is drawn for treatment in the converter or otherwise, as required. This continual pouring into and drawing out of a common receptacle produces such a mixing of the charges as results in a uniform average quality of metal, whether treated in the converters, or used for casting without such treatment, as is very desirable, and has been hitherto found to be practically unattainable." Again the application was rejected at the patent office. The Witherow references are withdrawn, no doubt because the storage function of the reservoir did not necessarily result in the mixing of the metal to the uniform average quality sought by the applicant. The patent office, however, again refers to the description of the Kirk method of metal founding above noted, which states that "the metal is run continuously from the cupola, and mixed in the ladle, from which it is tapped into small ladles." "The iron is all run out of the cupola as fast as it is melted, and is mixed in the large ladle." References are also made to British patents No. 859, Bronan, March 23, 1866, and No. 2,382, Stewart, May 10, 1883. Again, the specifications and claims of the patent are amended, and now made to conform to these set out in the patent in suit.

Quite a transformation has taken place. The storage and reservoiring features have been eliminated, the mixing has become predominant, and, in order that the mixing may be differentiated from that described in the Kirk method, it was to be mixing "whereby its particles are diffused or mingled thoroughly among each other, and the entire charge is practically homogeneous in composition, and the product of the further treatment of the metal of a single order of homogeneous composition." Because the claims of the patent as granted so far differed from those set out in the original application, an affidavit of Jones was annexed, in which he says that "the invention has been found of great practical value in securing uniformity in the product of steel works, and thus rendering the same more certain in character and more valuable commercially."

In what respect, then, does this new claim differ from the one which had been rejected by the patent office examiner and from the Kirk method of founding, to which reference had been made? Only in this: Kirk's method of mixing was that which resulted from pouring the successive casts of one cupola into a reservoir, while the Jones method provided for the mixing, not merely of metal taken at

one time from the smelting furnace, but of a number of parts taken from different furnaces at different times. In this way, says the patentee, each charge represents an average of a variety of uniform constituent parts, all the charges of the converter will be substantially uniform, and the product of all will be homogeneous. Mr. Carnegie testifies on the record that the "soul of the Jones invention is the law of averages,—the dealing with successive small portions of metal, which may be selected at the blast furnace or the mixer"; and again declares its "essence to be that the appliances invented by Jones enable successive portions of metal to be combined according to their respective constituents, and this over a number of portions large enough to secure the uniform standard necessary." Should the metal sent from any furnace be at that time unsuitable for combination with that of other furnaces, it may be rejected by the superintendents. In the Kirk method there was no selection of metals; there was no drawing from many furnaces or cupolas to obtain, by the law of average, a uniform standard. There was no effort to obtain such a mixture of suitable metal as in combination would produce a standard quality.

These were the objects sought by Jones, as we, by the aid of the record and file wrapper, read the claim and specification of the Jones patent now in suit. What process, then, did Jones devise to attain these ends? It consists of introducing into a mixing receptacle successive portions of ununiform molten metal, and removing portions thereof, without entirely draining or emptying the same, and successively replenishing the receeptacle with fresh ununiform additions. The quantity which shall remain in the receptacle is stated to be a "considerable quantity." Beyond this vague description, the specification of the patent is silent. We find nothing in the patent which warrants us in determining that the inventor had in mind that the residue to be left in the receptacle should form a dominating pool. The residue, composed of parts of previous charges, mixes with the new portions which are poured in, and thereby the molten metal becomes practically uniform in chemical composition. This uniformity was to be attained, not so much by the pouring into the reservoir metal obtained at several times from one furnace, but by a number of parts from different furnaces. The stipulation entered into between counsel shows the manner in which the defendant uses what is alleged to be the infringing device. It is as follows:

"That the defendant in this case has used the mixer and other apparatus shown in blue prints, complainant's Exhibits Nos. 1 and 2 of defendant's mixer, together with blast furnaces at Johnstown, Pa., since date prior to the commencement of this suit, and at various times since that date, in the manner following: That is to say, the molten pig metal has been tapped from the several blast furnaces, four or five in number, and poured into the mixer, which has an actual capacity of about two hundred and eighty tons, additions to this molten metal from the blast furnaces being made from time to time to the mixer in quantities of about fifteen tons, as it is tapped from the blast furnaces; and that the molten metal in the mixer has been discharged by tapping the mixer from time to time, and as required for charging the Bessemer converters, into ladles having a capacity of about fifteen to eighteen tons each, the charges withdrawn being from about eleven to twelve tons each; that the amount of molten metal in said mixture varies from nothing to its

full capacity, depending on the supply and demand, the supply being generally sufficient to keep the mixer more than half full of molten metal, which metal remains molten therein; that the molten contents of the mixer are drawn off from time to time, as required for the converters, the converter charges being from eleven to twelve tons each, as above stated, the metal being charged into the converters in a molten condition, and sometimes a smaller portion being withdrawn from the mixer, and the remainder of the molten metal for the charge being run into the ladle containing the mixer metal from cupolas forming part of the converter plant, the combined charge of mixer metal and cupola metal being introduced into the converter and refined in the usual manner."

The record shows that the defendant's reservoir or accumulating ladle complained of is the same in principle as one which has been in use at the Cambria works ever since Bessemer steel was first manufactured there, with only this difference: that at first it was used at cupola, now at furnace. The primary object has always been to permit the work of Bessemerizing to proceed without interruption, to furnish a receptacle for the molten iron of the cupola or furnace when it was most advantageous to tap the same, and thereby avoid a too early tapping as well as the necessity of being obliged to hold too long. It is stipulated that the amount of molten metal ordinarily kept in the reservoir is more than one-half its capacity, but that it varies from nothing to its full capacity, depending on the supply and demand. Doubtless, under the ordinary conditions, there is a mixing of the molten metal when the partially filled vessel is replenished, but it is only such mixing as is incidental to the pouring together of mixable liquids under the well-known principle of diffusion. As we have said, the Jones patent was not for the storage or reservoiring of metal drawn either from furnace or cupola nor the mixing incidental thereto. The patentee had acquiesced in the finding of the patent-office examiner that, as to these matters, he was anticipated by the Witherow patents and Kirk's publication. If the defendant's reservoir carries with it, by well-known natural laws, incidental mixing, it cannot be regarded as an infringement of the patent in suit, unless, in addition to its function as a reservoir, it has in combination some additional element set out in complainant's process. If it be urged that the defendant, by drawing from several furnaces the molten metal required to replenish its reservoir, thereby obtains the average of uniformity sought by complainant's process, the answer is that in this respect the complainant's patent is anticipated by the British patent to Deightom, No. 3,672, May 7, 1874, whose claim of invention was the placing of a vessel so as to "receive the molten metal tapped from two or more blast furnaces, to get a better average of metal, which will be more suitable for making Bessemer steel or metal of uniform quality." For these reasons we are of the opinion that the defendant's device does not infringe the second claim of the patent in suit. The decree of the circuit court is reversed, and the case is remanded to that court, with directions to dismiss the bill of complaint.

THE ANACES.

(District Court, E. D. North Carolina. October 7, 1899.)

MASTER AND SERVANT—EMPLOYING INCOMPETENT SERVANT—INJURY TO THIRD PERSON.

Libelant, who was employed as a laborer by stevedores, and engaged with others in stowing cotton in the hold of a ship, was injured by the rolling against him of bales of cotton lowered by the winchman upon those lying under the hatchway. *Held*, that in the absence of evidence to sustain allegations of the incompetence of the winchman, or of gross negligence on his part, the ship could not be held liable for the injury.

In Admiralty. Libel against the British steamship Anaces to recover for personal injuries received by libelant while employed by stevedores in loading the ship.

Iredell Meares, for libelant.

George Rountree, Junius Davis, and Thomas Evans, for defendant.

PURNELL, District Judge. The former order in this cause dismissing the libel (87 Fed. 565) having been reversed (34 C. C. A. 558, 93 Fed. 240), the cause was heard at the regular term of the court at Wilmington; and the court, sitting in admiralty, after looking into the eyes of the witnesses, observing their demeanor on the stand and manner of giving in their testimony, and hearing them examined by proctors both for libelant and contra, finds the following facts from its recollection of such testimony, being aided therein by the stenographic report thereof and the admissions in the record. There is much conflicting testimony, and the court therefore must exercise its prerogative of sifting the kernels of evidence from the chaff of testimony.

The following are the facts: The British steamship Anaces was in the port at Wilmington, N. C., shipping a cargo of cotton at a compress wharf. Alexander McCullom was a laborer employed by the stevedore engaged in loading said ship, and while so engaged was injured by cotton falling or rolling upon him and jamming him against the side of the ship. For injuries thus received said Alexander McCullom files his libel in rem, alleging as the immediate and proximate cause of such injuries the gross negligence and incompetency of the man employed by the officers of the steamship to operate the lever winch of the dummy engine in hoisting and loading such cargo, the negligence and carelessness of the officers of the ship in employing for such service an inexperienced hand, and that he was endamaged $2,500. These allegations are traversed, and the damages denied. Libelant was employed by Andrew J. Walker, the stevedore who had the contract for loading the ship, as a common laborer, and was at work with one of the four gangs (22 men) in hold No. 2, storing cotton. The designated duty of libelant was, with others, "to sling and untie cotton and move it out of the way" when lowered into the hold. There were four holds and four winches being operated. The captain, in accordance with the custom of the port for ships to furnish the winchmen, had given the contract for operating the winches to

Andrew Brown, a well-known man in the business, about whose competency there is no question. Brown was operating the winch for holds 3 and 4, and had employed Curtis Croom to perform this duty for holds 1 and 2. A sailor had been at the winch at hold 2, where the accident occurred; but on that day, at 7 o'clock in the morning, Curtis Croom was put at this winch, and was there at work when the accident occurred, between 12 and 1 o'clock. The man at the winch is governed by orders given him by the man at the gangway, who stands at or near the hatchway or hold,—in this instance, Frank Isler,—who tells him to hoist, hold, or lower away. The winchman cannot see in the hold. The gang in the hold generally sing when at work; the "boss" leading, and the members of the gang responding in chorus. They were thus singing in hold 2 at the time of the injury. The four winches on deck were being operated, making much noise, and the cargo loaded as expeditiously as possible. There were four gangs at work in No. 2; the gang engaged in slinging, untying, and rolling from under the hatchway cotton, of which Alexander McCullom was a member, being under the immediate orders of B. C. Stokes, whose duty it was to give orders to Frank Isler, the gangwayman, who in turn gave them to the winchman. About noon (between 12 and 1 o'clock), while Alexander McCullom was engaged with his gang moving bales of cotton out of the way, from under the hatchway, a sling of three bales of cotton was lowered into the hold and rolled over on the libelant, after reaching the bottom or the pile of cotton in the hold, jammed him to midship, and broke three ribs,—the eighth, ninth, and tenth. Under the hatchway is a dangerous place to work, and McCullom had been warned to look out for cotton. Isler had given the order to hoist away, and then to lower the sling of cotton into the hold. Complaint had been made to the captain about the way the winch was being operated, but nothing had been said to Curtis Croom, or to Andrew Brown, who engaged him. It does not require an engineer or a mechanic of education and skill to operate a winch. Curtis Croom had had experience as a winchman, and was competent for the work in which he was engaged. There was no negligence on the part of the officers of the ship in letting the contract to Andrew Brown, or the employment of Croom to operate the winch. Libelant's injuries are not permanent, or likely to become so. He was kept from work two months. but within this period was "downtown" once, and on another occasion went to the circus shortly after he was injured. His earnings before he was injured were $4.80 to $5 per week, and since then he has worked at Ft. Caswell, "shoveling sand." What his earnings have been since does not appear. Expenses shown, doctor's bills etc., amount to $80. Including this, and making a liberal allowance for loss of time, difference in earnings, and other incidentals, he has been damaged $300.

In the former decision of this cause the allegations in the libel were taken as true, and the decision made as upon a demurrer ore tenus. Admiralty rule 23, under which libelant is entitled to proceed in rem, provides what must be set forth in the libel; but in

admiralty, as in other causes, allegations alone will not suffice. There must be proof. The libel is held sufficient. What are the facts? The system of admiralty jurisprudence is intended to approach natural justice, and to this end technicalities are frequently disregarded, but the natural justice is for both parties to a cause. It would not be natural or common justice, simply because one party is a fellow being, to whom, in his suffering and need, the sympathy of all goes out, and who we would be happy to aid in his distress, and the other an inanimate object, a foreign ship in one of our ports, representing foreign capital, to arbitrarily take from the one and give to the other. This is too often done or attempted by juries, under the hypnotic influence of eloquent counsel, and from sympathy; but is in many instances condemned by a fair-minded public, and set aside by a just judge. In admiralty there is no jury; the court finds the facts and applies the law. Having the right to proceed in rem, as said by his proctor, libelant must establish to the satisfaction of the court the following conclusions:

"First, the libelant was injured through the careless operation of the winch; second, the winchman was incompetent and inexperienced; third, that the master failed to exercise proper care and diligence in ascertaining the winchman's qualifications; fourth, the master failed to remove him after knowledge of his incompetency came to some officer of the ship; and, fifth, that libelant has been damaged in consequence of his injury."

The allegation is that the immediate and proximate cause of the injury was the gross negligence and incompetency of the man at the winch. The statement in the brief is a radical modification of this allegation, but it is the allegation which must be supported by evidence. True, some witnesses testified that Croom, the man at the winch, was incompetent, while others testified that he was thoroughly competent, for the work in which he was engaged. Here is a direct conflict,—more of opinion than of substantive fact; and the duty of determining the truth, not always pleasant when there is a conflict, devolves on the court. Sifting the kernels of evidence (facts proved) from the chaff of testimony (what witnesses said on the stand), the court has found as a fact that Curtis Croom, the man at the winch, was not grossly negligent or incompetent. He seems, in the noise and confusion of loading a large steamship with cotton (four winches running on deck, and the stevedore's gangs singing in the holds), to have been discharging his duty in the customary manner,—hoisting, holding, and lowering the cotton as ordered by the gangman, as he is called, who was standing on deck at the ship's hold. The winchman says the order to lower this particular sling of cotton was given. Isler says he did not give the order. The cotton was hoisted from the wharf, over the side of the ship, several feet into the air, and lowered into the hold. This occupied some time,—long enough for Isler to have stopped it from being lowered into the hold, if he had not given the orders to hoist and hold until the cotton could swing over the hold. These facts, together with the appearance and deportment of the men on the stand, and other surrounding circumstances, warrant the conclusion that Croom told the truth, and Isler is mistaken. The

court therefore finds that the allegation is not proved, and the immediate and proximate cause of the injury was not the gross negligence and incompetency of the man at the winch. This disposes of the first and second conclusions, which it is admitted libelant must establish to the satisfaction of the court. It is not incumbent on the court to find what was the immediate and proximate cause of the injury, the allegation in the libel not being sustained by evidence. It was not the manner of loading the cotton by any one for whom the ship was responsible, but seems to have been from some cause, after the particular sling of cotton had reached the bales piled in the hold under the hatchway, which it was the special duty of the gang with which libelant was at work to store away, rolling on libelant after the sling was untied. Whose negligence was this? It does not appear in evidence, and is not the proximate cause set up in the libel. The third and fourth conclusions are not established to the satisfaction of the court. The master was a stranger in that port. He made inquiry of probably the agent of one of the largest exporters of cotton in the country, and gave the contract of running the winches to a man in the business, whose competency is not questioned. True, complaint was made to the captain, but it does not clearly appear whether this was before or after the injury. If after, it is of no consequence; and, if before, it does not appear how long before,—whether long enough for him to see the contracting winchman or to make a change. But even in this complaint, testified to in an unsatisfactory and contradictory manner, nothing was said about Croom being incompetent. It is not every accident which occurs in a hold of a ship which amounts to a maritime tort, or entitles one injured thereby to damages. Upon the facts found, the questions involved in the present status of the case being questions of fact mainly, libelant is not entitled to damages. The libel is therefore dismissed. It is so ordered.

THE GENEVIEVE.

THE VULCAN.

(District Court, N. D. New York. October 18, 1899.)

1. COLLISION—SUIT FOR DAMAGES—DETERMINING FAULT.
   In determining, on conflicting testimony, which of two vessels was in fault for a collision, the court will take into consideration the probabilities and presumptions based upon the skill, knowledge, and ability of the crews of the respective vessels, which was the better manned, and the less likely to make a mistake.

2. SAME—STEAM VESSELS MEETING—SIGNALS.
   Where the one of two meeting steam vessels having the right of way fails to signal as required by the rules governing navigation on the lakes (28 Stat. 645), on approaching the other may properly signal by two blasts, in accordance with rule 23, meaning, "I am directing my course to port," and she is not required to wait for an answering signal before changing her course.[1]

---

[1] As to signals of meeting vessels, see note to The New York, 30 C. C. A. 630.

8. SAME—EVIDENCE OF FAULT.

Where a steam vessel passing down the Detroit river in the night, and having the right of way, failed to signal, as required by the rules, when half a mile from a vessel passing up, and, on receiving a signal from the latter vessel when nearer, answered by a cross signal, changed her course accordingly, and continued at full speed, in violation of rule 26, although the vessels were then near together, she must be held in fault for a resulting collision.

In Admiralty. Cross libels by the steam tug Genevieve and the propeller Vulcan to recover damages for collision. On final hearing.

George Clinton, for the Genevieve.
John C. Shaw, for the Vulcan.

COXE, District Judge. The collision occurred at 3 o'clock a. m., October 17, 1897, between the steam propeller Vulcan and the tow of the steam tug Genevieve, opposite Mamajuda Island in the Detroit river. The Vulcan is 260 feet long and 38 feet beam. She was bound up the river with a load of coal and was drawing 16 feet of water. She was properly manned and equipped; she was fitted with all the modern appliances and had the full complement of officers and men. At the time of the collision her master and mate were on the pilot house, the steersman was at the wheel and there was a lookout at the bow. She was proceeding at the rate of about 9½ miles an hour. The Genevieve is 55 feet long, 15½ feet beam and was, at the time in controversy, drawing 9 feet aft and 5 feet forward. She was towing a flat-bottomed scow 127 feet long and about 30 feet beam. The scow was square-ended with a long overhang at each end. She carried a large derrick forward with a boiler and engine house 16 feet wide, 40 feet long and 10 feet high. In front of the derrick was a frame 35 feet high and 40 feet wide at the base. The scow was drawing about 4 feet of water. She was fastened to the tug by an 80-foot hawser and a bridle. There was a cross timber 47 feet from her bow projecting out beyond the sides of the scow. The night was dark but clear. Lights could be seen a long distance off. There was no wind. Both the Vulcan and the Genevieve displayed the proper lights. There was a lookout on the tug stationed just forward of the pilot house and there was a wheelsman at the wheel. These two men composed the entire deck crew of both tug and tow. No one was on the scow. The tug was proceeding down the river at the rate of about 7½ miles an hour. The stem of the Vulcan struck the tow a little forward of midships on the port side at the angle made by the projecting timber. The blow caused damage to both vessels but principally to the scow which was so badly injured that she sank soon afterwards.

The cause for such collisions as this must generally be sought for at a time prior to the few moments immediately preceding the impact. After the vessels are in close proximity either or both, in the stress of sudden danger, may adopt an unwise and imprudent course. The question is, who is to blame for bringing the vessels into a posi tion where cool calculation is impossible?

In arriving at a correct answer to this question the court should take into consideration the probabilities and presumptions based

upon the skill, knowledge and ability of the crews of the respective vessels. Which of the two would be most likely to make a mistake? The Vulcan was engaged in a business which required her to pass up and down the Detroit river many times a year in daylight and at night. Her master and mate were experienced mariners and in the prime of life. They were perfectly familiar with the channel, the lights and the ranges. At the time of the collision both of them were on the pilot house high above the water and thus able to get a commanding view of approaching vessels and to judge distances with accuracy. In addition to the master and mate was the lookout and steersman. The Genevieve, on the contrary, had but one man on deck and one man in the pilot house. Both were licensed pilots and sailors of long experience, but both were old men, probably over 60 years of age, and neither, of late years, had much experience in the navigation of the Detroit river. They were unfamiliar with some of the ranges and some parts of the channel and, being but a few feet above the water on the night in question, had not the same opportunity for extended vision as the crew of the Vulcan. It certainly is a fair statement to assert that the Vulcan was much better manned and less likely to make a mistake in navigation than the Genevieve.

When the first signal was given the vessels were separated by half a mile in distance and two minutes in time. The witnesses on the Vulcan agree substantially that the distance was less than half a mile. The two witnesses on the Genevieve are not in accord; one places it at between a quarter and a half a mile; the other at between three-quarters of a mile and a mile. It would be against the weight of evidence to place the distance at more than a half a mile.

The sailing rule applicable to the situation is rule 24 of the act of February 8, 1895. It is as follows:

"That in all narrow channels where there is a current, and in the rivers Saint Mary, Saint Clair, Detroit, Niagara, and Saint Lawrence, when two steamers are meeting, the descending steamer shall have the right of way, and shall, before the vessels shall have arrived within the distance of one-half mile of each other, give the signal necessary to indicate which side she elects to take."

Here, then, was a plain duty imposed upon the Genevieve. The vessels had reached the half-mile distance. Before that point was reached the Genevieve was commanded to signal the Vulcan the side she desired to take. The command was disobeyed and the duty wholly neglected. This, in the judgment of the court, was the initial fault to which all the others can be easily traced. This fault was committed deliberately and intentionally. Capt. Pratt, who was in charge of the Genevieve, says he did not blow a signal and did not intend to blow any. He thought the vessels would pass without any communication between them and he expected to take the chances and remain quiet. When the first signal was given he thinks the Vulcan was not much more than a quarter of a mile distant.

It is, of course, idle for the tug to contend after this testimony, that the half-mile point was not reached and that she might have signaled had not the Vulcan anticipated her. The evidence shows that the Vulcan waited till the last moment before indicating the course.

She did not act in this regard until it was perfectly evident that the Genevieve intended to pass without signal of any kind. The Vulcan saw the Genevieve when the vessels were a long distance apart, the former being still on the Limekiln ranges. When the Vulcan had turned upon the Grosse Isle range and was coming up on a course a little to the westward of that range her attention was particularly directed to the Genevieve. According to the testimony on behalf of the Vulcan the tug was coming down on a course to the eastward of the course from Grassy Island to Mamajuda Island, showing both lights. After waiting for a signal until it was evident that none would be given the Vulcan blew two blasts and put her wheel to starboard as required by rule 23.

The Vulcan is criticised for starboarding before she received a reply to her signal. The answer is twofold: First, the time was so short that prompt action was imperative, there was no time for experiments; and, second, the Vulcan did precisely what the rule requires—"two blasts to mean, 'I am directing my course to port.'" The rule does not say that two blasts shall mean, "I intend to direct my course to port," or "I will direct my course to port if you agree to it." What it does say is this, "I am now, at the moment you hear this signal, swinging to port."

No fault can be imputed to the Vulcan in giving the signal. Upon her own testimony such a signal was not only proper; it was absolutely necessary. Not to have given it would have been gross negligence.

But even upon the testimony of the two witnesses for the Genevieve the Vulcan was not at fault. It is asserted that if the vessels had kept their courses both remaining silent they would have passed in safety. Conceding this to be so it would be a strange proposition to hold that it is negligence per se for a heavily laden upbound vessel to request the port side of the channel of a descending tug when there is absolutely no question that they can pass safely starboard to starboard. The Genevieve had indicated no preference and it was apparent that they would meet at or near a point where it was necessary for the Vulcan to swing to port in order to make the Grassy Island range.

The two-blast signal from the Vulcan was answered by the Genevieve by one blast, meaning, "I am directing my course to starboard," and her pilot immediately put her wheel to port. This was a cross signal forbidden by rule 26. But the witnesses for the tug assert that they heard but one blast. That two blasts were given is beyond dispute. The master, mate, lookout, engineer and a passenger on the Vulcan all swear positively to this and the subsequent signals.

If it be true that those on the tug did not hear the signal the question arises, why did they not hear? The night was clear, there was no wind, nothing in the elements prevented sounds from being heard, and the Vulcan's whistle, in such circumstances, should have been heard miles away. If it were not heard because those in charge of the tug were deaf, or inattentive or in positions where it was impossible to hear, it was negligence for which the tug is responsible. That

the situation on the tug was somewhat extraordinary in this respect is further evidenced by the fact that no one on the tug heard a two-blast signal which was given but a moment or two before the collision. But in no view of the matter can the Vulcan be charged with negligence because the Genevieve did not hear her signal. The Vulcan blew a proper signal and was answered by an improper signal. She knew then that the Genevieve intended to turn towards the same side of the river as herself and that prompt action only could avoid a collision. The Vulcan again blew two blasts, checked down, blew two more blasts and reversed. When the collision occurred the Vulcan had almost come to a standstill. The blow to the scow was a light one; it was hardly felt on board the Vulcan who received no injury save a cracked plate at the bow.

There were but two affirmative acts on the part of the Genevieve and both were wrong. She gave the wrong signal and turned in the wrong direction. No signal was given to the engineer of any kind and the tug kept on at full speed in defiance of rule 26, which commanded her master "to reduce his speed to bare steerageway, and, if necessary, stop and reverse." The excuse for this uncontradicted violation of the law is that the danger was so imminent that it would have done no good to stop and reverse. Having disobeyed the law the onus is strongly upon the tug to establish the truth of this proposition. This she has not done; on the contrary it is quite clear that if there had been any collision at all it would have been so slight as to cause little or no damage.

It will be remembered that the Vulcan checked and reversed in rapid succession as soon as the peril became apparent, and yet it is charged against her as a fault that she did not do this sooner. "The Vulcan was in fault," says the brief, "for not stopping and reversing immediately upon getting the single blast. The mate did not stop to reverse, he merely checked, and it was only after he had repeated his signals that the engines of the Vulcan were reversed upon the captain's order to the mate. This was inexcusable."

To the mind of the court it seems somewhat inconsistent to assert, on the one hand, that the delay of a few seconds in reversing was inexcusable fault on the part of the Vulcan and, on the other, that the Genevieve, with the same danger confronting her, was absolutely free from fault although she did not check or reverse at all but rushed ahead at full speed.

Upon the proof there can be no question as to the negligence of the tug. Two open and flagrant violations of law are established without dispute. She omitted the signal required by rule 24; she failed to reduce her speed, stop and reverse, as required by rule 26. It is, therefore, unnecessary to examine the other faults alleged against her.

An able and ingenious argument is advanced on behalf of the tug to convince the court that the Vulcan should be inculpated also. The faults charged against her are as follows: First. That she crowded upon the course of the tug. Second. That after giving the first signal she should have waited till the tug answered before changing her helm. Third. That the second signal of two blasts was a cross

signal forbidden by the rule. Fourth. That she did not reverse soon enough. Fifth. That she did not sound an alarm. Sixth. That she did not keep out of the way of the tug. Seventh. That she should have signaled, if at all, for the right instead of the left side.

Some of these accusations have already been answered, others are based upon the hypothesis that the court will accept the uncertain and, in some respects, contradictory statements of the two witnesses for the tug, denied as they are by the witnesses for the Vulcan, and others still are unimportant for the reason that by no possibility could the omissions have changed the result. The entire testimony has been read with the result that the court is unable to point out any act or omission of the Vulcan which, considering the well-recognized rules of maritime law, can be regarded as a fault. Both Capt. Pratt and Capt. Day admit their unfamiliarity with the navigation of the Detroit river. Their lives as mariners have been spent principally upon other waters and their trips on the river of late years have been casual and infrequent. The statement made by Capt. Pratt at Detroit, immediately after the accident, differs, in at least two important particulars, from his testimony in court. It is thought that an impartial reader of the record will find it impossible from the testimony of these two witnesses to locate with accuracy the course of either vessel after they came within sight of each other. It is conceded on all hands that after the tug replied with one blast and put her wheel a-port, the danger was so near that the rule of in extremis applies. Both Pratt and Day testify that when they heard the second signal from the Vulcan they could do nothing to avert the accident; they had turned to the right and could not get back again. The signals from the Vulcan at this time were, in fact, an alarm. They were two blasts followed immediately by two more blasts. In this way the Vulcan was enabled to convey to the tug not only the idea of immediate danger, but also the information that the Vulcan was swinging to port, and so those on the tug understood it.

The Vulcan must be judged not in the light of the facts as they now appear but in the light of the facts as they appeared to her master and mate as they stood upon her pilot house on the morning in question. The conduct of the tug was surely sufficient to puzzle the most accomplished and prudent mariner and the court is convinced that the Vulcan did everything which was possible in the circumstances to prevent the collision. The City of New York, 147 U. S. 72, 85, 13 Sup. Ct. 211.

The Lorain Steamship Company, the owner of the Vulcan, is entitled to a decree.

WHELESS et al. v. CITY OF ST. LOUIS et al.

(Circuit Court, E. D. Missouri, E. D. October 11, 1899.)

No. 4,234.

JURISDICTION OF FEDERAL COURTS—JURISDICTIONAL AMOUNT—JOINDER OF COMPLAINANTS.

Under the settled rule that distinct demands or liabilities cannot be aggregated for the purpose of making up the amount necessary to give jurisdiction, although such rights or liabilities arise out of the same transaction, the owners in severalty of lots abutting on a city street cannot by joining as complainants maintain a suit in a federal court to enjoin the city from making an assessment against such lots, where the assessment against the property of no one complainant will equal $2,000; and the rule is the same whether the assessment has been levied, or is merely threatened.[1]

On Demurrer to Plea to the Jurisdiction.

Joseph Wheless and Lee W. Grant, for complainants.

B. Schnurmacher, C. Claflin Allen, and Kehr & Tittman, for defendants.

ADAMS, District Judge. This is a bill to restrain the city of St. Louis and the president of the board of public improvements of the city from making an assessment and levying the same against the property abutting on Whittier street, between Washington avenue and Finney avenue, to pay the cost and expense of paving that part of Whittier street. It is alleged that the defendants are proceeding to improve that part of the street under and pursuant to the provisions of the charter of the city, an ordinance passed by the municipal assembly of the city, and a contract made between the city and the defendant the Gilsonite Roofing & Paving Company, whereby assessments are contemplated and intended to be made against abutting property, not according to the benefits which the property receives as a result of the improvements, but in the arbitrary proportion which the linear feet of each lot fronting or bordering on the improvement bear to the total number of linear feet so bordering thereon; that under the provisions of the charter, ordinance, and contract, the complainants' property bordering on the street is made subject to a tax or charge without due process of law, and in violation of the fourteenth amendment of the constitution of the United States. There are several complainants in this case, each owning separate lots abutting the street, but none of them liable to be assessed for an amount equal to $2,000, the minimum jurisdictional amount of this court in such cases. The amounts which the property of all the complainants are liable to be assessed, according to the averments of the bill, aggregated together, largely exceed $2,000. There is no showing by the bill that any of the complainants own or are interested in any of the other lots, except that which it is averred he himself

[1] As to jurisdiction of circuit courts as determined by the amount in controversy, see note to Auer v. Lombard, 19 C. C. A. 75, and, supplementary thereto, note to Tennent-Stribling Shoe Co. v. Roper, 36 C. C. A. 459.

owns. In other words, the bill shows that the complainants have several interests, each according to his ownership of the property abutting the improvements, and in no sense a joint interest in all the lots. The question is whether this court has jurisdiction to hear and determine this controversy. This question has received the consideration of the supreme court of the United States in many cases, and, as a result of them all, the following proposition may be considered as settled:

"If several persons be joined in a suit in equity, * * * and have a common and undivided interest, though separable as between themselves, the amount of their joint claim or liability will be the test of jurisdiction. But where their interests are distinct, and they are joined for the sake of convenience only, and because they form a class of parties whose rights or liabilities arise out of the same transaction, * * * such distinct demands or liabilities cannot be aggregated together for the purpose of giving this court jurisdiction. * * *" Clay v. Field, 138 U. S. 464, 11 Sup. Ct. 419, and cases there cited.

Cases in which parties may aggregate their demands for jurisdictional purposes are illustrated by Shields v. Thomas, 17 How. 3, and other cases referred to in the leading case of Gibson v. Shufeldt, 122 U. S. 27, 7 Sup. Ct. 1066. The other class of cases in which complainants are not allowed to aggregate their demands for jurisdictional purposes are illustrated by Ex parte Baltimore & O. R. Co., 106 U. S. 5, 1 Sup. Ct. 35, and a large number of cases therein referred to, and also by cases cited and commented upon in Gibson v. Shufeldt, supra. It does not seem necessary to discuss or distinguish between these many cases. It will be found that they enforce the distinction already pointed out. The question, therefore, now before the court for determination is, to which class does the case now under consideration belong? In my opinion, it clearly belongs to the class last mentioned. It is a case in which many parties may be proper, but not necessary. The whole relief to which all claim to be entitled could as well be secured at the suit of any one of them. In other words, the controversy is several in its nature, in its object, and in its result. The right to be protected is several and individual. The wrong to be redressed is personal, and not collective in any sense. The matter in controversy between complainant Wheless and the city of St. Louis is one which concerns Wheless alone, and the right of the city of St. Louis to take his property, and the right to the tax which it might impose, is in no manner dependent upon whether the city proceeds against any one or more of the complainants in this case. It may be, and undoubtedly is, true that some of the facts available to Wheless may also be available to complainant Barnhart,—in other words, that their rights or liabilities arise out of the same transaction, or the same alleged unlawful action threatened to be taken by the defendants, and that their rights may be affected by the same facts,—but these circumstances do not entitle them to aggregate their demands for jurisdictional purposes. Clay v. Field, supra.

In reaching a conclusion with regard to the correct principles to be applied in this case, I have been very materially aided by the fact that the supreme court of the United States has, in the case of Ex

parte Baltimore & O. R. Co., supra, and in the case of Gibson v. Shufeldt, supra, critically considered all of the many cases before that time passed upon by them relating to this subject; and, in recurring to the opinions in these two cases, it is found that the cases of Shields v. Thomas, 17 How. 3; Market Co. v. Hoffman, 101 U. S. 112; The Connemara, 103 U. S. 754; The Mamie, 105 U. S. 773,—upon which complainants' counsel rely, have been judicially determined to have no application to cases like the present. They are all classified by the supreme court as belonging to the cases where the controversies are about matters in which the several complainants were interested collectively under a common title, and for that reason proper cases for the aggregation of claims on the part of numerous complainants in order to make up the jurisdictional amount. It is also found that the cases last referred to as relied upon by complainants' counsel are distinguished from the other class of cases in which the cause of action grows out of the same transaction merely, involving no common title or undivided interest, such as Seaver v. Bigelows, 5 Wall. 208, Paving Co. v. Mulford, 100 U. S. 147, and Russell v. Stansell, 105 U. S. 303; so that, if any particular expressions are found in any of the first-mentioned series of cases which might be seized upon as seeming authority for the contention of the complainants, it must be borne in mind that all those cases have been classified by the supreme court as belonging to a class not like that before the court. In this connection, and for the same purpose, see, also, Henderson v. Wadsworth, 115 U. S. 264, 6 Sup. Ct. 40. Although I do not think it necessary, as already stated, to separately consider the great array of cases bearing on this subject, there are two or three of them which seem to me to be so entirely apposite to the facts in the case under consideration, that I deem it best to refer to them somewhat more particularly.

In the case of Hawley v. Fairbanks, 108 U. S. 543, 2 Sup. Ct. 846, several persons, who were owners of bonds of the town of Amboy, Ill., united as relators in an application to the circuit court of the United States for a mandamus requiring the county clerk to compute and assess upon all the taxable property in the town a sufficient sum to pay the judgments obtained by the relators. One of the relators had a demand in excess of the jurisdictional amount. None of the others had a demand equal to the required jurisdictional amount. The trial court awarded a writ of mandamus, directed to the county clerk, commanding him to extend upon the tax collector's book of the town a sufficient sum to pay each of the several judgments held by the relators. To reverse that judgment a writ of error was taken to the supreme court of the United States. The court say:

"We are met at the outset with a motion of the defendants in error to dismiss the writ in this case on the ground that the several judgments proceeded upon below cannot be united to give jurisdiction."

The court sustained the motion as to all except one, who had an amount which was sufficient, and remarked as follows:

"In the present case distinct causes of action in favor of distinct parties were united, for convenience and to save expense in one suit, and distinct orders were made in favor of each one of the several judgment creditors."

It seems to me that the same argument which is made by counsel for the complainants in this case, if sound, would have applied to that case. In that case, it is true, there was not an attempt to enjoin the collection of taxes, but there was an attempt to enforce the collection of a tax. So far as the town of Amboy was concerned, it was one tax which was sought to be enforced, just as in the case now before the court, so far as the city of St. Louis is concerned, it is one tax that is sought to be enjoined; and, if the total of the tax sought to be collected in the Hawley Case was not considered in determining the jurisdiction of the court, it is not apparent how the whole amount of the tax sought to be enjoined in the case at bar can be considered in determining the jurisdiction.

In the case of Russell v. Stansell, 105 U. S. 303, the controversy arose over the action of Stansell in securing from the levee board of Mississippi district No. 1 an assessment of taxes for the collection of a judgment before that time obtained by Stansell against the levee board. It was claimed that the proceedings resulting in the assessment were illegal and unjust, and certain individuals who were assessed in small amounts, underneath the jurisdiction of the court, brought a bill to enjoin the further proceedings on the part of the board for the collection of the tax. It appeared in that case, as in this, that no single individual among all the parties complainant could in any event be made liable for an amount equal to the jurisdictional amount required for an appeal. On the presentation of the petition the court granted a preliminary injunction, but on final hearing the injunction was dissolved and the petition dismissed. From the last order an appeal was taken to the supreme court of the United States. The appellee, Stansell, moved to dismiss because the amount in dispute between him and any one of the several persons charged with the payment of the assessment was less than $5,000, the jurisdictional amount of the supreme court of the United States. The court in its opinion in that case say:

"While the appellants and those whom they have chosen to represent are all interested in the question on which their liability to the appellee depends, they are separately charged with the several amounts assessed against them. There is no joint responsibility resting upon them as a body. The proceeding on his [Stansell's] part was to require each of the several landowners of the levee district to pay his separate share of the debt that had been established against the district. The recovery was against each owner separately. While the appellants were permitted, for convenience and to save expense, to unite in a petition setting forth the grievances of which complaint was made, their object was to relieve each separate owner from the amount for which he personally, or his property, was found to be accountable. An injunction, if granted, would necessarily prevent the appellee from collecting from each owner the amount for which he was separately liable. It is clear that under the rulings in Paving Co. v. Mulford, 100 U. S. 147; Seaver v. Bigelows, 5 Wall. 208; Rich v. Lambert, 12 How. 347; Stratton v. Jarvis, 8 Pet. 4; and Oliver v. Alexander, 6 Pet. 143,—such distinct and separate interests cannot be united for the purpose of making up the amount necessary to give us jurisdiction on appeal."

It is clear—and seems to have been so conceded by counsel on the argument of this case—that the principles governing the right of an appeal to the supreme court of the United States, in so far as the

amount is concerned, requisite to confer jurisdiction upon the supreme court of the United States in such appeal, are the same as those involved in considering the amount requisite to give jurisdiction to this court in an original proceeding. Such being the case, the authority of Russell v. Stansell, supra, seems to be entirely applicable and controlling here. In the case now under consideration several persons unite in a petition, just as they did in the Russell Case, setting forth the grievances of which they complain. The object in this case, as it was in that, is to relieve each separate owner from the amount for which he personally, or his property, may be found accountable. And inasmuch as it appears that no one of the complainants is liable, or can be made liable, by the proceeding against which they complain, in an amount equal to $2,000, this court, following the doctrine of the supreme court, has no jurisdiction, and can afford no relief.

It was suggested in argument that a different rule is applicable to a case where no assessment has been in fact made, from that which is applicable to a case where an assessment has already been made, like the Russell Case. I am not able to appreciate the force of this distinction. In either of such cases the purpose sought to be accomplished is to declare the proceedings about to be taken, or which have been taken, to enforce a payment of certain taxes, illegal and unwarranted in the law; and, in my opinion, it makes no difference in the applicatory principles whether the defendants have taken one of the initial steps towards consummating the alleged illegal act of subjecting complainants' property to an unlawful charge, or whether they have taken none of them, but are threatening and intending so to do.

Counsel for complainants rely specially upon the cases of Davies v. Corbin, 112 U. S. 36, 5 Sup. Ct. 4, and Brown v. Trousdale, 138 U. S. 389, 11 Sup. Ct. 308. Concerning the first of these cases, it appears that the chief justice, who wrote the opinion, in reaching a conclusion found and held that all the relators claim under one and the same title, namely, the levy of taxes already made expressly for their benefit, and therefore that they, and each and all of the relators, have a common interest in the tax; and, inasmuch as it was immaterial to the collector whether he paid it to one or another of the complainants, the chief justice properly classifies this case with those of Shields v. Thomas, supra, and other cases in which aggregation of claims may be made for jurisdictional purposes. In the other of the cases so relied upon the chief justice, in delivering the opinion of the court, properly stated that the main question at issue was the validity of the bonds, and that involved the levy and collection of taxes for a series of years to pay the interest thereon, and finally the principal thereof, and not the mere restraining of a tax for a single year, and for this reason held that the rule applicable to complainants each claiming under a separate and distinct right in respect to a separate and distinct liability contested by the adverse party was not applicable to that case.

As a result of all the cases, and especially by the authority of the cases of Hawley v. Fairbanks, supra, and Russell v. Stansell, supra,

I am of the opinion that the court has no jurisdiction in the present case. It results from this holding that the demurrer to the plea to the jurisdiction of the respondents must be overruled.

GUARANTEE SAVINGS, LOAN & INVESTMENT CO. v. ALEXANDER et al.

(Circuit Court, D. South Carolina. July 26, 1899.)

BUILDING AND LOAN ASSOCIATION MORTGAGES—USURY—PLACE OF CONTRACT.

A resident of South Carolina made application through a local agent for membership in a building and loan association having its place of business in Washington, D. C., for the purpose of obtaining a loan from said association. The application was forwarded to Washington, where it was accepted, and the certificates for shares issued. An application for a loan was made in a similar manner, was accepted in Washington, where the notes were made payable, and the loan was secured by mortgage on real estate in South Carolina. *Held*, there being at the time no statute on the subject in South Carolina, that the contract was a Washington contract, and not subject to the usury laws of South Carolina, and, being valid, and not usurious, under the laws of the District of Columbia, the mortgage would be enforced.

In Equity. This was a suit in equity for the foreclosure of a mortgage, the defense being a plea of usury.

Dargan & Coggeshall and Willcox & Willcox, for complainant.
Boyd & Brown, H. E. Young, and E. O. Woods, for defendants.

SIMONTON, Circuit Judge. This bill has been filed for the foreclosure of a mortgage on real estate situate in the town of Darlington, S. C. The complainant is a corporation created by the laws of the state of West Virginia, originally under the name of the Guarantee Building & Loan Investment Company, which name, however, was changed to that in the title of this case. Its principal place of business is in the city of Washington, in the District of Columbia. This corporation is a building and loan association in this respect: The maturity of the contract is guarantied to be 10 years from its date, and is not dependent upon the business or on the termination of the existence of the company. The principal defendant, a citizen of the state of South Carolina, resident in Darlington, being desirous of the privilege of borrowing money from the complainant, applied for such membership, and subscribed for 30 shares of capital stock in the corporation. Under the terms of the subscription she agreed to pay each month for 120 months the sum of 50 cents per share, and also to abide by the rules, regulations, and conditions in the by-laws of the corporation. Upon fulfillment of this agreement, the company guarantied to pay her at the end of this period the matured value of the said stock, to wit, $100 per share. She was admitted into the corporation, paid the sum of $30 admission fee, and for two months paid the 50 cents per share on each of the 30 shares of stock. Carrying out her purpose on becoming a corporator, she applied to the complainant for a loan. Being the subscriber for 30 shares, she could have applied for $3,000.

For some reason, satisfactory to both parties, she applied for $2,500, and her holdings of stock were reduced from 30 to 25 shares. The applications for the stock and for the loan were made through an agent of the company resident in Darlington, the appointee of a local board; were by him transmitted to the officers of the company in Washington, D. C., and were considered and determined upon by them, and only after such determination went into effect. In the by-laws, rules, and regulations of this company a loan is treated as an advance of the prospective paid-up value of the shares. When such loan has been obtained, the subscriber borrowing must give security for the return thereof at the end of 120 months; must also secure the payment of interest thereon in monthly installments at the rate of 6 per cent. per annum; must also secure the payment of a premium for obtaining said advance in monthly installments for 120 months, at the rate of 6 per cent. per annum; and the same security must protect the monthly payments upon the shares of stock, which shares must also be assigned as collateral security for the loan. The defendant obtained the advance of $2,500 on the 25 shares retained by her, executed 119 notes, with her husband as surety, each for $37.50, the first of which was due and payable at the office of the company in Washington, D. C., on the first business day in January, 1895, and the others, for the same amount, falling due successively on the same days in each successive month thereafter. The $37.50 was made up by the 50 cents on each share, in all $12.50; by the monthly installments for premium at the rate of 6 per cent. per annum, $12.50; and the monthly increments of interest at the same rate, $12.50. Her shares of stock were assigned as collateral security, and then, as final security for all the advance, she executed the mortgage set out in an exhibit in the pleadings. The mortgage provided for the payment of the principal (share payments), interest, and premium on the advance represented in these 119 notes, all fines and penalties imposed pursuant to the by-laws, all taxes accruing on the property, and all premiums of insurance,—the amount of which insurance was fixed at $2,500. If the mortgagor did not pay any tax or premium of insurance, the company mortgagee could do so, and hold for its reimbursement the mortgage as security. The mortgage was duly executed and recorded. The mortgagor paid six of these notes, and then made default, paying no other. She also omitted to pay the taxes on the property for the year 1897–98, and also a premium on the policy of insurance. Thereupon this bill of foreclosure was filed, to which Mrs. Alexander and her husband and certain lien creditors were made parties defendant. The answers are in. That of the principal defendant, Mrs. Minnie C. Alexander, admits the main facts, and sets up the plea of usury. This is the question in the case, is this contract usurious? The complainant is the creature of the laws of West Virginia. Its place of business is in Washington, D. C. The defendant resides in South Carolina. The contract was negotiated through an agent of the company resident in Darlington, the residence of Mrs. Alexander, and the notes which were paid were paid to him. The mortgage is dated December 1, 1894. Under its

charter the complainant had the right to make the contract in question. By the laws of West Virginia such a contract is not usurious. Code W. Va. 1891, c. 54, par. 26. In the District of Columbia, where the company has its principal place of business, a contract like this, securing premiums for a loan by an association of this character, is not usurious. 27 Stat. c. 321, par. 1; Mulloy v. Association, 2 McArthur, 594. Under the law of South Carolina, as laid down by its supreme court, such a contract as this, made in this state, would be held usurious. Association v. Bollinger, 12 Rich. Eq. 124; Association v. Dorsey, 15 S. C. 462; Buist v. Bryan, 44 S. C. 124, 21 S. E. 537; Mearres v. Finlayson (S. C.) 32 S. E. 986. The law of South Carolina seems to be this: A stockholder in a building and loan association, so long as he holds his stock simply as an investment, can go on, and pay his monthly dues, subject to the by-laws of the company. When the period for distribution comes, he can enjoy all the privileges given by his stock subscription. But if, not content with waiting on his investment, he obtains from the company money in præsenti,—anticipates the probable value of his stock,—he stands in the position of an ordinary borrower. If the corporation advances this money, charges a lawful rate of interest thereon, and, in addition thereto, charges a premium, either by taking it out of the money lent or advanced or in installments during the currency of the loan, and thereby obtains for the use of the money an amount greater than a lawful rate of interest, this will subject the loan to the plea of usury. If the contract of loan be between citizens or residents of South Carolina,—be a South Carolina contract,—it is subject to the law of that state against usury. If, however, it be not a South Carolina contract, and if the law of the state in which the contract was made permit loans of that character, then, by comity, the courts of South Carolina will enforce the contract notwithstanding. Association v. Vance, 27 S. E. 274, 29 S. E. 204, and 49 S. C. 402; Tobin v. McNab, 30 S. E. 828, 53 S. C. 73. If the contract be made in another state, and by the laws of that state would be held usurious, then the courts of South Carolina, in an action brought upon it, would apply the laws of South Carolina, and would subject the lender to the same penalties as would be enforced were it a South Carolina contract. Meares v. Finlayson, 55 S. C. 105, 32 S. E. 986. The act of 1898, making all contracts with building and loan associations South Carolina contracts, does not apply to contracts like this at bar, made before the passage of that act. Tobin v. McNab, supra; Association v. Powell, 55 S. C. 316, 33 S. E. 355. The decisive question in the case therefore is, was this contract made in South Carolina or in the District of Columbia? The application for membership in the complainant's corporation was made with the intent and purpose of obtaining this loan. This application was made to the company at its office in Washington, was considered and granted there. The certificate of stock—the result of the application, and the basis of the loan—was signed and issued in Washington. The application for the loan was prepared in South Carolina, but it was forwarded to the company in Washington, to be passed upon. Until it was passed

upon and accepted, it was no contract. It was accepted in Washington, and so the contract was completed and made in Washington. 7 Am. & Eng. Enc. Law, 136; Shattuck v. Insurance Co., 4 Cliff. 598, Fed. Cas. No. 12,715. The notes given for the loan were made payable at the company's office in Washington on the first business day in each successive month; that is to say, if the first calendar day were a holiday, then on the first business day thereafter. As public holidays are largely matters of local law, the maturity of those notes was made dependent on the local law of the District of Columbia. The checks for paying the loan were drawn in and sent from Washington, and were made payable in New York. Mrs. Alexander and her husband, her agent in this behalf, must be presumed to have known and to have understood the natural result of their own acts. It seems impossible to escape the conclusion that this contract was a contract made in the District of Columbia, and not a South Carolina contract. Association v. Bedford, 88 Fed. 15.

It would enlarge this opinion beyond a reasonable length to go into the wilderness of cases upon the question of the lex loci contractus. The conclusion reached is sustained in principle by the supreme court of the United States in Pritchard v. Norton, 106 U. S. 124, 1 Sup. Ct. 102, affirmed in Coghlan v. Railroad Co., 142 U. S. 101, 12 Sup. Ct. 150, and is on all fours with the decision of the supreme court of Pennsylvania in Bennett v. Association, 177 Pa. St. 233, 35 Atl. 684; and it is the same conclusion which was reached by the supreme court of South Carolina in cases like that at bar in Association v. Vance, 27 S. E. 274, 29 S. E. 204, and 49 S. C. 402, and in Tobin v. McNab, 30 S. E. 828, 53 S. C. 73. The plea of usury is overruled. It is ordered that the special master compute the amount due in accordance with this opinion upon the mortgage set out in the pleadings, and report the same to this court, upon which complainant may take decree for foreclosure.

DECK v. WHITMAN et al.

(Circuit Court, E. D. Tennessee, S. D. October 14, 1899.)

1. FORECLOSURE OF MORTGAGES—MODE OF CONVEYING TITLE—POWERS OF FEDERAL COURTS.

   The established general practice in this country, in judicial sales upon foreclosure, is to direct sale to be made by a master named in the decree, and, when the sale upon report is confirmed, to order a conveyance of the property by the master to be delivered to the purchaser; and courts of the United States, in adopting such practice, are not restricted by the maxim that jurisdiction in equity is ordinarily exercised in personam, and their power confined to the ordering of a conveyance by the parties, a foreclosure suit being substantially a proceeding in rem.[1]

2. SAME—ADOPTION OF STATE PRACTICE.

   In a suit for the foreclosure of a mortgage upon real estate situated within the jurisdiction of the court, it is the right and within the power of a circuit court of the United States, if not its duty, to conform to any statutes of the state regulating the remedy for the enforcement of the mortgage contract.[2]

---

[1] A mortgagee, selling under his power of sale, can make a good title to the purchaser without the concurrence of the mortgagor. Corder v. Morgan (1811) 18 Ves. 344; 4 Kent, Comm. p. 147.

[2] As to mortgage foreclosures in the federal courts, see note to Seattle, L. S. & E. Ry. Co. v. Union Trust Co., 24 C. C. A. 523.

This was a suit in equity for the foreclosure of a mortgage. On settlement of decree after confirmation of sale.

Garnett Andrews, for complainant.
J. Hodge McLean, for defendants.

CLARK, District Judge. The bill in this cause was brought for foreclosure of a mortgage. The real estate on which the mortgage rested has been regularly sold by the special master pursuant to the terms of the decree, and, motion to confirm having been allowed, the question of proper provisions in the decree, as to the method of passing title to the purchaser, has been suggested by the special master.

The practice in this court for years has been in substantial conformity with the statutes of the state regulating the practice of courts of chancery in sales upon foreclosure. The statutory provisions found in Shannon's Code of 1896 are as follows:

"Sec. 6301. The decree may devest the title to property, real or personal, out of any of the parties, and vest it in others, and such decree shall have all the force and effect of a conveyance by such parties, executed in due form of law.

"Sec. 6302. The court may also appoint a commissioner to execute all necessary conveyances, releases, and acquittances, either in his name or in the name of the parties, as the court may think proper; and the instrument so executed will be as valid as if executed by the party.

"Sec. 6303. If the decree direct a conveyance, release or acquittance to be made, and the party against whom the decree is rendered fails or refuses to execute the same in the time specified in the decree, or in a reasonable time, if no particular time is thus specified, the decree operates in all respects as if the conveyance, release, or acquittance was made."

It is well known that there is now pending before the supreme court of Tennessee a case which involves the question of the power of this court, by decree, to devest and vest title, and to direct conveyances, by a special commissioner or master appointed for that purpose. The contention before that court is that a circuit court of the United States is without power to devest or vest title, or to pass title, by directing a conveyance in substantial conformity to the statutory regulations of the state upon that subject.

It has been the established practice of the courts of the United States in this district to execute decrees of sale and pass title in this method, which is the practice now generally prevailing in this country. The supreme court of this state having intimated a doubt as to the power of this court, by decree, to devest and vest title, or to order a conveyance, by special master or commissioner, the deservedly high character of that court gives to the question at once a serious import. It is said that the contention before that court is that the practice in the circuit courts of the United States is regulated by the practice of the high court of chancery in England, and that, under the English practice, power exists only to order a conveyance by the parties to the suit. In the examination of such a question, the distinction between questions of equity jurisdiction and jurisprudence and those of practice must be closely observed. The equity jurisdiction conferred on federal courts, in

the absence of an act of congress, is the same as that of the high court of chancery in England at the time of the adoption of the judiciary act of 1789. Pennsylvania v. Wheeling & B. Bridge Co., 18 How. 462; Fontain v. Ravenel, 17 How. 384; McConihay v. Wright, 121 U. S. 206, 7 Sup. Ct. 940. And the test of equity jurisdiction in the courts of the United States, in the absence of an act of congress, is determined according to the English system, as administered in 1789. Id.; Alger v. Anderson, 92 Fed. 696; Mississippi Mills v. Cohn, 150 U. S. 202, 14 Sup. Ct. 75.

In relation to the practice of the federal courts, the supreme court of the United States, under authority conferred by section 917 of the Revised Statutes, among other rules promulgated (in 1842) rule 90, which provides that:

"In all cases where the rules prescribed by this court or by the circuit court do not apply, the practice of the circuit court shall be regulated by the present practice of the high court of chancery in England, so far as the same may reasonably be applied consistently with the local circumstances and local conveniences of the district where the court is held, not as positive rules, but as furnishing just analogies to regulate the practice."

In regard to this rule, and its effect, the supreme court of the United States, in a note by the court to Thomson v. Wooster, 114 U. S. 112, 5 Sup. Ct. 792, said:

"Reference is made to the first edition of Daniell (published in 1837), as being, with the second edition of Smith's Practice (published the same year), the most authoritative work on English chancery practice in use in March, 1842, when our equity rules were adopted. Supplemented by the general orders made by Lords Cottenham and Langdale in August, 1841 (many of which were closely copied in our own rules), they exhibit that 'present practice of the high court of chancery in England' which, by our ninetieth rule, was adopted as the standard of equity practice in cases where the rules prescribed by the court, or by the circuit court, do not apply. The second edition of Mr. Daniell's work, published by Mr. Headlam in 1846, was much modified by the extensive changes introduced by the English orders of May 8, 1845, and the third edition by the still more radical changes introduced by the orders of April, 1850, the statute of 15 & 16 Vict. c. 86, and the general orders afterwards made under the authority of that statute. Of course, the subsequent editions of Daniell are still further removed from the standard adopted by this court in 1842; but, as they contain a view of the later decisions bearing upon so much of the old system as remains, they have, on that account, a value of their own, provided one is not misled by the new portions."

It has been often decided, in conformity to the very terms of the rule, that the practice of the high court of chancery in England is to be applied, not as controlling, but as furnishing just analogies to regulate, the practice in courts of the United States, where the subject is not regulated by an act of congress or a rule promulgated by the supreme court. So far as the English practice is regulated by statutes or orders of court subsequent to the date of rule 90, such practice does not control the courts of the United States. Changes introduced into the English system of practice subsequent to the above date have not been adopted, and furnish no rule for the practice of this court.

The courts of the United States possess jurisdiction of a foreclosure suit only when between citizens of different states or when other ground of federal jurisdiction exists. It is obviously just

and proper that these courts, in administering the equitable remedy in foreclosure suits affecting real estate, should enforce the rights of both parties to the mortgage contract, as defined and regulated by statute of the state and as enforced by the state chancery courts, and for the same reason should adopt substantially the same practice as to the method of making the decree effective, so far as this may be done.

A lack of substantial conformity with statutory regulations of the state, in the foreclosure of a mortgage of real estate, would, or might, result in something more or less than the rights of the parties, as understood when the contract was executed. It would introduce "discordant elements" and confusion, the real intention of the parties being effectuated in one set of courts and denied in the other.

It must be borne in mind that the method of strict foreclosure was the ancient, and, in general, only, practice in England. By this remedy the equity of redemption existing in the mortgagor, after default in payment, was cut off or foreclosed, leaving the absolute title in the mortgagee, according to the conveyance. In such a case, the decree of the court did not affect the legal title, but left that just as vested by the mortgage conveyance, and merely extinguished the equity of redemption. Chancellor Kent (in 1832), speaking of this method of foreclosure, said:

"This is the English practice to this day, though sometimes the mortgagee will pray for, and obtain, a decree for a sale of the mortgaged premises, under the direction of an officer of the court, and the proceeds of the sale will, in that case, be applied towards the discharge of incumbrances according to priority." 4 Kent, Comm. 181.

Under this practice, the court was not concerned with the passing or transfer of title, there being no sale.

The limited extent to which jurisdiction to order a sale was exercised in exceptional cases was hardly sufficient to make the question of passing the title very serious. The method would necessarily vary somewhat with the special facts and conditions, which made the exception. The difficulty in the method of ordering conveyances executed by the parties to the suit, as applied to married women, infants, lunatics, and persons residing beyond the territorial jurisdiction of the court, or absconding, is quite evident; and, although this may be regarded as the original practice, it was cumbersome, costly, and ineffectual, and has never been generally adopted or in vogue in this country. In justification of such a practice, it may be remarked that the court of equity was constantly undertaking to maintain a distinction between its decree and methods of execution and the judgment at law and process thereon. The judgment at law operated in its execution against property, while, agreeably to the ancient maxim, the decree in equity was executed by process in personam. This maxim was resorted to, also, as a basis for the proposition that, to entitle a court of equity to maintain a bill for the specific performance of a contract respecting land, it was not necessary that the land should be situated within the jurisdiction, but that, with the parties resident within the territorial jurisdiction of the court, per-

formance might be decreed in relation to land situate in a foreign country. This self-imposed limitation became to an extent an obstruction to the court's power to model its decrees and process to meet the requirements of a case,—a power which it has otherwise always claimed and exercised as a distinguishing feature of that court. It is to be remarked, further, that the practice was not of statutory origin, but such as the court adopted for itself. It is to be remembered, too, that the object of such methods as attachment for contempt, etc., was to compel the execution of a conveyance and a transfer of title. The methods, therefore, were indirect, and would be entirely unsatisfactory, in the light of the direct, less costly, and more efficacious methods of our own time.

In 1 Daniell, Ch. Prac. (1837) p. 228, it is said that, where an estate of an infant was decreed to be sold, a day was given the infant to show cause, after attaining full age, and a direction was generally inserted in the decree that in the meantime the purchaser should enjoy the estate against the infant until he attained such age, and that a purchaser buying such estate under such a decree must accept the order of the court for a future conveyance as a sufficient security. In the later and sixth edition of the same work, it is declared that:

"Formerly, a decree in a court of equity, unless it was for land, operated only in personam, and the only method of enforcing it was by process of contempt against the party disobeying it, under which the party, if arrested, might be kept in prison till he obeyed." 2 Daniell, Ch. Prac. p. 1032.

It is further pointed out that, in case a party refusing to obey the decree could not be arrested, or, having been arrested, remained in prison without obedience, a writ of sequestration might issue putting a commissioner in possession of the property of the defendant, and the rents and profits of his real estate, until he had cleared his contempt; and the sequestration process, it is said, had become the usual course of proceeding. The method of compelling obedience to a decree in England was originally like that for compelling appearance or answer, and was limited to process of contempt. Adams, Eq. pp. 393, 324. "It is obvious," says the critical author of the work just cited, "from the nature of the process of contempt, that, if a defendant absconded so as to avoid its operation, or if, when arrested under it, he perversely refused to submit, there were no means of compelling obedience; and, on the other hand, if a defendant in custody under process were incapable of doing the required act, his committal was practically imprisonment for life. * * * The inefficacy of the process of contempt for compelling a perverse defendant to obey has been already commented on, as well as the remedies which have been provided in respect to appearance and answer." Id. pp. 326, 394. The observations thus made related to the practice as it was down to 1841, with only slight changes in the remedies by statute. The English treatise by Adams, recognized as a work of first merit, was under preparation from 1842 to 1848, and published in 1850. It would be surprising to find that the equity courts of the United States, after more than half a century of progress, are adhering exclusively to, and restricted by, a method of procedure thus criticised in its own time and country, and long practically aban-

doned in England. The inefficacy of such methods becomes strikingly apparent in view of the increased extent to which mortgage contracts enter into business transactions of the largest magnitude in this country, and the extent to which the equity courts of the United States are called upon to enforce such contracts by judicial sale.

The reason why sale upon foreclosure could not be had is stated in Adams, Eq. (8th Ed.) pp. 119–121, as follows:

"It must be observed that the right of the mortgagee on such a bill is a right merely to foreclose the equity, and does not extend to warrant a sale; for, although a sale would be often more convenient than a foreclosure, yet it is not stipulated for by the contract, and the court has no more authority to sell the mortgaged estate for payment of the debt than to sell the mortgagor's other estates for the same purpose. * * * In Ireland and some of the American courts a different rule prevails, and the mortgagee may in all cases require a sale. If an express power of sale is given by the mortgage, such a power forms an additional remedy for the mortgagee, and does not interfere with his right to foreclose."

This method of foreclosure is commonly called "strict foreclosure," in contradistinction to the practice of equity foreclosure by judicial sale of the property for the payment of the debt, by which the mortgagor receives the benefit of the surplus, if any, in the proceeds of sale. The English system of strict foreclosure has never, as I have said, been generally adopted or followed in this country, in the courts of the states or the courts of the United States. At an early day in some New England states, and now in a few exceptional cases, the practice was and is followed. Whether due to the fact that no sale was stipulated for in the mortgage or not, the practice of strict foreclosure continued to be the general English practice down to the time of the chancery procedure act (called also "Chancery Improvement Act") of 1852 (15 & 16 Vict. c. 86), when power was conferred upon the chancery court to direct a sale on the hearing, in suit for foreclosure, upon the request of the mortgagee, mortgagor, or any subsequent incumbrancer, and the power of the court in this respect was further enlarged, by the Conveyancing and Law of Property Act of 1881, so as to extend the power of sale to redemption suits, enabling any person entitled to redeem to have an order of sale instead of redemption; but these changes in remedy and procedure in the English equity system have not, as stated, been adopted, and do not control or regulate the practice of the circuit courts of the United States. The present English practice is regulated by the conveyancing act of 1881 (which repealed the prior enactment), and by subsequent statutes and orders and rules. It would serve no useful purpose in this case to review this legislation, or to state, in detail, the existing English practice. The practice will be found fully stated in the standard English work on Vendors and Purchasers by Dart (6th Ed.; 1888) pp. 1313–1353. After pointing out the method of ordering conveyance by the parties to the suit with contempt process on refusal, the author gives the alternative modern method of dealing with the subject in this language:

"But the more usual course of proceeding, where a party to the suit refuses to execute, has been to treat such party as a trustee, within the trustee act

of 1850, and to obtain an order for a conveyance, or a vesting or releasing order having the effect of a conveyance; and this course may be adopted when the recusant party is a married woman, infant, lunatic, or mere tenant for life; and the mere decree, directing a sale and all proper parties to convey, makes the owner of the legal estate, if party to the suit, a trustee, within the act. Where property was sold in lots to several purchasers, it was held that each purchaser might separately petition for an order vesting the estate of an infant, and that the vendors must pay the costs. And now, where any person neglects or refuses to comply with a judgment or order directing him to execute any conveyance, the court may, on such terms and conditions as may be just, order that such conveyance shall be executed by such person as the court may nominate for that purpose, and the conveyance so executed will have the same effect as if the person originally directed to execute it had done so." 2 Dart, Vend. pp. 1347, 1348.

Under the existing practice in England, as a general rule, no party to the suit is allowed to bid for the estate without the previous permission of the court to do so; and in Mining Co. v. Mason, 145 U. S. 361, 12 Sup. Ct. 890, exception was taken to the sale, and error assigned on the ground that complainants in the cause had bid at the sale and become purchasers without obtaining previous permission of the court to do so, agreeably to the English practice. In overruling this objection, Mr. Justice Brewer, speaking for the court, said:

"The English practice does not obtain in this country. A sale made by a special master, under the directions of a court of chancery, is not a sale made by either of the parties to a litigation or under his direction. The master is a representative of the court, as a marshal or sheriff is in an action at law. He is not under the control of either party. He is not the agent of either to make the sale. At such public judicial sale, either party, as a rule, may bid. Richards v. Holmes, 18 How. 143; Smith v. Black, 115 U. S. 308, 6 Sup. Ct. 50; Allen v. Gillette, 127 U. S. 589, 8 Sup. Ct. 1331; Smith v. Arnold, 5 Mason, 414, 420, Fed. Cas. No. 13,004. In that case Judge Story said: 'In sales directed by the court of chancery, the whole business is transacted by a public officer, under the guidance and superintendence of the court itself. Even after the sale is made, it is not final until a report is made to the court, and it is approved and confirmed.'"

It would not be insisted that the courts of the United States are limited by the English remedy of strict foreclosure, as understood and defined, at the time of the adoption of the English practice, by rule 90; but such a result follows logically, if the contention before the supreme court is tenable. If this were so, the courts of the United States are without power, in the ordinary case, to do more than extinguish the right of redemption by the method of strict foreclosure. But in this country mortgages are executed, and have been from the earliest time, with power of sale, and the practice of strict foreclosure is entirely inapplicable, except in a few states and in a very limited class of cases. The mortgage in this country expressly providing for sale, and being regarded as security for the debt, the right to a judicial sale is an obligation or term of the contract. "It follows from the nature of the security, and arises upon its face, unless restrained by its terms." Railroad Co. v. Fosdick, 106 U. S. 68, 1 Sup. Ct. 10. To deny a sale would be a refusal to execute or enforce the contract. The decree requires a sale, and the practice of compelling conveyance by the parties, in a case where no sale is required, is not followed. In

relation to this point, see Miller v. Sherry, 2 Wall. 238, cited elsewhere herein. Such practice cannot, in the language of rule 90, "reasonably be applied consistently with the local circumstances and local conveniences of the district" where this court is held.

Power-of-sale mortgages are now in vogue in England, and wellnigh every mortgage contains the power of sale, and such a power, if not contained in the mortgage, is supplied by statute (Act 1860, superseded by Act 1881), unless the power is negatived or modified in the mortgage deed. The practice has changed accordingly. Mr. Justice Story, in the last edition of the Commentaries on Equity Jurisprudence, revised by the author and published in 1846, after his death, referring to the practice in England, and to certain special cases in which the rule of strict foreclosure was departed from, and a compulsory sale decreed, said:

"It is difficult to perceive any solid or distinct ground upon which these exceptions stand, which would not justify the courts of equity in England in decreeing a sale at all times when it is prayed for by the mortgagee, or when it would be beneficial to the mortgagor. The inconveniences of the existing practice of foreclosure in that country are so great that it has become a common practice to insert in mortgages a power of sale upon default of payment; and, although Lord Eldon at first intimated an opinion unfavorable to such a power as dangerous, it is now firmly established." 2 Story, Eq. Jur. § 1027.

The accepted doctrine in this country is that a court of equity, independently of statute, has jurisdiction to direct or decree a sale upon foreclosure. 2 Jones, Mortg. (5th Ed.) § 1573; 2 Story, Eq. Jur. §§ 1024–1026; Lansing v. Goelet, 9 Cow. 346; 9 Enc. Pl. & Prac. p. 262. And this is done regardless of any distinction whether the power of sale is contained in the mortgage or not. And it would seem to be elementary that, when the court is vested with jurisdiction to foreclose the mortgage and make a sale, this jurisdiction carries with it the power to adopt all forms and methods of practice necessary to the effective exercise of that jurisdiction.

In Tennessee, at an early day, the courts refused to accept or administer the harsh remedy of strict foreclosure, as known to the English practice. In the early case of Hord v. James (1805) 1 Overt. 201, the supreme court of Tennessee, rejecting this ancient method of foreclosure said:

"Consistently with the law, as laid down in all the modern books, we cannot vest the title in the complainant. The land, or part of it, must be sold at public sale, and the money applied to the payment of the debt and interest. The property may be of much greater value than the debt and interest, and it would be most unjust to vest the whole of it in the plaintiff, when the mortgage was only intended to secure a debt. It would be equally unjust to decree the property in full satisfaction, for it may be of less value than the debt and interest. Let it be sold, observing the directions of the acts of assembly in relation to the sale of real property under execution."

It will be noticed that in this case the court recognized the power to make the jurisdiction effective by ordering a sale upon foreclosure in accordance with the statutory regulation of sales upon execution.

In Williamson v. Berry (decided in 1850) 8 How. 545, Mr. Justice Wayne, discussing one of the points in the case, said:

"It involves what has been the practice in courts of equity, which, from long standing, habitual use, and uniform judicial acquiescence, has become law,—law in England, law in New York, law for the courts of equity of the United States, and law in every state of the Union, except as it may have been modified by the legislation of the states. The usual mode of selling property under a decree or order in chancery is a direction that it shall be sold with the approbation of a master in chancery, to whom the execution of the decree in that particular has been confided. It matters not whether the sale is public, or private, by a person authorized to make it. Not that the approbation of the master in either case completes a title to a purchaser. It is only the master's approval of the sale, and is one step towards a purchaser's getting a title. Before, however, a purchaser can get a title, he must get a report from the master that he approves the sale, or that he was the best bidder, accordingly as the sale may have been made either privately or at auction. That report, then, becomes the basis of a motion to the court, by the purchaser, that his purchase may be confirmed. Notice of the motion is given to the solicitors in the cause, and confirmation nisi is ordered by the court, to become absolute in a time stated, unless cause is shown against it. Then, unless the purchaser calls for an investigation of the title by the master, it is the master's privilege and duty to draw the title for the purchaser, reciting in it the decree for sale, his approval of it, and the confirmation by the court of the sale, in the manner that such confirmation has been ordered."

Is the conveyance prepared by the master to be executed by him or others? It might be said this precise point was left open by this statement of the practice, but, as the general law in this country is recognized as also that controlling in the courts of equity of the United States, the answer to the question suggested would not seem to be difficult.

In Lansing v. Goelet, 9 Cow. 346, Chancellor Jones, having first established the proposition beyond all reasonable question that jurisdiction to order a sale instead of strict foreclosure is original and inherent in equity, states the practice as follows:

"A judicial sale of the estate under the decree of the court, then, if the court has the power to make the decree, whether it be in form of a decree of sale preceded by a formal decree of foreclosure, or in the form of a decree for sale without a formal decree of foreclosure, effectually bars the right of the mortgagor to redeem; and the purchaser will hold it, under the title he acquires to it by virtue of the sale, and the conveyance he receives from the master, free and discharged from the equity of redemption. The purchase money then stands in the place of the estate, and will be applicable, as that was, first to the satisfaction of the debt to the mortgagee, and the overplus and residue, if any, to the use of the mortgagor; and, if the produce proves insufficient to satisfy the debt, he will remain personally liable for the deficiency.

"But the authority of this court to decree the sale of mortgaged premises for the satisfaction of the debt, which thus has its foundation in the principles of equity applicable to the contract of lender and borrower and the general jurisdiction of the court, is, moreover, recognized and sanctioned by the legislature. The eleventh section of the act concerning the court of chancery (1 Rev. Laws, p. 486) declares that all sales of mortgaged premises, under any decree of the court of chancery, shall be made, and deeds executed for the same, by one of the masters of the court; and that such deeds shall be as valid as if the same had been executed by the mortgagor and mortgagee, and shall be an entire bar against each of them, and their heirs, respectively, both in law and equity."

Substantially the whole of the first paragraph of this language taken from Lansing v. Goelet was adopted by the supreme court of the United States in Simmons v. Railway Co., 159 U. S. 288, 16 Sup. Ct. 1.

The power to adopt reasonable and suitable methods of practice in the exercise of a conceded jurisdiction is inherent in the court of equity, and in all courts, and statutes do not confer the power to adopt practice, but simply regulate that practice, so far as the statute, in terms, embraces the subject. It will be perceived that Chancellor Jones, in Lansing v. Goelet, was declaring the general practice in courts of equity in this country, which he said had been recognized and sanctioned by statute in the state of New York. The practice is regulated by statutes in many states. Of such enactments it is said:

"When provisions in detail are made on this subject, they are generally founded upon principles and rules of practice already established by courts of equity under the general jurisdiction they have always exercised of the subject, and the powers of these courts are only enlarged and defined by the statutes." 2 Jones, Mortg. (5th Ed.) § 1443.

In a recent work, by an author whose ability and long experience as United States District Judge qualify him to speak upon the subject, the practice of the courts of the United States in mortgage foreclosure and like cases is laid down as follows:

"Upon the filing of the report of a sale, a motion for the confirmation thereof should be filed, upon which the court will make an order that exceptions to the sale must be filed within a given time. If exceptions to such sale are filed, and for cause sustained, or if the court, of its own motion, deems the sale to be faulty in form, or inequitable in substance, the same will be set aside, and a resale be ordered. If exceptions are not filed, and cause to the contrary does not appear, the court, at any time after the expiration of the time for filing exceptions, may approve the report and confirm the sale, and order a conveyance of the property executed by the master to be delivered to the purchaser. If the sale is subject to redemption, the conveyance cannot be delivered until the expiration of the time of redemption. In such cases the master should execute a certificate of purchase, and deliver the same to the purchaser. Upon the expiration of the period of redemption, if redemption has not been made, a brief report showing the fact, with the proper master's deed, should be submitted to the court for its approval, and for the order of delivery." Shiras, Eq. Prac. (2d Ed.; 1898) p. 138.

As I have said, it is desirable, from any point of view, that the practice in the courts of the United States, in all that relates to foreclosure sales of real estate, should conform substantially to the remedy obtaining by statute in the courts of the state. The confusing and discordant results of different methods in this regard in the courts of the state and those of the United States within the state are obvious, and the right to adopt or follow substantially the state practice, as regulated by statute in this respect, in the courts of the United States, was declared in Brine v. Insurance Co., 96 U. S. 627. It was adjudged in that case that the statute of the state of Illinois securing to the mortgagor the right to redeem within 12 months after decree on foreclosure was as obligatory on the federal courts sitting in equity in that state as it was on the state courts, and that the rules of practice in the courts of the United States must be made to conform to the law of the state, so far as it was necessary to give full effect to this statutory right of redemption. Although this was the point under consideration, the doctrine laid down was much broader than the limits of

the particular question called for. Mr. Justice Miller, delivering the opinion of the court, said:

"It is denied that these statutes are of any force in cases where the decree of foreclosure is rendered in a court of the United States, on the ground that the equity practice of these courts is governed solely by the precedents of the English chancery court as they existed prior to the Declaration of Independence, and by such rules of practice as have been established by the supreme court of the United States, or adopted by the circuit courts for their own guidance. And treating all the proceedings subsequent to a decree which are necessary for its enforcement as matter of practice, and as belonging solely to the course of procedure in courts of equity, it is said that not only do the manner of conducting the sale under a decree of foreclosure, and all the incidents of such a sale, come within the rules of practice of the court, but that the effects of such a sale on the rights acquired by the purchaser, and those of the mortgagor and his subsequent grantees, are also mere matters of practice, to be regulated by the rules of the court, as found in the sources we have mentioned. On the other hand, it is said that the effect of the sale and conveyance made by the commissioner is to transfer the title of real estate from one person to another, and that all the means by which the title to real property is transferred, whether by deed, by will, or by judicial proceeding, are subject to, and may be governed by, the legislative will of the state in which it lies, except where the law of the state on that subject impairs the obligation of a contract; and that all the laws of a state existing at the time a mortgage or any other contract is made, which affect the rights of the parties to the contract, enter into and become a part of it, and are obligatory on all courts which assume to give remedy on such contracts. We are of opinion that the propositions last mentioned are sound; and, if they are in conflict with the general doctrine of the exemption from state control of the chancery practice of the federal courts, as regards mere modes of procedure, they are of paramount force, and the latter must, to that extent, give way. It would seem that no argument is necessary to establish the proposition that when substantial rights, resting upon a statute, which is clearly within the legislative power, come in conflict with mere forms and modes of procedure in the courts, the latter must give way, and adapt themselves to the forms necessary to give effect to such rights. The flexibility of chancery methods, by which it molds its decrees so as to give appropriate relief in all cases within its jurisdiction, enables it to do this without violence to principle. If one or the other must give way, good sense unhesitatingly requires that justice and positive rights, founded both on valid statutes and valid contracts, should not be sacrificed to mere questions of mode and form."

The doctrine of this case was reaffirmed in Langdon v. Sherwood, 124 U. S. 74, 8 Sup. Ct. 429. In that case the following section in the Code of Nebraska was under consideration:

"When any judgment or decree shall be rendered for a conveyance, release or acquittance in any court of this state, and the party or parties against whom the judgment or decree shall be rendered do not comply therewith within the time mentioned in said judgment or decree, such judgment or decree shall have the same operation and effect, and be as available, as if the conveyance, release or acquittance had been executed conformable to such judgment or decree." Code Civ. Proc. § 429b.

It will be noted that the similarity between this statute and the third method of transferring title provided for by the Tennessee act is quite close and striking. It was held that a judgment or decree rendered in the circuit court of the United States for the district of Nebraska, in respect to real estate situated in Nebraska, in conformity with this statute, operated to transfer the title to the estate which was the subject of the judgment or decree, upon the failure of the party to convey as ordered.

"We are of opinion," said Mr. Justice Miller, speaking for the court, "that, if this section of the Code be valid, it was the intention of the makers of it that a judgment and decree, such as the one before us, should have the same effect, where the parties directed to make the conveyance fail to comply with the order, as it would have had if they had complied, in regard to the transfer of title from them to the party to whom they were bound to convey by the decree. The language of this section of the Code hardly admits of any other construction. When the party decreed to make the conveyance does not comply therewith within the time mentioned in the judgment or decree, such judgment or decree shall have the same effect and operation and be as available as if the conveyance had been executed. The operation or effect here meant was the transfer of title, and it could not have been made any clearer if it had said that it should have the effect of transferring the title from the party who fails to convey to the one to whom it ought to be conveyed. This must have been the meaning, in the minds of the legislators. It was undoubtedly the ancient and usual course in such a proceeding to compel the party who should convey to perform the decree of the court by fine and imprisonment for refusing to do so. But inasmuch as this was a troublesome and expensive mode of compelling the transfer, and the party might not be within reach of the process of the court, so that he could be attached, it has long been the practice of many of the states, under statutes enacted for that purpose, to attain this object either by the appointment of a special commissioner who should convey in the name of the party ordered to convey, or by statutes similar to the one under consideration, by which the judgment or decree of the court was made to stand as such conveyance, on the failure of the party ordered to convey. The validity of these statutes has never been questioned, so far as we know, though long in existence in nearly all the states of the Union. There can be no doubt of their efficacy in transferring the title, in the courts of the states which have enacted them, nor do we see any reason why the courts of the United States may not use this mode of effecting that which is clearly within their power. The question of the mode of transferring real estate is one peculiarly within the jurisdiction of the legislative power of the state in which the land lies. As this court has repeatedly said, the mode of conveyance is subject to the control of the legislature of the state; and as the case in hand goes upon the proposition that the title had passed from the government of the United States, and was in controversy between private citizens, there can be no valid objection to this mode of enforcing the contract for conveyance between them according to the law of Nebraska. U. S. v. Crosby, 7 Cranch, 115; Clark v. Graham, 6 Wheat. 577; McCormick v. Sullivant, 10 Wheat. 192; U. S. v. Fox, 94 U. S. 315; Brine v. Insurance Co., 96 U. S. 627; Insurance Co. v. Cushman, 108 U. S. 51, 2 Sup. Ct. 236. We cannot see, therefore, any error in the circuit court in permitting the proceedings in the chancery suit to be given in evidence, nor in giving to them the effect of transferring from the Sauntee Land & Ferry Company such legal title as it had to any of the property in controversy."

Brine v. Insurance Co. has been reaffirmed and applied in Bendey v. Townsend, 109 U. S. 668, 3 Sup. Ct. 482; Allis v. Insurance Co., 97 U. S. 145; Barnitz v. Beverly, 163 U. S. 127, 16 Sup. Ct. 1045; and De Vaughn v. Hutchinson, 165 U. S. 570, 17 Sup. Ct. 461.

In Barnitz v. Beverly, the court expressly adopted the language of the Brine Case, which bears more directly upon the point now in judgment. Mr. Justice Shiras, speaking for the court, said:

"The view of the trial court was that remedy of an immediate sale, by decree of the circuit court of the United States sitting in equity, was not affected by the state statute. But this court held, through Mr. Justice Miller, that all the laws of a state existing at the time a mortgage or any other contract is made, which affect the rights of the parties to the contract, enter into and become a part of it, and are obligatory on all courts which assume to give a remedy on such contracts; that the construction, validity, and effect of contracts are governed by the place where they are made and are to be

performed, if that be the same; that it is therefore said that these laws enter into, and become a part of, the contract. In the opinion it was said: 'There is no doubt that a distinction has been drawn, or attempted to be drawn, between such laws as regulate the rights of the parties and such as apply only to the remedy. It may be conceded that in some cases such a distinction exists. In the recent case of Tennessee v. Sneed, 96 U. S. 69, we held that, so long as there remained a sufficient remedy on the contract, an act of the legislature, changing the form of the remedy, did not impair the obligation of the contract. But this doctrine was said to be subject to the limitation that there remained a remedy which was complete, and which secured all the substantial rights of the party. At all events, the decisions of this court are numerous that the laws which prescribe the mode of enforcing a contract, which are in existence when it is made, are so far a part of the contract that no changes in these laws which seriously interfere with that enforcement are valid, because they impair its obligation, within the meaning of the constitution of the United States.'"

See, also, Flagg v. Walker, 113 U. S. 659, 5 Sup. Ct. 697.

Benedict v. Railroad Co., 19 Fed. 173, was a case in the United States circuit court for the district of Kansas, Judge McCrary presiding. Under the statute of Kansas, no order for the sale of railroad property mortgaged with a waiver of appraisement could be made by the court until the expiration of six months after the decree of foreclosure. It was held that this statute regulated the transfer of land within the state, and was therefore binding on the federal courts. It was declared to be the settled practice of the United States courts to follow a statute of that kind in foreclosure cases, the court citing, in support of the ruling, the cases of McGoon v. Scales, 9 Wall. 23, and Brine v. Insurance Co. See, also, to the same effect, Dow v. Railroad Co., 20 Fed. 260. Indeed, the local law and the local method of enforcing a contract, as applied to a mortgage on land, has been so generally recognized in all jurisdictions that, under the ancient English practice, when strict foreclosure was the rule, one of the classes of cases in which that rule was departed from, and a sale decreed, was declared to be "where the mortgage is of land, and by the local law is subject to a sale; such as, for example, in Ireland and America." 2 Story, Eq. Jur. § 1026.

It would perhaps not add materially to what has been said as to the settled practice in the courts of the United States to point out that in well-nigh all of the adjudged cases, as in Simmons v. Railway Co., supra, deeds were, conformably to this practice, executed by masters making the sales to the purchasers, conveying, in terms, an absolute title to the property sold. It is true that these cases do imply an interpretation by those courts of their own power and practice in that regard, and a construction by those courts of their own powers and practice will, by comity, be recognized by other courts.

What has been thus far said is with a view to justify the established practice in this court, as regular and sanctioned by the adjudged cases, and such as would be sustainable in direct attack on appeal. This is the question raised by the master's request for instruction. In a case where real estate is situated within the territorial jurisdiction of the court, and the parties to the suit are regularly before the court, the validity of a sale made in the method in question ought never, it would seem, to have presented serious difficulty in a collateral inquiry.

The question pending before the supreme court of Tennessee, as I am advised, arises in an action of ejectment, and the attack upon the sale is collateral. Precisely such a question was presented in Miller v. Sherry, 2 Wall. 238, and decided by the supreme court of the United States. The action in that case was in ejectment, and the title of the plaintiff rested on a sale made and deed executed by a master in chancery under decree of the court. The insistence in that case was that a court of equity could only compel parties to convey the legal title. This contention was overruled. Mr. Justice Swayne, delivering the unanimous judgment of the court, said:

"The court had full jurisdiction, both as to the parties and the property. The decree was regularly entered, and the sale and conveyance by the master to Bushnell were made in pursuance of it. The only objection to the proceedings is that Williams, in whom was vested the legal title, was not ordered to convey, and did not convey. A conveyance by him was not necessary. Where a court of equity has jurisdiction, as in this case, a sale and conveyance in obedience to a decree is as effectual to convey the title as the deed of a sheriff made pursuant to a sale under an execution issued upon a judgment at law. When the object of the suit is to compel the conveyance of the legal title by the defendant, and the decree does not require a sale, the title will not pass until the deed is executed, unless it be provided, as has been done in some of the states, by statute, that the decree itself shall operate as a conveyance. In all such cases, the court has power to compel the defendant to convey. When the property is beyond the local jurisdiction of the court, and the defendant is before it, the court can compel him to convey, as it may direct, for any purpose within the sphere of its authority. This is an ordinary exercise of the remedial jurisdiction of those courts, and the power is one of the most valuable attributes of the equity system. The principle of those cases has no application here."

In this country, as I have already remarked, mortgages contain the power of sale, and, the legal title being vested in the mortgagee, there is in such a contract a stipulation on the part of the mortgagor that sale may be made and title passed. The power of sale implies this much. He, therefore, consents to such a sale in advance, and when, at the suit of the mortgagee, a judicial sale is made, it would seem too clear for argument that it passes to the purchaser at such sale all the rights of the mortgagee, however irregular the sale may have been. It was accordingly so adjudged in an action in ejectment in Brobst v. Brock, 10 Wall. 519. And an irregular judicial sale made at the suit of the mortgagee is effectual to pass all the mortgagee's rights to the purchaser, although such sale may be no bar to the equity of redemption. Bryan v. Brasius, 162 U. S. 415, 16 Sup. Ct. 803. In this case the question arose in an ejectment suit. It would seem quite clear that, when the court possesses full jurisdiction to render a final decree, the methods by which such decree may be executed present questions which affect procedure only, and do not touch the jurisdiction of the court. The distinction between the validity of a judicial proceeding, when called in question by direct proceeding to set aside or annul, and by collateral attack, while recognized at an early day, was not always attentively observed in the older cases. But the importance of such a distinction has become fully understood, and is closely enforced in the adjudged cases of our own time. No court has stated this distinction more clearly, or

adhered to it more consistently, than the present supreme court of Tennessee. Robertson v. Winchester, 85 Tenn. 171, 1 S. W. 781; Reinhardt v. Nealis, 101 Tenn. 169, 46 S. W. 446, and cases cited.

The inherent power of a court of equity to apply a remedy which is co-extensive with its jurisdiction over the subject-matter is not denied, and the only suggestion made against the power to mold its decree and model its procedure, so as to give effect to the remedy provided by statute of the state for the enforcement of a mortgage on land situated in such state, is the ancient maxim that the general jurisdiction in equity is exercised in personam, and not in rem. I do not now stop to discuss how far that maxim has lost its importance. By equity rule 8, the supreme court of the United States has provided that "final process to execute any decree may, if the decree be solely for the payment of money, be by writ of execution, in the form used in the circuit court in suits at common law in actions of assumpsit." The maxim is made the basis of text-book statement against the power of the United States courts generally to transfer title, otherwise than by deed executed by the parties under order of the court, consistently with the ancient English practice. A statement to this effect may be found in 3 Pom. Eq. Jur. § 1317, and Watkins v. Holman's Lessee, 16 Pet. 25, 26, and some other federal cases are cited as supporting the statement. Examination of those cases will disclose that their facts did not call for an opinion on the broad question of the court's power in cases generally, and the question under consideration in the case at bar was neither considered nor decided. In Watkins v. Holman's Lessee it was decided that a court of chancery, acting in personam, might well decree the conveyance of land situated in another state, and enforce the decree by process against the defendant properly before the court. It was further held that neither the decree itself, nor the conveyance under it, except by the person in whom the title was vested, could operate beyond the jurisdiction of the court. In other words, it was declared that such a decree could not operate beyond the territorial limits of the state in which it was pronounced, and that the decree could not, of itself, transfer title to land situate in another state. The proposition that, to entitle a court of equity to maintain a bill for specific performance or other similar relief relating to land, it is not necessary that the land should be situate within the jurisdiction where the suit is brought, was considered in different aspects in the other federal cases cited. This general doctrine was more clearly brought out, and its limits illustrated and defined, in the later cases of Carpenter v. Strange, 141 U. S. 87, 11 Sup. Ct. 960, and Dull v. Blackman, 169 U. S. 243, 18 Sup. Ct. 333. In Carpenter v. Strange the court said:

"The real estate was situated in Tennessee, and governed by the law of its situs, and while, by means of its power over the person of a party, a court of equity may, in a proper case, compel him to act in relation to property not within its jurisdiction, its decree does not operate directly upon the property, nor affect the title, but is made effectual through the coercion of the defendant, as, for instance, by directing a deed to be executed or canceled by or on behalf of the party."

So, in Dull v. Blackman, Mr. Justice Brewer, for the court, said:

"Upon these facts, we remark that as the land, the subject-matter of this controversy, was situate in Iowa, litigation in respect to its title belonged properly to the courts within that state (Ellenwood v. Chair Co., 158 U. S. 105, 107, 15 Sup. Ct. 771), although, if all the parties interested in the land were brought personally before a court of another state, its decree would be conclusive upon them, and thus, in effect, determine the title. The suit in New York was one purely in personam."

The lack of power to give to the decree extraterritorial effect is not a lack of jurisdiction. "The incapacity to enforce the decree in rem constitutes no objection to the right to entertain such a suit. Where, indeed, the lands lie within the reach of the process of the court, courts of equity will not exclusively rely on proceedings in personam, but will put the successful party in possession of the lands, if the other party remains obstinate, and refuses to comply with the decree." 2 Story, Eq. Jur. § 744. But the principle of those cases has no application to a case like the one at bar, in which the real estate is situated in the same jurisdiction where the suit is brought, and where, in the ordinary case, the parties to be affected are also residents within such jurisdiction and before the court. On the contrary, as has been seen, when the question now under consideration came before the supreme court of the United States, it was decided, in more than one case, in favor of the power of a court of equity to make sale and conveyance by a master in chancery, and in that way to convey the title as effectually as the deed of a sheriff made pursuant to execution on a judgment at law. Furthermore, however it may once have been, this maxim, "Æquitas agit in personam," has now no application to a judicial sale upon foreclosure, which is a proceeding partly in rem and partly in personam; the object being the seizure and sale of the property, and a deficiency judgment for any part of the debt not satisfied by the proceeds of sale. 2 Jones, Mortg. § 1444; 2 Black, Judgm. 810; Ror. Jud. Sales (2d Ed.) § 53; 1 Beach, Mod. Eq. Jur. § 491; Stevens v. Ferry, 48 Fed. 9; 9 Enc. Pl. & Prac. 220.

When the notions of a mortgage so changed that it was no longer regarded as the conveyance of an estate upon condition, but as mere security for the debt, creating a lien, and when the power of sale was added, the action to foreclose by sale became obviously one in rem, or substantially such. By statute, in Tennessee (Shannon's Code, § 6115), it is enacted that a court of chancery acts ordinarily in personam, and that suit may be brought wherever the defendant is found; but by section 6121 it is further provided that bills to enforce specific execution of contracts relating to realty, or to foreclose a mortgage by sale of realty, shall be filed in the county in which the land or a material part of it lies, or in which the deed or mortgage is registered. Other sections provide for service by publication in the court of chancery, and it is hardly to be doubted that this legislation, making the venue local, also makes the suit one in rem. 11 Am. & Eng. Enc. Law (2d Ed.) p. 169, and cases cited. This is clearly so, as the legislation was produced by the cases of Avery v. Holland (1806) 2 Overt. 71, and Grace v. Hunt (1813) Cooke, 341, and changed

the doctrine of those cases. See Roper v. Roper, 3 Tenn. Ch. 55. And it has been repeatedly decided by the supreme court of Tennessee that a decree in chancery, resting on proceedings with constructive service, in conformity with these statutes, is valid, and that a purchaser at judicial sale under such decree acquires a good title. If the suit, as regulated by statute of the state, is a proceeding in rem, there is no reason why the courts of the United States, exercising jurisdiction in foreclosure cases within the state, should not treat the action accordingly, in the absence of special questions. See Wood v. Brady, 150 U. S. 23, 14 Sup. Ct. 6. In the leading case of Pennoyer v. Neff, 95 U. S. 727, the supreme court of the United States, discussing the validity of judgments and decrees resting upon constructive service of process, said:

"Such service may also be sufficient in cases where the object of the action is to reach and dispose of property in the state, or of some interest therein, by enforcing a contract or a lien respecting the same, or to partition it among different owners, or, when the public is a party, to condemn and appropriate it for a public purpose. In other words, such service may answer in all actions which are substantially proceedings in rem. * * * It is true that, in a strict sense, a proceeding in rem is one taken directly against property, and has for its object the disposition of the property, without reference to the title of individual claimants; but, in a larger and more general sense, the terms are applied to actions between parties, where the direct object is to reach and dispose of property owned by them, or of some interest therein. Such are cases commenced by attachment against the property of debtors, or instituted to partition real estate, foreclose a mortgage, or enforce a lien. So far as they affect property in the state, they are substantially proceedings in rem, in the broader sense which we have mentioned."

In the earlier case of Day v. Micou, 18 Wall. 162, suit to foreclose a mortgage was declared to be a proceeding in rem; and in the later case of Broom v. Armstrong, 137 U. S. 278, 11 Sup. Ct. 75, it was said of such a suit:

"It is therefore a proceeding in rem, as much so as an attachment suit against the property of an absent debtor or a suit instituted to partition real estate; and the property is within the power of the court until the judgment or decree is entered, so that the lien upon it may be enforced, as the statute requires."

See, also, Arndt v. Griggs, 134 U. S. 316, 10 Sup. Ct. 557.

Furthermore, congress has, by legislation, expressly recognized the foreclosure suit as being one in rem, and impressed upon it the essential features of a case of that class by conferring on the circuit courts of the United States jurisdiction to proceed with it as a suit of that character, giving effect to the judgment as one in rem. Rev. St. § 738 (18 Stat. 470); Act March 3, 1875 (18 Stat. 470) § 8, expressly saved by Act 1887, § 5, as corrected by Act 1888 (25 Stat. 433). The act, among other provisions not affecting the matter now considered, provides that, in any suit commenced in a circuit court of the United States to enforce any legal or equitable lien upon, or claim to, real estate within the district where the suit is brought, substituted service may be had upon any one or more of the defendants not an inhabitant of, or found within, the district, in the manner specifically provided; the statute further providing:

"It shall be lawful for the court to entertain jurisdiction, and proceed to the hearing and adjudication of such suit in the same manner as if such

absent defendant had been served with process within the said district; but such adjudication shall, as regards such absent defendant or defendants, without appearance, affect only the property which shall have been the subject of the suit and under the jurisdiction of the court therein, within such district."

The legislation expressly authorizing the enforcement of lien upon property in a case of nonresident or absent defendants, and limiting the effect of the decree or judgment to the property subject to the lien and within the jurisdiction of the court, it is hardly necessary to say such legislation would be idle, unless the court possesses the power to transfer title and deliver possession, as in other cases of suits in rem, without resort to secondary methods of enforcing the decree, such as formerly belonged to a suit in personam. In this connection, it is pertinent to remark that the supreme court of the United States, by equity rule 92, has taken the last step necessary to assimilate the procedure in suits for the foreclosure of mortgages in circuit courts of the United States to that now prevalent in the states, by authorizing a deficiency decree for any balance of the debt found due the complainant over and above the proceeds of sale, and issuance of execution for the collection of the same, just as in rule 8, where the decree is solely for the payment of money.

The act of congress authorizing constructive service was under consideration, in some of its applications, in Mellen v. Iron Works, 131 U. S. 352, 9 Sup. Ct. 781, Greeley v. Lowe, 155 U. S. 58, 15 Sup. Ct. 24, and Dick v. Foraker, 155 U. S. 404, 15 Sup. Ct. 124. Where the object of the suit is one within the act, it is equally applicable, whether the nonresident is the sole defendant or one of several defendants. It was so ruled in Dick v. Foraker. In Greeley v. Lowe, Mr. Justice Brown, delivering the judgment, said:

"Hence, it appears that the case of Smith v. Lyon really has no bearing, as that case involved only the rights of parties to personal actions residing in different districts to sue and be sued, and was entirely unaffected by the act of 1888, which deals with defendants only in local actions, and expressly reserves jurisdiction, if the suit be one to enforce a lien or claim upon real estate or personal property. * * * The act of 1875 gave the right to sue defendants wherever they were found. The act of 1888 requires that they shall be inhabitants of the district. But, in both cases, an exception is created in local actions, wherein any defendant interested in the res may be cited to appear and answer, provided he be not a citizen of the same state with the plaintiff."

In Morrison v. Marker, 93 Fed. 692, it was held that suit to remove cloud on title to real estate within the district was essentially a suit in rem, and within section 8 of the act of 1875. It is too clear to admit of question that the statute is applicable to a suit for the foreclosure by sale of a mortgage on realty in the district where suit is brought. It was accordingly so adjudged in Grove v. Grove, Id. 865, and Black v. Scott, 9 Fed. 186. It was treated as applicable to such a suit in Kuhn v. Morrison, 75 Fed. 81, though the question was not distinctly raised. See, also, Single v. Manufacturing Co., 55 Fed. 553; Cowell v. Water-Supply Co., 96 Fed. 769.

The title to properties of great magnitude within these districts rests on judicial sales made and title transferred by master's or commissioner's deed, and this is presumably true of other districts.

A decision adverse to the validity of such titles would produce widespread mischief and much litigation.

In view of what has been said, I conclude—First, that the established general practice in this country in judicial sales upon foreclosure is to direct sale to be made by a master named in the decree, and when the sale, upon report, is confirmed, to order a conveyance of the property executed by the master to be delivered to the purchaser, as stated by Judge Shiras in the work already referred to, and that the courts of the United States, in adopting such a practice, are not restricted by the maxim that jurisdiction in equity is ordinarily exercised in personam, because, apart from other reasons, the foreclosure suit is substantially a proceeding in rem; second, that, in a suit for the foreclosure of a mortgage executed upon real estate situate within the jurisdiction of the court, it is the right, and within the power, of a circuit court of the United States, if not its duty, to conform to any statutes of the state regulating the remedy for the enforcement of the mortgage contract, and that the practice of those courts in thus conforming to the local law is recognized as proper by the supreme court of the United States. The result is that the decree will devest and vest title, and direct the master to execute and deliver a deed to the purchaser for registration, as a muniment of title, agreeably to the practice long since adopted and followed in this court.

UNITED STATES RUBBER CO. et al. v. AMERICAN OAK LEATHER CO. et al.

AMERICAN OAK LEATHER CO. et al. v. UNITED STATES RUBBER CO. et al.

(Circuit Court of Appeals, Seventh Circuit. October 3, 1899.)

Nos. 598, 599.

1. INSOLVENT CORPORATIONS—SECRET PREFERENCE OF CREDITORS.
   The keeping secret of an arrangement between an insolvent corporation and creditors by which the latter were put in control of the corporation, and were given judgment notes to secure them a preference, for the purpose of enabling the corporation to continue in business, with the knowledge that such continuance necessarily involved the obtaining of new credits by the corporation, which could not be obtained if the facts were known, constitutes a fraud on those who were thus induced to become creditors, although there was no specific intention to defraud them, and the parties may have believed it possible for the corporation to eventually pay in full.
2. SAME—EFFECT OF FRAUDULENT PREFERENCE.
   A commercial corporation, being in financial difficulty and largely indebted, made an arrangement with its two largest creditors by which it borrowed from them $50,000, and gave them judgment notes covering such sum and its prior indebtedness to them. As a part of the same arrangement, its board of directors was reorganized by placing thereon a majority of persons nominated by such creditors and having no interest in its business, and its by-laws were amended so as to require action of the directors to authorize the giving of further judgment notes. It was agreed that the new directors should not interfere with the business of the corporation, the sole purpose of their appointment being to prevent preferences to other creditors, and the entire arrangement was kept secret

to enable the corporation to continue its business. The business was continued for six months, when the corporation suspended, having been in fact insolvent when the arrangement was made. During this time some of the indebtedness was paid off, and new indebtedness to the same and other creditors contracted. *Held* that, although the laws of the state permitted the preference of creditors by an insolvent, such transaction constituted a fraud in fact on the general creditors, which not only rendered the preferences given by the judgment notes invalid, but precluded the creditors so preferred from sharing with the other creditors in the distribution of the assets of the corporation.

3. SAME.

A bank, being an unsecured creditor of an insolvent corporation, which was still a going concern, but was known to be about to suspend business, advanced a further sum to the corporation, with knowledge that it was to be used to pay claims in favor of the managing officers of the corporation, and, in consideration of such advance, received judgment notes of the corporation covering its entire claim; and the bills and accounts receivable of the corporation were also assigned to another preferred creditor, who, as a part of the same arrangement, entered into an agreement with the bank to divide pro rata all the proceeds of their respective demands. *Held*, that the fraudulent preference of the managing officers of the corporation rendered the entire transaction fraudulent and invalid as against the other creditors.

4. SAME.

Where certain creditors of an insolvent corporation secured preferences by an arrangement which was fraudulent as to other creditors, and for that reason deprived them of the right to share with such other creditors in the assets of the corporation, a third preferred creditor who became a party to the fraudulent transaction by making an agreement to share with them pro rata the proceeds of all collections made by either on their claims is equally debarred by the fraud, and his claim will be postponed to those of the general creditors.

Brown, Circuit Justice, dissenting.

Appeals from the Circuit Court of the United States for the Northern Division of the Northern District of Illinois.

We have here an appeal and cross appeal. They are from a final decree rendered in conformity with the master's report of his conclusions on the evidence, and in accord with the theory of the interlocutory order affirmed by this court in United States Rubber Co v. American Oak Leather Co., 53 U. S. App. 444, 27 C. C. A. 118, 82 Fed. 248. The defendants, the rubber companies and the Metropolitan National Bank, dispute that theory, and insist that the preferences which they obtained were valid. The original complainants, and other creditors who intervened, have brought the cross appeal, and insist that the fund in court should be applied to the discharge of their demands, and that in so far as the decree permits the defendants to share in the fund it is erroneous. The character of the case, as now presented, is not deemed to be essentially different from what it was before, but a fuller statement of the facts is desirable.

The corporation, C. H. Fargo & Co., successor to a partnership of the same name, was organized in 1889 to do a mercantile business in Chicago. In 1893 it became embarrassed, and being largely indebted to the rubber companies (the United States Rubber Company of New Jersey and L. Candee & Co. of Connecticut) and to the Metropolitan National Bank of Chicago, and being compelled to yield to the demand of the latter for security, executed judgment notes to the bank for $130,000, and to the rubber companies for sums aggregating $200,000; those companies not asking but accepting security because the bank exacted it. The Fargo Company had an agreed line of credit with the bank to the amount of $50,000, which was sometimes exceeded. The judgment notes given in 1893 were paid in part, from time to time, and before the close of 1895 were surrendered, and ordinary promissory notes taken for the unpaid balances. On December 30 or 31, 1895, the corporation, being

again unable to meet its maturing obligations, sent telegraphic messages to the rubber companies, in response to which Charles L. Johnson and Huston M. Sadler, Jr., as representatives of those companies, which some months before had become one in interest, went to Chicago, arriving January 2, 1896, and on the evening of that day commenced with Charles E. Fargo negotiations which on the 6th terminated in the agreement, the character of which is now the subject of dispute. In those negotiations Johnson and Sadler were assisted and advised by the local counsel of the rubber companies, Mr. William A. Beale, who was present at most of the interviews. At that time there was due from the Fargo Company to L. Candee & Co., as evidenced by notes given in settlement the preceding November, $44,900; to the United States Rubber Company on open account for the proceeds of sales of consigned goods, $141,537.13; to the Metropolitan Bank, $50,000; and to others, $210,216.20,—a total of $416,653.33. The value of the assets at that time was not definitely ascertained, but was represented by the Fargos to exceed largely the liabilities. In fact it was much less. Johnson, on arrival, was told of the company's embarrassment, and was asked to have his companies make a loan of $25,000 to meet paper soon to mature. He refused the request, and solicited security for what was owing to his companies; urging that, on account of what they had done in 1893, they were entitled to preference over other creditors. That meant, and was understood to mean, an immediate suspension of business, and was refused by Charles Fargo, who insisted that a failure was not necessary, and that, if they had to go to the wall, they would treat all creditors alike. The negotiations then proceeded, but without result until January 6th; the whole effort for four days, so far as disclosed, being expended in the endeavor to devise a plan whereby the rubber companies could be made absolutely secure, and the Fargo Company be able to continue in business. The idea of putting the board of directors under control of the rubber companies having been suggested, and it having been determined that the loan had better be $50,000, Johnson, acting for L. Candee & Co., then proposed to lend the Fargo Company $50,000 for six months, upon the understanding that the loan and the previous indebtedness for $44,900, and the debt due and to become due to the United States Rubber Company, "should be secured in such way as might be satisfactory to their counsel, Mr. Beale." This proposition was accepted on the same day, and, as the master's report proceeds to say, "it was agreed and arranged between the parties as follows: First. That the $50,000 should be advanced to the Fargo Company by L. Candee & Co. partly on that date and during the succeeding two weeks. Second. That the Fargo Company should that day execute and deliver its three judgment notes,—one for $45,000, payable on demand to the order of L. Candee & Co., to secure that company with respect to its liability as indorser or guarantor upon the notes for $44,900 given previous to January, 1896; one for $51,500, payable on demand to L. Candee & Co., as collateral security to plain notes of the Fargo Company which were given as evidence of the advance of $50,000 then to be made; and one for $140,000, payable on demand to the order of the United States Rubber Company, as collateral security to the then existing and to any future indebtedness of the Fargo Company to the United States Rubber Company as aforesaid. Third. That, in case the Fargo Company should at any time find it necessary to suspend business, it would assign as additional security all its accounts and bills receivable, that it should not give any judgment notes to other creditors which would impair the security to the rubber companies, and that the $50,000 advance should be used by the Fargo Company in reduction of its general indebtedness as it matured. And, fourth, that the four employés of the Fargo Company who were on the board of directors, and also E. A. Fargo, should retire from the board, and there should be elected in their places by the stockholders of the company five persons, to be nominated by said Beale, in whom he had confidence, one of whom should become secretary and treasurer, and that the directors so to be elected at Beale's nomination should not hamper or interfere with the proper carrying on of the ordinary business of the company."

On the same day a meeting of the board of directors of the Fargo Company as then and theretofore constituted was held, at which was passed a resolution authorizing the borrowing of the $50,000, and the giving of judgment

notes therefor and for existing indebtedness, as stipulated; and accordingly three judgment notes "were executed and delivered by Charles E. Fargo, president of the company, Frank M. Fargo, vice president and treasurer, and E. A. Fargo, secretary, and the loan of $50,000 was perfected; $10,000 being advanced at the time, and the balance of the $50,000 during the succeeding two weeks." This action was ratified on the 8th day of January, 1896, by the unanimous vote of the stockholders of the company, all the shares being represented. The three Fargos had been for some time the owners of all the shares. An effort was made to reduce to writing the understanding, but Charles Fargo insisted upon terms to which Mr. Beale would not assent; and Mr. Johnson, who was on his way eastward, being informed of the situation, sent from Altoona, Pa., on January 7th, a telegram to Mr. Beale containing the following: "Sadler has explained the situation to me. Think position should be made absolute as soon as possible, by completing arrangement as arranged, and organization of directors to prevent giving other judgment notes. * * * Failure thus to protect us should result in executions by us. Use, at your discretion, all judgment notes in your possession, in order to put our claim beyond peradventure." This having been read to Mr. Fargo, he consented to trust Johnson in the matter without a written agreement.

At a meeting of the stockholders on January 9, 1896, George C. Madison, Tiffany Blake, Buell McKeever, Frederick B. Fuller, Gilbert E. Porter, Charles E. Fargo, and Frank M. Fargo were elected directors for the ensuing year; all except the Fargos and Blake being employés in the office of Beale, and Blake being assistant corporation counsel of the city of Chicago, of which Beale was then corporation counsel, and all except the Fargos were chosen at the suggestion of Beale. At a meeting on the same day of the newly-elected board, Charles E. Fargo was re-elected president of the company, Frank M. Fargo, vice president, Buell McKeever was made secretary and treasurer, and the by-laws of the company were so amended as to forbid the giving of judgment notes or preferential security without special authorization from the board of directors. The change of the board of directors and officers, the change in the by-laws, and the resolution authorizing the execution of judgment notes and an assignment of accounts, the master reported, "were all for the purpose of giving preferential security to the rubber companies, and the matter was kept secret in order to allow the Fargo Company an opportunity of getting through embarrassments apparently temporary, but not with a fraudulent intent as to the other creditors of the company." The report then proceeds: "The only purpose and object of changing the board of directors as aforesaid, and of amending the by-laws, was to protect the rubber companies against the giving by the Fargo Company of preferential security or judgment notes to other creditors, which should be superior [or equal?] to the security of the rubber companies. * * * The arrangement as made was carried out in good faith by the parties, and the directors elected at the suggestion of said Beale took no part in the active management of the Fargo Company after their election, and no stockholders' and directors' meetings of the Fargo Company were held after January 9, 1896, until August 5, 1896."

It further appears that between January 6 and August 6, 1896, new liabilities were incurred by the Fargo Company to creditors other than the rubber companies and the bank to the amount of $246,660.54, of which there was due and unpaid on August 6, 1896, $142,690.95, and during the same period the Fargo Company paid to general creditors in the regular course of business more than $300,000; paying all of the indebtedness of January 6, 1896, which was largely to persons who are now creditors. Charles and Frank Fargo were personally liable upon portions of the debts of the company in January, and those portions were paid off before August. The original debt of $44,900 to the Candee Company was paid, and $13,470 on the loan of $50,000. To the United States Rubber Company as much as $15,000 was paid on old indebtedness, but additional consigned goods were sold to the amount of $24,534.04, of which the sum of $5,534.04 only was remitted, so that the sum due that company on August 6 was $142,424.81, and there was due to L. Candee & Co. $36,530. All credit given to the Fargo Company after January 9th, except by the rubber companies and $10,000 by the bank, was given in ignorance of the execution of the judgment notes to the rubber companies, of the

change of directors and officers, and of the arrangement existing between the rubber companies and the Fargo Company. Of the liabilities so contracted, the amount still unpaid exceeds $110,000. Besides the mere ignorance of the facts reported by the master, the evidence shows that in order to obtain credit of the banks at Dixon it was represented, in response to direct inquiry, that the company had given no judgment notes; and to the representative of another creditor, the Pfister & Vogel Leather Company, seeking payment or security, Charles E. Fargo, while denying that he had made a direct statement that the company had given no judgment notes, admitted that in response to inquiry he had made evasive answers likely to produce, and which he intended to produce, that belief. His testimony on the point presents an interesting picture of one who in all this transaction is credited with having had no wrongful purpose. About the last of July it became evident that a collapse was inevitable, and, with that result in view, Charles Fargo, desiring money for the individual uses of himself and brothers, sought to obtain for the company from the Metropolitan Bank, to which there was then owing $40,000 unsecured, an additional $10,000. His plan was to have the bank admitted into the arrangement with the rubber companies, and for the purpose of obtaining the consent of those companies he went to New York. He obtained the desired consent, but, according to the testimony of Mr. Sadler, without revealing the purpose to cease business. Mr. Sadler returned with him, or after a day or two followed him to Chicago, but for what purpose is not disclosed. Though not admitted, it is difficult to believe that he left Chicago without knowledge of what was being and about to be done.

In respect to the coming of the bank into the arrangement with the rubber companies the master found, among other things, "that C. H. Fargo represented to the president of the bank that C. H. Fargo & Co. was indebted to him and his brothers for money exceeding $10,000, which they had borrowed upon their notes for the benefit of the company, and which they had paid over to the company for use in its business, and that said Fargo brothers had put up some bank stock that they owned as collateral to said notes; and C. E. Fargo thereupon proposed to said bank that if it would loan said C. H. Fargo & Co. $10,000 in addition to its then existing loan, so that said company could reimburse him and his brothers and enable them to take up said notes, he would procure from the said C. H. Fargo & Co. judgment notes for said bank, both for said sum so advanced as aforesaid, and also for the notes then remaining due said bank to the amount of $40,000." Without a further rehearsal of details, it is sufficient to state that the bank was informed of the arrangement with the rubber companies, consented to join in it, advanced the additional $10,000, making its entire demand $50,000, received therefor two judgment notes for $25,000 each, accepted in immediate payment of one of them a conveyance by the Fargo Company of its manufacturing establishment and plant at Dixon, and contemporaneously entered into an agreement with the rubber companies that each would account to the other, and divide all sums realized pro rata according to the amounts of their respective claims. The bank and the rubber companies proceeded at once to take judgments, and to cause executions to be issued and levied. The accounts of the Fargo Company were assigned to the rubber companies as stipulated, and were placed in the hands of Mr. Beale's firm for collection, —an arrangement which was continued by order of the circuit court,—and the amounts realized therefrom and from the disposition of the property by the marshal have been duly reported.

Exceptions were filed to the master's report by the American Oak Leather Company, and by that company jointly with the other complainants, all of which the court overruled. Errors are assigned by the rubber companies jointly, and separately by the Metropolitan National Bank and by the United States Rubber Company. The errors assigned on the cross appeal are directed to the rulings upon exceptions to the master's report as well as to the final decree.

Henry S. Robbins and George A. Follansbee, for appellants in cause No. 598.

Jacob Newman and Frederick A. Smith, for appellees.

Before BROWN, Circuit Justice, and WOODS and JENKINS, Circuit Judges.

WOODS, Circuit Judge, after stating the case, delivered the opinion of the court.

Questions of fraud in law and fraud in fact are in their natures separate, though not always distinguishable by clearly defined lines. In this case they have been presented separately in the briefs and in the argument at the bar of the court, but the facts bearing upon them are so commingled, and to a large extent inseparable, that, to avoid repetition, no attempt will be made as we proceed to keep the distinction all the while in view.

There can be no doubt that the question of the validity of the preferences given to the rubber companies and to the bank should be determined by the law of Illinois, where the attempt to give them was made. That law, it is also certain, authorizes judgment notes, and permits the preferring of creditors by insolvent debtors, whether individual or corporate; and reference has been made to the decisions in Field v. Ridgely, 116 Ill. 424, 6 N. E. 156, Hegeler v. Bank, 129 Ill. 157, 21 N. E. 812, and Haas v. Sternbach, 156 Ill. 44, 41 N. E. 51, for adjudications of the validity of preferences obtained by means of judgment notes which had been withheld from record "for four years," "for more than a year," and "for five years," while the debtor continued in business, obtaining, as it was alleged, new credit which would have been refused if the existence of the judgment notes had been known. In Hegeler v. Bank, mortgage security had been offered by the debtor, but refused by the creditor "because it would injure the credit of the glass company and prevent it from obtaining credit elsewhere." The court in that case said:

"The argument proceeds throughout upon the proposition that the bank took its notes and held them under circumstances that made its conduct operate as a fraud upon others. There is no pretense that there was any agreement to conceal its claim against the glass company; much less, that any such agreement was made for the purpose of enabling the company to obtain credit from others. No evidence can be found in the record proving or tending to prove acts or declarations on the part of the appellee calculated to induce appellant to give credit to the glass company. There is nothing in the bill, and certainly nothing in the evidence, to show that, at the time appellee took the notes and refused to take mortgage security, it did not honestly believe that, notwithstanding the insolvency of the glass company, it would, if its credit could be maintained, successfully recover from its embarrassment, continue business, and pay all its debts."

In Haas v. Sternbach, a mortgage on real estate, kept off the record at the request of the mortgagor with the view to an early sale of the property, was pronounced not fraudulent as against creditors of the firm of which the mortgagor was a member; but an important distinction of that case, as well as of the preceding one, from the present, was marked by the court when it said:

"There was no agreement or promise to keep the mortgage secret, but simply that it would not then be recorded; and there is an entire absence of proof that Charles Sternbach or his firm did or said anything, other than

withholding the mortgage from record, which could have misled others as to its existence."

"Thus, in Illinois it is clearly established law," say counsel, "that the maintenance of secrecy respecting a preference, without 'fraudulent intent as to other creditors,' does not make the preference fraudulent;" and to reinforce the proposition they cite Sanford Fork & Tool Co. v. Howe, Brown & Co., 157 U. S. 312, 15 Sup. Ct. 621; Manufacturing Co. v. Hutchinson, 24 U. S. App. 145, 11 C. C. A. 320, 63 Fed. 496. Whatever may be thought of the legislative policy which permits the execution and long holding of unrecorded judgment notes, the decisions cited afford no precedent, direct or inferential, in justification of the scheme in question, the like of which, we believe, if ever conceived, never before was brought into effective operation. As a judicially sanctioned or commercially accepted possibility in business it is unbelievable. It could be attempted only by a corporate debtor, and its approval by the courts would afford a new and fruitful motive for the creation of corporations by the many who would be quick to avail themselves of so promising a method of pursuing hazardous enterprises at the risk of others. "The maintenance of secrecy," to repeat the words chosen by counsel to express the scope of the decisions referred to, does not signify necessarily more than the fact of secrecy, begun and continued without previous agreement or purpose to maintain it; but secrecy kept for a specific purpose means much more. The master's finding on the point implies, and the evidence demonstrates, a mutual understanding between those concerned that secrecy was necessary, and an express agreement that it should be kept would not have made the understanding more clear, or its fulfillment more imperative. During the negotiations the suggestion of a chattel mortgage was advanced, but promptly rejected, because without the publicity of recording the security would be invalid against other creditors. The scheme adopted, which, if upheld, though not constituting a recognized form of lien, would be a better security than a chattel mortgage, was accepted not only because it would make secrecy possible, but because it would render exposure impossible, if those employed to execute it kept faith; and that every one of them was given to understand, that, once the scheme was on foot, his chief responsibility would be to maintain a discreet silence, the proof is clear, and there has been no attempt or apparent disposition to deny. Returning to the language of the report: "The matter was kept secret in order to allow"—that is to say, for the purpose of allowing—"the Fargo company an opportunity of getting through embarrassments apparently temporary;" and that, of course, and avowedly, they were to do, or to try to do, by continuing the business under a plan which without secrecy was known to be impossible, and by which the risks of the business were shifted wholly upon those who, not suspecting the situation, should give undeserved credit. Secrecy kept for a purpose is not accidental or unintended; it is premeditated; it is, in essence, the same as if agreed upon; and the color imparted by it to this transaction, when all the circumstances are

considered, is not removed by the added words of the finding, "but not with a fraudulent intent as to the other creditors of the company." Read strictly, that part of the finding is not broad enough to include subsequent creditors, against whom the scheme was so plainly wrongful that Charles Fargo, who is credited with having suggested the making of the change in the directory of the company, after a time became unwilling to pursue it further by seeking renewals of the company's notes in bank. If, however, the master intended, as it seems probable he did intend, to find that the parties to the scheme had no conscious purpose to harm either present or future creditors, the finding cannot abrogate or restrict the application of that familiar rule, without which a coherent code of law or morals would be impossible, that men shall be deemed to intend the natural and probable consequences of their acts or conduct. What did these people intend "as to other creditors"? Plainly, that they should remain or become creditors without security or the possibility of obtaining it, and be at the mercy of themselves, who by a secret control of the corporation were to be able at any hour to close its doors and appropriate all its property to the payment of their own demands. There is a pertinent passage in the testimony of Mr. Beale. After explaining that he had personally cautioned Charles Fargo against being too hopeful, being inclined to branch out, and possibly having too much time to go fishing, and telling him that "he was all right if they handled their business as it ought to be handled," he added:

"They had started with a big business, and ought to be able to carry it along, even through these hard times; but I was particularly desirous that through any strong temptation he should not put the Metropolitan Bank in a position where it could claim to have been deceived. I do not think that the idea of other creditors,—merchandise creditors,—or their position, entered the mind of either Mr. Johnson or Mr. Sadler or myself during the entire transaction. We were thinking of the Metropolitan Bank, and were anxious to see that that indebtedness should not increase after we made the arrangement, and that subject—reference to the Metropolitan Bank—formed the subject of some conversation between Mr. Johnson and myself; and I distinctly remember, at one of the interviews at the Auditorium Annex, saying that Fargo after that must not go to the Metropolitan Bank to borrow additional money. We had in mind that he would not need to increase the credits after getting this $50,000 from the rubber companies."

One creditor, at least, was important enough to be thought of and talked of, and to be the object of solicitous care that, "through any strong temptation," Fargo should not put it in a position where "it could claim to have been deceived." What stronger condemnation could there be of the scheme, or better proof that its essential character was apprehended (though unconsciously, according to the finding) by those who were about to put it into operation? There were potent reasons for thinking of the bank, and for desiring that it should not have ground for asserting deceit. Mercantile creditors were further away, and individually of much less importance, it is easy to see, than the Metropolitan National Bank, with which it was a part of the plan to keep up, though it seems not to increase, the Fargo company's line of credit; but all that only emphasizes the wrong done in forgetting others equally entitled to consideration, if

they were forgotten; and, if they were purposely left out of consideration, still greater was the wrong. The apprehended power of temptation proved too strong for one of the Fargos when he obtained credit of the Dixon banks by a direct denial that judgment notes had been executed, and for another of them when by an evasive denial he intentionally produced the same belief. Mr. Beale, concerned only with the legal aspects of the situation, and pressed with other business, testified as he remembered; but is it possible to believe that neither Johnson nor Sadler, during the four days devoted to this one matter, thought and talked of the bearing of the transaction upon one creditor, the bank, and did not think of its import either to those who should give credit in the future, or to present creditors, whose demands were a large factor in the situation, and could not have been omitted from an intelligent estimate of what had been and must be done? Their testimony contains no assertion or admission of such forgetfulness. The inventors of the scheme were bound to apprehend its probable consequences, and in fact nothing occurred after January 9th, when it was put into operation, which was not then reasonably to have been foreseen. The large existing indebtedness, present embarrassment, and the unsettled conditions of business were known. The plan then adopted to keep the business going, of course, was known in all its features. It was known, too, that new credit was to be sought, and that success was uncertain, to say the very least, in a degree far beyond the ordinary contingencies of a new business starting well, or of an old business in an unembarrassed condition. That the rubber companies apprehended a breakdown is demonstrated, aside from other considerations, by the extraordinary and unheard-of means which they employed to guard themselves against all foreseen contingencies; knowing that by the same means the consequences, however disastrous, would be turned upon others, who, misled by the appearance of a well-sustained and prosperous business, should give credit to the Fargo Company. Two years before a like embarrassment of the company had been bridged over by an agreement with the rubber companies and the bank, but judgment notes only were then required. The lapse of time had not improved the situation. The debt to the bank had been largely reduced, and that to the rubber companies by a small amount, but in the aggregate the liabilities still exceeded $400,000. The assets were represented to be considerably in excess of that amount, but no examination or close inquiry was made into the truth of the representation, though it was of a character which, under the circumstances, ought to have challenged belief. To a large amount, not then definitely stated, perhaps, but in the report of April 1, 1896, to the Dun Agency put at $366,000, they consisted of notes and book accounts; and yet, for the purpose of devising means to raise $25,000,—a mere bagatelle, as a witness accepting the word from M. Beale called it,—the representatives of the rubber companies were summoned on a day's notice to come from New York to Chicago, and after arrival devoted four days to the achievement. If the notes and accounts were good, as represented, the aid of the rubber companies was not needed to raise $25,000, or twice that sum; or, if needed,

why were not notes and accounts turned over at once as collateral, either for the $50,000 alone, or for that and the original indebtedness? They could have been put at once into the same process of collection which was employed six months later. That course could have been pursued without impairing the standing of the company. But the evident truth is—and Johnson and Sadler were not much deceived about it—that the statement of assets in that particular, and in others, like the plant at Dixon put down at $110,000, when in fact worth nothing over incumbrances, was greatly exaggerated: and they can hardly be credited with not understanding that the company was then practically insolvent, and, without the indulgence of its creditors, bound to close its doors. Even if the bank and rubber companies had agreed to hold their demands in abeyance, the company would have been unable to meet its liabilities of $210,000 to other creditors. To say the least, and without going beyond the facts reported by the master, the agents of the rubber companies knew that the Fargo Company owed commercial debts to the amount of $400,000; that, while its assets were asserted to be largely in excess of that amount, they were not presently available, and that the company could go on in business for the next month only by procuring a loan of $25,000; and that, to be able to go on certainly for a longer time, $50,000 would be necessary. It was hoped—let us say it was believed—by all concerned that with that sum, under the plan agreed upon, the company "would be able to weather the storm." It was a storm, they knew, and no matter what they believed, without better reason than the word of their debtor discredited by facts within their own knowledge, they had no right, in an attempt to ride out the storm, to adopt a deceitful plan, which they hoped might succeed, but by which, if failure came, loss, supposed to be made impossible to themselves, would certainly befall others. They may well be credited with having believed that the assets were then sufficient and that in the prosecution of the business under the plan proposed they would remain sufficient for the payment in full of their own demands, including the added $50,000; but beyond that, if their scheme were lawful, they did not need to care, and evidently did not, during the negotiations, very much concern themselves.

It was not, as alleged in the bill, a part of the plan that increased purchases should be made for the purpose of improving the security of the rubber companies. On the contrary, the opposite course was recommended by Mr. Johnson, and to some extent was pursued; resulting, as stated, in a reduction of indebtedness about equally in the aggregate to the rubber companies and to other creditors. There was no necessity, at least no known necessity, for a different course in the interest of the rubber companies; their security being supposed to be ample, and it being in their power, by means of immediate judgments and executions, to exclude all other creditors until their demands were satisfied. The notes and accounts, though not leviable by execution, they supposed could not escape them, because they had a contract with the old board of directors for their transfer, which the new board appointed to do their bidding would see performed. This suggestion, it is true,

goes a little beyond the finding of the master that "the only purpose of changing the board" was to protect the rubber companies against the giving of preferential security or judgment notes to other creditors; but it is evident that other emergencies might have arisen that would have called for the active interference of the board, directly or indirectly, for the protection of the rubber companies, and it is idle to say that the board was not constituted as it was for the purpose of meeting whatever emergency might arise in the interest of those companies. "Practically, they sat on a safety valve, * * * so far as protection to the rubber companies was concerned," answered a witness, accepting again the words of counsel; and the full significance of the figure is in the fact that the craft they were sailing, if allowed to blow up, unless the navigators should bungle their work, could not injure owners, nor crew, nor certain passengers, but only those who should have come aboard in the innocent belief that the boat was one of ordinary type, and that they were exposing themselves to no risks from which the captain, crew, and other passengers were exempt. While that craft, it is not overlooked, was "a going concern," yet, by the mere appearance given it of staunchness and completeness of equipment, it was calculated to allure the unsuspecting to a voyage beset with unwonted dangers.

It has been emphasized in the taking of testimony that the Fargos were to be left to conduct the business in their own way; that the new board, or the new trustees, were not to interfere with them; and that McKeever, the new treasurer-elect, was to be treasurer in name only. This, it is explained, was done so that if the former treasurer, who was still to be treasurer in effect, and on the letter heads kept in use was still designated as treasurer, should join in the execution of judgment notes, as in 1893 he had done, his authority could be denied by showing that he was not in fact treasurer. It was a fraud on the law to constitute a board of trustees and a treasurer of a corporation of men who from the beginning were pledged not to give attention to their duties, or to participate in the management of the business of the corporation, further than to protect the rights of particular creditors in whose interest alone they were given their places: and when, in addition to enjoined silence and secrecy on the subject, letters under the old form of letter head, showing the old officers to be still in office, were sent out as they were to old customers and to new, it was an act of deception for which the rubber companies cannot escape liability, since that it should be done was implied in the plan adopted. It was essential to the secrecy which it was understood should be preserved, and was within the stipulation that the Fargos should be allowed to keep the business going and to conduct it without interference. It is no answer to say that those who dealt with the company did not consider nor care who were the officers. A change in the names on the letter heads could not be made, because likely to excite inquiry, and inquiry implied exposure.

When it is important to know the motives of men, their conduct is to be considered, rather than their assertions, especially when

they testify in support of large pecuniary interests, either their own or of others put at hazard by their conduct. In the negotiations of January Charles Fargo at the beginning was master of the situation. He was able to compel and did compel Johnson to accede to his terms, and it was only by reason of an untimely delivery of the judgment notes, due on demand, before getting the written agreement which he desired, that he found himself in Johnson's power, and Johnson determined upon immediate action,—willing, as he had declared himself a day or two before, to lose $25,000 or $50,000 rather than that the Fargo Company should fail. What Johnson wished and sought at the beginning was security for the $186,437.13 owing to his houses, and, when denied that on terms which involved an immediate suspension of the Fargo Company, he began to negotiate on the basis proposed,—of a loan to enable the company to continue in business. Touching his own motives, Charles Fargo testified to a belief that suspension was not necessary, and would not be. He was either purposely ignorant of the situation, or unreasonably hopeful. He had a special motive, however, for seeking to escape immediate surrender, in the fact that he and his brother Frank were indorsers upon the company's paper to other creditors than the bank and rubber companies to the extent of $15,000, and, if the business could be kept going a few months that paper could be taken up. It was taken up before the collapse in August. The Fargos, therefore, were acting probably under two motives,—one to keep the business going, with whatever hope they had of ultimate success, and the other to keep it going long enough to pay off the obligations of the company on which they were personally liable. The controlling purpose of Johnson was to get security, and in order to get it he yielded to the request of the Fargos for a loan, increasing by that sum the demands of his houses. That price he consented to pay in order to obtain security for the whole indebtedness, believing the security adequate under any contingencies likely to come about during the ensuing six months deemed necessary for the working out of the scheme. He was willing—perhaps, in a degree, hopeful—that the Fargos should succeed, and that other creditors should not suffer; but, except for the interest of the rubber companies and the integrity of their security, he was practically indifferent, and any attempt to put him in any other attitude in the transaction strikes us as unnatural, unbusinesslike, and incredible. In August, as in January, Charles Fargo was able to dictate terms to the others concerned in what was then to be done. This time he had nothing to lose, but something to gain for himself and his brothers, and for the Metropolitan National Bank, of which he was a stockholder. In January, it appears, he opposed the suggestion of admitting the bank into the arrangement with the rubber companies, and it is perhaps not crediting him with too much acumen to suppose that, besides other considerations, he saw the advantage of holding that card for the last play. As an original proposition, it is not probable that the bank would have joined in the scheme, but in the end it was at his mercy, because without yielding the $10,000 it must lose its unsecured $40,-

000, or bring suit, by which at best only a small percentage could be saved. The rubber companies could not oppose him without danger of losing the book accounts and bills receivable which had not yet been assigned, and without exposing their judgment notes to attack by the bank supported by the Fargos, who, perhaps, were the more to be respected because "knowledge is power." But for the "pressure" which Fargo was able to bring upon them, what businesslike reason was there for the rubber companies consenting to share their security with the bank, if they believed it unimpeachable? Whatever they thought in January, they knew then that the property within reach of the executions which they could obtain was insufficient, and with the accounts receivable added would hardly realize enough, to satisfy their own demands. When the agreement was made with the bank, stipulating that each party should account to the other for a prorated share of all sums realized, it is evident that any expectation of full payment had been abandoned. It is recited in the agreement that the parties had "determined to unite their efforts to collect their respective claims, * * * and share pro rata in the results thereof," but nowhere is there a hint of a possible surplus to divide. The Fargos had carried away their $10,000, the reward for their share in what had been done; and there was no reason, apparent at the time, for inserting in the agreement even a formal expression of the residuary rights of the Fargo company and its victimized creditors. The assignment of the bills and accounts, as finally made, treated as the consummation of the agreement to assign made in January, was tainted with the illegality of that contract, of which it was a part; and if it could be regarded as an independent act, freed of the taint of its origin, it was illegal, because part of a transaction by which the managers of an insolvent corporation going out of business secured a preference for themselves. If the Fargo Company was justly indebted to Charles and Frank Fargo for money which they had borrowed upon a pledge of their bank stock, and the $10,000 obtained of the bank was for the purpose of enabling the corporation to repay them, it was, under the doctrine of Manufacturing Co. v. Hutchinson, supra, an unlawful preference, and made illegal any other preference granted wholly or partly in consideration thereof. This proposition applies also to the preference given to the bank. Besides being managing officers, the Fargos were parties to the original scheme for securing the rubber companies, and, of course, could not prefer themselves over others whom by the false pretenses of that scheme they had induced to give credit to the corporation.

It is contended in behalf of the bank that it entered into the agreement with the rubber companies in ignorance of their arrangement with the Fargo Company, that there was no wrong in its conduct, that nobody was harmed thereby, and therefore that, whatever may be said of the position of those companies, the preference which the bank received is not assailable merely because of its contract to join the rubber companies in efforts to collect their respective demands and to prorate the proceeds. The master has reported that, at the time of the completion of the arrangement, "neither the bank nor

its officers nor attorneys had any knowledge of the change of the directors of the said C. H. Fargo & Co. or of its by-laws." The president of the bank testified concerning his knowledge on the subject. It does not appear that other officers of the bank had anything to do with the matter, and the finding in respect to them is unobjectionable; but, if there is evidence in the record, we have not found it, that the attorney of the bank, who conducted the negotiation, and is shown to have had a much more intimate knowledge of the details of the transaction than the president, did not know every feature of the original scheme. The president of the bank himself testified that when he agreed to loan the $10,000 he knew it was necessary to get the authority of the directors for the execution of the judgment notes for the whole sum of $50,000, and that, on his asking Porter when the judgment notes would be made, "he said it was easy to make them; that the directors were all in that office [Beale's], or could be gotten." That certainly ought to have put him upon inquiry into the reasons for so extraordinary an organization of the directory; and in an earlier part of his testimony, after denying knowledge that the Fargo Company was officered by parties representing the rubber companies, and being asked when he first learned that persons were acting in behalf of the company other than those connected with its management in the sale of goods, he answered: "It might have been the day following. I think it was, from something which was said in Mr. Beale's office by Mr. Porter. My impression is that he said that the directors of the company were men who were employés in the office there, or were part of the firm,—of the law firm there." And again, on cross-examination, he admitted that he did learn "of the extent of the indebtedness to the United States Rubber Company and L. Candee & Co., and also learned that they had some kind of an agreement with the Fargo Company by which they were authorized to secure their indebtedness in advance of any other creditors of the company." All this, it is certain from his own testimony, occurred before the judgment notes to the bank were executed, and before the $10,000 was paid over. If the witness testified to his knowledge or ignorance of the change in the by-laws, we have failed to find the passage; but it is not of much importance, in view of what he did well understand. Besides, if the bank were acquitted of all guilty knowledge and purpose in the transaction, how can it escape the entangling alliance into which it entered with the rubber companies? The agreement between them is still in force, and, if the bank is allowed to retain its preference, it will be bound to pay over to the rubber companies of what it realizes in the proportion of $14 to every $5 received to its own use; and if the preference be set aside, and the bank permitted to share pari passu with other creditors, except the rubber companies, of the amount so received, great or small, it will be bound to account to the rubber companies in the same proportion. The validity of that agreement as between the parties is not in issue, and cannot be affected by the decree in this case. If unlawful and invalid as against other creditors because made in fraud of their rights, it is nevertheless binding as between the parties, and could not be annulled at the suit of either, against the consent of the other,

on account of anything done in this case. Courts of equity do not interfere to relieve parties from the consequences, though unexpected, of illegal agreements. Moreover, the bank, if permitted to share in the fund to be distributed, the rubber companies being excluded, would receive more in proportion than if the preferences had been upheld and the division were made between it and the rubber companies. It is clear that the rubber companies were guilty of fraud in fact, and, as against subsequent creditors of the Fargo Company, should not be allowed to share in the fund for distribution; and, for the reasons stated, the bank likewise should be postponed.

The fact that some of the creditors were creditors when the arrangement between the Fargo Company and the rubber companies was put into operation cannot be allowed to change the result. It is impossible to say that they were not injuriously affected, even in respect to their prior demands, and it is certain that they would not have given further credit if there had been proper publicity about the things done which were purposely kept secret from them. The innocent creditors, whether prior or subsequent, are all entitled to share proportionately in the fund. The rubber companies and the bank are not entitled to share, as against the subsequent defrauded creditors, and therefore cannot be permitted to share with the prior creditors, since thereby they would be sharing with those who were defrauded. The principal appeal is denied, the cross appeal is sustained, and the decree below is reversed in so far as it permitted the rubber companies and the bank to share pari passu with other creditors, and the cause is remanded, with direction that the decree be so modified as to require the payment in full of all claims of other creditors, if the fund be sufficient, and that, if anything remains, it be paid proportionately to the bank and to the rubber companies.

BROWN, Circuit Justice (dissenting). On January 6, 1896, the corporation known as C. H. Fargo & Co. was in desperate financial straits. To avoid an immediate collapse, and to procure the money necessary to continue the business, it entered into an arrangement with its two principal creditors by which the latter undertook to lend $50,000, and the Fargo Company to execute three judgment notes, not only to secure the $50,000 advanced, but $45,000 owing to Candee & Co., and $140,000 to the United States Rubber Company, with a further stipulation to assign its accounts and bills receivable, should it become necessary for it to suspend business. There was a further stipulation that it should not give any judgment notes to other creditors. To secure the performance of this, five of the directors of the Fargo Company were to retire from the board, in favor of five persons elected upon the nomination of the preferred creditors.

The general creditors had no knowledge of this arrangement, although the Metropolitan National Bank was subsequently informed of it.

The master found that this arrangement was "for the purpose of giving preferential security to the rubber companies, and that the matter was kept secret in order to allow the Fargo Company an opportunity of getting through embarrassments apparently temporary,

but not with a fraudulent intent as to the other creditors of the company," and that the only purpose and object of changing the board of directors as aforesaid, and of amending the by-laws so as to prevent the giving of judgment notes except by vote of the board, was to protect the rubber companies against the giving of judgment notes to other creditors.

This arrangement continued until August 6, 1896, during which time the Fargo Company continued its business as before, and reduced its general indebtedness and its indebtedness to Candee & Co. to a considerable extent, when it was forced to suspend.

The district judge was of opinion that, although the giving of the judgment notes was not unlawful, the arrangement by which the matter was kept secret while the corporation devested itself of power to give like notes to other creditors, and continued to carry on its business as before, rendered the whole device a constructive fraud upon its creditors. In this we all agree.

To make it actually fraudulent, such as to require the claims of those preferred creditors to be postponed to the claims of the general creditors, I think it should clearly appear either that the preferred claims were not bona fide, of which there is no pretense, or that the arrangement was entered into, not for the purpose of tiding the company over its immediate crisis, enabling it to continue business, and at the same time to secure the preferred creditors, but for the purpose of ultimately winding it up, and in the meantime of giving it credit, and enabling it to purchase additional goods which the preferred creditors would thereby be able to seize and subject to their own debts.

I find no testimony to satisfy me that an actual fraud upon the general creditors was intended. The device of changing the directors was evidently not for the purpose of giving up control of the business, but only to secure the arrangement that no other judgment notes should be given, and as a matter of fact the new directors did not interfere with the business of the company as conducted by the Fargos. Indeed, no meeting of directors was held after the change was made. No new creditors were induced to give credit to the company upon the faith of their continuing the business, as the evidence shows that with few exceptions the same persons were creditors in January and in August.

Of the alleged misrepresentations of the Fargos to the Dixon Bank and to the Pfister & Vogel Company that no judgment notes had been given, it may be said that they are not admissible as against the claims of the rubber companies, unless there be evidence of a conspiracy between them to defraud their creditors, of which there is no evidence aside from the agreement itself, and that in any event none but the Dixon Bank and the Pfister & Vogel Company could have been injured by these representations. Such representations might be used as a basis for giving them priority, but they would not inure to the benefit of other general creditors. Upon the whole, it does not seem to me that such a case of fraud is made out as authorizes the court to postpone the claims of the preferred creditors to those of the general creditors, and thereby practically to

confiscate them, and that there is no sound reason for departing from the general rule laid down by the supreme court in White v. Cotzhausen, 129 U. S. 329, 9 Sup. Ct. 309, and Streeter v. Bank, 147 U. S. 36, 13 Sup. Ct. 236, wherein the preferred creditors were permitted, after their security had been set aside, to stand upon an equality with the general creditors. See, also, Comer v. Tabler, 44 Fed. 467; Brown v. Stove Co. (Tenn. Ch. App.) 42 S. W. 161.

The evidence satisfies me that there was a bona fide attempt to assist the Fargo Company in continuing its business, with the hope of ultimately pulling it through, and that, if this attempt had been successful, it would have redounded greatly to the interest of the general creditors. It was natural, at least, that in making this attempt the rubber companies should have endeavored to secure themselves, not only for their immediate outlay of $50,000, but for their prior debts. In palliation of the secrecy, which was held to make this constructively fraudulent, it may be said that publicity doubtless would have destroyed the entire scheme of raising money to carry on the business.

TERRE HAUTE & L. RY. CO. v. HARRISON.

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

No. 577.

1. RAILROADS—FORECLOSURE SALE—RIGHTS OF PURCHASER—LIENS.

The rule of caveat emptor, as applied to judicial sales, operates not only to deprive the purchaser of a railroad sold under foreclosure of any recourse against the proceeds of the property on account of existing incumbrances or tax liens on the property, but also of any claim to reimbursement for such liens from a fund in the registry of the court, or in the hands of a receiver, derived from the earnings of the property during the receivership, unless the decree, or order of sale, or special equitable considerations give him a right to such reimbursement.

2. SAME—LIENS ON PROPERTY.

A railroad in the hands of the receiver of a lessee was sold under foreclosure in November, and the purchaser was put in possession December 1st, up to which time the earnings were taken by the receiver. The sale was specifically made subject to all rights under a prior mortgage securing an issue of bonds, with accrued interest thereon since July 1st. Under the laws of the state the taxes on the property for that year became a lien on April 1st, but were not payable until January 1st following. During the receivership a special fund had been set aside by order of the court, representing the net earnings of the leased road, from which, under the terms of the lease, all taxes and the interest on both issues of the lessor's bonds were required to be paid by the lessee; and from time to time, by order of the court, the maturing interest and taxes had been paid by the receiver from such fund, in which a considerable sum remained at the time the leased property was sold. *Held*, that the purchaser was not entitled to payment, from such fund, of the interest on the first mortgage bonds, and the proportion of the year's taxes accruing prior to December 1st, as against the second bondholders, whose claims were not paid in full from the proceeds of the sale.

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

The appellant, the Terre Haute & Logansport Railway Company, is the purchaser at foreclosure sale, through Joshua Twing Brooks, of the property

of the Terre Haute & Logansport Railway Company, and as such intervenes in the proceedings for distribution of funds in the hands of the receiver, to procure payment out of a so-called "Logansport Fund" of five-sixths of an installment of interest on a prior mortgage and two-thirds of the taxes, which were liens against the property at date of sale, but became due after such date. The fund referred to was set apart by the order of court entered in the primary cause by which a receiver was appointed of this and other lines operated by the Indianapolis & Terre Haute Railroad Company, as hereinafter stated. The decree from which the appeal is brought was entered after confirmation of the sale under the foreclosure decree, and denies the application of the appellant for such payment of interest and taxes, and directs that the fund be paid over to the complainant, to be applied on the bonds and interest in suit, except the sum of $20,000, retained for further distribution, and the sum of $38,500, retained to await the result of this appeal.

The following are the material recitals and findings in the decree: "Comes now the complainant, by his solicitors, Miller & Elam; and the defendants, the Terre Haute & Indianapolis Railroad Company and the Terre Haute & Logansport Railway Company, come by their solicitor, S. O. Pickens, Esq. Comes also the receiver, Volney T. Malott, by John G. Williams, Esq., his solicitor. And the court having considered the petition of the complainant for distribution of a part of the moneys on hand in the Logansport fund and in the registry of the court to be applied in payment of the bonds and interest, and the court having also considered the answer of Terre Haute & Logansport Railway Company to said petition, and the prayer in said answer for the application of a portion of said moneys in the Logansport fund to the payment of two-thirds of the taxes on the property so sold under the decree of this court for the year 1898, when the same shall mature, and also a further portion of the same to the payment of five-sixths of the interest coupons maturing January 1, 1899, on the first mortgage bonds of said property, and the court having also considered the report of the receiver touching the subject-matter, as well as the record in this case, doth now find, order, and decree: First. The complainant is entitled, as between parties in this cause, to have the moneys remaining in said Logansport fund applied to the payment of the bonds and interest secured by the mortgage foreclosed, except that it is necessary that there be retained in the hands of the receiver of the moneys in said Logansport fund the sum of twenty thousand dollars until the further order of this court. Second. Neither said taxes for the year 1898, nor any part thereof, nor the interest accrued on said first mortgage bonds since July 1, 1898, nor any part thereof, are prior in equity to the bonds and interest of the complainant, but the purchaser of the property sold therein took the same subject to and charged with the payment of said taxes and interest on said first mortgage bonds, and the defendant Terre Haute & Logansport Railway Company is not entitled to have any part of said interest or taxes paid or provided for out of the moneys in said Logansport fund. Third. The complainant is entitled to have presently paid over to him for application to the payment of said bonds and interest all of the moneys in said Logansport fund except said sum of twenty thousand dollars, and is also entitled to have presently paid over to him all moneys derived from the sale of said property in the registry of the court after the costs, expenses, etc., and after deducting the amount necessary to pay the proper pro rata on the five bonds not in the hands of the bondholders' committee."

The facts and proceedings upon which the claims rest are substantially as follows: On November 1, 1879, the Terre Haute & Logansport Railway Company, owning a line extending between Rockville and Logansport, and having a leased line from Rockville to Terre Haute, executed a mortgage to Benjamin Harrison, trustee, to secure bonds to the amount of $500,000, which constituted a first lien upon all its property. On November 22, 1879, it entered into a contract of lease to the Terre Haute & Indianapolis Railroad Company for a term of 99 years, under which the latter company entered into possession of the lines and property. The contract provided that the lessee company was to operate the lines, "and, after retaining seventy-five per cent. of the gross receipts from all traffic moved over said line or business done thereon" for its own use, it would "appropriate the remaining 25 per cent. as follows,

to wit: First. To the payment of taxes assessed against the property held and operated under this contract. Second. To the payment of the interest as it falls due on the first mortgage bonds of said party of the second part, being an issue of bonds to the amount of five hundred thousand dollars, bearing interest at the rate of six (6) per centum per annum, payable on the 1st day of January, A. D. 1910, and secured by a deed of trust, conveying to Benjamin Harrison, of Indianapolis, Indiana, as trustee, the line of railroad and property of the party of the first part hereinbefore described. Third. To the payment of rental accruing to the Evansville & Terre Haute Company for the use of its said line of railroad extending from Terre Haute, Indiana, to Rockville, Indiana. Fourth. The surplus, if any, to be paid annually to said party of the first part." And it was further stipulated that, in the event the 25 per cent. so appropriated proved "insufficient to pay the taxes, interest, and rental aforesaid, and proper cost of maintaining the corporate organization" of the lessor company, the deficit should be advanced by the lessee company to make such payments, and the amount so advanced become a charge to be repaid by the lessor. Subsequently it was determined to build an extension of the railroad to South Bend, and for that purpose the lessor company, on January 1, 1883, made a further mortgage, or so-called "extension mortgage," to the same trustee, to secure bonds to the amount of $1,000,000, which constituted a first mortgage on the extended portion and a second mortgage on the pre-existing property. On June 21, 1883, a new lease was entered into with the Terre Haute & Indianapolis Company, which included the extension, with like provision as above recited, except that interest on the bonds secured by this "extension mortgage" was made an additional charge upon the 25 per cent. of gross earnings, and to be advanced by the lessee in case of deficit. The lessee company further guarantied the payment of principal and interest by an indorsement on the bonds respectively secured by each mortgage. The terms of this lease and of the first lease above mentioned are set forth in the report of Railroad Co. v. Harrison, 60 U. S. App. 265, 32 C. C. A. 130, and 88 Fed. 913.

The Terre Haute & Indianapolis Railroad Company became involved in operating leases respecting other lines as well, and in November, 1896, a bill was exhibited against it by Mark T. Cox and others, in the court below, for specific performance of a lease made with the Terre Haute & Peoria Railroad Company; and on November 13, 1896, Volney T. Malott was appointed receiver of all the lines owned or leased by the defendant company. The order provided that the receiver should "keep separate and distinct accounts showing the amounts of the gross earnings derived from the operation" of each of the leased lines, and, among other provisions, that "twenty-five per cent. of the gross earnings derived from the operation of the Terre Haute & Logansport Railroad Company" be "set apart and held by the receiver as a separate and distinct fund," in separate bank account, specially designated to indicate the property from which it was derived, "and that no part of said percentages so set apart and deposited be paid out or applied except on the special order of the court," made upon notice to all parties appearing in the cause. The property of the Terre Haute & Logansport Railroad Company being thus in the custody of the court, the appellee, on leave of the court, filed his bill of complaint on December 30, 1896. As originally framed, it sought to enforce the liability of the Terre Haute & Indianapolis Company under the lease and guaranty, but that claim was withdrawn, and by amendment the bill was made one for foreclosure of the second or "extension mortgage" for default in payment of interest. On July 22, 1897, a decree of foreclosure and sale was entered, which was affirmed on appeal. Railroad Co. v. Harrison, supra. In the decree it was provided: "That this decree and sale are made without prejudice to, and with the full reservation of, the rights and interests of Benjamin Harrison, as trustee, in and of all holders of bonds and coupons under the said mortgage executed by said Terre Haute & Logansport Railroad Company to Benjamin Harrison, trustee, of date November 1, 1879." Before the sale, on September 26, 1898, on petition filed by appellee, an order was entered by the court, which reads as follows: "And comes also the receiver, Volney T. Malott, in charge of the property covered by the mortgage, which is the subject-matter of this suit, by John G. Williams, his solicitor,

and comes also the Terre Haute & Indianapolis Railroad Company, by S. O. Pickens, its solicitor, and it appearing to the court that a question has arisen whether the fund in the hands of the receiver known as the 'Logansport Fund' would pass to the purchaser at the foreclosure sale under the decree herein: Now, therefore, to avoid any such question, it is by the court ordered that said fund shall not so pass, but shall be reserved and held by the receiver for disposition under the orders of the court, first, to discharge any liabilities against the same which may be adjudged prior in equity to the bonds and interest; the balance to go, in case of a deficiency in the proceeds of the sale, to pay the bonds and interest in full, to liquidate such deficiency, or, if there is no such deficiency, then said fund, or so much thereof as may remain, to be paid to the party next in equity under the order of the court. And the master is directed to read this order in connection with the notice of sale before receiving any bids at the foreclosure sale." And the notice of sale by the master states as follows: "Provided, that said sale of said property shall be made without prejudice to, and with the full reservation of, the rights and interests of Benjamin Harrison, as trustee, in and of all holders of bonds and coupons under a certain other and older mortgage upon said property, or a portion thereof, by the said Terre Haute & Logansport Railroad Company to Benjamin Harrison, trustee, bearing date November 1, 1879, as security for the payment of bonds of said company to the amount of $500,000, with the unpaid interest thereon at six per cent. per annum since July 1, 1898; said last-recited mortgage being set out in full in the bill of complaint in said suit." On November 18, 1898, the property was sold for $1,060,000 to Joshua Twing Brooks, his bid for that amount exceeding the offer by the bondholders' committee. The purchase was completed on November 28, 1898, and deed executed to the appellant, in accordance with the purchaser's direction, December 1, 1898. An order confirming the sale was thereupon entered, and possession of the property was delivered to the appellant, dating from midnight, November 30, 1898.

The Logansport fund in the hands of the receiver amounted approximately to the sum of $137,000 at the date of sale, and the interest which had accrued on the first mortgage up to July 1, 1898, and the taxes for the years 1896 and 1897 had been previously discharged by the receiver out of such fund, pursuant to orders of the court. The unpaid charges in question are: (1) Interest from July 1, 1898, on such prior mortgage, of which an installment of $15,000 became due January 1, 1899; and (2) the taxes for 1898,—about $38,000,—assessed pursuant to the statute of Indiana, by which a lien was declared from April 1, 1898, but the provision for collection directed that the tax roll be delivered for that purpose to the treasurer "on or before the last day of December in each year." On December 5, 1898, the appellee filed his petition for application of such fund upon the deficiency remaining on the foreclosed bonds and mortgage, and the appellant obtained leave to be made a party defendant, and answered therein, and on the hearing the decree was entered from which appeal is brought.

Samuel O. Pickens and Laurence Maxwell, for appellant.

W. H. H. Miller, for appellee.

Before BROWN, Circuit Justice, JENKINS, Circuit Judge, and SEAMAN, District Judge.

SEAMAN, District Judge, after the foregoing statement, delivered the opinion of the court.

The general doctrine is well settled that there is no warranty in judicial sales; that the maxim caveat emptor applies, and the purchaser takes the property without recourse for tax liens or other incumbrances or defects in the title. The Monte Allegre, 9 Wheat. 616, 648; Osterberg v. Trust Co., 93 U. S. 424, 428; U. S. v. Duncan, 4 McLean, 607, Fed. Cas. No. 15,003; Fidelity Insurance, Trust & Safe-Deposit Co. v. Roanoke Iron Co., 84 Fed. 744; Ror. Jud. Sales,

§§ 458, 459. In the argument of counsel on behalf of the appellant this rule is recognized, but with the assertion that it operates only to forbid the purchaser "from asking that prior liens be paid out of the proceeds of the property sold." No authority is cited for so limiting its effect, and we are of opinion that the rule applies with equal force to any fund which is in the registry of the court or in the hands of the receiver as the earnings or other production of the property involved. Exception to this general rule undoubtedly arises in equity in the following instances: First, where the decree or order for the sale expressly provides for discharging liens or other claims against the property out of the proceeds or other funds coming into court, or where the proceedings or provisions are otherwise inconsistent with such rule; and, second, where there is fraud, concealment, or unfair dealing in the proceedings which entitle the purchaser to equitable relief.

The claims in controversy are: (1) For current interest accruing on the prior mortgage, to which the sale was subjected; and (2) for taxes assessed against the property sold for the year 1898, concurrent with the sale. Neither interest installment nor taxes was due and payable when the sale was perfected and possession passed to the purchaser, and both claims are clearly barred by the rule stated, unless circumstances are shown which create an exception, either on one of the grounds above mentioned or within well-recognized principles of equity. Are sufficient grounds presented in this case to exempt the purchaser from such rule through the several orders of court, receivership, or pre-existing leases? The contention is, on behalf of the appellant, that the Logansport fund stands in the registry of the court as a special fund which was set apart and dedicated for the payment primarily of the charges in question, both by the leases made by the mortgagor company and by the orders of the court entered in the course of the proceedings; and that the order of September 26, 1898, made pending the sale, not only reserved the fund from passing to the purchaser, but was, in effect, an assurance to him that it should be applied in liquidation of these charges. Manifestly, the last-mentioned order bears no such interpretation when considered alone. It recites "that a question has arisen whether the fund in the hands of the receiver, known as the 'Logansport Fund,' would pass to the purchaser at the foreclosure sale under the decree," and then provides:

"Now, therefore, to avoid any such question, it is by the court ordered that said fund shall not so pass, but shall be reserved and held by the receiver for disposition under the orders of the court, first, to discharge any liabilities against the same which may be adjudged prior in equity to the bonds and interest; the balance to go, in case of deficiency in the proceeds of the sale, to pay the bonds and interest in full, to liquidate such deficiency, or, if there is no such deficiency, then said fund, or so much thereof as may remain, to be paid to the party next in equity under the order of the court. And the master is directed to read this order in connection with the notice of sale before receiving any bids at the foreclosure sale."

That liens were accruing for current taxes and for interest on the prior mortgage were patent facts, presumably within the knowledge of all parties in interest; but neither item is so referred to in

the petition for the order, nor named in the order. No claim is made that payment of either out of the fund was suggested or otherwise assured at the sale or in negotiations leading up to it; and respecting the interest the notice of sale informs the purchaser that it will be made subject to the first mortgage, "with the unpaid interest thereon at six per cent. per annum since July 1, 1898." The ground for equitable relief must appear, therefore, in the previous orders or transactions, and the appellant's claim in that regard is thus stated in the argument of counsel: The purchaser "was distinctly advised by the order of September 26, 1898, that there was a fund in court which would be applied to discharge any liabilities against the same which might be adjudged prior in equity to the extension mortgage bonds; and he was also advised by the former orders of the court that taxes and interest on the first mortgage bonds had always been recognized and enforced as claims on that fund 'prior in equity' to the extension mortgage bonds." It is true that the primary order of the court appointing the receiver of the several lines of railroad distinctly provided that separate accounts should be kept by him "of the gross earnings derived from the operation" of each, and that the specified percentages of such earnings be "set apart and held by the receiver as a separate and distinct fund," to be paid out or applied only on special orders of the court; and that the earnings derived from the lines of the mortgagor company in question were so separated, and 25 per cent. thereof set apart as directed by said order, and constitutes the Logansport fund. And it is equally true that taxes and interest on the first mortgage were paid out of such fund from time to time as each accrued, upon further orders of the court. On these premises, however, no equity can be founded in favor of the purchaser at the sale to reimburse him for the payment of such liens which accrued against the property after the sale. The fund was thus set apart by the primary order from the gross earnings of the road, on the assumption that it represented their net product after meeting the expenses of operation, and its status as earnings was distinctly preserved to enable the court to make final disposition when the rights of the parties were ascertained. For the purposes of the order, the ratio adopted was the same fixed in the operating leases, but there was clearly no ratification or adoption of the leases or any of their covenants. The Logansport fund, therefore, was exclusively net earnings derived from the operation of the property by the receiver, and the general rule in such cases required its application to pay both taxes and interest on the prior mortgage as they accrued in the course of the receivership. The subsequent orders so directing payments to be made were usual in character, and have no bearing beyond the general rule referred to; and no order or course of action which appears in the record in terms or in purpose supports either view for which the appellant contends, namely, that they import (1) an adoption of the leases, or (2) an assurance to the purchaser that liens not accrued would finally be paid out of the fund, or declare (3) such liens to be "prior in equity" to the second mortgage. Nor can the claim be founded on

the provision in the pre-existing leases for payment of taxes and interest by the lessee during the term of the lessor's share of the gross earnings. Aside from the view above indicated that these leases were not adopted by the action of the court, and were, in effect, displaced by the receivership, the appellant obtained no interest in such leases through the purchase at foreclosure sale to authorize their enforcement for its benefit; and, however effective the covenants may be, either between the parties, or in favor of mortgagees for interest, or of the public for taxes, they cannot operate to relieve the appellant from a burden which is imposed by law upon the purchaser at judicial sale.

It then remains to ascertain whether an equity in the fund is otherwise established in favor of the purchaser through the nature of the liens and their inception during the possession by the receiver. The sale was made November 18, 1898, was duly confirmed, and possession was delivered to the appellant, taking effect from midnight, November 30th. The last installment of interest on the first mortgage bonds matured July 1, 1898, and was duly paid by the receiver; and the next installment—being the one in controversy—was not payable at the date of sale, but fell due January 1, 1899, one month after title and possession were acquired by the purchaser. The taxes in question were assessed for the year 1898, and, although the statute of Indiana declared the taxes to constitute a lien against the property from April 1st, it further provided (section 8566, Burns' Rev. St. 1894; section 6415, Horner's Rev. St. 1897) for delivery of the tax roll or "duplicate" to the treasurer for collection "on or before the last day of December in each year"; and it is asserted, and not disputed, that the practice is uniform thereunder for collections to commence after the ensuing 1st of January and extend until March or April. No proof is offered as to the time of delivery for collection in this instance, and it cannot be presumed that delivery was before the sale, but rather that the taxes became actually payable a month later, as contemplated by the statute. On this state of facts the ruling in Osterberg v. Trust Co., 93 U. S. 424, 428, is controlling. There the purchaser applied for relief from the payment of taxes under the following circumstances: Railroad property in the state of Illinois was in the hands of a receiver, and sold on mortgage foreclosure August 16, 1875. By the statute of Illinois the taxes for the year 1875 attached as a lien from May 1, 1875, but the warrants for collection were not to be delivered until "within the first ten days of December." The amount of his bid was not entirely paid by the purchaser until April 1, 1876, and the sale was not completed and confirmed until May 27, 1876. Meantime, up to December 9th, when the purchaser was let into possession under a provisional order of the court, the receiver retained possession, and had the earnings of the road, as directed by the order of the court. But the fact that the judicial sale antedated the maturing of the tax claim was held to conclude the purchaser, and the postponement of final payment of the purchase money and of actual transfer of title and possession until after the taxes fell due, even in conjunction with retention by the receiver of all the

earnings during the interim,—all being at the instance of the purchaser,—were ineffectual to relieve the purchaser from payment of the taxes so accruing after the bid was received. Of the tax lien it is there held:

"The taxes for 1875 were, at the date of the decree, a subsisting lien upon the mortgaged property, and he [the purchaser] had not only constructive, but actual, notice of its existence. It is true that the title of a purchaser at a judicial sale under a decree of foreclosure takes effect by relation to the date of the mortgage, and defeats any subsequent lien or incumbrance. A lien for taxes does not, however, stand upon the footing of an ordinary incumbrance, and is not displaced by a sale under a pre-existing judgment or decree, unless otherwise directed by statute. It attaches to the res without regard to the individual ownership, and when it is enforced by sale pursuant to the statute prescribing the mode of assessing and collecting them the purchaser takes a valid and unimpeachable title. But if the doctrine were otherwise, and if the doctrine of caveat emptor had no application to this case, we are not aware of any principle which would justify withholding from the mortgagee any of the moneys derived from the sale of the mortgaged property with a view to the application of them to satisfy such lien. This is not a controversy between incumbrancers."

And in reference to the purchaser's claim of an equity in the earnings thus coming to the hands of the receiver it is further said:

"He has no rightful claim to any part of the earnings of the road whilst it remained in the possession of the receiver, nor is he in a position to question the orders of the court as to the application of those earnings."

That case distinctly rules against the appellant's claim for the taxes of 1898, and the doctrine there stated is equally applicable to the lien for interest. We are of opinion that no equity appears for paying either claim out of the Logansport fund, and the decree accordingly is affirmed.

BRADLEY v. HARGADINE-McKITTRICK DRY-GOODS CO. et al.

(Circuit Court of Appeals, Eighth Circuit. September 25, 1899.)

No. 1,117.

1. CHATTEL MORTGAGE—REPLEVIN BY MORTGAGEE AGAINST THIRD PERSON—DEFENSES.

In an action of replevin by a mortgagee to recover the mortgaged property from an execution creditor of the mortgagor, the defendant is entitled to show that the property was in fact owned by the mortgagor's wife, who did not know of, or assent to, the mortgage, but who has since relinquished title to the purchaser at execution sale, in the absence of evidence tending to show the wife's acquiescence in the mortgage, or other facts which would create an estoppel against her to dispute its validity, and mere delay on her part in asserting her rights is not sufficient to create such estoppel, unless it is also shown that she had knowledge of the mortgage.

2. APPEAL—JUDGMENT ON REVERSAL—DETERMINING QUESTION NOT SUBMITTED TO JURY.

On review of a judgment in favor of plaintiff in an action of replevin, who claimed under a chattel mortgage, it is error for the court, on reversal, to render judgment for defendant on the ground that plaintiff's mortgage is void for fraud in fact, where no such issue was made by the pleadings or submitted to the jury on the trial.

8. CHATTEL MORTGAGE—VALIDITY—EFFECT OF CONTEMPORANEOUS POWER OF ATTORNEY.

The execution contemporaneously with a chattel mortgage of an instrument by which the mortgagor authorized the mortgagee, as his attorney in fact, to collect certain notes, and dispose of certain property covered by the mortgage, but which contained no provision as to the disposition of the proceeds, does not transform the mortgage into an assignment, which would be void under the laws of the Indian Territory, because no inventory or bond was required from the assignee.

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

J. F. Sharp, H. C. Potterf, and W. F. Bowman, for plaintiff in error.
W. A. Ledbetter and S. T. Bledsoe, for defendants in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

THAYER, Circuit Judge. This is a proceeding to review a judgment of the United States court of appeals in the Indian Territory, which court reversed the judgment of the United States court for the Southern district of the Indian Territory, where the case originated. John L. Bradley, the plaintiff in error, claiming title under a chattel mortgage, brought an action of replevin in the last-named court against the Hargadine-McKittrick Dry-Goods Company and J. J. McAlester, United States marshal, the defendants in error, to recover the possession of certain cattle, horses, and mules, and damages for their detention to the amount of $500. The defendants answered the complaint, in substance, as follows: That, under an execution in favor of the Hargadine-McKittrick Dry-Goods Company against William Hull and others, the cattle, horses, and mules in question were levied upon by J. J. McAlester, United States marshal, as the property of William Hull, the same being in his possession, and were sold as his property at an execution sale; that in point of fact said horses, cattle, and mules belonged to Hull's wife, both at the time of the levy and sale under execution and at the time Hull mortgaged them to the plaintiff, Bradley, by the chattel mortgage under which the latter claimed title; and that Hull had executed said mortgage without the knowledge or sanction of his wife. The defendants further averred that, having ascertained after the execution sale that the live stock so sold belonged to Mrs. Hull, they had entered into an agreement with her whereby, for a valuable consideration, she had ratified and confirmed the execution sale, and had agreed that the property in controversy might be retained by Sam Garvin, the purchaser at said sale. The defendants also pleaded, in substance, by way of defense, that even if the live stock belonged to Hull at the time he executed the mortgage thereon in favor of Bradley, yet that the mortgage was inoperative and void as to Hull's creditors, for the reason that in connection therewith, and as a part of the same transaction, he had executed a power of attorney authorizing Bradley to take immediate possession of a lot of notes belonging to Hull, and to dispose of them for the purpose of raising a fund to pay the debt secured by the mortgage, and that the mortgage and power of attorney together constituted an assignment, and that, as an assignment,

the instruments so executed were void under the laws of the Indian Territory, because they did not contemplate or provide that the assignee thereby appointed should make an inventory of the assigned property, or execute a bond, but did contemplate that the assignee should obtain possession of said property and administer it without bond. The defendants further pleaded that the mortgage under which Bradley claimed was without consideration, because it was executed to indemnify him against liability as an indorser for Hull on certain notes, which indorsements, as it was alleged, had been placed thereon after the notes had been executed and delivered, and without any agreement for the extension of the time of payment, or other consideration which would support the several indorsements. The record discloses that in the trial court the defendants were denied the right to establish one of the defenses set forth in their answer, namely, that the plaintiff, Bradley, had acquired no title to the property in controversy by virtue of the chattel mortgage under which he claimed, because at the time such mortgage was executed the property thereby conveyed belonged to the mortgagor's wife, Sippie Hull, who had neither joined in the mortgage nor assented thereto. The proof which was tendered by the defendants in support of this defense was excluded, upon the theory, apparently, that the mortgagor's wife was too late in setting up her ownership of the property, and was therefore estopped from claiming it. To such action the defendants reserved an exception. The record, however, is barren of any evidence which has a tendency to show that the wife was aware of the fact that her husband had mortgaged the property in controversy as his own, and had actually assented thereto, or that she had remained passive for such a long period of time after acquiring knowledge of the mortgage that assent or acquiescence on her part ought to be presumed. We are unable to find in the record any proof of facts or circumstances which would warrant a court in holding that the wife was precluded from asserting her title as against Bradley, her husband's mortgagee; and, if she was not estopped, we perceive no reason why the defendants below should not have been permitted to show title in her, which, for a valuable consideration, she had relinquished to Garvin, the purchaser at the execution sale. The exclusion of this evidence was, in our opinion, an error which necessitated a reversal of the judgment that was rendered at nisi prius.

The court of appeals for the territory reversed the judgment of the trial court, and rendered a judgment of its own in favor of the opposite party,—that is to say, in favor of the defendants below,—and, in view of such action, the general question which arises with respect thereto is whether it was justified in rendering a final judgment for the defendants, or whether it should have contented itself with ordering a new trial. The appellate court based its decision (vide Dry-Goods Co. v. Bradley [Ind. T.] 43 S. W. 947), as we understand, on two grounds: First, that the mortgage in favor of Bradley, and under which he claimed, was fraudulent in fact,—that is to say, conceived with an intent to hinder, delay, and defraud the creditors of Hull; and, second, on the ground that another instrument,

which was executed contemporaneously with the mortgage by the mortgagor, transformed it into an assignment, which was void under the laws of the Indian Territory, within the rule declared by this court in Appolos v. Brady, 4 U. S. App. 209, 1 C. C. A. 299, and 49 Fed. 401. That court concluded that the mortgage and contemporaneous agreement evidenced an intent on the part of the mortgagor to set aside the property therein described and conveyed as a fund to pay a debt for which Bradley had become a surety, and that it was not the mortgagor's intent to secure that debt simply by a lien on the property conveyed, or to reserve the right to discharge the debt out of other funds, and thus release the lien. On this ground the court held, as a matter of law, that the mortgage was in effect an assignment and invalid, no inventory or bond having been executed or filed. Concerning the first of these grounds on which the judgment was based, we remark that the plea that the mortgage in favor of Bradley was fraudulent in fact was not interposed by the defendants, and the case was thus made to turn on an issue which was not fairly raised by the pleadings. We think that the plaintiff below was entitled to have the issue of fraud tried by a jury under pleadings which fairly presented that issue, and that he is entitled to complain of the manner in which it was raised for the first time in the appellate court. The evidence from which that court drew the inference of fraud in fact was adduced during the trial incidentally, when the defendants were endeavoring to show that the so-termed mortgage was an assignment, and it was introduced in support of that defense only. It may be that from the testimony in question a jury would be at liberty to infer fraud, but such an inference, we think, should be drawn by a jury under pleadings so framed as to tender that issue.

Concerning the second ground on which the decision of the appellate court was rested, it may be said that in connection with the chattel mortgage, which was in the ordinary form and covered certain sewing-machine notes, sewing machines, sewing-machine wagons and harness, and horses used in the sewing-machine business, as well as the cattle, horses, and mules here in controversy, two instruments appear to have been executed, which are quoted below in the margin.[1]

[1] "Know all men by these presents that I, William Hull, do hereby agree with John L. Bradley that said Bradley is to take possession of all the sewing-machine property mentioned in mortgage of this date, and to collect, as far as possible, the amounts due on said notes, to sell the sewing machines, wagons, harness, and horses to the best advantage as to him appears, and, retaining all expenses, to pay the balance to the White Sewing-Machine Company on the notes of the said William Hull on which said Bradley is surety; that, in cases in which it appears to him that the notes cannot be collected, the said Bradley is authorized to exercise his own discretion in regard to compromise and settlement, taking back the machine if he thinks advisable, and he shall be held responsible for such money and property as he shall receive in settlement of said notes.

"Dated this 14th day of December, 1893. W. M. Hull."

"Know all men by these presents that I, W. M. Hull, of Pauls Valley, Indian Territory, have appointed, and by these presents do constitute and appoint, John L. Bradley, of Pauls Valley, Indian Territory, my sole, true, and lawful

As we construe the testimony which was adduced at the trial, a controversy arose between the respective parties concerning which one of the two instruments quoted below was executed and finally became effective. On the part of the plaintiff it seems to have been claimed that the instrument bearing date December 14, 1893, was first executed; that within a day or two thereafter it was suggested by some one that the execution of said instrument would impair the validity of the mortgage, whereupon the second instrument, acknowledged on December 16, 1893, was executed to take its place, and became effective. On the other hand, the defendants below contended that the first power of attorney was never supplanted by the one bearing a later date. The evidence on this head raised an issue of fact which was properly determinable by the jury, but it seems to have been ignored or overlooked.

If the second of these instruments was executed in lieu of the first, as the plaintiff's evidence tended to show, then we are of opinion that it did not work a change in the apparent character of the mortgage or transform it into an assignment. The instrument in question was simply a power of attorney which authorized the mortgagee to collect certain notes and to sell certain chattels for and in behalf of the mortgagor and as his agent. The mortgagor had the right to call upon his agent for the proceeds of such collections and sales as the agent might make, and he still retained his equity of redemption in all of the property covered by the mortgage, together with the right to pay the mortgage indebtedness and discharge the lien. In other words, by the transaction in question there was no such absolute appropriation of certain property to raise a fund to pay a debt as constituted it an assignment within the rule which prevails in the Indian Territory, and in the state of Arkansas, from whence much of the local territorial law was borrowed. It is probably true, however, that the first agreement of December 14, 1893, if it remained operative and was the one under which the parties acted and intended to act, did make such an appropriation of property as would have the effect last stated, as the court of appeals seems to have held. Bartlett, Reid & Co. v. Teah (C. C.) 1 Fed. 768; Appolos v. Brady, supra, and cases there cited.

We therefore conclude that the territorial court erred in rendering a final judgment in favor of the defendants. The judgment at nisi

agent and attorney in fact for me, and in my name, place, and stead, to collect all notes and accounts due me in the sewing-machine business, to settle and compromise same as he may deem advisable, to sell the sewing machines, wagons, harness, and horses now on hand, and used in connection with said business, to the best advantage as to him appears; hereby granting to my said attorney for the period of twelve months from date full power and authority to do and perform all things in the premises requisite and necessary to the full performance of the powers aforesaid, hereby ratifying and confirming any and all things which my said attorney shall lawfully do in the premises by virtue hereof.

"Witness my hand this —— day of December, 1893.

"W. M. Hull."

"Executed and delivered in the presence of L. T. Jones.

"Acknowledged before J. A. McLemore, N. P., December 16, 1893."

prius should have been reversed for the error heretofore indicated, and the case should have been remanded for a new trial, with leave to the defendants to amend their answer by pleading fraud in fact if they were so minded; and on such second hearing the trial court should have been directed to submit to the determination of the jury, under proper instructions, the question as to which of the two instruments that were executed in connection with the chattel mortgage became operative, as the determination of that question, in effect, determines whether the mortgage is valid or invalid. It is accordingly ordered that so much of the judgment of the United States court of appeals in the Indian Territory as adjudged "that the appellee, John L. Bradley, take nothing by his action, and that the appellant here and the defendant below go hence without day," be, and the same is hereby, reversed and annulled, and that in lieu thereof the order be that the case be remanded to the United States court for the Southern district of the Indian Territory for a new trial, the same to be conducted in accordance with the views herein expressed.

TENNEY v. AMERICAN PIPE MFG. CO.

(Circuit Court, D. South Carolina. October 18, 1899.)

REMOVAL OF CAUSES—TIME FOR APPLICATION—SOUTH CAROLINA STATUTE.

Under Code S. C. § 156, requiring notice to a nonresident defendant to be published "at least once a week for six weeks," the service is not completed, for the purpose of determining the time when the defendant is required to answer, within the removal act, until the expiration of six weeks from the date of first publication, although the last publication is prior to that time.

At Law. On motion to remand.

J. A. McCullough, for plaintiff.
Ansel & Cothran, for defendant.

SIMONTON, Circuit Judge. The ground of the motion is that the petition and bond for removal were not filed within the time allowed by statute for making answer. The defendant is a foreign corporation, and the summons was served by publication. The first publication was on Sunday, October 23d; the last publication was Sunday, November 27th, the sixth publication, but the day beginning the sixth week. The full six weeks did not terminate until December 3d. The point raised by the plaintiff is that the service was completed by the sixth insertion of the advertisement in the newspaper, and that the time for answering began to run from the date of the sixth insertion, and not from the end of the week following that insertion. The Code of South Carolina (section 156) provides that the publication shall be made "at least once a week for six weeks." Service by publication of the summons upon a nonresident is in derogation of the common law, and the statute must be strictly construed. Guaranty Trust & Safe-Deposit Co. v. Green Cove Springs & M. R. Co., 139 U. S. 137, 11 Sup. Ct. 512. The pre-

cise point here raised has been decided by the New York court of appeals under a code which in this respect is precisely similar to the South Carolina Code. Market Nat. Bank of New York v. Pacific Nat. Bank of Boston, 89 N. Y. 398. In this case it is held that the service is not complete until the expiration of the full six weeks. With this view I concur. See, also, Code S. C. § 158. It is therefore ordered that the motion to remand be refused.

COUGHLIN v. BLUMENTHAL et al.

(Circuit Court, D. Delaware. October 24, 1899.)

MASTER AND SERVANT—INJURIES TO SERVANT—ACTION—PLEADING—DEMURRER.

The degree of particularity required of the pleader largely depends on the circumstances of each case. A defendant is entitled to be apprised with reasonable particularity of the case against which he is called on to make defense, not only to prevent surprise at the trial but to obviate the labor and expense of preparing himself against claims on which the plaintiff may have no thought of relying. At the same time the right of a defendant to be informed of the issue he is called on to meet is not to be so extended as to require from the plaintiff such particularity of averment as, while not necessary to enable the defendant properly to prepare his defense, may unduly burden the plaintiff and needlessly subject him to the peril of a fatal variance at the trial.

(Syllabus by the Court.)

Action by Catharine A. Coughlin, by James Coughlin, as her father and next friend, against Ferdinand Blumenthal and another, trading as F. Blumenthal & Co. Defendants demur to the declaration. Demurrer sustained.

Levi C. Bird, for plaintiff.

Leonard E. Wales, for defendants.

BRADFORD, District Judge. This is an action on the case brought by Catharine A. Coughlin, a minor, through her father as next friend, against the firm of F. Blumenthal & Company, to recover damages for personal injuries alleged to have been sustained by her through the negligence of the defendants while in their employ. The declaration contains three counts, all of which have been specially demurred to for want of particularity. The first count alleges, among other things, that the defendants operated a certain morocco factory, "wherein they ran and operated certain dangerous glazing machines"; and that Catharine A. Coughlin, a minor, was employed by them to work in their factory. It then proceeds:

"By and through the negligence and carelessness of the said defendants in ordering and permitting the said Catharine A. Coughlin to work at and with a certain dangerous glazing machine and machinery, at their said morocco factory * * * without having properly instructed her as to her duties in connection with the use and operation of said machine and machinery, and without having properly explained to her and warned her of the risk and danger incident thereto, she, the said Catharine A. Coughlin, being then and there a minor, under the age of twenty-one years, and ignorant of the risk and danger attendant upon and incident to the operation of the said machine and machinery, while at work for the said defendants at their morocco factory

in obedience to the orders and directions of the said defendants, and while in the exercise of due care and caution on her part, had one of her fingers mashed and mangled, and was otherwise hurt, cut, crushed, wounded and injured by the said glazing machine and machinery, then and there in motion, at and with which the said Catharine A. Coughlin was then and there working," &c.

The second count, after alleging among other things that the defendants carried on the business of manufacturing morocco at their factory and used and operated therein "certain dangerous glazing machines and machinery operated by steam power" and that Catharine A. Coughlin, a minor, was employed by them, proceeds as follows:

"By and through the negligence and carelessness of the said defendants, in not providing and enforcing proper rules, regulations and methods of operating their said glazing machines, and the machinery therewith connected, she, the said Catharine A. Coughlin, being then and there a minor, unacquainted with the use and operation of machinery, and ignorant of the danger and risk attendant thereupon, was, while herself in the exercise of due care and caution, badly cut, crushed, bruised, wounded and injured, crippled and disfigured by a certain dangerous and unsafe glazing machine then and there being operated by the said defendants at their factory * * * at and with which she, the said Catharine A. Coughlin, was set to work by the said defendants, and had one of the fingers of her hand badly hurt, mashed and injured by said machine," &c.

The third count, after alleging among other things the nature of the business of the defendants and the employment of Catharine A. Coughlin, states:

"By and through the negligence and carelessness of the said defendants in suffering and permitting a certain glazing machine to be and remain out of repair and order, broken, defective and dangerous after they knew, or by the exercise of proper care and inspection might have known thereof, she, the said Catharine A. Coughlin, who was then and there a minor, inexperienced in the operation of machinery, and ignorant of the risk and danger connected therewith, while at work at and with the said defective and dangerous machine, in obedience to the orders and instructions of the said defendants, and without negligence on her part, had one of her fingers badly crushed and injured by said machine, by reason of the defective condition thereof—said machine being then and there rapidly moved by steam power—and was otherwise badly cut," &c.

The degree of particularity required of the pleader largely depends on the circumstances of each case. A defendant is entitled to be apprised with reasonable particularity of the case against which he is called on to make defense, not only to prevent surprise at the trial but to obviate the labor and expense of preparing himself against claims on which the plaintiff may have no thought of relying. At the same time the right of a defendant to be informed of the issue he is called on to meet is not to be so extended as to require from the plaintiff such particularity of averment as, while not necessary to enable the defendant properly to prepare his defense, may unduly burden the plaintiff and needlessly subject him to the peril of a fatal variance at the trial. Lore, C. J., in delivering the opinion of the court in King v. Railway Co., 1 Pennewill (Del.) 452, 41 Atl. 975, well says:

"The plaintiff must set forth in his declaration the facts of his claim, with such certainty as reasonably to inform the defendant what is proposed to be proved in the case; so that the defendant may have a fair opportunity to meet

such facts in preparing his defense. It is the purpose of pleading to reasonably and fairly disclose the facts of the case and not to conceal them. Pleadings should not be used as the means of concealing the facts by vague and general terms. Time, place and circumstances, so far as relied on and within the knowledge of the party, must be specified; and that, too, with reasonable fullness and fairness. Any other rule would make pleading the medium of concealing the facts of the case, except so far as might be necessary to bring it within the least possible legal certainty. * * * We do not mean to say that the plaintiff is always bound to set forth facts or circumstances, the knowledge of which is more properly or peculiarly in the opposite party, or to detail the circumstances minutely; but that such circumstances, as he does know and must have contemplated and relied on when he framed his declaration, and are reasonably necessary for the defendant's information, should be specified with reasonable certainty. To this he is unquestionably held by all the rules of good pleading."

Another elementary rule of pleading requires that, when a declaration or any of its counts is reasonably susceptible of two or more constructions, that construction shall be adopted which is least favorable to the pleader. The application of these principles will readily determine the questions raised by the demurrer.

The first count in referring to a dangerous glazing machine must be restricted to a glazing machine not out of repair or order, defective or broken, but which in its principle of construction or essential nature is, when normally operated, dangerous. Danger must inhere in the machine when properly run. This count as it now stands would not cover danger resulting from any unusual speed at which the machine may have been run, nor from any defect other than one of construction in the machine or machinery connected with it, nor from any shaking of the building or floor, nor from any other cause than the inherent nature of the machine and machinery immediately connected with it as normally operated. Such being the proper construction of the first count, the defendant is apprised of the case the plaintiff proposes to make thereunder, and it is not an unreasonable requirement that the defendants should be prepared, as occasion may require, to show by proof the character of the glazing machine with respect to danger when normally operated. Aside from latent defects, they are chargeable with knowledge of the general character as to danger or otherwise of the machinery they employ when properly run. Greater particularity is not required of the plaintiff in the first count, and the demurrer as to it must be overruled.

The same considerations apply to the second count. With respect to this count, however, the defendants claim that it should have set forth the "specific negligent act or omission on their part" as to providing or enforcing rules, regulations and methods of operating the glazing machine and machinery therewith connected, on which the plaintiff relies. Clearly this contention cannot be sustained. The defendants are charged with negligence in not providing and enforcing proper rules, regulations and methods of operating their glazing machines. It would not be practicable for the plaintiff to specify any rule, regulation or method of operation in this connection. In so far as it may be material that some proper rule, regulation or method of operation should have been provided or enforced, the defendants have full opportunity, if able, to show the existence of

such rule, regulation or method, and its enforcement. The demurrer as to this count must be overruled.

Different considerations apply to the third count. In this count the defendants are charged with negligence in "suffering and permitting a certain glazing machine to be and remain out of repair and order, broken, defective and dangerous." They are not chargeable with knowledge of what the plaintiff's witnesses will testify to in this regard and are entitled to be informed, not necessarily in minute detail, but, at least, generally of the character of the defect which caused the alleged injury, in order that the defendants may be fairly apprised of what they have to meet. It must be assumed, in the absence of anything to the contrary, that the plaintiff has knowledge of the general nature of the defect of which complaint is made; and to require it plainly to be averred imposes no unreasonable burden; while the omission of such requirement would involve hardship to the defendants. The demurrer must be sustained as to the third count, with leave to the plaintiff within five days to amend the declaration.

DE LUCA v. HUGHES et al.

(Circuit Court, D. Delaware. October 24, 1899.)

MASTER AND SERVANT—INJURIES TO SERVANT—ACTION—PLEADING—DEMURRER.

An averment in a declaration, in an action to recover damages for personal injuries resulting from negligence, that the defendants negligently omitted to provide the plaintiff, who was their employee, with safe and suitable machinery and appliances for raising an anchor and chain of a certain dredge in the course of their business, whereby one of the legs of the plaintiff was caught by the anchor chain and injured, is demurrable for want of particularity.

(Syllabus by the Court.)

Action by Aristidi de Luca against Eugene Hughes and others. Defendants demur to the declaration. Demurrer sustained.

William S. Hilles, for plaintiff.

Leonard E. Wales, for defendants.

BRADFORD, District Judge. This is an action on the case brought by Aristidi de Luca against the firm of Hughes Bros. & Bangs to recover damages for personal injuries alleged to have been sustained by him through the negligence of the defendants while in their employ. The declaration contains seven counts, the second, third, fourth and seventh of which have been specially demurred to for want of particularity. At the hearing the third count was abandoned by the plaintiff. The second count alleges, among other things, that the defendants are engaged in carrying on the business of quarrying and transporting stone, and while so engaged employed the plaintiff as a laborer. It then proceeds as follows:

"That to the said plaintiff, so employed as aforesaid, the said defendants owed the duty of providing him with safe and suitable machinery and appliances, yet the said defendants * * * negligently and carelessly neglected and omitted to provide the said plaintiff with safe and suitable machinery and

appliances for raising the anchor and getting in the anchor chain used to hold a certain barge used by the said defendants in their said business, whereby the said plaintiff, who was then and there * * * in the exercise of due care and caution on his part, had one of his legs, to wit, his right leg, caught by the said anchor chain, and thereby the said right leg of the plaintiff was mangled." &c.

The fourth count after setting forth the character of the business of the defendants and the employment by them of the plaintiff as a laborer, alleges:

"While so employed it became the duty of the said defendants not to subject the said plaintiff in his said employment to any unnecessary risks, or any risks against which he could be guarded by reasonable diligence on the part of the said defendants, yet the said defendants * * * ordered and directed this plaintiff to assist in taking up the anchor of a certain barge or scow at a time when owing to the condition of the weather it was hazardous and dangerous so to do, and with appliances so defective and improper for that purpose, and without sufficient assistance to the said plaintiff, whereby the said plaintiff, who was then and there * * * in the exercise of due care and caution on his part, had his right leg caught between the said anchor chain and a cleat on the said barge or scow, and thereby the right leg of the plaintiff was mangled," &c.

The seventh count after alleging the nature of the business of the defendants and the employment by them of the plaintiff as a laborer, proceeds as follows:

"That while so engaged as aforesaid the said defendants then and there used a certain scow or barge for the purpose of floating a certain derrick or crane; that while the said barge or scow was lying at anchor in the Delaware Bay * * * at a time when the conditions of weather made it improper so to do, the said defendants not regarding their duty to this plaintiff negligently and carelessly directed this plaintiff to raise a certain chain and anchor of great weight by which the said barge or scow was moored, and with appliances and machinery totally unfit therefor, and at the time, and without the knowledge of this plaintiff, negligently and carelessly permitted and suffered a certain large and strong tug boat known as the 'Bangs' to be pulling upon the said scow or barge, and thereby upon the said chain and anchor, whereby a certain improper and inadequate iron bar furnished by the said defendants to the said plaintiff for the purpose of holding the anchor and chain, and through them the barge or scow aforesaid, broke, and thereby the said plaintiff, who was in his occupation aforesaid in the exercise of due care and caution on his part, had one of his feet or legs caught between the said chain and a cleat on the said barge or scow, and thereby the said leg of the plaintiff was mangled," &c.

The principles applicable to the questions raised by the demurrer in this case were stated by this court in Coughlin v. Blumenthal (this day decided on demurrer) 96 Fed. 920, as follows:

"The degree of particularity required of the pleader largely depends on the circumstances of each case. A defendant is entitled to be apprised with reasonable particularity of the case against which he is called on to make defense, not only to prevent surprise at the trial but to obviate the labor and expense of preparing himself against claims on which the plaintiff may have no thought of relying. At the same time the right of a defendant to be informed of the issue he is called on to meet is not to be so extended as to require from the plaintiff such particularity of averment as, while not necessary to enable the defendant properly to prepare his defense, may unduly burden the plaintiff and needlessly subject him to the peril of a fatal variance at the trial."

The second count does not reasonably apprise the defendants of the case the plaintiff proposes to make. It alleges negligence on the part of the defendants in omitting to provide the plaintiff with safe

and suitable machinery and appliances for raising an anchor and getting in the anchor chain used in connection with a certain barge employed by the defendants in their business, whereby the plaintiff had his right leg caught and injured by the anchor chain. This statement is too general and indefinite. It is not alleged that the injury to the plaintiff resulted from the breaking of any chain or other appliance, nor is there any specification of any machinery or appliance as unsafe or defective, or of the nature of any defect or danger inherent in the machinery and appliances used for raising the anchor and getting in the anchor chain. The defendants are left wholly in the dark as to the question of fact they will be called on to meet at the trial. Similar considerations apply to the fourth count. As to both of these counts the demurrer must be sustained.

The seventh count, however, while general and indefinite in its earlier part is cured as to such generality and uncertainty by the averments contained toward its close, where it is stated that the injury to the plaintiff resulted from the breaking of "a certain improper and inadequate iron bar furnished by the said defendants to the said plaintiff for the purpose of holding the anchor and chain, and through them the barge or scow aforesaid." The demurrer as to this count must be overruled. Leave will be granted to the plaintiff to amend the declaration within five days.

ECORSE TRANSP. CO. v. EARHART.

(Circuit Court, D. Minnesota, Fifth Division. October 21, 1899.)

COUNTERCLAIM—JOINT RIGHT OF RECOVERY—MINNESOTA STATUTE.

In an action on notes given by defendant to plaintiff for the purchase price of a part interest in a steamer, the remaining interest being purchased at the same time by others, who gave similar notes, all of which were secured by mortgage on the vessel, the defendant cannot plead the alleged wrongful seizure and conversion of the vessel by plaintiff, and a pretended and collusive sale of the same under the mortgage, as a counterclaim, under Gen. St. Minn. § 5237, subd. 1, because he cannot recover on such claim without the joinder of his co-tenants; but he may plead such facts as defensive matter going to the equitable discharge of his liability on the notes, either in full or pro tanto.

On Demurrer to Counterclaim Pleaded in Defendant's Answer.

Searle & Spencer, for plaintiff.

F. W. Sullivan, for defendant.

LOCHREN, District Judge. Plaintiff demurs to the second counterclaim pleaded in defendant's answer. The causes of action set forth in the complaint consist of three promissory notes made and delivered by defendant to plaintiff at Detroit, Mich., December 16, 1895, each for the sum of $2,062.50 and interest at 6 per cent. after January 1, 1896, payable, respectively, July 1, 1897, January 1, 1898, and July 1, 1898; all being unpaid, except interest thereon till January 1, 1898. The defendant, as his second counterclaim, avers that at said Detroit, on December 16, 1895, the plaintiff owned the

steamer George Farwell, and then sold and delivered the same, with its engines, boilers, fixtures, apparel, and furniture, as follows: To the defendant an undivided one-half thereof, to one Nicholas J. Boylan an undivided one-fourth thereof, and to Sydenham Scott an undivided one-fourth thereof,—for the sum of $39,000 in the promissory notes of such purchasers, each of whom gave to plaintiff his own several notes for the purchase price of the interest purchased by him, and that the notes sued on were then made and given by defendant to plaintiff upon such purchase; that, to secure the payment of all the said notes so made by all of said purchasers, the said purchasers then executed and delivered to said plaintiff their chattel mortgage of said steamer, which stipulated that said purchasers should retain possession of the property so mortgaged, and the use thereof, until the indebtedness so secured should become due, and that the mortgage was in February, 1896, recorded in the office of the collector of customs at Duluth, Minn., where said vessel was then enrolled; that the notes due and coming due were on December 15, 1897, extended by plaintiff, for a valuable consideration, till the opening of navigation on the Great Lakes in the spring of 1898, and that before that time the plaintiff wrongfully took possession of said steamer at her winter moorings at Manitowoc, Wis., and employed it in its own use until April 20, 1898, when plaintiff made a pretended but invalid foreclosure sale thereof to Jesse H. Farwell for $18,000, though the said steamer was then, and for more than four months had been, more than 400 miles distant from the place of such pretended sale, and was of the value of $56,000; that defendant is informed and believes that such unlawful sale was caused to be made fraudulently by the said plaintiff "in collusion with the other owners of said vessel," and that said steamer has since been sold by said Jesse H. Farwell to persons to defendant unknown, and is now, as defendant believes, out of the jurisdiction and waters of the United States; that defendant owned seven-sixteenths of said vessel. He demands judgment that the plaintiff take nothing, and that defendant recover $29,500 and interest against plaintiff. The allegations contained in the statement of this second counterclaim therefore tend to plead a wrongful conversion of the said vessel by the plaintiff, by tortiously taking possession of the same and using it before the mortgage debt had become payable, and by a pretended, but fraudulent and invalid, foreclosure sale under said chattel mortgage.

The chattel mortgage was made at the same time with the giving of the notes for the purchase of the vessel, and was therefore a part of the same transaction which included the making of said notes which it secured. The mortgage, and the action of the mortgagee under it, whether legal or illegal, were connected with the notes secured by that mortgage, some of which constitute the subject of this action. If all the owners of said vessel—the mortgagors in said mortgage—were makers of the notes in suit, and defendants in this action, I should have no doubt that the matters alleged and above referred to would constitute a proper counterclaim, in its fullest sense, under subdivision 1, § 5237, Gen. St. Minn. The

trouble is that the tortious conversion of the mortgaged property by the mortgagee constitutes a single, indivisible cause of action, in which all the tenants in common of the vessel must join as plaintiffs. 1 Chit. Pl. 51. A plea in abatement would not be applicable to such counterclaim pleaded by only one of the several tenants in common, as no amendment or change of averment can make it a proper counterclaim. Id. 445. A demurrer is therefore the proper remedy.

But although the defendant cannot, alone, recover any judgment against the plaintiff upon the facts stated, and hence they do not constitute a proper counterclaim under the Minnesota statute referred to, still, as the value of the mortgaged property, if wrongfully converted and disposed of by the mortgagee, may, to the extent of its value, be applied in equitable satisfaction of the notes then held by the mortgagee, for the payment of which the property was pledged and appropriated, so that, if such value is enough to satisfy all such several notes, all will be satisfied, and, if less than enough to satisfy all, will be applied on them equitably and proportionally, I think the defendant, if so advised, may plead the same matters, not as a counterclaim or cause of action existing in his favor, severally, against the plaintiff, upon which he alone has a right to recover, but as defensive matter whereby the notes sued upon have become satisfied and discharged. The demurrer is sustained, with leave to the defendant to amend his answer as above indicated, or otherwise as he may be advised, on or before November 15, 1899.

TOMPKINS v. MacLEOD et al.

(Circuit Court, D. Kentucky. October 6, 1899.)

REMOVAL OF CAUSES—ACTION AGAINST FEDERAL RECEIVERS.

An action against receivers appointed by a federal court is one per se arising under the laws of the United States, and when brought in a state court is removable, under the removal acts, where the jurisdictional amount is involved, regardless of the citizenship of the parties. The right of removal in such case is not affected by the provision of the judiciary act (25 Stat. 436) permitting such receivers to be sued in state courts without first obtaining leave of the court which appointed them.[1]

On Motion to Remand to State Court.

Matt O'Doherty, for plaintiff.
B. H. Young, for defendants.

EVANS, District Judge. The plaintiff, Samuel Tompkins, brought this action in the state court against John MacLeod, F. W. Tracy, and S. M. Felton, the receivers appointed by this court for the Kentucky & Indiana Bridge Company. He alleged in his petition that he was damaged and injured to the extent of $25,000 by the negligence of the said receivers and their employés in the conduct of

[1] As to suits by and against receivers of federal courts, see note to J. I. Case Plow Works v. Finks, 26 C. C. A. 49.

said bridge company's affairs, and in the manner specified in the petition. He prayed for judgment for the sum named. Within the proper time the defendants filed their petition, gave bond, and removed the action into this court. The plaintiff now moves to remand it to the state court upon the ground that one of the defendants, namely, John MacLeod, is a citizen of Kentucky and a resident therein, and that no federal question is involved, to authorize the removal of the case to this court. The contention is that the fact that the receivers are appointees and officers of this court is not of itself sufficient to bring the case within the removal act, especially in view of that provision which permits receivers of the federal courts to be sued in the state courts without first obtaining the leave of the court which appointed them. Counsel cites the cases of Echols v. Smith (Ky.) 42 S. W. 538; Bausman v. Dixon, 173 U. S. 113, 19 Sup. Ct. 316; and Pope v. Railroad Co., 173 U. S. 573, 19 Sup. Ct. 500. Whatever may be the decision of other courts, the law of this circuit, at least until reversed, should be regarded as fixed by the opinion of Judge Taft in Gilmore v. Herrick, 93 Fed. 525. It is there distinctly ruled that, where the amount in controversy is below the sum or value of $2,000, the receivers appointed by a federal court, when sued as such in a state court, cannot remove the case, because a sufficient amount is not involved, but that where the amount is over $2,000 the right to remove is clear. True, the denial of the right to remove was all which that case absolutely called for, inasmuch as it involved less than $2,000; but the views of the learned judge upon the proposition are clear, and should be followed by this court. Those views need no support from me, but it is admissible to say that they appear to be altogether correct. It was there conceded by counsel and adjudged by the court that such a suit is one which arises under the laws of the United States. Some of the cases cited to support the concession may not do so, because not quite applicable, but there are many others to supply their places. At all events, section 2 of the removal act provides that actions involving the requisite amount may be removed, when they arise under the constitution or laws of the United States.

The plaintiff relies with much apparent confidence upon the opinion of the supreme court in Bausman v. Dixon, 173 U. S. 113, 19 Sup. Ct. 316, especially as it is supposed to be supplemented by Pope v. Railroad Co., 173 U. S. 573, 19 Sup. Ct. 500; but a careful examination of those opinions will show them to have no real application to this case, particularly as in neither of them was the question of removal raised or decided. A removal had not in either case been attempted, and no right under the removal act had been denied. Difficulties may arise by overlooking the different meaning or application of the phrase "federal question" as used by the courts. It has never been used in congressional enactments. Section 709 of the Revised Statutes provides that appeals and writs of error may be taken from judgments of certain state courts to the supreme court of the United States, where there is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision is against the validity. Not

only, under that section, must the validity of the authority or treaty or statute be drawn in question, but the decision of the state court must be against the validity, before the right of appeal arises. In that event only is there a federal question to support the jurisdiction of the supreme court of the United States of an appeal from the state court, and that alone is what the latter court was speaking about in the case of Bausman v. Dixon. But under the removal act the federal question exists where there is a suit of a civil nature arising under the constitution or laws of the United States, or which shall be made under their authority. This comparison makes very clear the proposition that the phrase "federal question" means in one case something very different from what it means in the other. As applicable to this case, we may say that under section 709, Rev. St., there must be drawn in question in the state court the validity of an authority under the laws of the United States, and the decision of the state court must be against the validity, before the supreme court has jurisdiction of an appeal, while under the removal act the right to remove exists in the case of suits of a civil nature arising under the laws of the United States, or which are made under their authority, whatever may be the ruling of the state court upon the question, and regardless of whether there is any decision at all.

As already indicated, many authorities establish the proposition that actions against receivers appointed by the federal courts are actions which, per se, arise under the laws of the United States, by virtue of which laws the receivers had been appointed by her courts, and under which they exercise their authority. And it may be added that it appears to the court that that section of the act which permits suits to be brought in the state courts against receivers without first obtaining the leave of the federal court which appointed them only so far changes the law upon that subject as to relieve the plaintiffs in such suits from the penalties of contempt. Otherwise, the law remains the same as it would be without that section. It results from these views that the motion to remand must be overruled.

COWEN et al. v. WINTERS.

(Circuit Court of Appeals, Sixth Circuit. October 8, 1899.)

No. 692.

1. CARRIERS OF PASSENGERS—SALE OF TICKETS—REPUDIATION OF CONTRACT WITH PURCHASER.

   A railroad company which authorizes another company to issue and sell mileage tickets good over its road makes such company its agent, and cannot repudiate the contract so made with a passenger, who, in good faith, buys a ticket from such agent, on account of any subsequent disagreement between the two companies.

2. EXEMPLARY DAMAGES—EJECTION OF PASSENGER—IMPLIED MALICE.

   Where the general passenger agent of defendant, a railroad company, deliberately repudiated a large number of mileage tickets which had been issued and sold to the public by his authority, and in consequence of his orders plaintiff, who had purchased one of such tickets in good faith, was ejected from defendant's train, such action, by one of its controlling officers,

was in such wanton and reckless disregard of defendant's duties, and of the rights of its ticket holders, as to be equivalent to an intentional violation of such rights, and to warrant the imposition of exemplary damages.

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

This is an action in tort against a railroad company by a person who, after taking passage, was forcibly ejected from a passenger train by the conductor. There was a judgment in favor of the plaintiff below for $1,000 (90 Fed. 99), from which the railroad company has sued out this writ of error. The facts of the case were practically undisputed, and were substantially these: The Cincinnati, Jackson & Mackinaw Railroad Company sold to the plaintiff below a certain mileage ticket, which purported on its face to be good for passage, not only on the line of the selling company, but on the lines of several other railroads, including that of the Baltimore & Ohio, the plaintiff in error. This sale was made June 19, 1897, and the coupons were subject to use at any time during the remainder of the year. This ticket purported to be good over the railroad of the Baltimore & Ohio by virtue of an express agreement, existing in full force at the time of the sale, between that company and the selling company, under which each was authorized to sell mileage good over both roads. On August 24, 1897, the defendant in error boarded a passenger train of the Baltimore & Ohio at Welker, a station in Ohio, to go to Tiffen, another station in the same state, and on the same railroad. He presented his mileage book to the conductor of the train, and asked him to detach the requisite mileage due for his passage. The conductor refused to accept said ticket upon the ground that the company had expressly directed him to refuse all mileage tickets sold or issued by the Cincinnati, Jackson & Mackinaw Railroad Company, and demanded that Winters should pay his fare in money or leave the train. This Winters absolutely refused to do, and demanded that the company should carry him to his destination, according to its contract as evidenced by the said mileage ticket. Thereupon the conductor forcibly ejected him from the train, using, however, no more force than was essential to overcome the sturdy determination of the defendant in error to pursue his journey upon the tender of the ticket already made. The answer of the plaintiff in error admits that the conductor acted under its authority in refusing to accept the ticket tendered by Winters, and in ejecting him from its train for nonpayment of the local fare. Its only defense is that the ticket did not entitle Winters to passage over its railroad. The circuit judge instructed the jury to find for the defendant in error, and that, in addition to compensation, they might add a sum by way of exemplary damages.

J. H. Collins, for plaintiff in error.

James M Brown, for defendant in error.

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

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

There was no error in directing a verdict for the plaintiff below. The Cincinnati, Jackson & Mackinaw Railroad Company was the authorized agent of the Baltimore & Ohio Railroad Company in selling the ticket presented by Winters as good for passage over the Baltimore & Ohio Railroad. As an excuse for the repudiation of this ticket, the plaintiff in error shows that on July 31, 1897, it was notified by the said Cincinnati, Jackson & Mackinaw Railroad Company that one of its agents had wrongfully sold a batch of mileage tickets good over the lines of the Baltimore & Ohio Railroad Company, upon a credit, to a ticket broker, who refused to either pay for or return

the tickets, and that it would not redeem any such tickets thereafter taken up by the Baltimore & Ohio Company. A list of these repudiated tickets was at the same time furnished to the said company, to enable its conductors to identify them when presented for passage. The general passenger agent of the plaintiff in error declined the responsibility of guarding against so great a list of "bogus tickets," and by letter of August 2, 1897, among other things, said: "I think the only safe course to pursue would be to instruct conductors to refuse all of your tickets. * * * I dislike very much to adopt this extreme measure, but do not see any other recourse." No other arrangement being made, the general passenger agent, the manager of passage traffic, and the general superintendent issued orders to all train conductors to refuse all mileage books issued by the Cincinnati, Jackson & Mackinaw Railroad Company, to collect local fare, "and refer holders of such tickets to the issuing line for redress." The ticket held by Winters was not one of the tickets wrongfully sold by the agent of the Cincinnati, Jackson & Mackinaw Railroad Company, and we need not concern ourselves as to the rights of one who bought one of that batch of tickets without notice of the circumstances under which they had been originally disposed of. Neither was this ticket issued after the abrogation of the agreement authorizing that company to sell mileage books good over the Baltimore & Ohio Railroad Company. The agreement between the two companies constituted each the agent of the other in the sale of mileage tickets good over both lines. The ticket contained a statement that it was good for passage over the lines of the Baltimore & Ohio Railroad, and this, having been placed thereon by authority of the Baltimore & Ohio Company, constituted a contract between the purchaser and that company, which could not be repudiated without his consent. The contract in every particular was as obligatory upon the Baltimore & Ohio Company as if the ticket had been sold directly to Winters by that company. The case is not in principle different from that which would prevail if a through ticket over the line of two different companies had been sold by one of the companies by authority of the other. Each company would be the agent of the other in respect to tickets of the kind mentioned, and the selling company would bind the other through the agency thus created. Gifford v. Corrigan, 117 N. Y. 257, 22 N. E. 756; Trimble v. Strother, 25 Ohio St. 378.

The conductor only obeyed his instructions when he refused the ticket, and when he ejected Winters for refusing to pay his fare in money. But this does not exonerate the company. The ticket was a valid one, and the company was under the highest obligation to accept it. The conduct of the Cincinnati, Jackson & Mackinaw Company in repudiating the tickets wrongfully disposed of by its own incompetent or dishonest agent did not in any degree justify the Baltimore & Ohio Company in repudiating tickets unaffected by the action of the Cincinnati, Jackson & Mackinaw Company. It may be that the latter company was arbitrary in its determination to dishonor the tickets placed in circulation by its own agent, and it may be that the Baltimore & Ohio Company would have run some

risk and assumed a most inconvenient burden in endeavoring to discriminate between the so-called "bogus tickets" and those which were unaffected by fraud, but neither reason furnishes any excuse for the repudiation of outstanding valid contracts which it was under the highest obligation to carry out. The case is not one of a ticket which on its face had expired, or which for any other reason was not good for the transportation, such as Railway Co. v. Bennett, 6 U. S. App. 1, 1 C. C. A. 392, and 49 Fed. 598; Poulin v. Railway Co., 6 U. S. App. 298, 3 C. C. A. 23, and 52 Fed. 197; Mosher v. Railway Co., 127 U. S. 390, 8 Sup. Ct. 1324; Boylan v. Railroad Co., 132 U. S. 146, 10 Sup. Ct. 50.

The tort in the wrongful ejection of Winters was the tort of the corporation itself. It cannot justify what was done by the fact that its conductor was but obeying the instruction of the company. That instruction was absolutely unjustifiable, in law or morals, and was a breach of both the public and private duty of the plaintiff in error to one who was rightfully on its train with a ticket which neither on its face nor in fact was subject to any question. Neither did Winters know before boarding the train that he would probably or possibly subject himself to the humiliation which came to him, for he had no notice that the company had repudiated the mileage tickets sold by the Cincinnati, Jackson & Mackinaw Company. We have therefore to deal with a case of a passenger lawfully upon the train with a clean ticket, and a clear right to be carried to his destination upon that ticket. He was under no obligation, legal or moral, to pay the local fare demanded, as he had both the legal and moral right to demand passage upon the ticket he presented. He was therefore entitled to recover full damages for his illegal and wrongful ejection. "If," said the supreme court in Railroad Co. v. Winter's Adm'rs, 143 U. S. 60, 73, 12 Sup. Ct. 360, "he was rightfully on the train as a passenger, he had the right to refuse to be ejected from it, and to make a sufficient resistance to being put off to denote that he was being removed by compulsion and against his will, and the fact that, under such circumstances, he was put off the train, was itself a good cause of action against the company, irrespective of any physical injury he may have received at that time, or which was caused thereby."

That he was entitled to recover all his damages is indisputable. But it is said that the court went beyond compensatory damages, and instructed the jury that they might also allow exemplary damages. Upon this subject the court below, among other things, said:

"Every common carrier owes the public a duty in this respect somewhat different from other parties to a contract, and it is for the vindication of that public duty that the law allows the jurors to go beyond mere compensatory damages, and add exemplary damages, where there is nothing but erroneous judgment and reckless disregard of the duties of a public carrier to comply with its contracts of carriage, and recognize the tickets it issues and which are binding upon it."

"Compensation" means recompense for the whole injury suffered. This, in addition to the actual outlay incident to the repudiation of his ticket and the delay in his journey, would include his necessary

and reasonable expense in and about the prosecution of this suit in vindication of his legal right as a passenger. So, the jury would have a right, without exceeding the limits of compensation, to consider the humiliation to which the defendant in error had been subjected in the effort to assert and maintain his legal rights, and the outrage put upon him by his wrongful public ejection from a public railway train, and allow an additional sum in compensation for this injury. Railway Co. v. Prentice, 147 U. S. 101–111, 13 Sup. Ct. 261. Beyond compensation for the injury suffered the jury would not be authorized to go, unless it should appear that the defendant had acted "wantonly or offensively, or with such malice as implies a spirit of mischief, or criminal indifference to civil obligations." "Guilty intention on the part of the defendant is required in order to charge him with exemplary or punitive damages." Railway Co. v. Prentice, 147 U. S. 101–107, 13 Sup. Ct. 261.

We are not here involved with the question of the responsibility of the corporation for the conduct of the conductor. There is no complaint of excessive force or abusive conduct by the conductor, and no denial of the responsibility of the corporation for the ejection. The highest officials of the company in charge of its passenger business directed that the entire issue of mileage tickets sold by the Cincinnati, Jackson & Mackinaw Railroad Company should be repudiated, and persons presenting them denied passage, and ejected from its trains, unless they would pay the local fare. We have, then, to deal with the ejection of Winters as an act directly authorized by the corporation, being a direct consequence of an absolutely illegal and inexcusable general order made and promulgated through the chief of the passenger department of the company. The conduct of Mr. Schindler, the general ticket agent of the Cincinnati, Jackson & Mackinaw Railroad Company, in his reckless and wholesale repudiation of tickets, improperly disposed of by one of his own subordinates, without any regard to the civil liability of his company to railroads which might receive such tickets from persons holding them in good faith, and of the rights of the general public who might acquire such tickets innocently, cannot be too severely censured. But that conduct affords no sort of excuse for the wider and more reckless order made by Austin, under which outstanding tickets issued before the trouble arose over the so-called "bogus tickets," and tickets subsequently sold by the Cincinnati, Jackson & Mackinaw Railroad Company directly to applicants, were included in one general and sweeping repudiation. It is hard to conceive of a serious legal doubt as to the rights of bona fide holders of such mileage tickets as were outstanding when the agreement between the companies was rescinded. The abrogation of the agreement was, of course, within the legal right of either company, as no time was fixed for the continuance of such a mutual agency. But the discontinuance of the agreement could not affect the general public, who in good faith had acquired such tickets while the arrangement was in effect.

If Mr. Austin, the general passenger agent of the Baltimore & Ohio Railroad Company, had not been recklessly indifferent in this regard, he would, at least, have submitted the matter for the legal

opinion of the company's counsel. If, in pursuance of a legal opinion, he had adopted the course he took, it would have furnished strong evidence that the motive of the company was not bad, and rebutted the obvious implication that he had no regard for the rights and convenience of the bona fide holders of such tickets, and was indifferent to the consequences of his arbitrary order. The entire correspondence between the general passenger agents of the two companies was in evidence. It contains no intimation that the rights of such ticket holders were for one moment the subject of consideration, or the duty and obligation of either company of any importance. In what way could the Baltimore & Ohio best protect itself against receiving a coupon which the Cincinnati, Jackson & Mackinaw Company would refuse to redeem seems to have been the only matter which gave concern. It is hard to believe that he considered for a moment the rights of such ticket holders or regarded the legal obligation of the company as of any importance. Thus, in his letter of August 2, 1897, to Schindler, the general passenger agent of the Cincinnati, Jackson & Mackinaw Railroad Company, after stating that he was unwilling to burden his conductors with a list of 700 repudiated tickets, and that "he did not wish to assume the risk of having any of those tickets accepted by our conductors with a strong probability that they will be repudiated," he proceeds to say:

"I think the only safe course to pursue would be to instruct conductors to refuse all of your tickets, and, if other lines will adopt the same course, I am sure it would soon force the issue, and place you in a position to either receive proper compensation for this block of tickets in the hands of the broker, or else place them in your possession."

Under the date of August 5, 1897, he writes Mr. Schindler as follows:

"Since my reply, under date of August 2d, to your letter, this matter has been gone over very carefully, both by the writer and Mr. Martin, manager of passenger traffic, who has been in the city, and we have come to the conclusion that the only safe course for us to pursue is to dishonor your entire issue of outstanding mileage, which we have accordingly done by instructions to agents and conductors. While we regret very much the necessity which obliges us to take this course, still in view of the fact that you cannot give us any assurances of redemption on tickets that we may honor, and we cannot impose conditions on our conductors to distinguish between the valid and repudiated mileage, we feel that the risk is too great for us to assume."

This correspondence indicates a high-handed determination to protect his company, without the least consideration for the rights of the public who might be bona fide holders of tickets which his company was legally and morally bound to respect. This contemptuous disregard for the rights of innocent holders of such tickets constitutes that degree of reckless disregard for public and contractual obligations as to justify the imposition of exemplary damages by way of punishment of the offender as a public carrier and as a warning to others. The entire want of care for the rights and convenience of bona fide holders of such tickets indicates a conscious or criminal indifference to the consequences, and where this exists exemplary damages may be added, at least where the action is for a tort or in trespass. The reckless indifference to the rights of others is equivalent

to an intentional violation of them. The right to award such damages has been said to rest primarily upon the existence of evidence of a wrongful motive. But it has also been ruled by the highest authority that reckless indifference to the rights of others "is equivalent to an intentional violation of them." Railway Co. v. Arms, 91 U. S. 489; Publishing Co. v. Hallam, 16 U. S. App. 613, 647, 8 C. C. A. 201, and 59 Fed. 530.

In Railroad Co. v. Prentice, 147 U. S. 101–107, 13 Sup. Ct. 263, the doctrine of the supreme court in respect to exemplary damages is thus stated:

"In this court, the doctrine is well settled that, in actions of tort, the jury, in addition to the sum awarded by way of compensation for the plaintiff's injury, may award exemplary, punitive, or vindictive damages, sometimes called 'smart money,' if the defendant has acted wantonly, or oppressively, or with such malice as implies a spirit of mischief or criminal indifference to civil obligations. But such guilty intention on the part of the defendant is required in order to charge him with exemplary or punitive damages."

To the same effect is the case of Scott v. Donald, 165 U. S. 58–86–88, 17 Sup. Ct. 265.

We see nothing in the charge of the trial court which conflicts with the view we have expressed, and the judgment will be affirmed.

In re RICHARDS.

(Circuit Court of Appeals, Seventh Circuit. October 4, 1899.)

No. 611.

1. BANKRUPTCY—JURISDICTION OF CIRCUIT COURT OF APPEALS.
Upon an appeal to the circuit court of appeals from the district court in bankruptcy, under Bankr. Act 1898, § 25, the facts, as well as the law, are before the appellate court for review. But the petition for review, under section 24b, which authorizes the circuit courts of appeals to "superintend and revise in matter of law the proceedings of the several inferior courts of bankruptcy," is intended as a summary mode of reviewing any alleged erroneous decision upon a question of law, and does not contemplate a review of the facts.

2. SAME—REQUISITES OF PETITION FOR REVIEW.
A petition to the circuit court of appeals for a review of a decision of the district court sitting in bankruptcy should state specifically the question of law which was involved and ruled upon by the district court, and should be accompanied by a certified copy of so much of the record as will exhibit the manner in which the question arose, and its determination; and the question of law so presented is the only question which will be decided by the appellate court.

3. SAME—CONSTRUCTION OF STATUTE—LIENS.
The two subdivisions "c" and "f" of section 67 of the bankruptcy act, relating to the effect of an adjudication of bankruptcy upon existing liens upon the property of the bankrupt acquired through legal proceedings, are antagonistic, and irreconcilable; and therefore, in any case of conflict between them, the former must give way, and the latter prevail.

4. SAME—ACT OF DEBTOR—KNOWLEDGE OF CREDITOR.
All liens obtained through legal proceedings against an insolvent debtor within four months prior to the filing of a petition in bankruptcy by or against him are annulled by his adjudication as a bankrupt, irrespective of the question whether the debtor suffered or permitted the lien to be

obtained, and irrespective of any knowledge by the creditor of the debtor's insolvency.

5. SAME—VOLUNTARY AND INVOLUNTARY CASES.

Bankr. 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, subd. 1, declares that "'a person against whom a petition has been filed' shall include a person who has filed a voluntary petition."

6. SAME—ENTRY OF JUDGMENT ON JUDGMENT NOTE.

Where a creditor holding a judgment note of his debtor enters judgment thereon within four months prior to the filing of the debtor's voluntary petition in bankruptcy, the latter being insolvent, the lien of the judgment is annulled by the adjudication in bankruptcy, notwithstanding the fact that the giving of the note itself ten months before the bankruptcy proceedings could not have been set up against the debtor as an act of bankruptcy.

Petition for Review of a Decision of the District Court of the United States for the Western District of Wisconsin, in Bankruptcy.

On the 19th of June, 1899, John Richards, Thomas Caygill, and Samuel Treloar presented their petition to this court representing that they were judgment and execution creditors of the bankrupt by virtue of a judgment entered upon a judgment note given by the bankrupt to the petitioners on the 11th day of April, 1898, judgment whereon was rendered on the 9th day of February, 1899, in the circuit court of the state of Wisconsin for the county of Iowa, and under an execution upon such judgment levied on that day upon the goods of the bankrupt. On February 11, 1899, the bankrupt filed his petition in bankruptcy in the district court of the United States for the Western district of Wisconsin, and was upon that day adjudged a bankrupt. On the same day the district court by its order restrained the sheriff from proceeding further under such execution, and from selling the goods of the bankrupt. Afterwards, by stipulation between the judgment creditors and the trustee of the bankrupt, the property was sold and the proceeds covered into the registry of the district court, without prejudice to the rights of the judgment creditors, and subject to their lien, if any, upon the goods. They thereupon petitioned the district court for the payment of their judgment, and the trustee answered thereto, which petition and answer are annexed to the petition to this court. Thereafter the matter came on to be heard upon such petition and answer, and upon testimony taken thereunder; and at some time thereafter—but when does not appear by the petition or by the record—the district court filed its opinion denying the prayer of the petition of the judgment creditors. In re Richards, 95 Fed. 258. The record does not exhibit any order made in pursuance of this opinion, nor does the petition to this court state such order. The petition alleges that the decision of the district court is erroneous and should be corrected, and prays that the trustee may be summoned to answer the petition, and to comply with such order and decree as this court may make in the premises. The facts, as stated by the district judge in his opinion with respect to the origin and the nature of the claim of the judgment creditors, are as follows: Richard T. Richards, the bankrupt, in the spring of the year 1897 was elected treasurer of the town of Linden, in the county of Iowa, and state of Wisconsin. John Richards and Thomas Caygill, two of the petitioning creditors, became sureties upon his official bond. At the end of his term, in April, 1898, Richard T. Richards was found to be a defaulter to the amount of $1,350 in respect of the town tax. He was unable to pay that amount, and procured his bondsmen and the third petitioner, Samuel Treloar, to pay the amount due the town, and he gave them a judgment note, dated April 11, 1898, payable one day after date, for $1,400, and certain mortgages upon real estate, and also transferred to them as collateral one-half of his book accounts, and a separate mortgage on his homestead was given to Samuel Treloar, who was not a surety upon the bond, but who in fact paid in cash $450, the one-third part of

the amount due to the town. The payees in this judgment note on February 9, 1899, entered judgment for the amount due, issued execution thereon, and thereunder the sheriff levied upon the stock of goods belonging to the bankrupt. Five days after the entry of judgment, and on February 14, 1899, Richard T. Richards filed his petition in bankruptcy, and was duly adjudged a bankrupt. 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 was so known to be by the petitioners, the judgment creditors, and the judgment was entered and levy made for the purpose of gaining a preference over other creditors.

A. L. Sanborn, for petitioner.

H. L. Butler, for respondent.

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

JENKINS, Circuit Judge, upon the foregoing statement of the case, delivered the opinion of the court.

We might properly dismiss this petition without consideration of the merits, both upon the ground that no order appears to have been entered by the district court determining the prayer of the petition, and upon the further ground that the practice adopted by the petitioners in seeking a review of the decision below is not conformable to law. We pointed out in Re Rouse, Hazard & Co., 63 U. S. App. 570, 33 C. C. A. 356, and 91 Fed. 96, that the bankrupt act authorized an appeal of controversies arising in bankrupt proceedings, and also invested the circuit courts of appeals with the power to superintend and revise in matter of law the proceedings of the several inferior courts of bankruptcy within their jurisdiction. In the case of an appeal the facts as well as the law are before this court for review. In the case of original petition this court has authority to review merely a matter of law arising in the course of the proceeding below. The latter is intended as a summary mode of reviewing any supposed erroneous holding upon a question of law, and does not contemplate a review of the facts. A similar conclusion was reached by the court of appeals of the Fifth circuit in Re Purvine, 96 Fed. 192. The petition in such case should state specifically the question of law which was involved and was ruled upon by the court below, and should be accompanied by a certified copy of so much of the record as will exhibit the manner in which the question arose, and its determination. Such question of law, so presented, is the question and the only question that can properly be ruled upon by this court upon an original petition. The petition here states no such question, but charges that the decision below, upon the facts as well as upon the law, is erroneous. We are careful to point out the defects of practice in this instance because we think a proper exercise of our jurisdiction under the bankrupt act requires a strict adherence to the requirements of the law. But the question of practice was not suggested at the hearing by the opposing counsel, and the question of law involved is important and was fully argued at the bar, and should have an early solution. We have therefore concluded to overlook the question of practice, and to determine the question of law presented. We do not, however, review the evidence, but take the facts stated in the opinion of the court below as the established facts.

The question, therefore, for determination, is whether the lien of a judgment obtained against a person who is insolvent upon a judgment note within four months prior to the filing of the voluntary petition in bankruptcy is protected by the bankrupt act. 30 Stat. 544, c. 541. Section 67 of the act deals with the subject of those liens which shall be preserved and enforced and those which shall be discarded. The subdivisions of that section which we need to consider are as follows:

"(c) A lien created by or obtained in or pursuant to any suit or proceeding at law or in equity, including an attachment upon mesne process or a judgment by confession, which was begun against a person within four months before the filing of a petition in bankruptcy by or against such person shall be dissolved by the adjudication of such person to be a bankrupt if (1) it appears that said lien was obtained and permitted while the defendant was insolvent and that its existence and enforcement will work a preference, or (2) the party or parties to be benefited thereby had reasonable cause to believe the defendant was insolvent and in contemplation of bankruptcy, or (3) that such lien was sought and permitted in fraud of the provisions of this act; or if the dissolution of such lien would mitigate against the best interests of the estate of such person the same shall not be dissolved, but the trustee of the estate of such person, for the benefit of the estate, shall be subrogated to the rights of the holder of such lien and empowered to perfect and enforce the same in his name as trustee with like force and effect as such holder might have done had not bankruptcy proceedings intervened."

"(f) 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, unless the court shall, on due notice, order that the right under such levy, judgment, attachment, or other lien shall be preserved for the benefit of the estate; and thereupon the same may pass to and shall be preserved by the trustee for the benefit of the estate as aforesaid. And the court may order such conveyance as shall be necessary to carry the purposes of this section into effect: provided, that nothing herein contained shall have the effect to destroy or impair the title obtained by such levy, judgment, attachment, or other lien, of a bona fide purchaser for value who shall have acquired the same without notice or reasonable cause for inquiry."

It is quite clear that the transaction of giving the judgment note and mortgage and collateral security is not avoided by subdivision "c," for the reason that the securities were so given more than four months before bankruptcy; but whether the lien obtained by entry of judgment upon the judgment note holds is quite a different question. The judgment note did not create a lien. Its efficacy and value as security consisted in this: that by virtue of the irrevocable power of attorney it was possible for the creditor to enter judgment at will at the maturity of the note, without consent of or participation by the debtor, and in despite of his opposition. Therein inhered its potency and its superior value. It did not create a lien upon the property of the debtor, but enabled the creditor to obtain such lien by immediate judgment, at his will. We must, therefore, inquire whether the lien of a judgment under a judgment note acquired by legal proceedings against a person who is insolvent within four months prior to the filing of a petition in bankruptcy is saved or avoided by the bankrupt act. If the case falls within subdivision

"c," under the rule in Clark v. Iselin, 21 Wall. 360, construing a somewhat similar provision under the former bankrupt act, it might be possible to uphold the claims of the petitioners, although the provisos of that section are stated in the disjunctive, and it may be difficult to give meaning and sense to them unless they are read conjunctively. But subdivision "f" declares that all liens obtained through legal proceedings against a person who is insolvent within four months prior to the filing of the petition shall be void in case he is adjudged a bankrupt. These two subdivisions, "c" and "f," in our judgment, are plainly antagonistic and irreconcilable. The former saves a lien obtained through legal proceedings begun within four months unless it was obtained and permitted while the debtor was insolvent, or the creditor had reasonable cause to believe such insolvency, or the lien was sought and permitted in fraud of the provisions of the act. The question of the pecuniary condition of the debtor and knowledge upon the part of the creditor are influential in determining the validity of the lien so obtained. But subdivision "f" is broader in its scope, and avoids all liens obtained through legal proceedings within the time stated against a person who is insolvent, within the meaning of the subdivision, irrespective of knowledge on the part of the creditor of the fact of insolvency, and irrespective of the question whether the obtaining of the lien was in any way suffered and permitted by the debtor. It avoids all liens obtained through legal proceedings against a person who is insolvent within four months before the filing of the petition. We are unable to reconcile these provisions. They are broadly and clearly in antagonism. It is not a question, therefore, how they may be reconciled, for that is impossible. The question is, which shall prevail? The rule in such cases is stated by Puffendorf (Potter, Dwar. St. [Ed. 1871] p. 132):

"When we meet with a seeming repugnancy in the terms, conjectures are necessary to work out the genuine sense, by reconciling it, if it is possible, to those terms that seem to be repugnant. But, if there be a clear, evident repugnancy, the latter vacates the former. This rule applies to the making of laws, wills, and contracts."

Under this rule, subdivision "f" must control, and we find confirmation of the justice of this rule in the history of this act. Two bills in bankruptcy were presented to congress; one to the senate and one to the house of representatives. They were broadly divergent in spirit. One was supposed to be largely in the interest of the creditor; the other largely in the interest of the debtor. Subdivision "c" of section 67 was contained in the house bill; subdivision "f" was contained in the senate bill. The two houses were at disagreement respecting these bills, and the matter was referred to a conference committee of the two houses near the end of the session, resulting in the incorporation into the house bill of subdivision "f" which was in the senate bill. Mr. Henderson, in presenting the conference report to the house, stated that subdivision "f" was incorporated into the bill to strengthen the bill. 31 Congressional Record, pt. 7, p. 6428, June 28, 1898. The confusion results from the omission of the conference committee to modify the language of subdivision "c," or to strike it out altogether; but the passage of the bill by the house

with subdivision "f" contained in it, after this report of the conference committee, must be taken as an indication of the will of the lawmaking power that the provisions of subdivision "f" shall prevail, notwithstanding anything antagonistic to them previously found in the act. We are of opinion, therefore, under the rule stated, corroborated and justified by the action of congress, that the provisions of subdivision "f" must prevail over those of subdivision "c," and that all liens obtained through legal proceedings within the time stated against a person who is insolvent, and irrespective of any sufferance or permission thereof by the debtor and of any knowledge by the creditor of the debtor's insolvency, are avoided if that subdivision can be held to apply to voluntary proceedings in bankruptcy, and if another objection, hereinafter considered, is unavailing.

It is insisted, however, that subdivision "f" of that section has no application to cases of voluntary bankruptcy. But to ascertain the purpose of the lawgiver we must look within the four corners of the act to gather the real purpose and intent of the law, having regard to the mischief sought to be remedied. It is difficult to see why the remedy for the supposed evil should be limited to a case of involuntary bankruptcy, for it would then be in the power of the debtor to prefer one creditor, and, by filing a voluntary petition, anticipate and prevent an attack by other creditors through involuntary proceedings. The expression "filing of a petition against him" is also used in the last clause of subdivision "e," which provides that "and all conveyances, transfers or incumbrances of his property made by a debtor at any time within four months prior to the filing of the petition against him and while insolvent which are held null and void as against the creditors of such debtor by the laws of the state, territory or district in which such property is situate, shall be deemed null and void under this act against the creditors of such debtor if he be adjudged a bankrupt, and such property shall pass to the assignee and be by him reclaimed and recovered for the benefit of the creditors of the bankrupt." Can it be presumed that congress designed to avoid transactions by the debtor declared by the law of the domicile to be in fraud of creditors only when a petition is filed against the debtor, and to uphold and sustain such fraudulent transaction in case of a voluntary petition? The manifest purpose of the law, aside from the relief of the debtor by discharge from his debts, is to secure an equal distribution of his property among all his creditors, and to avoid all transactions within the specified limitation of time which are in fraud of creditors. Did congress design to establish a race of diligence between debtor and creditor, by which the former could anticipate the action of the latter, and by voluntary bankruptcy legalize fraudulent transactions which the act would avoid upon involuntary proceedings in bankruptcy? We could only assent to such a proposition when compelled by clear and precise language in the act. By the first section of the act, which was in the house bill when it went to the conference committee, and which house bill was substituted for the senate bill, and was reported with amendments, certain definitions are stated to control and explain language subsequently used in the act. It is there provided as fol-

lows: "The words and phrases used in this act and in proceedings pursuant hereto shall, unless the same be inconsistent with the context, be construed as follows: '(1) A person against whom a petition has been filed,' shall include a person who has filed a voluntary petition." The exact expression, "a person against whom a petition has been filed," occurs but once in the whole act and that in section 3, subd. "d"; but it can scarcely be supposed that a definition would be given in one section of an expression but once used in the act, since it would have been easy, by using in the subsequent section the words "by or against," to have avoided the need of definition, and particularly when the section in which the expression is found has reference to what could occur only in a case of involuntary bankruptcy. And so, also, with respect to section 11 of the act, which provides for a stay of suits pending against an insolvent at the time of filing a petition against him, and for 12 months after an adjudication. The language of the section is limited to involuntary proceedings, the manifest intention being that, pending the bankruptcy proceedings, the debtor, with respect to debts which may be discharged in bankruptcy, shall not be annoyed by legal proceedings. The reason for such provision is equally applicable to voluntary as to involuntary proceedings in bankruptcy, and the section is given its full effect by the application to it of the section upon definitions. We are of opinion that the intent of congress in stating the definition was to declare that the provisions of the act respecting proceedings against debtors should be applicable to and comprehend all cases where a voluntary petition is filed where such provisions are pertinent. In this way only, as it seems to us, can any harmonious design be evolved from the act; and it is the duty of the court, as we conceive it, to construe the act to work out, if possible, a consistent whole. We are aware that the contrary opinion was expressed in three cases: In re De Lue, 91 Fed. 510; In re Easley, 93 Fed. 419; In re O'Connor, 95 Fed. 943. In the first two of these cases the question would seem to have been ruled without reference to or consideration of the section upon definitions, and without regard to the serious wrong which would flow from the construction adopted. In the last case the provisions of section 1 are considered, but held not to apply. The learned judge concedes that the grounds upon which he excludes such application are extremely technical. They do not approve themselves to our judgment, and, as we have pointed out, would render valid, under subdivision "e," fraudulent acts of the debtor if he should anticipate the action of creditors by first filing his petition.

We are also unable to uphold the contention that the lien of this judgment must be upheld because the acts which led up to and procured it occurred more than four months before the bankruptcy, and therefore did not constitute the acts of bankruptcy within subdivisions "a" and "b" of section 3. The validity of the lien depends upon the terms of the act speaking to that subject, but not upon the question whether the acts which resulted in the lien were acts which subjected the debtor to proceedings in bankruptcy. It is doubtless true that the debtor could not have been forced into bankruptcy because of the acts done by him; but under the law, when for any rea-

son bankruptcy has supervened and adjudication has been determined by the court, all liens which fall under the ban of section 67 are avoided, whether the debtor has been or could have been adjudicated a bankrupt for his acts with reference to any specific lien. We are constrained to the conclusion that by subdivision "f" of section 67 all liens obtained through legal proceedings "against a person who is insolvent" within four months of the bankruptcy are avoided. It is not within our province to speak of the policy of the act. It is sufficient to us that congress has so declared. It asserts the principle that, as between creditors, "equality is equity," and that the race of diligence must cease, with respect to legal proceedings against a person who is insolvent, at the commencement of four months preceding the filing of the petition. This conclusion does not prevent the honest debtor seeking to work out from embarrassments from receiving present aid to that end, and from giving proper security for the aid received. But the one advancing money must take a present security other than that obtained through legal proceedings against an insolvent.

The petition is dismissed, and the clerk will certify this ruling to the court below.

In re TUDOR.

(District Court, D. Colorado.)

No. 179.

1. BANKRUPTCY—JURISDICTION OF REFEREE — SURRENDER OF PROPERTY BY BANKRUPT.

   An order of a referee in bankruptcy, finding that a bankrupt examined before him has money in his possession which he should surrender to his trustee and requiring him to do so, is within his authority and jurisdiction, and will not be reversed by the court on appeal, unless plainly erroneous or based on insufficient evidence.

2. SAME—ACCOUNTING BY BANKRUPT—AFTER-ACQUIRED PROPERTY.

   An order of the referee requiring the bankrupt, on his examination, to render to his trustee an account of the profits received by him on the sale of a certain business, and deliver to the trustee the books of account relating thereto, will not be reversed by the court on review merely on the ground that such accounts, if rendered, might show that the money in question was after-acquired property of the bankrupt, and not liable to administration in bankruptcy.

In Bankruptcy. On proceedings to commit the bankrupt to jail for his failure to comply with certain orders of the referee in bankruptcy touching his estate.

Bicksler, McLean & Bennett, for creditors.
John H. Gabriel, for bankrupt.

HALLETT, District Judge (orally). The first part of the order of the referee is that the bankrupt pay over to the trustee appointed herein the sum of $2,106.44. We do not understand there is any question made as to the testimony on which this order was made. The referee appears to have determined, upon the examination of

the bankrupt, that there was this amount of money and property in his possession, which the bankrupt should turn over to the trustee. It is not plain that the referee was mistaken in his judgment, or that the testimony was not sufficient to support the order.

As for the remainder of the order, it was that the bankrupt render the trustee a full and true statement of the profits received by him on the sale of the stock and fixtures of the Denver Crockery & Housefurnishing Company, and deliver to said trustee all books of account in his possession relating thereto. In that part of the order he is not required to pay anything to the trustee. He was to make a statement of profits received from this concern and turn over the books of the concern. Whether the referee would, upon any such statement being made, or upon examination of the books of the Denver Crockery concern, make a further order directing him to make any payment to the trustee, is not disclosed; but, the presumption being in favor of the referee's jurisdiction, we must assume, for anything that has been said here to-day, that he had jurisdiction to make such an order. If it be true, as alleged by counsel, that the earnings of the bankrupt, after the filing of the petition and before adjudication, are not subject to the payment of creditors' demands, we do not know that upon ascertaining any such matter the referee would have ordered them paid. He appears to have been conducting an investigation. He was engaged in inquiring about the condition of this estate, and he was authorized to inquire. The bankruptcy law provides that, upon adjudication, a bankrupt shall submit himself to an examination of the creditors. Of what avail will an examination be, if it can be arrested at any point in the progress of the examination upon the ground that the matter may be found to be of such a character that the bankrupt cannot be required to surrender to his creditors? We are not authorized to say anything of that kind. I think the orders made here were clearly within the power and authority of the referee, and this man must be committed to the jail of Arapahoe county until he shows some disposition to comply with the orders; and I so order.

In re BOOTH.

(District Court, N. D. Georgia. June 21, 1899.)

No. 163.

1. BANKRUPTCY—SECURED CREDITORS—SALE OF MORTGAGED PROPERTY BY TRUSTEE.

Where it appears that it would be for the interest of creditors at large of the bankrupt to have real estate which is incumbered by a mortgage taken by the trustee, and administered with the balance of the estate, preserving the lien of the secured creditor, the court of bankruptcy has jurisdiction to order the trustee to take possession of such property, and to enjoin the secured creditor and others from selling it, or otherwise interfering with it.

2. SAME—REVIEW OF REFEREE'S FINDINGS.

When a referee in bankruptcy, upon examination of witnesses, has decided that it is for the interest of an estate in bankruptcy that real

property subject to a mortgage should be taken by the trustee, and sold in the bankruptcy proceedings, rather than sold by the secured creditor on foreclosure of his lien, the judge will not reverse his decision on appeal unless it is manifestly erroneous.

In Bankruptcy.

Frank L. Upson, the referee in bankruptcy to whom this case was referred, found that the bankrupt had given to one of his creditors—Nickerson—a deed to certain real estate, to secure a loan, taking back a bond for title; and held that the two instruments, taken together, constituted an equitable mortgage. He also found that Nickerson, within four months prior to the filing of the petition in bankruptcy, and with knowledge that Booth (the bankrupt) was then insolvent, brought suit in a state court to foreclose his lien. Upon judgment recovered in this action the sheriff levied on the property in question. The referee found as a fact that the property would probably not command a higher price than the amount of the debt secured upon it, if sold by the sheriff at public sale, but that, if it were taken into the charge of the trustee in bankruptcy, and sold by him at private sale, it would probably bring its market value, which was considerably greater. He concluded that an injunction should issue forbidding the creditor and others from proceeding under the levy, and also an order directing the trustee to proceed to recover possession of the property from the sheriff.

Lumpkin & Burnett, for trustee in bankruptcy.
Strickland & Green, for creditor secured.

NEWMAN, District Judge. In this case the action of the referee is approved. I think the property should go into the possession of the trustee, as much of it as is not already in his possession, and be sold by him for the best interests of the creditors. Of course, existing liens must be carefully preserved, and as little expense incurred as is consistent with the proper administration of the estate. This case is not controlled at all by the recent decisions of our appellate court construing section 23b of the recent bankruptcy act (In re Abraham, 93 Fed. 767, 35 C. C. A. 592; Camp v. Zellars, 94 Fed. 799), but is controlled by sections 57e, 57h, in reference to secured creditors and the value of their security, etc. My understanding is that in bankruptcy the court has power to continue the trustee in possession in a case like this, where it appears to be for the advantage of the estate to have the mortgaged property brought into the bankruptcy court, and administered with the balance of the estate for the best interests of all the creditors. The referee has examined into this matter on the spot, with the witnesses before him, and it would be unwise, and contrary, I think, to the recognized rule, for this court to interfere with his conclusion in the matter, unless it is manifestly erroneous. Such is not the case here, and his decision in the matter must stand.

In re CRYSTAL SPRING BOTTLING CO.

(District Court, D. Vermont. October 13, 1899.)

1. BANKRUPTCY—CORPORATIONS—CALL ON STOCKHOLDERS.
When the assets of a bankrupt corporation are insufficient to pay its debts, the trustee, under direction of the court of bankruptcy, has authority to call upon the stockholders to make good the unpaid balance of their subscriptions to the capital stock of the corporation to an amount not exceeding the deficiency of the other assets as compared with the debts.

2. SAME—STATUTORY LIABILITY OF DIRECTORS.
Where directors of a corporation have incurred a statutory liability to creditors of the corporation by contracting debts in excess of the amount allowed by law, or by paying dividends when the company was insolvent, such liability is not assets of the corporation in bankruptcy, nor a fund to be resorted to by the trustee; and consequently its existence will not prevent the trustee from calling upon stockholders for the unpaid balance of their stock.

3. SAME—JURISDICTION TO ENFORCE CALL.
When the trustee of a bankrupt corporation calls upon stockholders to make good the unpaid balance on their subscriptions to its capital stock, compliance with the call is to be enforced by a suit in equity in the federal district court in which the estate of the bankrupt is being administered.

In Bankruptcy.

Henry C. Ide and Harry Blodgett, for trustee in bankruptcy.
Clarke C. Fitts, for stockholders of bankrupt corporation.

WHEELER, District Judge. The capital stock of this corporation, organized under the laws of the state, was $50,000, divided into 2,000 shares of $25 each, on which $10 per share, amounting to $20,000, was paid in, and the balance of $15 per share, amounting to $30,000, remains unpaid. The trustee in bankruptcy represents that, after realizing all he can from the assets, a deficiency remains of about $28,000 for the payment of the debts proved, and asks to call in the balance unpaid on the stock for that purpose. That the corporate stock subscriptions are a primary fund for the payment of the corporate debts is well settled, and not disputed, but a call is necessary before unpaid subscriptions can be collected. The corporation in bankruptcy cannot act by its officers in making a call, and it can be done only by the trustee under direction of the court. That this is the proper mode is well shown by Scovill v. Thayer, 105 U. S. 143, where this course was taken and approved. Of course, these unpaid subscriptions are available only for, and to the extent of, a deficiency of other assets of the corporation for the payment of its debts. Beyond that would be collecting these unpaid subscriptions for the stockholders which have not been called for in their behalf, and is not within the scope of these bankruptcy proceedings. The laws of the state provide that no debts of such a corporation shall be contracted in excess of two-thirds of the capital stock actually paid in, and that a director assenting thereto shall be personally liable for the excess; and that, if the directors declare and pay a dividend while the corporation is insolvent, or by which it became insolvent, knowing its condition, those assent-

ing thereto shall be liable in an action on the statute for debts due from the corporation at the time. V. S. §§ 3723, 3724.

Some of the directors of this corporation are alleged by shareholders who have appeared to have become liable for some of these debts by assenting to them in excess of two-thirds of the capital paid in, and for some of them by declaring and paying dividends during insolvency; and these liabilities are set up as securities which should be reckoned in reduction of the debts to which they are applicable, or as assets of the corporation available for its debts, to meet the deficiency of assets for payment of the debts. These debts are, however, none the less those of the corporation itself because the directors have become in some manner liable for them collaterally. The original liability is not substituted for nor changed; that created by the statute is annexed to it without removing it. Institution v. Sprague, 43 Vt. 502. The creditor is not obliged to exhaust that remedy; nor has the corporation, or the trustee of it in bankruptcy, any right to pursue it. It is not an asset of the corporation, but security for the creditors, who may follow it or not, at their pleasure, with all other securities, till they are paid in full. Merrill v. Bank, 173 U. S. 131, 19 Sup. Ct. 360.

Some defenses by particular stockholders are set up, but are not considered now. The present question is whether a call for the unpaid subscription should be made by the trustee, to be enforced, if not complied with, so far as it lawfully can be; and it appears now quite clearly that one for the amount of the subscription unpaid should be made, and so enforced.

Some suggestions have been made as to where suit should be brought on failure to comply with the call. According to Patterson v. Lynde, 106 U. S. 519, 1 Sup. Ct. 432, there should be one suit in equity for adjustment of the whole matter as to all within the jurisdiction. This is not such a suit as the bankrupt could have brought. Scovill v. Thayer, 105 U. S. 143. Therefore it is not within sections 23a and 23b of the bankrupt act, limiting actions by the trustee to where the bankrupt could sue. This leaves the jurisdiction of such a case as this, arising under the bankrupt law, in the United States courts where the bankrupt estate is being administered, the equities of the parties can all readily be made to appear, and the jurisdiction of such a case more properly belongs. Motion granted, and call for payment by November 1st ordered to be enforced by a suit in the United States courts.

In re BAUMANN.

(District Court, W. D. Tennessee, W. D. October 10, 1899.)

INVOLUNTARY BANKRUPTCY—ISSUE OF INSOLVENCY—EXEMPT PROPERTY AS ASSETS.

On the trial of a contested petition in involuntary bankruptcy, in determining the issue as to the solvency or insolvency of the respondent, within the meaning of Bankr. Act 1898, § 1, subd. 15, all the property which he owns is to be reckoned in computing the amount of his assets,

except such as he may have transferred or concealed in fraud of creditors, but not excluding property which is exempt from execution by the laws of the state.

In Bankruptcy.

W. K. Poston and Frank Zimmermann, for petitioning creditors.
J. M. Gregory, for respondent.

HAMMOND, J. The question is made on an exception to the evidence, and by asking an instruction to the jury, whether property exempt under the state statute from execution at law is to be reckoned in balancing the property and debts upon the issue of solvency or insolvency, as made by a contested petition in bankruptcy. It is entirely true, as stated by Mr. Justice Bradley in Re Bass, 3 Woods, 382, Fed. Cas. No. 1,091, "that exempted property constitutes no part of the assets in bankruptcy, and that the assignee acquires no title to exempted property." Nevertheless it does not follow that it is not to be counted when determining the question whether he be solvent or insolvent. It is not a question of what constitutes assets in a court of bankruptcy, for that has not been reached as yet, but what constitutes a solvency that shall escape a condition of bankruptcy and the bankruptcy court. The bankruptcy statute provides, in section 1, subd. 15, as follows:

"A person shall be deemed insolvent within the provisions of this act whenever the aggregate of his property, exclusive of any property which he may have conveyed, transferred, concealed, or removed, or permitted to be concealed or removed, with intent to defraud, hinder or delay his creditors, shall not, at a fair valuation, be sufficient in amount to pay his debts."

This is probably as arbitrary a provision as is to be found in the statute. It was intended to wipe out, as with a sponge, all that confusion which is to be found in previous bankruptcy statutes and decisions as to the meaning of the word "insolvency." It had also the more comprehensive purpose of designating with absolute fixity the only class of persons upon whom the involuntary features of the bankruptcy statute should operate, namely, those whose property was not sufficient in amount to pay their debts. It does not proceed upon any theory that the debts will in fact be paid by the appropriation of the property to that end, nor upon the theory that as a matter of fact it is available for compulsory payment, but upon the theory that the defendant has sufficient property with which he may pay his debts if he chooses to do so. It would destroy the fixity of the statutory definition if an inquiry were permitted as to the more or less difficulty there might be in making the property available under legal compulsion, and it would reintroduce into the law of bankruptcy as much or more confusion about the meaning of the word "insolvency" than existed before congress determined to put the meaning of that term beyond all question. Moreover, the language of the above-quoted section is explicit. There is not the least ambiguity about its meaning. It leaves no room for any construction by implication or otherwise. Obviously, it was intended to give us a rule in mathematics, the terms of which are absolute. Congress had the most plenary power to so limit the operation of the bankruptcy statute,

and, looking to the perplexities of the subject, public policy requires that effect shall be given to the statute as it is written. The learned Judge Ware remarked, in construing our bankruptcy act of 1841, "that it is a rule in the construction of all statutes that when the statute covers the whole case, in all its circumstances, and makes no exceptions, none can be made by the court." In re Marwick, 2 Ware (Dav. 229) 233, Fed. Cas. No. 9,181. This wise rule is commended everywhere. Mr. Justice Lamar, in Lake Co. v. Rollins, 130 U. S. 662, 670, 9 Sup. Ct. 652, thus expresses it:

"To get at the thought of the meaning expressed in a statute, a contract, or constitution, the first resort in all cases is to the natural signification of the words, in the order of grammatical arrangement in which the framers of the instrument have placed them. If the words convey a definite meaning, which involves no absurdity, nor any contradiction of other parts of the instrument, then that meaning, apparent on the face of the instrument, must be accepted, and neither the courts nor the legislature have the right to add to it or take from it. So, also, where a law is expressed in plain and unambiguous terms, whether those terms are general or limited, the legislature should be intended to mean what they have plainly expressed, and consequently no room is left for construction."

If congress had intended to exclude from the terms of this definition property exempted by law from execution, the phrasing of the statute would have contained the exception either explicitly or by necessary implication,—as if the statute had used the phrase, "the aggregate of his property subject to execution at law," or "the aggregate of his property available for the payment of his debts," or "the aggregate of his property, except such as is exempted by law"; and it is most natural that the language of the statute should have taken some such form if it had been the intention to exclude from the count the value of the exempted property. It might have been best for congress to have made that exception, but it is neither absurd nor in any sense unwise that it should, in the furtherance of its determination to give us a fixed rule, have made no exception at all. Again, the statute does in fact contain in its language one particular exception, and it contains no more. If another exception had been intended, it would have been expressed along with that which was significantly declared. So, taking it all together, there seems to be no occasion for any construction by implication, but a necessity for following the ordinary rule laid down by Mr. Justice Lamar in the quotation above given.

One of the learned counsel (Mr. Zimmermann) suggests that this exempted property should be excluded because, being a homestead, it is not under the control of the defendant. He cannot sell it or use it in payment of his debts without the consent of his wife. But we all know that a complaisant wife generally will do what a good husband asks her to do in such matters; and in this very case his counsel, Mr. Gregory, undertakes that the defendant shall procure his wife to sign a deed that shall convey the homestead to a trustee in bankruptcy, if one should be appointed in this case, or to otherwise convey it in trust to pay these debts. This incident itself illustrates the confusion that might enter into the consideration of the question if we should once break down the rule by admitting the

exception now suggested; and at another time some other equally plausible exception may be suggested,—such, for example, as that equitable assets should not be counted, but only those which are legal and leviable at law,—so that from time to time we would incorporate, now one exception, and then another, until the test of solvency would become that prescribed by the particular judge, and not that furnished us by congress. Our inquiry would be complicated with a multitude of collateral investigations of the status of each parcel of property to determine, if it be available, by compulsory process, for the uses of creditors; and our rule in mathematics would become a veritable pons asinorum to the juries and the judges. It is my opinion that no exception can be made but that very one which is found in the statutory definition, and that consequently the value of the homestead must be included in the aggregate of the defendant's property, notwithstanding its exemption from execution at law. Although not leviable, it may be used voluntarily for the payment of these debts, which is enough to satisfy the statute. Ruled accordingly.

In re WIENER & GOODMAN SHOE CO.

(District Court, E. D. Pennsylvania. May 17, 1899.)

No. 3.

1. BANKRUPTCY—PROVABLE DEBTS—RIGHTS OF ASSIGNEE.
Where, under the law of the state, the assignee of a nonnegotiable judgment note takes it subject to all equities and defenses available against it in the hands of the assignor, he will not be entitled to prove it as a claim against the estate of the maker in bankruptcy, unless the assignor could have done so.

2. SAME—OBJECTIONS TO PROOF—UNPAID SUBSCRIPTION TO CORPORATE STOCK.
Where a creditor of a corporation is also a subscriber for its corporate stock, and his subscription has not been fully paid, he will not be allowed to prove his claim against the estate of the corporation in bankruptcy until he has paid the balance remaining due on his subscription.

In Bankruptcy.

Appeal by Simon Wiener, as a creditor of the bankrupt corporation, from an order of the referee in bankruptcy disallowing his claim against the bankrupt. One Albert Wiener, being a subscriber for capital stock in the corporation, paid into its treasury one-half the par value of the stock subscribed for; and about a month later he received from the corporation a sealed instrument in the form of a nonnegotiable promissory note, payable to himself, for the same amount, which he assigned to his brother, the present claimant. The referee held that the note was without consideration, and was not a provable debt against the corporation in bankruptcy, in the hands of an assignee.

Charles J. Hepburn, for claimant.
John W. Wetzel and James F. Campbell, for creditors.
Wilbur F. Sadler, for bankrupt.

McPHERSON, District Judge. We agree with the conclusion of the learned referee. Under the Pennsylvania law, Simon Wiener took the judgment note in controversy subject to all the equities and defenses that would have been available against it if it had remained in the hands of his brother, Albert. In addition to the cases cited by the referee, we may add Reineman v. Robb, 98 Pa. St. 474; Theyken v. Machine Co., 109 Pa. St. 95; Geiger v. Peterson, 164 Pa. St. 352, 30 Atl. 262; and Bank v. Roessler, 186 Pa. St. 431, 40 Atl. 963. This rule does not apply in its fullness to the assignee or indorsee of overdue negotiable paper, but the restriction in favor of such paper is obviously not applicable to the sealed instrument now under consideration.

One defense to the note in the hands of Albert Wiener was the fact that he still owed the company upon his contract of subscription to the capital stock. This defense is now at the service of the other creditors, for it certainly cannot be endured that a creditor, who is also a debtor, of an insolvent, and is therefore withholding money to which his fellow creditors are entitled, shall be allowed to take away from them part of the other assets of the bankrupt. He cannot be permitted to diminish a fund that he is under obligation to increase, and thereby deprive the other creditors of money that it would be his duty immediately to return. If the company had continued to be solvent, it might or might not have been at liberty, under all circumstances, to set off his subscription against its liability on the note. That point is not now involved, for the fact of insolvency has supervened, and this creates a situation in which the rights of other creditors must also be considered. It would be highly inequitable to allow him to apply a part of the assets for his own benefit, until he has put into the fund the money that he justly owes. He must cease to be a debtor before he can enforce his claim as a creditor. The appeal is dismissed, and the action of the referee is confirmed.

In re CAROLINA COOPERAGE CO.

(District Court, E. D. North Carolina. October 13, 1899.)

1. BANKRUPTCY—COMMISSIONS OF TRUSTEES.
   Bankr. Act 1898, § 48a, providing that trustees in bankruptcy shall be compensated for their services by commissions, not exceeding a certain percentage, on the sums paid as dividends and commissions by the estates administered, is mandatory, and must be followed; and a court of bankruptcy has no authority to allow to a trustee a lumping sum in lieu of commissions calculated as the act directs.

2. SAME—SERVICES AS AGENT OF COURT.
   Where, at the time of the bankrupt's adjudication, its property was in the hands of a sheriff under an execution levied, and the court of bankruptcy ordered the marshal to take the property, and appointed an agent to make sale thereof, who took possession, and advertised the sale, and was thereafter elected trustee of the bankrupt's estate, and then made the sale, *held*, that he was not entitled to compensation for services rendered as agent of the court, in addition to the commissions to be allowed him as trustee.

3. SAME—PRIORITY OF CLAIMS—WORKMEN AND SERVANTS.
The president of a business corporation, who has supreme authority in managing and directing its affairs, and receives a salary of $700 per annum for his services in that capacity, is not a "workman, clerk, or servant" of the corporation, within the meaning of Bankr. Act 1898, § 64b, giving priority of payment out of bankrupt estates to wages due to such persons.

4. SAME—ATTORNEYS' FEES.
In a case of involuntary bankruptcy, where all the bankrupt's property was taken from the possession of a sheriff, and sold under orders of the court of bankruptcy, and thereafter there was no litigation directly interesting the bankrupt, or in which he was actively engaged, so that the bankrupt's attorney had no duties to perform except to fill out the schedules, and give legal advice, *held*, that an allowance of $75 to such attorney was excessive, and should be reduced to $25.

5. SAME—REFEREE'S EXPENSE ACCOUNT—CLERK HIRE.
A referee in bankruptcy is not entitled to charge, as a part of his expense account against an estate administered before him, the cost of "clerical aid." There is no authority for the hire of a clerk by the referee.

6. SAME—FEE TO ATTORNEY OF TRUSTEE.
The court of bankruptcy, in its discretion, may refuse to allow a fee to the attorneys for the trustee in bankruptcy, when the same attorneys have been allowed a fee as attorneys for the petitioning creditors, which covers any services rendered to the trustee or the estate.

In Bankruptcy. On final report of referee in bankruptcy.

PURNELL, District Judge. This case is again before the court upon the final report of the referee and settlement of costs. But two items are excepted to.

First. The allowance of $100 to the trustee in lieu of the 3 per cent. commission allowed by the statute. This exception is sustained. Section 48a, Act 1898, provides a trustee shall receive as full compensation for his services a fee of $5, and commissions not to exceed 3 per cent. on the first $5,000 or less, etc. Even if the statute had not thus limited the compensation of this officer, the United States supreme court, in rule 35, § 3 (18 Sup. Ct. ix.), has done so in the following language: "The compensation allowed to trustees by the act shall be in full compensation for the services performed by them; but shall not include expenses necessarily incurred in the performance of their duties and allowed upon the settlement of their accounts." This is conclusive. Neither the referee nor judge can make an allowance in violation of the statute and rules. But it is said the trustee was an agent of the court for the sale of the property of the bankrupt corporation. The facts are that all the property of the bankrupt was in the hands of the sheriff under an execution issuing from a state court, when it was, under an order of this court, taken into possession by the marshal. On account of the expense incident to preserving the estate, a sale was ordered, and C. L. Taylor, by consent, appointed agent to make the sale. After this the same gentleman was selected as trustee, and made the sale after such selection. The only service performed before such selection was to take possession of the property and advertise it. These are services the bankruptcy act contemplates the trustee shall perform, and when the sale was actually made he was trustee. The referee proposes

to amend his report by allowing the 3 per cent. commission, and then a special allowance as agent to make this sale. This would be an evasion the court cannot countenance. It is not contemplated in the law. Allowances are in the sound judicial discretion of the court. Suppose the sale was made as agent of the court, as contended, then all the services performed by the trustee were to receive and hold the proceeds of sale, and his maximum commissions are not to exceed 3 per cent. The minimum commissions would be allowed. Both agent and trustee being the same, the 3 per cent. is ample compensation for all the services performed, and the only compensation allowed under the act. As before said in Re Woodard, 95 Fed. 956: "One of the purposes of the act of 1898 in establishing a uniform system of bankruptcy was to avoid what was the principal cause of the repeal of the bankruptcy act of 1867,—excessive fees and great expense." This being so, the law should be administered at the minimum cost consistent with efficient service. This being the manifest intention of congress, it is incumbent on the bankruptcy court and its officers to so administer the law. To do otherwise is to violate the law. Parties should not accept office under the bankruptcy act in ignorance of the fees allowed by law; and when they inadvertently do so, and are dissatisfied with the fees allowed, they can relieve themselves of the burden without the nominal expense of a postage stamp, by a few lines resigning the trust, sent under a frank as official business. Vacancies can always be filled without much delay. The trustee will be allowed the 3 per cent. commissions as provided in section 48a, rule 35, and no more.

The second exception is to item 4, as to debts having priority and to be paid in full, as follows: A. H. Slocumb's salary as president of the bankrupt corporation at a rate of $700 per annum from October 27, 1898, to January 27, 1899,—$175. This exception is sustained. No authority can be cited for the contention that this debt, if it be a debt, should have priority over claims of persons whose funds have been swallowed up in the bankrupt corporation, but the spirit of the law and the decisions is against it. The citation of the definition of "wage earner" in section 1, subsec. 27, cannot aid the claimants. This definition was intended for other sections of the act, as a cursory examination will show any logical mind. But the section, and the only section, under which it is claimed Slocumb has a priority, is section 64b, which limits the priority of wages to be paid to workmen, clerks, and servants which have been earned within three months. Slocumb was neither a workman, a clerk, nor a servant, in the sense in which these limiting words are used. If congress had intended this provision to extend to presidents of commercial corporations, it would have said so. Presidents of such corporations do not generally act as workmen, clerks, or servants, but exercise authority over these classes, occasionally arbitrary and oppressive, but always in a way to let them know the president is not one of them. There is no evidence before the court that Mr. Slocumb was an exception to the general rule; no evidence he did any work; no evidence he kept

the books, or even the minutes, of the corporation, as clerk, or acted in the capacity of servant. He was not a servant, for he had no master over him, but was presumably supreme in the body. Men who have attained position, and in their own minds regard themselves as rulers, often in a bombastic way proclaim themselves the servants of the people. It is diplomacy, and in some quarters regarded as good form. Possibly, in this way, a president of a commercial corporation may regard himself as the servant of the corporate body, but this is not what is contemplated in the statute. The classes to whom it was evidently the intention of congress to give priority is that class who labor and serve; parties who, under the laws of some states, would have a lien, or at least be preferred to other creditors in the settlement of an estate. The president of a commercial corporation does not fall under this head. The same view of this section was taken by Phillips, district judge, Western district of Missouri, in Re Grubbs-Wiley Grocery Co., 96 Fed. 183. The case was almost "on all fours" with the one at bar. The learned judge says:

"Indeed, it would present a remarkable feature of the bankrupt act if the managing officers of a business corporation could vote themselves salaries ad libitum, and after, by their management, wrecking the company, and inviting an adjudication in bankruptcy, they could, to the exclusion of other creditors of the concern, whose money and property they had obtained on credit, come in as preferred creditors to the exclusion of such general creditors."

The president of a corporation was evidently not in the mind of the lawmakers. This claim cannot be allowed a priority, and will be stricken from that list.

The attorney's fees which the court may allow under section 64, subsec. 3, must be reasonable. In view of what has already been said,—the course of the proceeding, and the fact that there has been no litigation, since the sale, in which the bankrupt was directly interested or actively engaged,—it is evident that an attorney for the bankrupt would not have had onerous duties to perform, or any duty other than filling out blank schedules, and giving legal advice. Seventy-five dollars for this service is excessive. Twenty-five dollars is ample and reasonable for the service which could probably be required in connection therewith. It is therefore ordered that the allowance to the bankrupt's attorney be reduced from $75 to $25, and no more paid by the trustee on this account.

There is no authority for the hire of a clerk by a referee, and the item in the referee's expense account of $10 for "clerical aid and stationery" is disallowed. There is no voucher filed for the stationery, as required, which is probably the smallest part of the item. Such items, under rule 35, § 2 (18 Sup. Ct. ix.), can only be allowed by order of the judge. If a referee could thus hire a clerk at $10, he could hire some one to attend to all except the judicial duties of the office, while he attended to other business, and thus, under an act and rules limiting his compensation in plain terms, increase the cost of a proceeding in bankruptcy far beyond any of the extravagance under the act of 1867. This item will be stricken from the expense account of the referee.

The ruling of the referee refusing to recommend a fee to the attorneys for the trustee on the ground that the same attorneys are allowed a fee as attorneys for the petitioning creditors, which covers any service rendered in this behalf, is affirmed. The allowance of any attorney's fee is a matter within the sound judicial discretion of the court (section 64, subsec. 3), and should be exercised in accordance with the spirit and purposes of the act as to costs and expenses, due regard being always paid to the ends of justice, equity, and economy.

There are other items in the final report which do not seem to be in exact compliance with the intent of the bankrupt law, but, having passed the scrutiny of the counsel representing all the parties interested, it is presumed upon explanation these items are satisfactory to all, and, except as herein otherwise decided, the report is affirmed.

In re BAKER.

(District Court, D. Kansas, First Division. September 9, 1899.)

1. BANKRUPTCY—ARREST OF BANKRUPT ON STATE PROCESS—RELEASE ON HABEAS CORPUS.

Where a bankrupt, having been arrested on civil process issuing from a state court, applies to a court of bankruptcy to be discharged from such arrest on habeas corpus, he cannot be released if the debt or claim on which the process issued is one which would not be affected by his discharge in bankruptcy. Although general order No. 30 authorizes his release if the debt or claim is one provable in bankruptcy, yet this rule must yield to the more restricted provisions of section 9 of the act, which regulates the subject.

2. SAME.

A judgment in a bastardy proceeding brought against the putative father in the name of the state, and by the public prosecutor, according to the state law, adjudging him to pay a certain monthly sum to the mother of the child for its maintenance and education for the period of 10 years, and to secure such payment by a bond with sureties, is not such a debt as will be released by his discharge in bankruptcy; and hence, if he is arrested, during the bankruptcy proceedings, for failure to furnish the bond required, and committed, the court of bankruptcy will not set him at liberty on habeas corpus.

In Bankruptcy. On bankrupt's application for writ of habeas corpus.

W. F. Riggs, for petitioner.

E. A. Enright and L. W. Keplinger, opposed.

HOOK, District Judge. This is an application for a writ of habeas corpus. On January 28, 1899, the petitioner was found to be the father of a bastard child by the judgment of the district court of Wyandotte county, Kan., in an action brought in the name of the state on the relation of Birdie Dysart, the mother of the child. By the judgment, Baker was charged with the maintenance and education of the child, and for that purpose he was required to pay to the mother the sum of $10 per month for the period of 10 years, and to secure such payment by a bond with sufficient sure-

ties. In default of bond he was adjudged to be committed to the county jail of Wyandotte county. On July 8, 1899, Baker filed his petition in bankruptcy in this court. He scheduled two items of indebtedness,—one to Ella A. Baker in the amount of $100, and the other the judgment referred to, which he specified as an indebtedness to the mother of the illegitimate child. No assets were listed except a small amount of exempt property. On the 10th of July, 1899, the petitioner was duly adjudged to be a bankrupt. At the time fixed for the meeting of creditors to prove their claims no one appeared, and no claims were proven against the bankrupt's estate. Having neglected to give the bond required by the state court in the bastardy proceeding, Baker was confined by the sheriff in the county jail of Wyandotte county, Kan. To relieve himself of such confinement, this petition is filed.

Sections 752 and 753 of the Revised Statutes authorize the granting of the writ of habeas corpus where the prisoner in jail is in custody in violation of the constitution or of a law of the United States. General order in bankruptcy No. 30 (32 C. C. A. xxx., 89 Fed. xii.) supplements the statute, and, among other things, provides that:

"the petitioner during the pendency of the proceedings in bankruptcy be arrested or imprisoned upon process in any civil action, the district court upon his application may issue a writ of habeas corpus to bring him before the court to ascertain whether such process has been issued for the collection of any claim provable in bankruptcy and if so provable he shall be discharged; if not, he shall be remanded to the custody in which he may lawfully be."

Section 9 of the bankrupt act, in providing for the exemption of the bankrupt from arrest upon civil process, makes an exemption when the process is "issued from a state court having jurisdiction, and served within such state, upon a debt or claim from which his discharge in bankruptcy would not be a release." It will be observed that the language of the order is more comprehensive than the terms of the statute. The former provides for the bankrupt's release upon habeas corpus if the arrest or imprisonment complained of is upon a claim provable in bankruptcy, while section 9 of the act permits of his arrest if it is based upon a debt or claim from which his discharge in bankruptcy would not be a release. A similar variance in phraseology existed between section 26 of the bankrupt act of 1867 and No. 27 of the general orders made in pursuance of that act. The concluding clause of section 26 of the act of 1867 is as follows:

"No bankrupt shall be liable to arrest during the pendency of the proceedings in bankruptcy in any civil action, unless the same is founded on some debt or claim from which his discharge in bankruptcy would not release him." 14 Stat. 529.

General order No. 30 under the act of 1898, and No. 27 under the act of 1867, are identical, excepting in a single instance, where the word "referee" in the former replaces the word "register" in the latter. The order must yield to the terms of the statute, and the test of the legality of the bankrupt's imprisonment is not whether the claim or demand upon which it is based is provable against the bankrupt's estate, but it is whether his discharge in bankruptcy

would operate as a release of the claim or demand. The decisions of the courts under the act of 1867 fully sustain this view. In re Robinson, 6 Blatchf. 253, Fed. Cas. No. 11,939; In re Patterson, 2 Ben. 155, Fed. Cas. No. 10,817; In re Whitehouse, 1 Low. 429, Fed. Cas. No. 17,564. Various kinds of demands are provable in bankruptcy, yet the bankrupt's discharge does not operate to release him from further liability thereon. In the petitioner's case it may be said that, even if the judgment rendered against him in the state court were provable against his estate,—though this is not at all clear,—the important question still remains whether his discharge in bankruptcy would operate as a release of the judgment. If it would, he should be discharged from imprisonment; if not, he should be left in the custody of the sheriff of Wyandotte county. Section 17 of the act of 1898 provides that a discharge in bankruptcy shall release a bankrupt from all his provable debts excepting those falling within certain classes therein enumerated. However, as the result of the interpretation of the different bankrupt laws by the courts, and the ascertainment of the intent and purpose of congress in their enactment, various other claims and judgments than those specifically enumerated therein have been determined to be not affected, nor the liability of the bankrupt thereon impaired or released, by his discharge in bankruptcy. Some demands, although in the form of judgments, are held not to be debts within the meaning of that term as used in the acts; and others, though within the letter, are held not to be within the spirit, of those laws. Thus, under the act of 1867 a judgment for a fine was held not to be a debt provable in bankruptcy. The word "debt," as found in the act, was used in its legal or limited sense, and not in its popular and enlarged signification. In Re Sutherland, Deady, 416, Fed. Cas. No. 13,639, the court said that to place such an obligation in the class of ordinary debts affected by the bankrupt law would, in effect, be allowing the national government, through its courts, to grant pardons for crimes committed against the state, and that such result was certainly not in contemplation when the act was passed. The same conclusion was reached by the supreme court in Spalding v. New York, 4 How. 21, affirming 7 Hill, 301, 10 Paige, 284. To the same effect is Macy v. Jordan, 2 Denio, 570. A debt due to the United States is not released by a discharge of the debtor in bankruptcy unless the bankrupt act expressly and specifically so provides. The leading case upon this subject is U. S. v. Herron, 20 Wall. 251, where it is held that the act of 1867, which provides in general terms that the certificate should release the bankrupt "from all debts, claims, liability, and demands which were or might have been proved against his estate in bankruptcy," did not affect a claim due to the United States, although it might prove its debt, and secure priority of other creditors. The supreme court announced the broad doctrine to be that no general words in a statute devested the government of its rights or remedies. It is familiar doctrine in England that where an act of parliament is general, and thereby any prerogative, right, title, or interest is devested or taken from the king, he shall not be bound thereby unless there are express

words extending the provisions of the statute to him. Thus it is held that the ordinary statutes of limitation do not apply to the government unless made so by express terms, and it has frequently been decided that debts due the crown are not released by a discharge in bankruptcy under the English bankrupt acts. It is said that "the most general words that can be devised" do not affect the king in the least, if they may tend to restrain or diminish any of his rights and interests. Magdalen College Case, 11 Coke, 74. And the supreme court, in Dollar Sav. Bank v. U. S., 19 Wall. 239, holds that "the rule thus settled respecting the British crown is equally applicable to this government, and it has been applied frequently in the different states, and practically in the federal courts." Various state courts have held that this exemption from general terms of legislative enactments applies to the states not only in their united, but also in their separate, sovereignties, and that the claims of a state are not within provisions for the release of debts owing by the bankrupt upon his discharge in bankruptcy unless expressly made so. The legislature will not be taken to have postponed the public right to that of an individual except in cases where such purpose has been most plainly manifested. Com. v. Hutchinson, 10 Pa. St. 466; Saunders v. Com., 10 Grat. 494; Connecticut v. Shelton, 47 Conn. 400; Johnson v. Auditor, 78 Ky. 282. So far as concerns this question, there are two points of difference between the act of 1867 and the one now in force. Section 57, cl. "j," of the present act provides that debts owing to the United States, or a state, or some subdivision thereof, as a penalty or forfeiture, shall not be provable except for the amount of the pecuniary loss sustained, with costs and interest. No such provision appears in the act of 1867. Section 17 of the present act exempts from release of provable debts such as are due as a tax levied by the United States, the state, or some subdivision thereof. Language of the same import appears in the act of 1867, but it is not found in the section relating to release of the bankrupt's debts. These differences are insufficient to indicate an express intention on the part of congress in the passage of the present act to establish a different rule as to the devesting of the government, national or state, of its rights or remedies from that which obtained under the act of 1867 as construed by the supreme court in U. S. v. Herron, supra. If congress had intended that the bankrupt's discharge should operate as a release of his debts owing to the government, it would undoubtedly have so provided in unmistakable terms, especially in view of the rule of construction which has been established and so uniformly followed for so many years.

It has been held that a judgment for alimony is not released by a discharge in bankruptcy. In re Lachemeyer, 18 N. B. R. 270, Fed. Cas. No. 7,966; In re Foye, 2 Low. 399, Fed. Cas. No. 5,021. The contrary is held in Re Houston, 94 Fed. 119. Whatever may be the correct rule respecting an award of alimony, it is not governed by the same principles that apply to a judgment in a bastardy proceeding, which, in Kansas, is substantially a prosecution brought in the name of the state, and carried on by the public prosecutor, for the

enforcement of a police regulation. The history and legislation on this subject shows that the object and purpose of such acts as the one under which the petitioner was prosecuted is to protect the public from the responsibility and burden that would be cast upon it by the criminal act of the putative father, and to relieve society of the cost of the maintenance and education of the illegitimate offspring. In some states the complaint is brought by the overseers of the poor or other officials intrusted with the administration of the laws relating to persons whose maintenance is or may become a charge upon the public. In some states the prosecution is instituted in the name of the town liable for the maintenance of the child; in others by the town where the mother and child have procured a settlement, in case the mother shall refuse to prosecute; in others in the name of the people, or, as in Kansas, in the name of the state. In some jurisdictions the complaint is brought in the name of the people, or state, or some subordinate division thereof, on the relation of the mother as prosecuting witness, while in others the mother has no record connection with the proceedings, unless it be in the capacity of a witness. In almost every state, however, the prosecution is either in the name of or is controlled by the public authorities, and it will be noticed that in Kansas the county attorneys of the various counties are charged with the conduct of the prosecution. The proceedings against the petitioner in the state court were under chapter 47, Gen. St. Kan. 1889, being "An act providing for the maintenance and support of illegitimate children," the principal features of which bearing upon this inquiry are as follows: When any unmarried woman shall make written complaint, under oath, before a justice of the peace, charging a person with being the father of a bastard child of which she is pregnant or has been delivered, the justice issues his warrant, and the defendant is arrested, and brought before him. The prosecution is in the name of the state of Kansas on the relation of the prosecuting witness. The inquiry before the justice is in the nature of a preliminary examination, and, if his determination is against the defendant, he is required to enter into a recognizance for his appearance at the next term of the district court, or be committed to jail. If the district court or jury in such state court find against the defendant, "he shall be adjudged the father of such child, and stand charged with the maintenance and education thereof." The district court enters judgment accordingly, and makes such order as seems just to it for securing the maintenance and education of the child by the annual payment to the mother, or if she be dead, or an improper person to receive the same, to such other person as the court may direct, of such sum of money as the court may order, and payable at such times as may be adjudged proper. The judgment shall require of the defendant that he secure the payment of the sum adjudged by good and sufficient sureties, or, in default thereof, that he be committed to jail until the security is given; but the imprisonment cannot exceed one year. Execution may issue on the judgment whenever any amount is due on the same. After the arrest, the trial and proceedings of the prosecution before the justice and in

the district court are governed by the law regulating civil actions, except as otherwise especially provided. The prosecuting witness may at any time before final judgment dismiss the suit, if she shall enter of record an admission that provision for the maintenance of the child has been made to her satisfaction. The several county attorneys within their respective counties are charged with the prosecution of all cases originating under the act. The supreme court of the state, in a number of decisions interpreting the act and defining its objects and purpose, has said that the obligation sought to be enforced is not based upon contract, either express or implied; that the proceeding is not a suit to recover a sum of money owed by the defendant to the complaining party; that the judgment rendered is not a debt, within the meaning of the constitution, prohibiting imprisonment for debt except in case of fraud; that the moral duty of the father to make provision for the support of his illegitimate offspring is made a legal duty by the statute; and, finally, that the proceeding, which partakes of both a criminal and civil character, is a police regulation, designed to require of the putative father that he secure the public against loss and expense in the maintenance of his child, which might otherwise become a public charge.

There is no merit in the contention that, because a judgment is, generally speaking, a debt, it is like any other debt in the administration of the bankrupt law. The character of the claim upon which the action is brought and the nature of the proceeding enter into and determine the character of the judgment when brought into a court of bankruptcy. Nor is it significant that an execution may issue to enforce the collection of the judgment against the petitioner. The collection of a fine and costs imposed for violation of a criminal statute is frequently enforced by that writ. It has been held that a judgment obtained under a statute of Connecticut, whereby the bankrupt was ordered to make certain quarterly payments for the maintenance of a bastard child of which he had been adjudged the putative father, was not within the meaning of the term "debt" as used in the bankrupt act of 1841. In re Cotton, Fed. Cas. No. 3,269. See, also, Com. v. Erisman, 21 Pittsb. Leg. J. 69. At common law a father was bound for the support of his legitimate offspring, and the obligation was a continuing one during its minority. It was never intended by any bankrupt law that the parent should be released from such an obligation by his discharge in bankruptcy, and, if means were prescribed for the enforcement of the duty against a neglectful father by a proceeding in court, the remedy would be equally without the provisions of a bankrupt act. There is no difference in principle between such a case and the one under consideration. The statute supplies an omission of the common law, and also charges the father of an illegitimate child with its maintenance and education; and, on account of the uncertainty of its paternity, an order or judgment of filiation is provided for after due hearing. That such obligations are put into a concrete form by the judgment of a court for their better enforcement can afford no cause for a release therefrom by a discharge in bankruptcy. The application of the petitioner will be denied.

UNITED STATES v. PRICE et al.

(District Court, D. Kentucky. October 20, 1899.)

1. WITNESS—EXEMPTION FROM PROSECUTION—WITNESS IN PROCEEDING FOR VIOLATION OF INTERSTATE COMMERCE LAW.
   Act Feb. 11, 1893, § 1 (27 Stat. 443, c. 83), provides that "no person shall be excused from attending and testifying * * * in any cause or proceeding, criminal or otherwise, based upon, or growing out of, any alleged violation of [the interstate commerce act] on the ground or for the reason that the testimony or evidence * * * required of him may tend to criminate him or subject him to a penalty or forfeiture. But no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he may testify * * * in any such case or proceeding." *Held*, that the amnesty given to the witness by the second clause of the provision is limited to the matters as to which he is compelled to testify by the first clause, and extends only to "a cause or proceeding based upon or growing out of an alleged violation" of the said act to regulate commerce, and that as to other matters regarding which he may be interrogated as a witness he is left, first, to his privilege of refusing to answer lest he may criminate himself, or, second, if he answers, then to his rights under Rev. St. § 860, supplemented by the further provisions of the act of 1893 prohibiting the use of his testimony against him.
2. INDICTMENT—GROUNDS FOR PLEA IN ABATEMENT.
   It is no ground for a plea in abatement to an indictment for conspiring to obstruct the justice of the United States by taking from a witness papers which he had been required by a subpœna duces tecum to produce before a grand jury of the United States that the defendants, as witnesses before the grand jury in behalf of the United States in an investigation of charges of violation of the interstate commerce law were interrogated and testified as to the matters upon which the indictment was based.

On Demurrer to Pleas in Abatement.

R. D. Hill, Dist. Atty., for the United States.
W. M. Smith, for respondents.

EVANS, District Judge. The indictment in this case charges that J. W. Price, S. M. Jackson, and Theodore Maxfield did knowingly, unlawfully, and feloniously conspire, confederate, and agree, etc., to obstruct the justice of the United States by taking from one Clarence L. Wilson, a witness residing in Arkansas, who had been duly subpœnaed to appear before the grand jury of the United States in this district, certain papers which he had been directed to bring with him, and which he had brought, and which furnished testimony in connection with what it was supposed the witness Wilson would state bearing upon a charge against W. B. Belknap & Co. of having violated the provisions of the act to regulate commerce, commonly called the "Interstate Commerce Law." To this indictment S. M. Jackson filed a special plea in the following language:

"And now comes S. M. Jackson, in his own proper person, into court, and, having heard the said indictment read, says that the United States ought not further prosecute this indictment against him, said S. M. Jackson, because he says that some short time before April 18, 1899, he was duly subpœnaed to attend as a witness in behalf of the United States before the grand jury of the United States at the February term, 1899, in Louisville, in the district of Ken-

tucky, to testify in behalf of the United States in certain investigations to be had before said grand jury against parties charged with the violations of the interstate commerce law; and he says that some time in April, 1899, and before the finding and returning of this indictment, he, having answered before said grand jury in obedience to said subpœna, was called before said grand jury, and was duly sworn, and compelled to testify before them in regard to transactions, matters, and things concerning the violation by W. B. Belknap & Co. of the interstate commerce act, and he did so testify, and, among other things, he was compelled to and did testify in regard to and concerning of the control and possession of certain invoices of goods bought from said W. B. Belknap & Co. by Theodore Maxfield & Bro., Batesville, Ark., since Jan. 1, 1899, and copies of bills of lading of said goods transported and delivered to said Maxfield Bros., and in regard to the taking of said bills of lading from one Clarence L. Wilson (being same mentioned in indictment), and delivered by them, defendant and S. M. Jackson, to J. W. Price; that he did so testify before said grand jury to all of said matters fully and completely, and in answer to questions propounded to him before said grand jury, and that in said testimony he did fully state the manner in which said bills of lading and invoices were taken from said Wilson and delivered to said Price by defendant and Maxfield, and his connection therewith, and that upon said evidence, together with that of other witnesses, on April 18, 1899, this indictment was found and returned in court, and this the said S. M. Jackson is ready to verify."

The plea of Theodore Maxfield was the same. The United States having demurred to the pleas, the question to be determined is whether they are sufficient, and it has been ably argued by counsel. If the defendants were on trial under this indictment, it is manifest that the provisions of section 860 of the Revised Statutes and those of the act of February 11, 1893, in relation to testimony before the interstate commerce commission, etc., would prohibit the admission against them, respectively, of any testimony they had given before the grand jury, as stated in the plea. The plea in abatement, however, to an indictment which in no way charges a violation of the interstate commerce act, but which does charge a conspiracy to obstruct justice, raises a very different question. Section 860 of the Revised Statutes clearly prohibits the use against them, respectively, of any testimony which they then gave; and if, while before that body, they had refused to answer any question which might tend to criminate them, except as to violations of the interstate commerce law, the cases of Boyd v. U. S., 116 U. S. 616, 6 Sup. Ct. 524, and Counselman v. Hitchcock, 142 U. S. 547, 12 Sup. Ct. 195, would have manifestly supported them in the refusal. But they did not bring themselves within those cases by declining to answer. They appear to have answered all questions, and now plead that fact in abatement of an indictment which charges, not a violation of the interstate commerce act, but a conspiracy to obstruct justice by the seizure of the papers of a witness for the United States while in his possession, and while he was in the district with them, in obedience to a subpœna duces tecum.

The first section of the act of February 11, 1893, is as follows:

"That no person shall be excused from attending and testifying or from producing books, papers, tariffs, contracts, agreements and documents before the interstate commerce commission, or in obedience to the subpœna of the commission, whether such subpœna be signed or issued by one or more commissioners, or in any cause or proceeding, criminal, or otherwise, based upon or growing out of any alleged violation of the act of congress, entitled 'An act to regulate commerce,' approved February fourth, eighteen hundred and eighty

seven, or of any amendment thereof, on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him, may tend to criminate him or subject him to a penalty of forfeiture. But no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing, concerning which he may testify, or produce evidence, documentary or otherwise, before said commission, or in obedience to its subpœna, or the subpœna of either of them, or in any such case or proceeding; provided, that no person so testifying shall be exempt from prosecution and punishment for perjury committed in so testifying."

This section certainly does provide that no person shall be excused from attending and testifying as a witness before the interstate commerce commission, or "in any cause or proceeding, criminal or otherwise, based upon or growing out of any alleged violation of the act of congress entitled "An act to regulate commerce," and complete amnesty is expressly given any person so testifying in respect to such matters (Brown v. Walker, 161 U. S. 591, 16 Sup. Ct. 644); but the court is of opinion that it was the intention of congress, in the section copied, to limit this amnesty to a "cause or proceeding based upon or growing out of an alleged violation" of the said act to regulate commerce, and that as to matters outside of those the witness was left, first, to his privilege of refusing to answer lest he might criminate himself, or, second, if he had answered, then to his rights under section 860 of the Revised Statutes, as supplemented by the act of 1893, prohibiting the use of his testimony against him. It was not the intention of congress to grant him amnesty as to other crimes merely because he had testified to violations of the interstate commerce law. The first clause of the act of 1893 provided that no person should be excused from testifying in cases "based upon or growing out of any alleged violation of the" interstate commerce law. That was all. It went no further. The second clause of the act must logically and necessarily be limited to the same thing, and evidently that is all congress intended. The constitutional principles announced in Counselman v. Hitchcock made it necessary that the amnesty provided should be coextensive with the requirement to testify in such cases. But nothing in the case last mentioned, nor in Brown v. Walker, demanded anything more. They were both based entirely upon the refusal of witnesses to testify in cases of alleged violations of the interstate commerce act. The first clause of the act of 1893 made necessary the second clause; otherwise, neither would have been effective. The latter supplemented the former, but was limited by it, and refers to nothing except the matters upon which witnesses shall not be excused from testifying by virtue of the express provisions of the act. If this is not the proper contruction of the act of 1893, the least collusion with a single friendly grand juror might enable the worst violator of the laws of the United States to entitle himself to amnesty by procuring himself to be summoned as a witness nominally to testify or to be asked about a violation of the interstate commerce law. It seems to the court that the plain language of the act of 1893 requires this construction, and, besides, it is very doubtful whether the pleas in abatement afford the proper way to determine the matter of fact alleged, wherein it is averred that this indictment was found upon the testimony before the grand

jury given by these defendants. At all events, the court sustains the demurrer, overrules the pleas, and reserves for investigation at the trial certain matters of fact alleged in the pleas.

In re BRUNDAGE.

(Circuit Court, D. Minnesota. September 21, 1899.)

1. CONSTITUTIONAL LAW—OLEOMARGARINE—INTERSTATE COMMERCE.
Oleomargarine is a lawful subject of commerce, and a state statute (Act Minn. April 19, 1899, § 16) which prohibits the sale of oleomargarine so colored as to resemble butter is unconstitutional and void in so far as it applies to a sale within the state of oleomargarine manufactured in another state, and imported by the agent of the manufacturer, and sold by him in the original and unbroken packages of importation, stamped and marked as required by the act of congress of August 2, 1886 (24 Stat. 209), the product being composed of the materials described in said act as constituting lawful oleomargarine of commerce.

2. HABEAS CORPUS—IMPRISONMENT UNDER VOID STATE STATUTE—COMITY.
A federal circuit court has jurisdiction to release on habeas corpus a person sentenced to imprisonment upon conviction in a state court of a violation of a penal statute of the state, which statute is void for conflict with the constitution of the United States; but for comity's sake it will not exercise this power unless where large interests, affecting the business of many, or the rights of the public, are so involved that serious consequences would follow from the delay necessary to the prosecution of a writ of error, or unless the state court, in convicting the prisoner under the statute, has disregarded a decision of the United States supreme court upon the question at issue.

On Habeas Corpus.

H. D. Dickinson, for the State.
C. A. Severance, for defendant.

LOCHREN, District Judge. This case arises from the attempted enforcement of a statute of the state of Minnesota designed to prevent the sale, or having in possession for the purpose of sale, of oleomargarine colored with any coloring matter so as to resemble butter made from cream. Section 16 of an act of the legislature of the state of Minnesota, entitled "An act to prevent fraud in the sale of dairy products, their imitations or substitutes, to prohibit and prevent the manufacture or sale of unhealthy or adulterated dairy products, and to preserve the public health," approved April 19, 1899, reads as follows:

"Sec. 16. No person, by himself or his agents, or his agents or servants, shall manufacture for sale, have in his possession with intent to sell, expose or offer for sale, or sell as butter or as cheese, or as substitutes for butter or cheese, or as imitations of butter or cheese, under any name or title whatsoever, any mixture or compound, which is designed to take the place of butter or of cheese, and which is made from animal or vegetable oils or fats, or by the mixing or compounding of the same, or any mixture or compound consisting in part of butter or of cheese in mixture or combination with animal or vegetable oils or fats, nor shall any person mix, compound with or add to milk, cream, butter or cheese any animal or vegetable oils or fats, with design or intent to make or produce any article or substance in imitation of butter or cheese, nor shall any person coat, powder or color with annotto or with any

other coloring matter whatever, butterine or oleomargarine or any mixture or compound of the same, or any article or compound made wholly or in part from animal or vegetable oils or fats not produced from milk or cream, whereby the said article or compound shall be made to resemble butter or cheese, nor shall any person offer or expose for sale or sell any article, substance or compound made, manufactured or produced in violation of the provisions of this section, whether such article, substance or compound shall have been made, manufactured or produced within this state or in any other state or country; and the having in possession by any person, firm or corporation of any article, substance or compound made, manufactured or produced in violation of the provisions of this section shall be considered as prima facie evidence of an intent to sell the same as butter or as cheese contrary to the provisions of this section."

The violation of any of the provisions of this act was made a misdemeanor, punishable by fine or imprisonment. The petition and return show that upon complaint made and filed in the municipal court of the city of Minneapolis the petitioner, Charles N. Brundage, was charged with having, on the 22d day of May, 1899, at said city, willfully and unlawfully offered and exposed for sale, and having in his possession with intent to sell, "a quantity of a certain compound designed to take the place of butter, and made in part from animal and vegetable oils and fats not produced from milk or cream, said compound being an article commonly known as 'oleomargarine,' and being then and there colored with a coloring matter whereby the said article and compound was made to resemble butter"; whereupon a warrant was issued by said court upon which the petitioner was arrested, and upon trial was by said court convicted, and sentenced to pay a fine of $25 and $3 costs, or be imprisoned in the workhouse of said city for the term of 30 days at hard labor. As the petitioner did not pay the fine, he was taken into custody by Harry M. Burke, a police officer of said city, upon a warrant for his commitment to the said workhouse. On the hearing it was admitted that all the testimony at said trial was correctly set forth in Exhibit A, attached to said petition. From this testimony it appears, in brief, that the petitioner was and is the manager of the business at Minneapolis of the Hammond Packing Company, an Illinois corporation, dealing at wholesale in beef and provisions, including oleomargarine; and that on May 22, 1899, William C. Corbett, an inspector of the state dairy and food department of the state of Minnesota, asked for and purchased from the petitioner, at the place of business of said Hammond Packing Company, a 10-pound package of oleomargarine for the sum of $1.40, paid by him therefor. The said 10-pound package was an original package of oleomargarine, manufactured by the G. H. Hammond Company, of Hammond, in the state of Indiana; the inclosure of the package being a wooden box, having thereon the revenue stamps and marks required by law; and upon the sale thereof at said Hammond was thence consigned by railroad by the said manufacturer to the purchaser, the Hammond Packing Company, at Minneapolis, where it was received by the said purchaser, and sold entire in the same package to said William C. Corbett, who thereafter made in said municipal court the said complaint upon which said petitioner was prosecuted as aforesaid. The oleomargarine so sold was the

well-known article of food and of commerce of that name; entirely wholesome, and fit for consumption as human food, and colored with the ordinary wholesome ingredients used in the manufacture of that article to impart to it the color of the best dairy butter. On such sale it was represented and sold as oleomargarine, which was the article asked for by the purchaser. Oleomargarine has for some years, in states like Minnesota, having large dairy interests, been the subject of hostile legislation, because it comes in competition with and is a substitute for butter, and, supplying its place at less cost, diminishes the price of that article and the profits of the dairymen; and also because of the facility with which it can, by dishonest dealers at retail, and keepers of inns and boarding houses, be put off as butter upon customers and patrons who desire only butter, and would not knowingly use oleomargarine. In the earlier cases in which the validity of this legislation was questioned it was sustained by the courts. It could not rest on the admitted right of every state as matter of police regulation to provide for the inspection of articles of food put upon its markets, and for the confiscation or destruction of such articles as were found to be deleterious or unwholesome, because the legislation referred to, of which the section above quoted of the Minnesota statute is a sample, provides for no inspection, and aims to prohibit and exclude from the markets of the state an article of food presumably wholesome and fit for human consumption, simply because of the fact that, as customarily prepared and colored to make it attractive and marketable, it is made to resemble perfectly another article of food, for which it is a substitute, and is thus liable to be mistaken for that article, and to be fraudulently imposed upon consumers as that article. In People v. Arensberg, 105 N. Y. 123, 11 N. E. 277, it was held that, assuming oleomargarine to be as wholesome, nutritious, and suitable for food as dairy butter, and in fact the same article except as regards its origin, and that it is cheaper, yet, to protect the people from deception, the legislature could prohibit the sale or keeping or offering for sale of oleomargarine, to which, in its manufacture, a coloring matter not injurious to health had been added to make it resemble the best dairy butter. It was intimated that the legislature had the power to prohibit the like coloring of winter butter to make it resemble summer butter; and the then mooted question whether, in case the essential ingredients of oleomargarine should produce an article identical in color and appearance with dairy butter, the legislature could require that a different color be given to oleomargarine to distinguish it from butter, was stated, but not passed upon. Plumley v. Massachusetts, 155 U. S. 461, 15 Sup. Ct. 154, was in all essentials like the present case. The statute of Massachusetts under which Plumley was convicted prohibited the sale, offering or exposing for sale, or having in possession with intent to sell any article, product, or compound made wholly or partly out of any fat, oil, or oleaginous substance or compound thereof, not produced from unadulterated milk or cream from the same, which shall be in imitation of yellow butter produced from pure unadulterated milk or cream; with a proviso that nothing in

the act should be construed to prohibit the sale of oleomargarine in a separate and distinct form, and in such manner as will advise the consumer of its real character, free from coloration or ingredient that causes it to look like butter. Plumley was the Boston agent of an Illinois firm engaged in the manufacture of oleomargarine at Chicago, and in shipping the same for sale to various towns and cities of that and other states, and there selling the same; and Plumley was convicted by the municipal court of Boston for selling one original 10-pound package of oleomargarine, shipped to him by the manufacturers; it being admitted that the article was wholesome, nutritious, and palatable, and that the acts of congress had been complied with as to marks, words, and stamps on the package. Being taken, upon writ of commitment, to jail, after such conviction, and failure to pay the fine imposed, Plumley sued out a writ of habeas corpus from the supreme judicial court of Massachusetts on the ground that he was restrained of his liberty in violation of the constitution of the United States; claiming that the Massachusetts statute was repugnant to the clause of the constitution providing that congress shall have power to regulate commerce among the several states, and setting up all the grounds of invalidity which are here urged against the Minnesota statute. The supreme judicial court held that the Massachusetts statute was not in violation of the constitution or laws of the United States, and remanded the prisoner, who took the case by writ of error to the supreme court of the United States. That court held that the Massachusetts statute, in its application to sales of oleomargarine artificially colored, so as to cause it to look like yellow butter, and brought into Massachusetts, was not in conflict with the clause of the constitution of the United States investing congress with power to regulate commerce among the several states; and that a state has the power to prevent the sale of articles of food manufactured in and brought from another state, being subjects of sale and commerce, if their sale may cheat the people into purchasing something they do not intend to buy, and which are wholly different from what their condition and appearance import. Among the cases cited in the opinion of the court with apparent approval are State v. Marshall, 64 N. H. 549, 15 Atl. 210, and Weideman v. State, 56 N. W. 688, which is the same case reported as State v. Horgan, 55 Minn. 183. In each of these two cases the court had sustained the validity of state statutes forbidding the sale, or having in possession with intent to sell, of any article or compound made in imitation of butter, or as a substitute for butter, and not wholly made from milk or cream, and that is of any other color than pink. Three of the justices of the supreme court, including the chief justice, dissented from the decision of the court in the Plumley Case, denying that a state may exclude from commerce legitimate subjects of commercial dealings because of the possibility that their appearance may deceive purchasers in regard to their qualities. But the decision of the court seemed to settle the law on the subject, and when the question of the validity of the Minnesota act of 1891 (Laws 1891, c. 11), which, in its effect, forbade the sale of oleomargarine unless colored bright

pink, being the identical statute which had been held valid by the Minnesota supreme court in 55 Minn. 183, 56 N. W. 688, came before me in Packing Co. v. Snyder, 84 Fed. 136, I regarded the tenor of the Plumley decision, and its apparent approval of the Minnesota and New Hampshire decisions just referred to, as conclusive authority in support of the validity of the Minnesota act of 1891. Since then the whole subject has again been considered and passed upon by the supreme court of the United States in Schollenberger v. Pennsylvania, 171 U. S. 1, 18 Sup. Ct. 757, and Collins v. New Hampshire, 171 U. S. 30, 18 Sup. Ct. 768. In the Schollenberger Case it is held that oleomargarine has been recognized for nearly a quarter of a century in Europe and the United States as an article of food and commerce, and has been so recognized by acts of congress; and, being thus a lawful article of commerce, it cannot be wholly excluded from importation into a state from another state where it was manufactured, although the state into which it is introduced may so regulate the introduction as to insure purity; and that, as an incident to the right to import, the importer may personally or by his agent sell the imported article in the original packages, either to dealers or consumers; and that the statute of Pennsylvania of May 21, 1885, enacting that "no person, firm or corporate body shall manufacture out of any oleaginous substance, or any compound of the same, other than that produced from unadulterated milk or cream from the same, any article designed to take the place of butter or of cheese produced from pure unadulterated milk or cream from the same, or of any imitation or adulterated butter or cheese, nor shall sell or offer for sale, or have in his, her or their possession, with intent to sell the same as an article of food," and making such act a misdemeanor, is invalid to the extent that it prohibits the introduction of oleomargarine from another state, and its sale in the original package. As a fact of the first importance in determining that the manufacture of oleomargarine is a lawful pursuit, and the manufactured article a legitimate subject of commerce, the court refers to the act of August 2, 1886 (24 Stat. 209), "An act defining butter, also imposing a tax upon and regulating the manufacture, sale, importation and exportation of oleomargarine," which levies special taxes upon manufacturers and dealers in that article, and directs the kinds and sizes of the packages, and the marks, brands, and stamps to be placed thereon, and that sales thereof shall only be made in and from such original stamped packages, and for surveillance by officers of the government over the manufacture of the article, and its forfeiture if found to contain ingredients deleterious to the public health. One description of oleomargarine contained in this act includes "all mixtures and compounds of tallow, beef fat, suet, lard, lard oil, vegetable oil, annotto, and other coloring matter, intestinal fat, and offal fat made in imitation or semblance of butter." The decision of the court in the Schollenberger Case certainly goes to the extent of holding that the manufacture of oleomargarine by the compounding of the ingredients named in this quotation from the act of August 2, 1886, is recognized by congress as being a lawful business, and that the oleomargarine so produced

is a lawful article of commerce. It follows, and is distinctly held in that case, that any act of a state legislature assuming to prohibit the importation into the state and sale there by the importers of such article in original packages is invalid, being inconsistent with the exclusive power of congress over the subject of commerce among the several states.

Comparing section 16 of the Minnesota act of April 19, 1899, under which the petitioner is prosecuted, with the above quotation from the act of congress of August 2, 1886, it is obvious that the Minnesota act, by its terms, prohibits, and attemps to exclude from the state, oleomargarine compounded of the very materials, including coloring matters, which are described in said act of congress as constituting lawful oleomargarine of commerce, "made in imitation or semblance of butter." According to the decisions of the supreme court in the Schollenberger and Collins Cases, the Minnesota act is, to this extent, invalid; and, as the conviction and imprisonment of the petitioner rest solely upon this invalid portion of that act, the conviction was null, and the imprisonment was unlawful.

The argument that oleomargarine colored to resemble butter is adulterated by such coloring, so that it may for that cause be excluded from the markets of the state under its unquestioned power to exclude any article of food which is unwholesome or deleterious, fails, because there is no pretense that the coloring matter contained in the oleomargarine sold by the petitioner was unwholesome, or that the oleomargarine so colored and sold was different from the "pure oleomargarine" mentioned in the opinions of the supreme court referred to; pure, not as containing no mixture, because oleomargarine is a compound of many ingredients, but pure in the sense of containing nothing debasing, or of a character which would render the article less wholesome, valuable, or desirable. The doctrine, which has apparent support in the Plumley Case, that a state may exclude from its markets, and absolutely prohibit the sale of, an admittedly wholesome article of food merely because it is designedly prepared to resemble so closely another more generally desired article, for which it is a substitute, that persons may be easily deceived, and have it imposed upon them for the other article, is plainly contrary to the holding in the Schollenberger Case, and untenable since that decision, in which the court announces that "the legislative policy does not extend so far as to embrace the right to absolutely prohibit the introduction within the limits of the state of an article like oleomargarine, properly and honestly manufactured."

As to whether, in a case like this, the court should discharge the prisoner on habeas corpus, or, by remanding him, leave him to the remedy of a writ of error, it is hardly necessary to refer to the very numerous authorities. If the imprisonment is upon regular process of a court having jurisdiction, and the prosecution is had under a valid law, alleged errors cannot, usually, be considered upon habeas corpus. But if the court issuing the process under which the prisoner is imprisoned had no jurisdiction, or if the prosecution is under

an unconstitutional and invalid statute, the circuit court has jurisdiction to discharge the petitioner on habeas corpus. Even then, for reasons of comity, such power will seldom be exercised by the circuit court to discharge a petitioner held under process from a state court, even after conviction by the trial court, unless large interests affecting the business of many or the rights of the public are so involved that serious consequences will follow from the delay which will be caused by the prosecution of a writ of error to a final decision, or unless the question has already been decided by the supreme court of the United States, whose decisio the state court has disregarded in the proceeding. State statutes prohibiting the importation from other states and sale of articles of commerce, especially articles of food, or adapted for general use, are regarded as affecting general interests and the rights of the public; and habeas corpus has frequently been resorted to in cases of imprisonment for violation of such statutes. Minnesota v. Barber, 136 U. S. 313, 10 Sup. Ct. 862; Plumley v. Massachusetts, 155 U. S. 461, 15 Sup. Ct. 154; State of Iowa v. McGregor, 76 Fed. 956. As this is a case of that character, and as the unconstitutionality of statutes in effect like the Minnesota statute under consideration has been adjudged by the supreme court of the United States in the latest cases in that court upon the subject, the petitioner will be discharged from the imprisonment complained of.

In re BRADLEY.

(Circuit Court, S. D. California. October 1, 1898.)

1. FEDERAL AND STATE COURTS—HABEAS CORPUS—DISCHARGE OF STATE PRISONER BY FEDERAL COURT.
   The power given to the circuit and district courts of the United States by Rev. St. § 753, to discharge from custody on habeas corpus one who is restrained of his liberty in violation of the constitution, although held under state process to answer for a crime against the state, is a discretionary one, and one of great delicacy, which should not be exercised in any case when suitable relief can be had through the regular procedure of the state tribunals.
2. SAME—OFFENSE COMMITTED AT SOLDIERS' HOME.
   A person arrested by state authorities charged with the commission of a crime will not be discharged from custody by a federal court on habeas corpus, on the ground that the offense is charged to have been committed within the limits of grounds ceded as a soldiers' home, and over which the United States has exclusive jurisdiction.

This was a petition by Albert G. Bradley for a writ of habeas corpus.

John D. Pope, for petitioner.

WELLBORN, District Judge. Petitioner alleges that he is imprisoned by the sheriff of Los Angeles county, Cal., in the county jail of said county, under a commitment by the justice of the peace of Santa Monica township, in said county, directing said sheriff to hold petitioner for examination on a charge of assault with intent to mur-

der; that said crime is charged to have been committed by the petitioner within the limits of the soldiers' home in said county; that the land, and the buildings thereon, within said limits, are owned by the United States, and occupied and used as a home for disabled volunteer soldiers; that the legislature of the state of California, by virtue of section 34 of the Political Code of said state and other acts, has ceded to the United States exclusive jurisdiction over said land; and that an offense committed within said limits is not an offense against the laws of the state of California, and that the courts of said state have no jurisdiction over offenses committed within said limits.

Unquestionably, the circuit and district courts of the United States may, on habeas corpus, discharge from custody one who is restrained of his liberty in violation of the constitution of the United States, even though he is so restrained under state process to answer for an alleged crime against the state. Rev. St. U. S. § 753. This power, however, in the federal judiciary, "to arrest the arm of the state authorities, and to discharge a person held by them, is one of great delicacy" (Ex parte Thompson, 23 Fed. Cas. p. 1016), and ought not to be exercised in any case where suitable relief can be had through the regular procedure of the state tribunals (Ex parte Royall, 117 U. S. 241, 6 Sup. Ct. 734; Ex parte Fonda, 117 U. S. 516, 6 Sup. Ct. 848; In re Hacker, 73 Fed. 464). The reasons for the above rule are stated by the supreme court of the United States with such clearness and force in Ex parte Royall, supra, that I quote at length from the opinion in that case, as follows:

"It remains, however, to be considered whether the refusal of that court to issue the writ and to take the accused from the custody of the state officer can be sustained upon any other ground than the one upon which it proceeded. If it can be, the judgment will not be reversed, because an insufficient reason may have been assigned for the dismissal of the petitions. Undoubtedly, the writ should be forthwith awarded, 'unless it appears from the petition itself that the party is not entitled thereto,' and the case summarily heard and determined, 'as law and justice require.' Such are the express requirements of the statute. If, however, it is apparent, upon the petition, that the writ, if issued, ought not, on principles of law and justice, to result in the immediate discharge of the accused from custody, the court is not bound to award it as soon as the application is made. Ex parte Watkins, 3 Pet. 193, 201; Ex parte Milligan, 4 Wall. 3, 111. What law and justice may require in a particular case is often an embarrassing question to the court, or to the judicial officer before whom the petitioner is brought. It is alleged in the petitions—neither one of which, however, is accompanied by a copy of the indictment in the state court, nor any statement giving a reason why such a copy is not obtained—that the appellant is held in custody under process of a state court in which he stands indicted for an alleged offense against the laws of Virginia. It is stated, in one case, that he gave bail, but was subsequently surrendered by his sureties; but it is not alleged, and it does not appear, in either case, that he is unable to give security for his appearance in the state court, or that a reasonable bail is denied him, or that his trial will be unnecessarily delayed. The question as to the constitutionality of the law under which he is indicted must necessarily arise at his trial under the indictment, and it is one upon which, as we have seen, it is competent for the state court to pass. Under such circumstances, does the statute imperatively require the circuit court, by writ of habeas corpus, to wrest the petitioner from the custody of the state officers in advance of his trial in the state court? We are of the opinion that, while the circuit court has the power to do so, and may discharge the accused in advance of his trial, if he is restrained of his liberty in violation of the national constitution, it is

not bound in every case to exercise such a power immediately upon application being made for the writ. We cannot suppose that congress intended to compel those courts, by such means, to draw to themselves, in the first instance, the control of all criminal prosecutions commenced in state courts exercising authority within the same territorial limits, where the accused claims he is held in custody in violation of the constitution of the United States. The injunction to hear the case summarily, and thereupon 'to dispose of the party as law and justice require,' does not deprive the court of discretion as to the time and mode in which it will exert the powers conferred upon it. That discretion should be exercised in the light of the relations existing, under our system of government, between the judicial tribunals of the Union and of the states, and in recognition of the fact that the public good requires that those relations be not disturbed by unnecessary conflict between courts equally bound to guard and protect rights secured by the constitution. When the petitioner is in custody, by state authority, for an act done, or omitted to be done, in pursuance of a law of the United States, or of an order, process, or decree of a court or judge thereof, or where, being a subject or citizen of a foreign state, and domiciled therein, he is in custody, under like authority, for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission or order or sanction of any foreign state, or under color thereof, the validity and effect whereof depend upon the law of nations, in such and like cases of urgency, involving the authority and operations of the general government, or the obligations of this country to, or its relations with, foreign nations, the courts of the United States have frequently interposed by writs of habeas corpus, and discharged prisoners who were held in custody under state authority. So, also, when they are in the custody of a state officer, it may be necessary, by use of the writ, to bring them into a court of the United States to testify as witnesses. The present cases involve no such considerations. Nor do their circumstances, as detailed in the petitions, suggest any reason why the state court of original jurisdiction may not, without interference upon the part of the courts of the United States, pass upon the question which is raised as to the constitutionality of the statutes under which the appellant is indicted. The circuit court was not at liberty, under the circumstances disclosed, to presume that the decision of the state court would be otherwise than is required by the fundamental law of the land, or that it would disregard the settled principles of constitutional law announced by this court, upon which is clearly conferred the power to decide ultimately and finally all cases arising under the constitution and laws of the United States. In Taylor v. Carryl, 20 How. 595, it was said to be a recognized portion of the duty of this court (and, we will add, of all other courts, national and state) 'to give preference to such principles and methods of procedure as shall seem to conciliate the distinct and independent tribunals of the states and of the Union, so that they may co-operate as harmonious members of a judicial system co-extensive with the United States, and submitting to the paramount authority of the same constitution, laws, and federal obligations.' "

In Ex parte Tatem, 1 Hughes, 588, 23 Fed. Cas. p. 708, where the United States district judge for the Eastern district of Virginia discharged, on habeas corpus, a prisoner, who had been arrested and was held by the state authorities on a charge of murder alleged to have been committed in the Gosport navy yard, over which the United States had exclusive jurisdiction, the decision was made many years before that in Ex parte Royall, supra; and besides, in the former case, a prosecution against the prisoner for the same offense had been instituted in the United States courts before his arrest by the state authorities.

Assuming—without, however, deciding—that the allegations of the petition, in the case at bar, show, that the imprisonment of the petitioner is without due process of law, and violative of the federal constitution, they do not, as held in Ex parte Royall, supra, "suggest

any reason why the state court of original jurisdiction may not, without interference upon the part of the courts of the United States, pass upon the question which is raised," as to the lack of jurisdiction in the state government over the land or place in question. The writ will be denied.

E. T. FAIRBANKS & CO. v. DES MOINES SCALE & MANUFACTURING CO.

(Circuit Court, S. D. Iowa, C. D. September 12, 1899.)

No. 2,372.

1. EQUITY PRACTICE—HEARING OF EXCEPTIONS TO PLEADING.
Where, in a suit to enjoin the infringement of a trade-mark and unfair competition, the purpose and effect of defendant's acts complained of are not clear on the pleadings, and can better be determined after a hearing on the merits, the disposition of issues raised by exceptions to the answer will be deferred until a hearing is had.

2. TRADE-MARKS—SUIT FOR INFRINGEMENT—PRELIMINARY INJUNCTION.
Where it appears that complainant had knowledge of the alleged infringement of its rights by defendant for many years before suit was brought, the case made by the bill is fully met by the answer, and no showing of defendant's insolvency is made, a preliminary injunction will not be granted.

In Equity. On exceptions to answer, and application for preliminary injunction.

M. H. Beach, for plaintiff.
St. John & Stevenson, for defendant.

WOOLSON, District Judge. These matters were submitted in June. Earlier decision has been prevented by illness, the consequent accumulation of official business, much of which would not permit of delay, and the steady and heavy pressure of the large amount of labor under the recent bankruptcy statute. Counsel on either side have favored the court with a large array of authorities. These have been carefully considered, with the possible view of practically deciding this suit under the full and unusually clear pleadings filed. But after consulting these cited cases, and giving the matters pretty full consideration, it has seemed to me but just to the parties, and desirable for the court, to take the action hereinafter stated.

1. As to the exceptions filed: The bill exhibits the trade-marks on its weighing scales, registered by plaintiff in 1878 and 1893. It recites the progress of plaintiff's increasing business since its commencement in 1838, and that the word "Fairbanks," sometimes associated with the word "Patent" or the word "Standard," has to the public become the indicia of manufacture of such scales by plaintiff; that defendant is using such words, simulating in their manner of use such words as long used by plaintiff, and thereby deceiving the public, and preventing, to the extent of defendant's sales thereof, the sale of scales made by plaintiff, to plaintiff's great damage, with prayer for injunction. The answer largely admits the acts by defendant performed as charged in bill, but denies intent to injure or

that it has by wrongful acts injured plaintiff; affirms that, at termination of patents issued to plaintiff, the patented invention as to scales was thrown open to the public; that during the period of validity of such patents said scales received in the commercial world, and were known by the generic name of "Fairbanks" scales, such being the name by plaintiff given to such scales; that such term was recognized by the commercial world generally as defining the kind of scale which had been covered by the patent to plaintiff, as contradistinguished from scales patented to or manufactured by other and rival scale manufacturers, and that defendant, in using such term, used it as distinguishing the scales manufactured by it, viz. as being of the type which had theretofore been manufactured under said Fairbanks patents, but that on each scale by it manufactured, whereon appeared the word "Fairbanks," defendant had caused to be placed, in prominent lettering, the statement that such scale had been manufactured by defendant, the manner of the statement thereof being such as that no person had been or would be deceived into believing that such scale had been manufactured by plaintiff; that the words "U. S. Standard," placed by defendant on its scales were designed to mean, and was by the commercial world and the public generally understood to mean, that such scale had been tested, as to its accuracy of weighing, according to the United States standard of weights and measures, and was of that degree of accuracy. The answer traverses each allegation of the bill which charges on part of defendant intent to injure or actual injury to plaintiff by acts of defendant, and attempts to base its defense as to its claim of nonliability, and its allegation of plaintiff's lack of cause of action, substantially, on the doctrine announced in Singer Mfg. Co. v. June Mfg. Co., 163 U. S. 169, 16 Sup. Ct. 1002. Without attempting complete specification of bill or answer, the general lines of the pleadings are stated above. I have considered the exceptions filed by plaintiff to the answer of defendant; and, with reference to the answer as attacked by such exceptions, the general language used by Justice Miller in Merriam v. Publishing Co., 43 Fed. 450, 451, with regard to a full hearing as to the facts, I deem peculiarly applicable, although there applied when answer had not been filed:

"Now, taking all these allegations together, there may be some evidence of a fraudulent intent on defendant's part to get the benefit of the reputation of [Fairbanks scales], which the plaintiff is [manufacturing], and it may be that, in consequence of the facts averred, the public are deceived, and that the complainants are damaged to some extent. We think, therefore, that this is one of those cases where, as the facts are stated in the complaint, the interests of justice would be best subserved by requiring the defendants to [reply], so that there may be a full and fair investigation of the law and facts upon a final hearing."

With the evidence or agreed statement of facts before the court, opportunity will then be afforded for a much more satisfactory determination of the issues raised by the exceptions filed than can now be done.

2. As to application for preliminary injunction: The defendant strenuously insists that (1) the laches shown on plaintiff's part should defeat any right, if otherwise existing, to such writ; (2) that,

on the merits, plaintiff is not entitled to such writ, defendant having fully answered under oath as to the issues tendered in bill.

As to laches: The proof tendered by affidavit shows that for some 18 years these scales, as now manufactured by defendant, have been manufactured in Des Moines; that during a good portion of that time the agents and salesmen of defendant have come into close competition with salesmen of plaintiff; that during all that time the lettering on the Des Moines made scales has been substantially as the same is now, with regard to the words "Fairbanks," "Fairbanks Patent," and "Fairbanks Standard" appearing on the scales manufactured by plaintiff, and shown by Exhibit A to plaintiff's petition; that such scales have been sold, set up and used in Des Moines and the general surrounding vicinity; that in the fall of 1894 correspondence passed between defendant and their counsel and agents and counsel for Fairbanks, Morse & Co., of Chicago, who are alleged to have then been acting as general Western agents for plaintiff, with regard, among other things, to the use by defendant of the words "Fairbanks," "Fairbanks Patent," etc., on scales made by defendant, and that such correspondence extended over some months, and terminated with the assertion by defendant of their right to use, and intention to continue using, such words on the scales by them manufactured; and that since that date to the present, save by the filing of present bill in February of this year, and matters in this suit transpiring, no action has ever been taken by plaintiff to enforce its asserted rights as against defendant's alleged wrongful appropriation of the words above copied. No attempt is made to explain why this delay occurred after the general Western agents of plaintiff were advised of the said use by defendant of such words.

No allegation or showing is made as to any insolvency of defendant, and no showing of irreparable injury to plaintiff as liable to occur during pendency of present suit, nor that the output of defendant's works is so great as materially to affect the market, as against plaintiff's scales, meanwhile. The preliminary writ should not issue without strong showing therefor, especially where the right to relief prayed is squarely put in issue, and result not clear beyond question on the pleadings, and where its issuance would tend to disturb the established and long-continued business of a manufacturing firm.

On the entire case as presented, without in any wise indicating what might be the judgment of the court were the case finally submitted on the pleadings now on file, I do not find such a state of facts shown as to justify this court in ordering preliminary writ to issue. Apparently, the facts involved in this suit will not be many, and very few of them contested. An early submission of the case on its merits can be had, and the present action of the court will not long delay the relief of injunction, if, on the whole case, plaintiff is entitled thereto. The exceptions to the answer are overruled (but leaving the matter therein contained to be renewed, without prejudice from present ruling, on final hearing, if then pertinent and desired by plaintiff), and application for writ of preliminary injunction is denied, to all of which plaintiff excepts.

SPERRY MFG. CO. v. J. L. OWENS CO.

(Circuit Court, D. Minnesota, Fourth Division. October 19, 1899.)

PATENTS—INVENTION—FANNING MILLS.

The Sperry patent, No. 267,032, for a fanning mill, shows only a combination of old appliances and devices long used in fanning mills in a manner which produces only old results, and evolves no new functions, and is void for want of invention.

Suit in equity by the Sperry Manufacturing Company against the J. L. Owens Company for infringement of a patent.

Paul & Hawley, for complainant.

C. S. Cairns, for defendant.

LOCHREN, District Judge. The parties are Minnesota corporations, each engaged in the manufacture and sale of fanning mills for cleaning and separating grain; and the complainant, as licensee of Willis Sperry, to manufacture, use, and sell grain cleaning and separating machines, under patent No. 267,032, issued to said Willis Sperry, November 7, 1882, brought this suit to restrain the defendant from infringing the said patent, and for damages and an accounting of profits in respect to past infringements. The defendant denies infringement, and also attacks the validity of the Sperry patent, pleading numerous prior patents as showing anticipations of Sperry's alleged invention. The claims of the Sperry patent are as follows:

"(1) In combination with a hopper, the upper grain-receiving screen, G, the lower and coarser screen, J, the adjustable lower screen, K, inclined in the opposite direction, and the spouts, D and E, arranged the former beneath screen J, and the latter beneath screen G, as described. (2) The combination of the screen, G, the coarser screen, J, adapted to receive the tailings therefrom, the spout, D, located beneath the screen J, a second spout, E, inclined in the opposite direction, and arranged to receive the material passing through the lower end of the screen G, and the bottom screen, K, inclining in the opposite direction from the upper screen, G, and arranged to receive the material passing through the upper end of said screen. (3) In a grain separator, the vibratory shoe or shaker, B, the two oppositely inclined spouts, D and E, attached to the foot of said shoe, and partaking of its movements, in combination with the screens, G and J, and longitudinal adjustable screen, K, arranged in the relative positions described. (4) The combination of the screen G, coarser screen, J, spouts, D and E, longitudinally adjustable screen, K, and board, L, arranged with respect to the inner spout and the adjustable screen, as described and shown."

The specification states that "the invention consists in a peculiar combination and arrangement of screens and conductors"; and the patentee states therein further:

"I am aware that machines have been variously constructed with double conducting spouts therein, said spouts inclined in opposite directions. I am also aware that coarse and fine screens have been employed in various combinations, and under various arrangements, and I make no claim thereto; but I am not aware of any machine wherein the screens and troughs bear to each other the same relation as those herein described."

Sperry does not claim to be the inventor of any separate part or appliance of his machine, but only of a peculiar combination of

constituents, which were all well known and in use in such machines before such combination was made.

Aside from what is shown by the numerous patents put in evidence by the defendant, it is matter of common knowledge that fanning mills for cleaning, winnowing, and separating grain, constructed in partially inclosed frames, with rotary fans, and with oscillating and vibrating inner frames called "shoes" or "shakers," containing a series of parallel inclined screens or sieves, and beneath that series one or more oppositely inclined screens or sieves, shaken by the same power that revolves the fan which generates the blast to drive out of the machine the chaff and light impurities as the mass comes from the hopper upon and through the shaking sieves, and with variations in the meshes of the sieves or perforations in the screens to separate the various kinds of grain and seeds, and with gather boards and spouts to convey them to separate receptacles, have been in very general use among the farmers of this country for at least half a century, and that similar appliances have, during the same time, been used for the same purposes in the separators of threshing machines. Sperry's machine is but an aggregation of old appliances. Its merit consists in its superior utility, as compared with older machines, in separating wheat and oats when grown together, as of late years, in the crop, which, from the mixture, has been called "succotash." In that machine the higher part, marked G, of the upper screen, upon which the mass first comes from the hopper, has its mesh adapted for the passage through it of the full and perfect kernels of wheat with the small seeds of all kinds, which also go through the lower parallel sieves of the same series to the reverse sieve, K, which lets through the small seeds, which are conducted by the board, L, to their receptacle, while the cleaned wheat passes over the lower end of screen K to its receptacle, or out of the machine. At the lower end of screen G some wheat mixed with oats passes through the upper series of screens, and falls into the spout E, and is thereby conducted to a receptacle outside the machine, to be returned to the hopper; the screen K being slidable longitudinally, so that its upper end, above spout E, can be adjusted so as to receive only the cleaned wheat, leaving that which has a mixture of oats to fall into the return spout, E. Because of the smallness of the mesh of screen G, and the effect of the air blast, most of the oats pass over that screen to its continuation in the larger-meshed screen, J, through which the oats pass, well cleaned and separated from the wheat and smaller seeds, into the spout D, which conducts them to a receptacle outside the machine. The most serious question in this case is whether the Sperry patent is not invalid from lack of invention, as being merely an aggregation of prior devices used for the same purposes in similar machines, and each performing its well-known function in the old way, and producing no new result. The latest statement by the supreme court of the law on this subject is in the case of Office Specialty Mfg. Co v. Fenton Metallic Mfg. Co., 174 U. S. 492, 496, 19 Sup. Ct. 643:

"Where a combination of old devices produces a new result, such combination is doubtless patentable; but where the combination is not only of old ele-

ments, but of old results, and no new function is evolved from such combination, it falls within the rulings of this court in Hailes v. Van Wormer, 20 Wall. 353, 368; Rockendorfer v. Faber, 92 U. S. 347, 356; Phillips v. City of Detroit, 111 U. S. 604, 4 Sup. Ct. 580; Brinkerhoff v. Aloe, 146 U. S. 515, 517, 13 Sup. Ct. 221; Palmer v. Village of Corning, 156 U. S. 342, 345, 15 Sup. Ct. 381; Richards v. Elevator Co., 158 U. S. 299, 15 Sup. Ct. 831. Hoffman may have succeeded in producing a shelf more convenient and more salable than any which preceded it, but he has done it principally, if not wholly, by the exercise of mechanical skill."

To the same effect are Smith v. Nichols, 21 Wall. 112, 119; Fuller Warren Co. v. Michigan Stove Co., 30 C. C. A. 193, 86 Fed. 463, and cases cited.

The combination of Sperry's screen G, having its mesh adapted to the passage through it of wheat and smaller seeds, with its continuation, screen J, of coarser mesh, adapted to the larger size of oats, is disclaimed by Sperry in his specifications, and is shown in prior patents. The double conducting spouts inclined in opposite directions are also disclaimed, and are likewise shown in prior patents. Indeed, the use of inclined spouts in fanning mills to convey separated divisions of grain to receptacles outside the machine were well-known substitutes for drawers in the machine, or boxes under it, to receive such divisions of grain, long before the complainant's alleged invention. A lower screen, inclined in a direction opposite to the inclination of the upper screens, was also an old appliance at that time; and in patent No. 39,000, issued to Elijah Youngs June 30, 1863, such oppositely inclined lower screen was made longitudinally movable and adjustable, the same as in the complainant's machine, and for the same expressed purpose of being capable of such adjustment as would separate the well-cleaned wheat falling through the upper part of the upper screens from that falling through the lower part of the upper screens in which there will be some mixture of oats. When the Youngs patent, referred to, is studied, it will be found to contain all the combinations of complainant's patent, operating in substantially the same way to attain the same results,—the division of the grain into three parcels: (1) The cleaned wheat falling through the upper part of the upper sieves upon the lower adjustable reversely inclined sieve; (2) the cleaned oats going into a receptacle at the end of the upper sieve; and (3) the intermediate mixture of wheat and oats falling beyond the upper end of the lower adjustable sieve into a receptacle, to be thence returned to the hopper. It was urged on the argument that the machines actually built by Youngs under his patent used a shaker vibrating endwise, and that this movement is not as well adapted for the use of spouts attached to the end of the shaker, or to the separation of the cleaned wheat from that mixed with oats by the adjustment of the lower screen, as is the movement of a shaker having a sidewise vibration. But the endwise and sidewise vibrations of shakers in fanning mills were both old at the time of the Youngs patent, which, by designating neither, left the choice to any mechanic who might construct the machine. Considering the spouts used in the complainant's machine to receive the divisions of grain, and convey them to receptacles outside the machine, as well-known

substitutes for drawers in the machine, or boxes at its bottom, to receive the same divisions of the grain, the principal difference between the Youngs patent and that of complainant in respect to appliance is that in the former the oats appear to pass entirely over the upper screen, and "are secured in any desirable manner," while in the latter the oats pass through the meshes of the coarser screen, J, into the outer spout, D, while that coarser screen helps to carry the straw beyond that spout. But such coarser screen to let the oats pass through to their receptacle, while carrying the straw over, is an old device, and is shown in patent No. 43,026, issued to Aaron Higley June 7, 1864, patent No. 56,912, issued to Charles K. Ehle August 7, 1866, and several other earlier patents. My conclusion is that the Sperry patent is but a combination of old appliances and devices, long used in fanning mills, and free to every one, in a manner which produces only old results, and evolves no new function. It is therefore void for lack of invention, and decree may be entered dismissing the bill, with costs.

McNEELY et al. v. WILLIAMES et al.

WILLIAMES et al. v. McNEELY et al.

(Circuit Court of Appeals, Third Circuit. October 4, 1899.)

1. PATENTS—INVENTION—STEAM-HEATING APPARATUS.
   Claims 1 and 3 of the Williames patent, No. 256,089, for an improvement in heating apparatus, cover patentable combinations not disclosed in the prior art, and are valid.
2. SAME—ANTICIPATION.
   To sustain the defence of anticipation, it is necessary that the anticipatory matter should clearly show the invention subsequently patented, in such manner as to enable any person skilled in the art or science to which it relates to construct, and practically use, the invention, for the purposes contemplated by the subsequent patent.
3. SAME—SUIT FOR INFRINGEMENT—EFFECT OF PRIOR DECISIONS.
   A circuit court of appeals is not required, by considerations of comity, to follow the decision of a circuit court of another circuit, upon questions relating to the validity of a patent.
4. SAME—ANTICIPATION—HEATING APPARATUS.
   Claims 2, 5, and 7 of the Williames patent, No. 256,089, for an improvement in heating apparatus, which are broad claims, covering the use of means to create a suction in steam-heater pipes to cause or facilitate the passage of steam through such pipes, were not anticipated by the Reid and Billinton English patent, No. 2,603, granted in 1877, it being shown that the invention of Williames was prior in date, nor by anything in the prior art, and such claims are valid.

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

Joseph C. Fraley, for McNeely & Co.
E. H. Hunter, for Williames and others.

Before ACHESON, Circuit Judge, and BUFFINGTON and BRADFORD, District Judges.

BRADFORD, District Judge. These are cross appeals from the final decree of the circuit court for the Eastern district of Pennsylvania (64 Fed. 766), in a suit for alleged infringement of letters patent No. 256,089, dated April 4, 1882, granted to Napoleon W. Williames for an improvement in heating apparatus. The defences set up are lack of novelty and of invention, non-infringement and failure to disclaim. The specification of the patent in suit in describing the invention alleges in part as follows:

"It consists in tapping an ordinary unobstructed exhaust-pipe from a steam engine and connecting it through said taps with ordinary heating-coils; further, in connecting the outlet or bleeder pipes from said heating-coils with a main which communicates with a tank or hot-well in which a partial vacuum is maintained; further, in combining said hot-well and bleeder-main with a vacuum-pump; further, in means by which the heating-coils may be cut out of operation and the exhaust-steam, or part of it, may be drawn through the hot-well to heat the feed-water for the boiler; further, in a hot-well, in combination with heating-coils for steam and bleeder-pipes, with their main to return the part of the exhaust-steam and condense the same and return it to the boiler as feed-water. * * * The object of my invention is to construct suitable mechanism by which the usual back pressure to the steam-engine, due to loading the exhaust for the purpose of creating a forced circulation in the heating-coils, is dispensed with, this mechanism being substantially means to create a suction through the heating-coils to draw steam from a free or open exhaust-pipe, and thereby perform the double function of heating the building without back pressure to the engine and reducing the normal pressure by creating a partial vacuum in the exhaust-pipe."

The claims are as follows:

"1. In apparatus for heating buildings, the unobstructed exhaust-pipe and heating-coils opening from it, in combination with a bleeder-pipe connecting with said coils and opening at the bottom into a hot-well in which a partial vacuum is maintained, substantially as and for the purpose specified.

"2. In apparatus for heating buildings, the unobstructed exhaust-pipe and heating coils opening into it in combination with a bleeder-pipe connecting with said coils and means to create a suction in said bleeder-pipe, substantially as and for the purpose specified.

"3. In apparatus for heating buildings, the unobstructed exhaust-pipe A, heating-coils B, bleeder-main D, hot-well E, suction or exhaust fan F, and feed-water pipe N, substantially as and for the purpose specified.

"4. In apparatus for heating buildings, the combination of an exhaust-pipe with heating-coils B, or their equivalent, bleeder pipe or main D, provided with valve L, hot-well E, pipe J, with its valve K, exhaust-fan F and its pipe G, and feed-water pipe N, substantially as and for the purpose specified.

"5. In apparatus for heating buildings, an exhaust-pipe and steam-heating apparatus, in combination with means to suck steam from said exhaust into or through said heating apparatus, substantially as and for the purpose specified.

"6. The combination of exhaust-pipe A, heaters B, bleeder-main D, hot-well E, vacuum-valve I, and vacuum-pump F, substantially as and for the purpose specified.

"7. In apparatus for heating buildings, a steam-main into which steam is fed, in combination with steam-heating apparatus and means to create a suction through said heating apparatus, to draw steam from the main into said heating-apparatus."

The bill charges the defendants with infringement "by having caused to be constructed for their use, and by using heating apparatus substantially the same in construction and operation as in the said letters patent is described and claimed, and particularly in the first and third claims thereof." In May, 1887, Williames

and his then licensee, Robert Coddington, brought suit in the circuit court for the Southern district of New York against George A. Barnard and the Ingersoll Rock Drill Company for the infringement of claims 1, 2, 3, 5 and 7 of this patent. That court filed an opinion February 12, 1890 (41 Fed. 358), sustaining its validity as to claims 1 and 3 and holding that those two claims had been infringed, and made an interlocutory decree for an injunction and an accounting June 11, 1892. In that case it was held that the broad claims 2, 5 and 7 were invalid on the ground that as to them the patent had been anticipated by an English patent No. 2,603, granted to Reid & Billinton, for "Improvements for Warming Railway Carriages and in Brake Apparatus Connected Therewith," dated July 5, 1877, and sealed December 7, 1877. It does not appear that any disclaimer has been entered as to the broad claims or any of them; nor does it appear that any evidence was adduced in the New York case on the accounting so decreed or that a final decree has been made. The bill in the present case was filed January 27, 1893. The answer as amended alleges that the patent in suit is wholly void by reason of unreasonable neglect or delay on the part of Williames to enter a disclaimer of the subject matter of invention as set forth in claims 2, 5 and 7. The court below failed to find such unreasonable neglect or delay and sustained claims 1 and 3, but held that the ruling of Judge Coxe in the New York case that the broad claims had been anticipated by the Reid & Billinton apparatus should be followed, and that, no disclaimer as to them having been entered, no costs could be recovered by the complainants. It appears from the evidence taken before the master and from his report that at the time of the alleged infringement in September, 1888, the complainants had established with the public a license of $5 per square foot of grate bar surface or its equivalent for the use of the Williames apparatus; that the license fee for the defendants on that basis would have amounted to $687.50; and that aside from the loss of this sum with interest no damage had been sustained by the complainants, nor any gains or profits made by the defendants, through the alleged infringement. The master seems to have taken the view that the licenses relied on to establish the amount of the fee covered the use of such heating-apparatus as was inclusive of all the claims of the patent in suit, and, claims 2, 5 and 7 having been adjudged invalid, and claims 1 and 3 sustained, and there being no evidence by which an apportionment of the fee could be made, reported that the complainants were entitled only to nominal damages. The court below took the same view and accordingly decreed that the complainants recover six cents, without costs. The complainants contend that the court erred in not awarding them damages equal to the sum of $687.50, together with interest from September, 1888, and also costs. The defendants claim that the bill should have been dismissed. The questions before us are substantially whether, aside from the omission to disclaim, claims 1 and 3 were valid and were infringed by the defendants; whether a disclaimer should have been entered and, if so, whether the omission to enter it was the result of un-

reasonable neglect or delay on the part of Williames; and whether the complainants, if entitled to recover, should not have been awarded by way of damages the amount of the established license fee, with interest from the date of infringement. Careful examination of the evidence has led us to the conclusion reached by Judge Coxe in the New York case and by the court below that claims 1 and 3 cover combinations not disclosed in the prior art, and that those combinations were patentable. We are also satisfied that both of these claims were infringed by the apparatus used by the defendants and complained of in the bill. That apparatus includes the same combinations of parts or equivalent parts co-operating in substantially the same manner to perform the same function as the combinations respectively covered by these two claims. It therefore becomes necessary to consider the alleged defence based on the failure of Williames to enter a disclaimer as to claims 2, 5 and 7. On the assumption that it was incumbent on him to disclaim, if his omission to do so was the result of unreasonable neglect or delay, the complainants were not entitled to recover anything, while, if there was no such neglect or delay, they were entitled to recover damages, but no costs. No disclaimer was necessary to the recovery either of damages or of costs unless Williames in those three claims or one or more of them included something to which he was not entitled. Certain patents and other publications prior to the date of the patent in suit are set up by way of anticipation, and it is contended that they sufficiently disclose the subject matter of the broad claims. To sustain the defence of anticipation it is necessary that the anticipatory matter should clearly show the invention subsequently patented in such manner as to enable any person skilled in the art or science to which it relates to make or construct and practically use the invention for the purposes contemplated by the subsequent patent. Eames v. Andrews, 122 U. S. 40, 66, 7 Sup. Ct. 1073. Applying this rule it is clear that none of the prior patents or publications relied on, with the exception of the Reid & Billinton patent, discloses the invention covered by claims 2, 5 or 7. The Corey patent of November 25, 1873, for an "Improvement in Water-Tanks for Hotels" covers apparatus for the utilization of escape steam in heating water and does not relate to the circulation of steam for heating purposes nor suggest Williames' invention. Nor does the condensing engine disclose that invention. The distinctive feature of such an engine consists in devices to create a vacuum in the cylinder by an immediate condensation of steam in front of the piston. It is the distinctive purpose and operation of the invention in question to prevent condensation of steam in the heating pipes. While a vacuum, total or partial, is created in each case, the purpose for which it is created in the two cases respectively are wholly different. The condensing engine does not suggest steam-heating apparatus. Claim 5 of the patent in suit covers a combination of an exhaust pipe and of means to suck steam from it into or through the apparatus. The exhaust pipe may or may not be obstructed or weighted in such manner as to cause back pressure to the engine. This claim does

not in terms require an unobstructed exhaust, and it cannot be so construed in the light of the description. The patentee says:

"My invention may be applied to the loaded exhaust heaters now in common use by simply attaching an exhaust or vacuum pump to the bleeder-main and creating a suction therein; but I prefer in all cases to use an open exhaust-pipe. It is immaterial to my invention whether the exhaust is unobstructed or weighted, or whether an engine is used or not, as my invention comprehends broadly a main to supply steam when arranged with steam heaters, and means to create a suction through said heaters."

Nor does claim 5 exclude the idea of the existence of sufficient pressure in the exhaust to cause steam to pass therefrom into bleeder mains or heating pipes. Nothing is said on this point. The passage of steam into the mains and pipes would naturally result from the weighting or obstruction of the exhaust pipe. The "means to suck steam from said exhaust into or through said heating apparatus" may therefore consist of devices which by suction aid or facilitate, as well as those which wholly cause, the passage of steam from the exhaust pipe into and through the bleeder mains and heating pipes. Substantially the same considerations apply to the combination covered by claim 7. The exhaust pipe in the combination covered by claim 2 is unobstructed, and it is unnecessary particularly to consider this claim in this connection. The Reid & Billinton patent discloses a combination in apparatus for heating railway cars, including an exhaust pipe from which steam freely passes into heating pipes and means for causing through suction the circulation of the steam through those pipes. Judge Coxe in the New York case held that claims 2, 5 and 7 were clearly anticipated by this English patent. The learned judge below followed the ruling of Judge Coxe, saying: "I think that the ruling of Judge Coxe that the Reid and Billinton apparatus anticipated the broad claims of the Williames patent should be followed." He also said: "It has not been conclusively settled that Williames claimed anything of which he was not the original and first inventor," etc. This court as an appellate tribunal is not in the least concluded by the decision in the New York case, nor do considerations of comity toward a circuit court with respect to its rulings have the same potency with a circuit court of appeals as they may properly have with a circuit court when confronted with the alternative of following or departing from the ruling of another circuit court. Assuming that the Reid & Billinton patent discloses the subject-matter of the broad claims of the patent in suit—a point which we do not now decide—did the English patent antedate the invention of Williames? On this question there is considerable evidence. Williames testifies to the effect that he conceived the invention described and claimed in his patent in 1871 and in 1872 disclosed it to the Keystone Council of Engineers in Philadelphia; that a minute was made of what transpired at that time; that the experiments he made before that body convinced him that his invention was practical; that the other members of that body, while admitting that it might work on a small scale, did not believe it could circulate steam throughout a mill without back pressure on the engine; that thereafter he tried to get it introduced in some mill on

a large scale; that in this effort he was unsuccessful for several years because he had not sufficient means to introduce his system on a large scale and others who wanted steam heating had no confidence in his system; that after much difficulty in overcoming the incredulity of those to whom he mentioned the subject he finally succeeded in having his system introduced in the Chatham mills in 1880; that prior to that time he explained his invention to sundry persons on different occasions who have testified in this case; and that while he always contemplated the securing of a patent from the time of his conception he delayed applying for one until he had put the system into operation on a large scale and thoroughly tested it. The minute of the Keystone Council of Engineers in January, 1872, above referred to, is as follows:

"The balance of the evening taken in experimenting, the subject was boiling-point of water. The apparatus being got ready, namely, a bottle of ordinary river-water, and heated with an alcohol lamp, when no hotter than could be held in the hand, was made to boil by relieving it of the pressure of the atmosphere, by a vacuum-pump. Water was then brought to the boiling-point, with heat, when the hose attached and at the end a hollow ball, after the air had been expelled, the lamp removed, the water in the jar was kept boiling by condensation, namely by a flow of cold water on the ball. The open mercury column gauge next produced, when the members commenced blowing, to test the strength of their lungs, also the gauge from 1 to 2½ lbs. per square in. was reached, the gauge attached to the steam-bottle, but, the hour of adjourning having arrived, the experiment ceased, to be continued next Tuesday evening."

This minute possesses much significance. It shows that in 1872 Williames caused water at a temperature far below the normal boiling point to boil by relieving it of atmospheric pressure through the action of a vacuum pump. It also shows that he at that time caused water which had reached the boiling point from heat applied by a lamp to continue to boil after the removal of the flame through the condensation of steam in a hollow ball by the use of cold water, the steam passing from the vessel to which the lamp had been applied through hose into the ball. The principle of operation of the apparatus used in 1872 appears to be the same as that on which the broad claims of the patent are founded. Here was a bottle of boiling water connected with a hollow ball by hose, and steam sucked or drawn through the hose from the bottle into the ball by means of condensation occurring therein. The disclosure made by Williames in 1872 imparts to his testimony and that of other witnesses relating to a later date great force which it might not otherwise possess. Williames states: "I applied a vacuum pump for circulating steam through a coil in 1872. I applied the same principle to circulating the steam in heating factories in 1880." With respect to the manner in which the coil was connected he says: "In 1872 it was connected with a flask with water in, and in 1880 it was connected with the exhaust pipe of an engine." The witness Peifer testifies that the Williames system of steam heating was first brought to his attention in 1872 at the rooms of the Keystone Council of Engineers; that Williames explained it to those present; that "all the members ridiculed it"; that what was done there at that time was "only illustrating

how water could be made to boil under a vacuum, and by using that experiment also showing how steam could be carried through pipe by using a globe that we had for experimenting"; and that afterwards in 1872 he saw other experiments made by Williames, "something similar, on the same basis, with the exception of drawing it through a coil of pipe; that is, using steam through, showing that we could heat the pipe and also boil water and do heating with it." Early in 1877 Williames entered the employ of John Rommel as engineer for a certain building on Carter Street, Philadelphia. The building was large, having eight stories, and was used for various manufacturing purposes. The time is fixed by a written agreement between Williames and Rommel, a copy of which is an exhibit, dated January 23, 1877. Among the stipulations on the part of Williames were the following:

"2d. That during the term of his service he will use his best judgment, skill and efforts to run the engine and machinery economically.

"3d. That at his own expense for labor (but not for material) he will make such alterations and improvements in the engine and machinery as his experience and knowledge may suggest so that by increased economy in fuel as much gain as he can possibly make shall be gained for the advantage of said Rommel."

Within two weeks after the execution of the above agreement Williames, in accordance with his undertaking to run the engine and machinery economically, endeavored to secure the introduction of his system in the Carter Street building. He says:

"I explained it to Mr. Sprogell, who was the manager. * * * I stated to Mr. Sprogell that I wanted to change the live steam heating to exhaust, which would make a great deal of saving in coal; but he couldn't believe there was any such thing as circulating steam below the atmosphere, that they had had an experience of trying to use exhaust steam. * * * I explained to him that by putting on a pump, making changes from the live steam connection to exhaust, I would be able to circulate the exhaust steam without any back pressure on the engine. That the greater cost was nothing in the way of coal for heating the building."

The witness Sprogell says:

"Mr. Williames was employed at Carter Street for the very purpose of introducing methods for the saving of expense. * * * The first thing that he did was to go over the building and see what was wrong. He found the shafting out of line all over the building, and indeed the engine was out of jig, out of repair, out of order, and the heating of the building, which was done then by exhaust steam, according to his figuring at that time, which I suppose was correct, was one of the greatest items of expense—that is, the consumption of coal. My recollection is that we were carrying a back pressure on the engine of—I think they measure it by inches, though I am not sufficient of a mechanic to tell that, but I think it was 15 inches—that is my recollection—fifteen pounds perhaps it was—back pressure. For the purpose of relieving that waste, Mr. Williames at that time suggested this method of re-arranging the steam heating apparatus—the coils—and he said that he could heat the whole building. We had never been able to heat the upper stories, and he said that he could heat the whole building by putting a vacuum pump at the end of the steam heating pipes. I did not believe it and it was not adopted. * * * Well, I did not believe in it. It would have been expensive to have re-arranged the steam pipes—very expensive. It was a large building, fifty feet front, eight stories high, and I did not think that the system was feasible. * * * His idea was this generally, because I do not pretend to recall exactly at this late stage—that he could draw steam through the pipes by making a vacuum at the other end of the pipe—at the

tail end--the waste end. I told him that it couldn't be done. He argued the matter more than once—I suppose a dozen times. * * * He said he knew it could; he insisted on it. I told him I did not believe it could. * * * The principle described in 1877 was exactly the principle he put in in 1881. * * * I mean the principle of moving the steam through the pipes by the use of a vacuum."

The witness Rich, in reference to certain conversations with Williames within a few weeks after the latter had been employed by Rommel, says:

"He told me he had a plan by which he could circulate exhaust steam through any amount of heating pipe without any back pressure on the engine. In fact, he said he could do it by even diminishing the pressure in the pipes. He told me he would create a vacuum in the pipe; relieve the atmospheric pressure, and that would cause the steam to circulate through without any back pressure on the engine. * * * He explained his system; he said it consisted of a pump attached to the system by which he would draw the air out of the pipes and create a partial vacuum in the pipes. He claimed then the steam would go through without any back pressure whatever on the engine. * * * It seemed to me to be ridiculous at that time, and I spoke to my brother about it and he said he didn't think it could be done."

The witness Peifer, speaking of the Williames system, says:

"I myself tried to get it introduced in the mill about, I think 1876. It may have been before that. Say 1876, anyhow. The mill then was owned by Mr. Thurlow. We had trouble in heating at that time, and he ridiculed the idea of it, and laughed at it, and finally, in 1878, the mill was burned down. * * * In 1878 Montague & White got the mill. I wanted to put it in at that time, and they would not listen to it. They ridiculed it. * * * In 1880 the mill burned down the second time, and I proposed to put it in then again and had hard trouble to get it there. Both Mr. Williames and I did all we knew how to get it in, and the only way I could get it in was by using the old pipe that had been in the fire and doing the work myself with Mr. Williames' assistance, and then hiring laboring hands at five dollars a week, which made it cheaper then than if we had got an outside man to have done it, because they would not use the old pipe."

It appears from the evidence that the first time the above mentioned mill burned down was January 10, 1878, and the second time February 9, 1880. Peifer also states that the Williames system as introduced in the Chatham mills in 1880 was substantially the same system as was disclosed to him by Williames in 1872. These witnesses have not been contradicted or discredited in any manner. Their story is consistent and natural and possesses strong inherent probability. It is supported and strengthened by the minute of the proceedings before the Keystone Council of Engineers, the written agreement between Williames and Rommel, and the production of diaries to fix dates. The record does not disclose anything to indicate that Williames knew or heard of the Reid & Billinton invention or patent before introducing his system in the Chatham mills in 1880. The question before us in this connection relates, not to priority of use, but to priority of invention. We are satisfied that Williames in 1872, or prior thereto, conceived the broad idea disclosed in his present system, and that in that year he embodied his conception in apparatus which, though crude in its construction and not adapted to practical use, disclosed the subject matter of the broad claims of the patent in suit.

That others received his invention with incredulity and ridicule was no fault of his. He never abandoned his invention. Nor do we find such laches on his part as to deprive him of its fruits. He was a poor man and was ill for a long time. He unaided was without means to construct his apparatus on such a scale as would demonstrate its merit. Those to whom he applied for its introduction turned a deaf ear to him. In the face of discouragement and with reasonable diligence in view of his circumstances he persisted in his efforts until they were finally crowned with success. We must, therefore, hold that the Reid & Billinton apparatus did not anticipate any of the claims of the patent in suit, and consequently that Williames was under no obligation to enter a disclaimer. The conclusion reached practically disposes of the contention on the part of the defendants that the complainants were not entitled in any event to recover more than nominal damages. It appears from the evidence that at the time of infringement there was an established license fee for the use of apparatus such as that employed by the defendants, and that it amounted on the proper basis of computation to $687.50. This sum, with interest from September, 1888, is the measure of damages which the complainants are entitled to recover. They are also entitled to costs in this court and in the court below. The decree below is reversed, with directions to the circuit court to enter a decree for complainants in accordance with this opinion.

DUFF MFG. CO. v. NORTON.

(Circuit Court, D. Massachusetts. October 4, 1899.)

1. PATENTS—CONSTRUCTION AND VALIDITY—EFFECT OF PRIOR DECISIONS.
   The rule that, in cases involving mixed questions of law and fact, especially cases arising with reference to patents for inventions, the courts in one circuit should follow the solemn decisions of the circuit court of appeals in another circuit, when it appears that the issues and proofs are substantially the same, is *held* to apply, not only to questions of the validity of patents, but also to the construction of claims, so far as they need be construed, with reference to alleged infringements.
2. SAME—INFRINGEMENT—LIFTING JACKS.
   In view of the rule stated as to the effect of prior decisions, the Barrett patent, No. 455,993, for an improvement in lifting jacks, construed, and *held* valid and infringed as to claims 1, 2, and 6.
3. SAME.
   The Barrett patent, No. 511,923, for an improvement in lifting jacks, the claims of which relate only to such a construction of the frame as will guide the pawls into the notch when the jack is in rapid action, does not disclose patentable invention, and is void.

This was a suit in equity by the Duff Manufacturing Company against Arthur O. Norton for infringement of certain patents. On final hearing.

James I. Kay, for complainant.
Edward S. Beach, for defendant.

PUTNAM, Circuit Judge. This case relates to alleged infringements of claims 1, 2, and 6 of the patent issued to Josiah Barrett on July 14, 1891 (No. 455,993), and of claims 1 and 2 of the patent issued to Mr. Barrett on January 2, 1894 (No. 511,923). Each of the patents purports to relate to improvements in lifting jacks. The earlier patent was under consideration on an application for an ad interim injunction in this case, as shown by our opinion passed down on March 15, 1899. 92 Fed. 921. The lifting jacks to which these patents relate are those of which the basis is a notched lifting bar, moved by two pawls, which pawls are, respectively, hinged on opposite sides from the pivot of the lever which moves them, so that the motion of each is in a reverse direction from that of the other. While the jack is being used for raising, each pawl drops naturally, by its own weight, from the notch with which it was last engaged, when the other pawl becomes engaged with its proper notch, and is, in its turn, pushed up by the lever. In this way the pawls operate alternately in raising the bar without difficulty. The improvement in issue with reference to the earlier patent was intended to obviate the difficulty arising from the fact that, when a weight is being lowered, the pawls will not naturally detach themselves from the notches in the bar. In the jacks alike of the complainant and the respondent this difficulty is overcome by the use of a spring, or other elastic device, which withdraws the pawls alternately from engagement with the notches in the bar. In the prior art this was accomplished by mounting the springs on the pawls, but in each jack before the court the springs, or other elastic devices, are mounted elsewhere than on the pawls. In the specification of his patent No. 455,993, Mr. Barrett says that he makes use of "a yielding tripping-plate having lugs thereon adapted to engage with the fingers of the pawls, and, by the pressure thereof, to withdraw the pawls from engagement with the toothed bar." The claims in issue in this patent are as follows:

"(1) In a jack, the combination of a bar, having teeth on one side thereof, a pivotal lever, two pawls pivoted to said lever, and having fingers rigid therewith, and a yielding tripping-plate having lugs thereon adapted to engage with said fingers, and through the same draw the pawls from engagement with the toothed bar, substantially as and for the purposes set forth.

"(2) In a jack, the combination of a bar having teeth on one side thereof, a pivotal lever, two pawls pivoted to said lever and having fingers rigid therewith, and a yielding tripping-plate pivoted to the jack-frame, and having lugs thereon adapted to engage with said fingers, substantially as and for the purposes set forth."

"(6) In a jack, the combination of a bar having teeth on one side thereof, a pivotal lever, a pawl pivoted to said lever and having a finger rigid therewith, and a yielding tripping-plate mounted on the frame and having a lug adapted to contact with said finger, and through the same draw the pawl from engagement with the toothed bar, substantially as and for the purposes set forth."

Both in the specification and in the claims Mr. Barrett uses the word "fingers." These fingers, as shown in his drawings, are secured to the side of the pawls, and engage the lugs on the tripping-plate. His commercial construction omits the fingers, but it uses

what is strictly the mechanical equivalent thereof; and no issue can be raised in the case by reason of that fact.

This patent has been very much in litigation, which was described in part in our opinion passed down on March 15, 1899. The only suit to which we need now refer is that in the Third circuit, reported in the circuit court as Manufacturing Co. v. Forgie, 78 Fed. 626, and in the circuit court of appeals as Forgie v. Manufacturing Co., 26 C. C. A. 654, 81 Fed. 865. We have already, in Green v. City of Lynn, 55 Fed. 516, 518, and in Beach v. Hobbs, 82 Fed. 916, 919, indicated our views as to the effect to be given to decisions in other circuits, and also as to the method of ascertaining whether or not, in cases involving mixed questions of law and fact, the prior litigation covered substantially the same issues as those in the pending case. Since these expressions of our views, the circuit court of appeals for this circuit, in Beach v. Hobbs, 34 C. C. A. 248, 92 Fed. 146, 147, has given full effect to them in the following language, which referred to earlier litigation in another circuit:

"Although the defendants in this case are not the same or in privity with the defendants in the other cases, we think, as a general rule, and especially in patent cases, we should follow the decision of the circuit court of appeals of another circuit upon final hearing with respect to the issues determined, if based upon substantially the same state of facts, unless it should clearly appear that there was manifest error."

The circuit courts and the circuit courts of appeals throughout the United States are of equal dignity, and therefore we are unable to perceive any reason why, unless in cases of clear error or oversight, each of these courts should not follow the rule practiced in the two divisions of the court of appeal, sitting under the English judicature acts, to the effect that each division accepts the decisions of the other as of binding force, thereby avoiding the just complaints, and the substantial detriment to the administration of the law, which come from inconsistent proceedings of several tribunals of like authority. At the hearing before us on the application for an ad interim injunction, the patent of one Alfred was interposed, which was not in evidence in the prior litigation. That is now withdrawn from the record. A careful scrutiny of the opinions given in the Third circuit leads to the conclusion that the proofs in the case there adjudicated were substantially the same as the proofs now before us, and therefore we are able to perceive that the adjudications in the Third circuit related to the same issues which are now before us, except a single question, which is as to the form of the alleged infringing device, to which we will hereafter refer, and which, as we will explain, is, in our opinion, unsubstantial. The issues thus involved are as to the nature of the patentee's alleged invention, as to the construction to be given to his claims, and as to the relation of that construction to alleged infringing devices. With reference to all these, we are able, in view of the facts to which we have referred, to apply the rules which we have heretofore laid down with regard to adjudications in other circuits; and inasmuch as the case before us is, in any view of it, far

from clear in behalf of the respondent, so that it would be impossible for us to assume that, if we took it up anew, our investigations would yield better results than those of the courts in the Third circuit, we ought to abide by what has already been determined. The litigation in the Third circuit related specifically to only the first and sixth claims of the patent in issue, but the respondent has not sought to point out to us that a determination as to those claims should not be followed by a like determination with reference to claim 2. Moreover, while it is true that the litigation in the Third circuit arose on an application for an ad interim injunction, yet the courts of that circuit, in passing upon it, solemnly determined all the issues we have before us, and the conclusions are quite as effective as though they had followed a hearing on bill, answer, and proofs. That litigation determined fully the question of the validity of the patent in issue, so far as the invention covered by the claims which we are considering is concerned. The opinion in the circuit court was rendered by Judge Buffington, and was practically adopted by the circuit court of appeals, so that, for the purposes of this opinion, we need refer only to it. At page 630 it observed as follows: "The yielding tripping-plate, which is the foundation of Barrett's device, seems wholly new. Nothing in anticipation thereof was cited to the court, or by way of reference in the patent office." At the foot of page 628, and top of page 629, it explained the objections to the prior method of mounting the springs upon the pawl, and the advantages of Barrett's improvement, which it pronounced "a decided advance." A careful examination of this opinion discloses that, in view of the facts appearing in the record, in which particular the case at bar does not differ from that before Judge Buffington, he gave the claims so broad a construction as to hold that Forgie's device infringed, although Forgie did not use a "yielding tripping-plate," as those words are commonly understood, but, in lieu thereof, used what Judge Buffington describes, at pages 630 and 631, as follows:

"His [meaning Forgie's] reversing apparatus [meaning by this the apparatus which answered the purpose of the Barrett yielding tripping-plate] consists of a sliding iron base plate, in which are seated two stiff brass springs with upwardly projecting ends. When a reverse action is desired, the plate is shifted and held rigid by an eccentric button. This shifting places the ends of the springs in positive, intense connection with the rigid fingers on the pawls. Starting with the upper pawl in engagement with the toothed notch, and counteracting the pressure exerted by the tool wrench on the jack nose, we find that, as the lever is rocked forward, this upper pawl, being above the lever's pivot, is drawn forward, whereby an increasing spring pressure is encountered. The result is, the pawl seeks to disengage itself from the notch. * * * The jack is ingenious, different in form from Barrett's, and we are free to say, at first view, seemingly different in substance. But detail examination and an analysis of its elements satisfy us very clearly that its principle, design, and functional purposes are based wholly on the conception of the application to this art of the yielding tripping-plate which Barrett suggested. To us it seems that a large part of the ingenuity shown in its structure is a studied purpose to so clearly transpose and rearrange Barrett's elements as to obscure the fact that it embodies the substance of his [Barrett s] invention."

First of all, the last sentence cited from Judge Buffington applies with full force to the form of the device of the respondent in the case at bar. Moreover, the respondent has merely substituted for the sliding base plate, moving horizontally, a rocker shaft, the line of whose motion is perpendicular, and for Forgie's stiff brass springs hard rubber tips. These modifications of Forgie's attempted escape from Barrett's invention are only such mechanical contrivances as would easily be devised by a skillful workman seeking some other method of evasion; and, mounted as they are on the jack frame, they accomplish, to use the language of Judge Buffington, "the principle, design, and functional purposes" of Barrett's conception by methods which might easily have been substituted by any person of ordinary skill in the art. In view of these conclusions, we are forced to adopt, with reference to letters patent No. 455,993, the results reached in the Third circuit.

The respondent, as we have already said, undertakes to make some use of the fact that Barrett, throughout his patent and in his drawings, describes "fingers" attached laterally to his pawls; but we have already disposed of that matter. The respondent also urges on the court the usual presumption arising from the fact that his device also is covered by a patent; but the application of such a presumption is always dangerous, as it cannot always be known whether the patent office contemplated that the later patent covered a substantial divergence, or only an improvement on the earlier one. Moreover, the breadth of construction given in the Third circuit to the claims in issue necessarily covers that proposition.

With reference to the other patent in suit, we are led to the conclusion that the claims in issue involve nothing which was patentable. They relate only to the interposition of a rib inside of the jack frame, or a thickening of some part of the interior surface of the frame, for the purpose of guiding each pawl into the notch when the jack is under rapid action. In Bates v. Keith, 82 Fed. 100, 103, we expressed our views on the subject-matter of guides, to the effect that they are so common in the arts, and have been used from time to time for so many purposes, that the presumption is that no adaptation of them, and no new form, includes invention. There are no special facts in the case at bar to take it out of the usual presumptions with reference to guides, because, so far as the record shows, the forms of guide adopted, alike by the respondent and the complainant, are only such as would readily occur to any mechanic of ordinary skill in the art as soon as he discovered that the pawls needed their assistance. Let there be a decree, as provided in rule 21, for an injunction and an accounting with reference to claims 1, 2, and 6 of letters patent No. 455,993, incorporating an order that on final decree the bill will be dismissed as to letters patent No. 511,923, and further providing that the question of costs also abide that decree.

WESTINGHOUSE AIR-BRAKE CO. v. NEW YORK AIR-BRAKE CO. et al.

(Circuit Court of Appeals, Second Circuit. July 18, 1899.)

No. 660.

1. PATENTS—CONSTRUCTION OF CLAIMS—IMPROVEMENTS IN AIR BRAKES.
The Westinghouse patent, No. 538,001, for an improvement in air brakes, describes in the specification an alteration in the perfected system of the inventor embodied in his prior patents, Nos. 360,070 and 376,837, being a departure from the devices therein shown only in respect to the means used for venting the train pipe into the brake cylinder. The invention, therefore, is not of a primary character, and the claims of the patent must be limited to a piston attached to, or moved by, the brake-cylinder piston, for venting the train pipe into the brake cylinder, and are not infringed by a venting device which is operated independently of the brake-cylinder piston, and vents the train-pipe air into the atmosphere.

2. SAME—INFRINGEMENT.
The Dixon patent, No. 382,032, for an improvement in air brakes, does not disclose an invention of a primary or important character, which entitles its claims to a broad construction, but describes, in claims 3 and 5, modifications of the prior Westinghouse patents, by venting the train pipe locally into the atmosphere, instead of into the brake cylinder. The venting mechanism described is operated by, and dependent on, the piston of the Westinghouse patent, No. 360,070, and the patent does not control analogous modes of venting to the atmosphere in different air-brake systems.

Lacombe, Circuit Judge, dissenting, de Westinghouse patent, No. 538,001.

Appeal from the Circuit Court of the United States for the Southern District of New York.

The complainant brought its bill in equity in the circuit court for the Southern district of New York, which was founded upon the alleged infringement of claims 1, 3, 4, 5, and 6 of letters patent No. 538,001, dated April 23, 1895, issued to George Westinghouse, Jr., and of claims 3 and 5 of letters patent No. 382,032, dated May 1, 1888, and issued to Theron S. E. Dixon. Each patent was for improvements in air brakes for railroad cars. The case came to final hearing, and from decree of dismissal of the bill this appeal was taken. 87 Fed. 882.

Fredk. H. Betts, for appellant.

Fredk. P. Fish, for appellees.

Before LACOMBE and SHIPMAN, Circuit Judges, and THOMAS, District Judge.

SHIPMAN, Circuit Judge. The Westinghouse patent, No. 538,001, hereinafter called the "patent of 1895," was an improvement upon the quick-action air brakes, described in letters patent 360,070 and 376,837, which were issued to Mr. Westinghouse, and which have frequently been the subject of litigation in the federal courts. It is well known that the device of No. 376,837 has gone into universal use, and has been the standard quick-action air brake upon long freight trains in this country. The history of air-brake invention is given in Westinghouse v. Brake Co., 170 U. S. 537, 18 Sup. Ct. 707; but, in order to understand the relation of the invention described in the patent of 1895 to the preceding art, it is not necessary to go beyond the years 1886 and 1887. That history was given

in Westinghouse Air-Brake Co. v. New York Air-Brake Co., 11 C. C. A. 528, 63 Fed. 962, and is as follows:

"The promptness with which an automatic air-brake system could be made effectual depended upon the promptness with which air pressure in the train pipe could be reduced, and the equalization of pressure could be changed. Before the series of inventions originated by the Burlington trials, this reduction had been effected in passenger trains of ordinary length by 'venting' the train pipe, or opening a port from the train pipe to the open air, which was initiated by a turn of the engineer's valve on the locomotive. Westinghouse, in his attempt to create efficient and immediate service upon each car of a long train, enlarged the venting system, so that, when the reduction of train-pipe pressure had commenced by the turn of the engineer's valve, the triple valve under each car should also vent the train pipe of that car. Each car, therefore, contained its own venting mechanism, and, as the mechanism did its work upon its own car, it hastened the work upon the car next in the rear. Westinghouse also sought to save, and did save, power by compelling the compressed air thus vented to pass into the brake cylinder, instead of into the open air. But sudden and large reduction of pressure is only to be used in a case of emergency, and therefore means for such reduction must be made supplementary to the means for the ordinary service of the brakes, so that ordinary and extraordinary use of the brakes can each be made available, as necessity arises. The method in No. 360,070 was to make the ordinary range of motion of the triple-valve piston, which was produced by a reduction of train-pipe pressure of a few pounds, do the ordinary work of 'braking' a train, and to make an extraordinary range of motion throughout the entire length of its capacity for travel, which was produced by a reduction of 15 to 20 pounds, do the extraordinary work which gave to the brake the name of 'quick-action.' When the piston of the triple valve moved through the entire length which it could travel, the stem of the piston came in contact with the stem of the emergency valve, opened it, which uncovered a port, and thereby the train-pipe pressure was vented into the brake cylinder. The claims of the patent call the first or ordinary range of motion of the piston 'a preliminary traverse,' which admits air from the auxiliary reservoir to the brake cylinder, and the second range of motion 'a further traverse,' which enables the piston to admit air directly from the main pipe to the brake cylinder."

The defect in this invention, which was that the port which was opened by the emergency valve was necessarily restricted in size, was remedied in No. 376,837, which abandoned reliance upon the piston of the triple valve as the means of opening the emergency valve, and used a supplementary piston, contained in a supplementary chamber, and actuated by pressure from the auxiliary reservoir. The port through which, when uncovered, this pressure passes, is, in the mechanism shown in the specification, uncovered by the excess stroke of the triple-valve piston. The mode of operation is described as follows:

"When an emergency stop is to be made, the engineer throws his engineer's valve wide open, thereby causing a sudden and material reduction of pressure. The excess of the auxiliary reservoir pressure then forces the main piston stem against said other stem, overcoming the tension of its spring, drives the main piston to the extreme limit of its stroke, and thereby uncovers the ports leading from the auxiliary reservoir to the supplemental valve chamber. This pressure drives the supplemental piston outwardly, or downwards, against the stem of the supplemental valve, and forces it from its seat. Thereupon, the preponderance of train-pipe pressure in the brake pipe opens the check valve, and the air from the train pipe rushes directly from the brake pipe to the brake cylinder."

A quick, and, so far as possible, a simultaneous, action of the brakes on each car depends upon quick and simultaneous action in

the reduction of train-pipe pressure. This was partially accomplished in No. 360,070 by the port from train pipe to brake cylinder, the novel feature of the invention of that patent, and was much more fully accomplished in the invention of No. 376,837 by means of the new piston, actuated by auxiliary reservoir pressure. In each device, the emergency port was from train pipe to brake cylinder, and the particular means by which it was uncovered in each device was the excess stroke of the triple-valve piston. The reason for venting into the brake cylinder will be adverted to hereafter.

In 1892, Mr. Westinghouse made a new invention, which modified or changed the means by which he had uncovered the opening into the brake cylinder. Instead of using a "further traverse" of the triple-valve piston to uncover the emergency valve of No. 360,070, and the excess stroke of that piston, which uncovered the port through which auxiliary reservoir pressure passed, in No. 376,837, he vented the train-pipe air into the brake cylinder by the use of a compound piston connected to the brake-cylinder piston. A valve in a passageway leading directly from the train pipe to the brake cylinder controlled the discharge of air from the train pipe. Prof. Parke, one of the complainant's experts, says:

"This valve is immediately operated by a piston under the influence of a motive power produced by the movement of another piston. In other words, the train-pipe vent valve of the device of patent No. 538,001 is operated by a compound piston, the movement of one part of which may be made to produce a motive power which will cause the other part to open the vent valve."

The piston which operates the vent valve "is subjected only to such an operative pressure as can be created by the rapid movement of another piston." The speed of the operative piston, rather than its length of movement, is the means by which the vent valve is opened, and train-pipe air is promptly vented. The best description of the method of operation of the compound piston is contained in the brief of the counsel for the complainant, and is as follows:

"In case it is desired to apply the brakes slowly or partially, for a 'service application,' the train-pipe pressure is gradually lowered by the engineer, which causes the triple valve to slowly vent auxiliary reservoir air to the brake cylinder through the graduating valve, resulting in a corresponding slow movement of the varying speed piston. When this slow movement of the varying speed piston takes place, air will pass through the small equalizing passage, 23, and maintain practically the same air density between and outside the two pistons; thereby permitting the varying speed piston to move without moving the secondary piston, and consequently resulting in not opening the train-pipe vent valve. If, however, an 'emergency' application of the brakes is to be made, the train-pipe pressure is suddenly lowered by the engineer, which causes the triple valve to rapidly vent auxiliary reservoir air to the brake cylinder, through the auxiliary reservoir emergency valve, causing a corresponding quick movement of the varying speed piston. Under such conditions, the air has not time to equalize between the pistons, as the small equalizing passage, 23, is not of sufficient area to permit of the same. Consequently a momentary partial vacuum will be formed in the chamber, G, and the action thereof will be to cause the secondary piston to move with the varying speed piston, unseating the train-pipe vent valve, the latter being attached to the secondary piston, thereby venting the air from the train pipe."

An application for this patent was filed on March 21, 1892. Changes were made in the claims, and the application lay in the office

for about three years, but there was no suggestion that the invention had a broader scope than a new method of venting the air to the brake cylinder, until after March 6, 1895, when the defendant's counsel sent to the complainant's counsel for their examination a statement and description of the new air-brake machinery, which the defendant proposed to adopt, and by which the train-pipe air was vented into the atmosphere. Thereupon, as it was deemed that the atmospheric venting employed the compound-piston method of venting into the brake cylinder which was contained in the pending application of March, 1892, six new claims were caused to be added to the application, which, by the use of general language, enlarged the claims so as to make them apply to the device, wherever used in air brakes. This amendment was allowed, and the patent was issued accordingly. Claims 1 to 6 are the amended, and claims 7 and 13 are the restricted, claims.

The contention on the part of the complainant is that the invention was actually of a broad and primary character, and was "a train-pipe vent valve directly operated by a piston, which is the secondary part of a compound piston so organized that the opening of the vent valve is dependent upon the manner or rate of movement of the primary part of such compound piston." The defendant is of the opinion that the mode by which the train pipe is vented to the brake cylinder constituted the scope of the invention. It is not denied that the invention, thus defined, is novel and patentable. It is urged by the complainant that the inventor had, when he made his application, the mental conception of a broad invention, because he said in his specification:

"As in my several letters patent before referred to [360,070, 376,837, 448,827], my present improvement operates to locally exhaust air from the train pipe, to cause a great and rapid reduction of train-pipe pressure, and this effect is not dependent on the subsequent disposition of the air, as it may be permitted to escape to the atmosphere, to a separate chamber, or to the brake cylinder."

He did not, however, tell or consider how it might be permitted to escape to the atmosphere, or to a separate chamber, because neither modification was a part of the invention which he wished to present to the public. The progressive history of his invention shows that such delivery was not, in his opinion, the one most beneficial for quick-action air brake purposes, and he added:

"There is, however, a great advantage obtained by exhausting the train-pipe air into the brake cylinder, because the final pressure obtained in the brake cylinder, after the auxiliary reservoir and brake-cylinder pressures have equalized, is much greater than it would be if the air from the auxiliary reservoir flowed into an empty brake cylinder. Not only is the final pressure in the brake cylinder greater, but the accretion of pressure therein is more rapid, and the brake pistons are consequently moved outward with greater speed and force."

A suggestion is made that a modification of the compound piston method by which train-pipe air could be sent into the atmosphere was an obvious one, and needed no explanation. That may be true. The air could be sent anywhere, but the means by which atmospheric venting was to be adapted to the other members of serial quick-acting air-brake mechanism would require invention. It is

manifest that the inventor meant to confine himself, in the investigations which resulted in the application of 1892, to the system which he had previously perfected; for, in each of the five modifications which he described, train-pipe air was vented into the brake cylinder, and each of the seven original claims of his application described the brake-cylinder piston as a member of the combination.

The question upon this patent depends, in our opinion, upon the construction which is to be given to the six claims which were introduced by amendment. If they are to be restricted in their character to the mechanism as shown in the specification, it will not be claimed that the defendant is an infringer. It seems clear that the invention was merely an alteration in a pre-existing perfected system, and was not of a primary character. As it was presented in the specification, it was a departure in respect to the means by which train-pipe air is vented through an emergency port into the brake cylinder, it did not contemplate a radical departure from the standard air brake of No. 376,872, and was intentionally limited to that style of structure. We are therefore of opinion that the claims inserted by amendment in 1895 must be limited to a piston attached to, or moved by, the brake-cylinder piston, for venting the train pipe into the brake cylinder.

The defendant caused its new device, known as "Valve C," to be invented for the purpose of escaping from the Westinghouse system of venting exclusively into the brake cylinder. It vents into the atmosphere, and uses for that purpose a compound piston, which is a part of the triple-valve piston, the action of which is not dependent upon the brake-cylinder piston. The cylinder of one part of the piston was attached to the other part in the form of a cup, and service and emergency operations of the brakes were obtained by very much the mode of operation which has been described with respect to the Westinghouse patent of 1895; that is, the varying speed of the operative piston, rather than its length of movement, was the means by which the vent valve was opened. It follows, from the construction which we have given to the patent of 1895, that the defendant's device, known as "Valve C," is not an infringement.

The Dixon patent was applied for on December 16, 1887, after the issuance of patent 360,070, and before the date of patent 376,837, but after the public had knowledge of the invention described in that patent, and was intended to be an improvement upon No. 360,070, by venting the train pipe into the atmosphere instead of into the brake cylinder. The patentee says in his specification:

"The first and main part of my invention consists essentially in cutting off and dispensing with the passage from the train pipe to the brake cylinder, and locally venting the train pipe directly to the atmosphere, through a passage or port, which is opened by preliminarily lowering the pressure in the train pipe, and closed by a sufficient increase of pressure in the brake cylinder."

He closed the passage in the Westinghouse device which carried the train-pipe air to the brake cylinder, and in lieu of it had a passage with an open-air port, H, to the atmosphere, so that, whenever the valve which covered the port was raised from its seat by the further traverse of the triple-valve piston, the train-pipe air passed out

through this opened port. He closed this venting port, inasmuch as it must be closed in order to release the brakes, by means of the same or another valve, which was actuated by brake-cylinder pressure. It is not contended that the defendant used the Dixon method of closing the port. He filled the brake cylinder with auxiliary reservoir air at or near the time when, by the final traverse of the piston, train-pipe air is vented into the atmosphere. In order to establish the primary character of the invention, stress is laid by the complainant upon the concurrent action of venting into the atmosphere and filling the brake cylinder with auxiliary reservoir air by the further traverse of the triple-valve piston, and it is said that auxiliary reservoir air was for the first time utilized for "quick individual action," while atmospheric venting was used for "serial quick action," and that the discharge from each of the two parts was free from obstruction from the other.

As the specification recognizes that in No. 360,070 a port from the auxiliary reservoir to the brake cylinder was opened by the action of the triple-valve piston when it made its final traverse, there was nothing new in this method of furnishing the brake cylinder with air, and the careful statement of the invention by the complainant simply means that atmospheric venting vented the train pipe quickly and without obstruction. Venting train-pipe air into the atmosphere in automatic air brakes was an old subject of invention when Dixon entered upon it. Its advantage, resulting from the quickness with which the train pipe is vented, was well known, as were also its disadvantages, by reason of the loss of the benefit from the rapid storage in the brake cylinder of train-pipe air, which helped to move the brake pistons promptly and energetically. Mr. Westinghouse has shown a system of venting into the atmosphere in his patent No. 217,838, and described a method in his addition of February 11, 1888, to his French patent No. 182,538, of March 29, 1887. His subsequent application for letters patent of the United States for an invention of the same kind was put in interference with the Dixon application. Priority of invention was decided in favor of Dixon, whose patent was subsequently assigned to the complainant. It has never put the invention into general use, presumably preferring to make the air brake of No. 376,837 its standard quick-action brake.

The defendant vents train-pipe air into the atmosphere by the aid of the triple-valve piston, which has been already generally described, and which does not have the preliminary traverse and the final traverse of the piston of the Westinghouse quick-action brakes. The compound piston of the defendant has but one range of motion.

The Dixon device is presented as a primary invention of importance, and therefore as one which calls upon a court to give a wide range to the territory covered by the patent. We do not thus understand the scope of the alleged improvement. It was an obvious expedient, as a modification of the Westinghouse system, it used the peculiarities of the action of his piston, and was not of an important character. The patent should not have a broad scope, and should not be able to control analogous modes of venting to the atmosphere in different air-brake systems.

Claims 3 and 5 are those which are said to be infringed, and are as follows:

"(3) The combination of the brake cylinder, the train pipe, the car reservoir, and the main valve operating piston with a passage leading from the train pipe to the open air, for locally venting the train pipe to the atmosphere, and a valve which opens said passage when the main valve operating piston opens the emergency port, and which is controlled by the movement of that piston, substantially as described."

"(5) The combination, in a fluid-brake mechanism, of a train pipe, brake cylinder, air reservoir, and a main valve operating piston, B, with a discharge passage leading from the train pipe to the open air, provided with a valve, which is operated by the final movement of the piston, B, in applying the brakes for emergency stops, thereby venting the train pipe to the atmosphere, substantially as described."

The specification shows that the piston which was to do the work in the Dixon device was the Westinghouse piston, which had an ordinary range of motion for a service application of the brakes, and additional range of motion for an emergency application. This piston is obviously the one referred to in claim 5, which speaks of the valve "operated by the final movement of the piston, B, in applying the brakes for emergency stops." Claim 3 is not so definite. Its element which corresponds with the valve of claim 5 is "a valve which opens said passage when the main valve operating piston opens the emergency port." The patentee had in his mind the piston which, in its further traverse, opened the emergency port. In other words, "this piston is an element of both claims," and therefore neither claim is infringed. The decree of the circuit court is affirmed, with costs.

LACOMBE, Circuit Judge (dissenting). I am unable to assent to the proposition that patent No. 538,001 should be restricted as closely as the opinion indicates it should be, and therefore am inclined to hold that defendant has infringed that patent. As to the Dixon patent, I entirely concur.

REYNOLDS v. BUZZELL.

(Circuit Court of Appeals, First Circuit. September 14, 1899.)

No. 271.

1. PATENTS—INVENTION.
   Where an inventor has devised a machine or tool for doing work which previously had been done only by hand, and the utility of the device is at once recognized by the trade, a court will not declare the patent void for want of invention simply because the result accomplished may be effected by the modification of an old structure used for a different purpose.

2. SAME—TOOL FOR GRINDING SHOE HEELS.
   The Buzzell patent, No. 317,622, for a tool for grinding and polishing the front of boot and shoe heels, discloses patentable invention, and was not anticipated by the Rogers patent, No. 227,839, for scouring the soles of boots and shoes.

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

Oliver R. Mitchell, for appellant.
Charles Allen Taber, for appellee.

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

COLT, Circuit Judge. This is an appeal from a decree of the circuit court sustaining the validity of the complainant's patent, No. 317,622, and holding that the defendant infringed the third claim thereof. The patent relates to a tool for grinding and polishing the front of boot and shoe heels. Before this invention the work was done with sandpaper in the hand of the operator. Tools for abrading the sole of a shoe were old, but Buzzell was the first to devise a tool adapted to reach and scour the concave front of the heel. The Buzzell tool has proved to be useful, and the demand for it is extensive. We are not dealing in this case with an improvement in an old device for doing the same work, but with a tool which for the first time in the shoe art accomplished a certain result, and where the old devices which had been in existence for some years did not, apparently, suggest to the skilled mechanic the means by which this particular thing could be done. Where an inventor has devised a machine or tool for doing work which previously had been done only by hand, and the utility of the device is at once recognized by the trade, the court should hesitate to declare the patent void for want of invention simply because what was done may be effected by the modification of an old structure used for a different purpose.

The Buzzell tool consists of an abrading disk with a cushioned peripheral face oblique to its axis, and with a circumferential guard to secure the abrading band in position upon the peripheral face of the disk. The third claim of the patent is as follows:

"(3) An abrading disk formed with a cushioned peripheral face oblique to its axis, and with a circumferential guard, i, adapted to sustain the abrading band, h, and secure it in position upon the disk, substantially as specified."

The patentee in his specification says:

"I am well aware that it is old, common, and well known to mount a disk of sandpaper upon the cushioned face or plane of a rotary disk, and I am also aware that it is equally well known to mount a band of sandpaper upon the periphery of a rotary disk or roll; hence I claim neither broadly, or in the abstract,—my invention consisting in the method and means of securing the disk of sandpaper in place upon the plane of the cushion, in a disk having a peripheral face oblique to its axis, and with a guard to prevent displacement of the band of sandpaper, and in the resulting combinations."

In the prior art it was old to mount a band of sandpaper upon the periphery of a disk for the purpose of scouring the soles of boots and shoes, as shown in the Messer patent of 1873. It was also old to so locate an abrading band in a dental polishing tool, as seen in the Locke patent of 1875. But neither of these tools was adapted to perform the work of grinding and polishing the breast of a shoe heel.

The anticipation chiefly relied upon by the defendant is the Rogers tool, described in patent No. 227,839, dated May 18, 1880. The Rogers tool was designed "to reach and scour all parts of the soles of boots and shoes, and particularly the hollow of the shanks thereof,

as well as the junction of the sole and heel." The prominent feature of that device is the elastic pad. The specification says:

"In my improved buffer an elastic pad is composed of an elastic stuffing inclosed within the pad covering, which latter is composed of two distinct parts, viz. a circular piece of emery cloth or other or similar abrasive material that is united, preferably by sewing it all around its periphery, to an annular or ring-shaped piece of leather, skin, or suitable yielding material, by which arrangement a pocket is, as it were, formed for the reception of the elastic pad, at the same time as the inner edge of the annular ring part, above described, serves for the purpose of securing the pad covering and its pad to the holder."

The Rogers tool is not adapted to scour the breast of a shoe heel. The abrasive material is located on the front of the disk, and not on its peripheral face, as in the Buzzell tool. There is also an important structural difference in the two devices. The Buzzell disk is so shaped as to give a more solid support to the cushion on which the abrading band is mounted. On this point Charles F. Brown, defendant's expert, says:

"The plaintiff [Buzzell] has given the cushion-supporting disk a different shape from that shown in the Rogers patent, by extending it outwardly so as to give the cushion a hard center nearly to its outer end."

It appears from some experiments by defendant's witnesses that, by covering the peripheral face of the Rogers disk with sandpaper, you can abrade the front of a shoe heel. But we are not satisfied that the Rogers tool, with this addition, is a practical and commercial device for doing this work, by reason of its elastic pad feature and the form of the disk. The more carefully we examine the evidence on the changes and modifications which must be made in prior structures to produce the Buzzell tool, the stronger grows the conviction that the patent is not void for want of invention, and that the conception of this device involved something beyond what would suggest itself to the skilled mechanic. All the elements which compose the combination described in the third claim of the patent are found in defendant's device, except the circumferential guard. As to the latter, we think the cup guard in defendant's tool is clearly the equivalent of the patented guard, and it follows that the defendant infringes the third claim of the patent. The decree of the circuit court is affirmed, with costs.

THE EMILY B. MAXWELL.

MULLIN v. CHAMBERLAIN.

(Circuit Court of Appeals, Sixth Circuit. October 3, 1899.)

No. 652.

COLLISION—SAILING VESSELS MEETING—CHANGE OF COURSE.

Under the sailing rules governing the navigation of the lakes (28 Stat. 645, rules 16, 20), which require a vessel running free to keep out of the way of a vessel closehauled, and the latter to keep her course and speed, the luffing half a point by a vessel closehauled on approaching one running free, and the subsequent falling off half a point, do not constitute a change of course, within the rules, so as to render her in fault for a collision.

Appeal from the District Court of the United States for the Eastern District of Michigan.

C. E. Kremer, for appellant.
F. H. Canfield, for appellee.

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

TAFT, Circuit Judge. This is an appeal from the decree of the district court of the United States for the Eastern district of Michigan in favor of the libelant in a collision case. The collision occurred between the schooner Col. Ellsworth and the schooner Emily B. Maxwell, about 4 o'clock in the morning of September 2, 1896, in the Straits of Mackinaw, about 4 or 5 miles to the eastward of Waugoshance light. It resulted in the sinking and total loss of the Ellsworth. The Ellsworth was a three-master fore and aft canal schooner, of 306 tons register, and was proceeding light, without cargo, from Charlevoix, Mich., to Blind River, Ontario. She was carrying a mizzen, mainsail, foresail, staysail, and jib. She was sailing closehauled on the wind, and was headed on a course of E. ½ S. The night was rainy and dark, and the wind blowing strongly about 20 miles an hour, say S. S. E. She was making about 3 or 4 miles an hour. Under these conditions it appears that she would make about a point and a half leeway per mile. The Maxwell was a schooner of 340 tons, loaded with a cargo of stone from Alabaster, Mich., to South Chicago. She had the wind free on her port side, and was sailing about 7 miles an hour, and making but little leeway. Both schooners were carrying the proper signal lights. About 4 o'clock the lookout on the Ellsworth reported the red light of a vessel, which afterwards proved to be the Maxwell, ahead, but a little on the port bow. The captain came forward, looked at the light through the glass, and directed the man at the wheel "to keep her close up, or close at it," and directed the lookout to exhibit a torch to the approaching vessel. The torch was lighted, and the helmsman luffed slightly, not to exceed a half a point. After the torch was burned out, the captain, through his glass, saw the green light of the Maxwell, a little on the starboard bow, and remarked to his helmsman, "He is all right, he is going to the windward of us," and directed him "to keep a good full on her," so that she should be better under control. Accordingly the wheelsman let the vessel go off a little, not to exceed half a point. In a short time both the Maxwell's lights were seen off the Ellsworth's starboard bow. When the Ellsworth was within two or three lengths of the Maxwell, and the master of the Ellsworth concluded that the collision was inevitable, he ordered the wheel to be put hard up, and let go her mizzen sheet. The vessel had but little time to swing, and before she had done so materially the collision occurred, and the Ellsworth sank. This is the case as the court below must have found it to be to sustain the decree. There is a variation in the allegation of the libel from the case as made from the evidence by the libelant, in that the libel alleges that after the red light was first seen and reported, and the torch was burned, the Maxwell showed

both her lights, and then shut out the red light and showed only the green light. The evidence does not show that between the exhibiting of the red light and the exhibiting of the green light both lights on the Maxwell were observed by those on the Ellsworth. If it is true that first the red light was seen, and then the green light, it would seem to follow that at some time it would have been possible for both lights to be seen on board the Ellsworth, so that the discrepancy between the evidence and the allegations would have no importance in fixing the positions and courses of the approaching vessels.

The case of the Maxwell, in the answer of her owner and by the evidence, is that while on the course of W. by S., with the wind fresh from about S., a red light was seen a little on the Maxwell's port bow, that the Maxwell's course was then slightly changed under a port helm, and that thereafter the Ellsworth suddenly changed her course and showed both lights, when the order of "Hard up the helm," was given, and the Maxwell's mizzen sheet was let go, and the Maxwell, already swinging rapidly, fell off to the northward, until she was heading N. W., and still swinging, when the Ellsworth, which had put her helm up, struck the Maxwell, stem on, on her port bow, near the cat head, breaking in her own bows so that she soon after went to the bottom. The Maxwell, after rescuing the crew of the Ellsworth, sailed back to Mackinaw.

There is a dispute as to the direction of the wind. The evidence on board the Ellsworth is that she was sailing closehauled, and that the wind was S. S. E. The evidence for the Maxwell is that the wind was due S., or a little W. of S., that she was sailing closehauled, and that her sails were trimmed flat aft. The helmsman of the Ellsworth was subsequently hired for a voyage upon the Maxwell, and was called by the owner of the Maxwell. He testifies that he was steering by the compass, and not by the wind, but he also testifies that the vessel was closehauled. The learned district judge who heard the witnesses necessarily found that the Ellsworth was sailing closehauled on the wind, and we agree with him. We think the evidence that the vessel was closehauled to be more worthy of credence than evidence as to the general direction of the wind. As the Ellsworth was closehauled, and the Maxwell was running free, the relative duties of the two vessels in passing each other are clearly established by the rules governing the navigation of the lakes. Rule 16 of the act of 1895 (28 Stat. 645–648) provides that:

"When two sailing vessels are approaching one another, so as to involve risk of collision, one of them shall keep out of the way of the other, as follows, namely: (a) A vessel which is running free shall keep out of the way of a vessel which is close-hauled."

Rule 20:

"Where by any of the rules herein prescribed one of two vessels shall keep out of the way, the other shall keep her course and speed."

The sole question in the case is whether the Ellsworth changed her course, and thus violated the sixteenth and twentieth rules. It is contended on behalf of the appellant that the luffing half a point and

the breaking off half a point, which the captain and helmsman of the Ellsworth admit, were such changes in the course as to bring about the collision, and, finally, that the last maneuver, by putting the helm hard up, itself caused the collision. We concur with the court below in the view that the change in the course into the wind of half a point in a vessel closehauled, and the breaking up of half a point in the opposite direction in order to make the sail full, so as better to control the movement of the vessel, is not a change of course in the vessel closehauled on the wind. The Ellsworth luffed when the Maxwell was showing her red light on the port bow of the Ellsworth. She filled her sails a little more and fell off half a point when she saw the green light of the Maxwell, and concluded, as she had the right to conclude, that the Maxwell was going to the windward of her. The variation one way of half a point, and the neutralizing of that variation by changing half a point in the other direction in a short time, hardly seem sufficient to have caused the collision; and in any event it was not, within the authorities, a change of the course, in violation of the rule. It was held in the case of The Marmion, 1 Asp. 412, that:

"A closehauled vessel is justified in luffing so as to bring her, after she has sighted another vessel, as close to the wind as she can get so as to remain under command; and such luffing is not a deviation from her course that will relieve the other vessel, having the wind free, from the duty of getting out of her way."

In the case of The Aimo, 2 Asp. 96, the privy council held that where a vessel was closehauled, and was approaching another vessel with the wind free, the luffing of not more than half a point, and not enough to lose her headway, was not regarded as a change of course in violation of a similar rule of navigation in force in English waters. In the case of The Earl Wemyss, 6 Asp. 364, the principle above stated was recognized, but it was held that it did not justify a vessel closehauled in luffing as much as 2½ points when approaching a vessel whose duty it was to get out of her way. And this last case accords with the case of The Elizabeth Jones, 112 U. S. 514, 5 Sup. Ct. 468. Mars. Mar. Coll. (3d Ed.) p. 475, says:

"A vessel closehauled does not, by luffing a little, and so that she does not lose her headway, break the rule requiring her to keep her course; nor, it is submitted, does she infringe article 22 by breaking off if the wind heads her."

See, also, Spencer, Mar. Coll. 148, 154.

In Mars. Mar. Coll. (3d Ed.) p. 414, it is said further:

"A ship sailing full and by and being kept a good full would be closehauled, within article 14."

We think, therefore, that, if the statements of the captain and others upon the Ellsworth are correct, there was no change of course, within the meaning of the rules, which would subject the Ellsworth to liability for the collision, unless it was by her last maneuver, when her helm was put hard up. It is true that the counsel for the appellant claims that the variation from the course must have been greater than that stated, in order to bring about the collision and the situation as described by those upon the Maxwell. The claim made on

behalf of the Maxwell is that she kept off from the time that the Ellsworth was sighted, and, therefore, that the Ellsworth must have changed her course very considerably in order to show a green light after she was showing a red light. We feel obliged to say that the evidence from the deck of the Maxwell is by no means as satisfactory and as clear as that from the Ellsworth. The precautions which were taken by the captain of the Ellsworth, the showing of the torch, the examination of the light of the Maxwell, and its direction by a night glass, show much watchfulness on the part of the master and others navigating the Ellsworth, while no such care is shown on the part of the captain and the lookout of the Maxwell. If we read between the lines of the evidence, the inference is not strained that the captain and the lookout had their attention diverted by the necessity of pumping, for the Maxwell was leaking some. The captain did not give to the helmsman any particular direction to keep off, until just before the collision, and such change of course as there was before this was made by the helmsman of his own volition and without orders. An admission by the helmsman is satisfactorily proven, and not satisfactorily denied by him, that when he first saw the red light of the Ellsworth on his port bow he may have luffed some, perhaps three-quarters of a point. This luffing, with the tendency of the Ellsworth, sailing light as she was, and on the wind, to drift a point and a half in a mile in the high wind, might explain how the Maxwell opened her green light to the Ellsworth, and thus led the captain of the Ellsworth to order his helmsman to give her a full on, and misled him into thinking that the Maxwell was going to windward. At all events, we are satisfied that the course of the Ellsworth is truly described by those who were on her, and that she did not change it. As it was the duty of the Maxwell to keep out of her way, the collision must, therefore, have been the fault of the Maxwell, unless the final maneuver of the Ellsworth, by which her helm was put hard to starboard and she swung off the wind, was a fault which caused the collision. The court below found that this was in extremis, and we think it was. We credit the statement of the Ellsworth's captain, that the Maxwell was but 100 feet away, and that the collision was inevitable, when he gave the order. It is not at all clear that sufficient time elapsed after the order before collision to make the vessel respond to the movement of the helm. It is not clear, therefore, that the maneuver even contributed to the accident. The emergency was caused by the fault of the Maxwell, which did not keep off enough, or did not go sufficiently to the windward, either of which courses was open to her to keep out of the way of the Ellsworth. The district judge heard the witnesses, and reached this conclusion. It is the duty of this court to accept his conclusion unless it is manifestly against the weight of the evidence. In the case before us, we should have reached the same conclusion on the record. The decree of the district court is affirmed.

MEMORANDUM DECISIONS.

BATE REFRIGERATING CO. v. SULZBERGER. (Circuit Court of Appeals, Second Circuit. October 11, 1897.) No. 82. Appeal from the Circuit Court of the United States for the Southern District of New York. Charles E. Mitchell, for appellant. Hoffman Miller, for appellee. No opinion. Judgment affirmed.

BUTLER v. UNITED STATES. (Circuit Court of Appeals, Third Circuit. March Term, 1899.) In Error to the District Court of the United States for the Eastern District of Pennsylvania. Before ACHESON and DALLAS, Circuit Judges, and BUFFINGTON, District Judge.

PER CURIAM. For the reasons stated in the case of Wilkins v. U. S. (C. C. A.; March Term, 1899) 96 Fed. 837, this case is affirmed. The record will be remitted to the district court, with directions to enforce the sentence imposed.

CARTER-CRUME CO. v. ASHLEY et al. (Circuit Court of Appeals, Second Circuit. November 10, 1897.) No. 3. Appeal from the Circuit Court of the United States for the Northern District of New York. James A. Allen, for appellant. Charles H. Duell, for appellee. Dismissed on motion of appellee, pursuant to the twenty-second rule. See 68 Fed. 378.

In re CHU AH QUAN. (Circuit Court of Appeals, Second Circuit. November 16, 1897.) Appeal from the Circuit Court of the United States for the Southern District of New York. William C. Beecher, for appellant. Wallace Macfarlane, U. S. Atty., for appellee. Dismissed for failure to docket, pursuant to the sixteenth rule.

DELAWARE, L. & W. R. CO. v. PROBASCO. (Circuit Court of Appeals, Second Circuit. September 30, 1897.) In Error to the Circuit Court of the United States for the Northern District of New York. Rogers, Locke & Millburn, for plaintiff in error. Clark & Tuthill, for defendant in error. Dismissed for failure to docket, pursuant to the sixteenth rule.

DIME SAV. BANK OF DETROIT v. MANUFACTURERS' PAPER CO. (Circuit Court of Appeals, Sixth Circuit. July 5, 1899.) In Error to the Circuit Court of the United States for the Eastern District of Michigan. Edwin F. Conely, for plaintiff in error. Leo. M. Butzel, for defendant in error. No opinion. Judgment affirmed.

DONALLAN v. TANNAGE PATENT CO. (Circuit Court of Appeals, First Circuit. November 2, 1899.) No. 296. Appeal from the Circuit Court of the United States for the District of Massachusetts. George L. Roberts and W.

Orison Underwood, for appellant. Frederick P. Fish and William K. Richardson, for appellee. Before WEBB, District Judge. Dismissed, without costs, per stipulation. See 93 Fed. 811.

ELMIRA WATERWORKS CO. v. NEW YORK FILTER MFG. CO. (Circuit Court of Appeals, Second Circuit. March 16, 1898.) No. 96. Appeal from the Circuit Court of the United States for the Northern District of New York. F. H. Betts and F. G. Finck, for appellant. John R. Bennett, for appellee. Dismissed on consent, pursuant to the twentieth rule. See 83 Fed. 1013.

HART & HEGEMAN MFG. CO. v. ANCHOR ELECTRIC CO. et al. (Circuit Court of Appeals, First Circuit. October 4, 1899.) No. 238. Appeal from the Circuit Court of the United States for the District of Massachusetts. Henry B. Brownell, for appellant. Edward P. Payson, for appellees. Before COLT, Circuit Judge, and BROWN and LOWELL, District Judges. Motion to reserve leave to court below to entertain motion by defendants to take further testimony denied. See 34 C. C. A. 606, 92 Fed. 657.

LI FOON v. McCARTHY, United States Marshal. (Circuit Court of Appeals, Second Circuit. October 27, 1897.) Appeal from the Circuit Court of the United States for the Southern District of New York. Petition for writs of habeas corpus and certiorari. William C. Beecher, for appellant. Wallace Macfarlane, U. S. Atty., for appellee. Dismissed for failure to docket, pursuant to the sixteenth rule. See 80 Fed. 881.

MT. MORRIS ELECTRIC LIGHT CO. v. BRUSH ELECTRIC CO. (Circuit Court of Appeals, Second Circuit. December 1, 1896.) No. 14. Appeal from the Circuit Court of the United States for the Southern District of New York. Forster, Hotaling & Klenke, for appellant. Cravath & Houston, for appellee. Dismissed on consent.

PINE v. MAYOR, ETC., OF CITY OF NEW YORK. (Circuit Court of Appeals, Second Circuit. October 27, 1897.) No. 106. Appeal from the Circuit Court of the United States for the Southern District of New York. Moran & Williams, for appellant. Francis M. Scott, Corp. Counsel, for appellee. No opinion. Judgment affirmed. See 76 Fed. 418.

PRESS PUB. CO. v. CROSSMAN. (Circuit Court of Appeals, Second Circuit. December 16, 1897.) No. 49. In Error to the Circuit Court of the United States for the Southern District of New York. Bowers & Sands, for plaintiff in error. Howe & Hummel, for defendant in error. No opinion. Judgment reversed.

REED MFG. CO. v. BROWN et al. (Circuit Court of Appeals, Second Circuit. March 10, 1898.) No. 71. Appeal from the Circuit Court of the United States for the Northern District of New York. Edward Wetmore, for appellant. F. H. Hamlin, for appellees. Dismissed on consent, pursuant to the twentieth rule. See 81 Fed. 48.

SOCIETE FABRIQUES DE PRODUITS CHIMIQUES DE THANN ET DE MULHOUSE v. FRENCH & AMERICAN TRADING CO. et al. (Circuit Court of Appeals, Second Circuit. October 4, 1897.) Appeal from the Circuit Court of the United States for the Southern District of New York. Lee & Lee, for appellant. Stern & Rushmore, for appellees. Dismissed on consent, pursuant to the twentieth rule. See 82 Fed. 439.

SUPREME LODGE KNIGHTS OF PYTHIAS v. ROBINSON. (Circuit Court of Appeals, Second Circuit. March 17, 1898.) In Error to the Circuit Court of the United States for the Southern District of New York. L. G. & W. A. Goodhart, for plaintiff in error. Hackett & Williams, for defendant in error. Dismissed on consent, pursuant to the twentieth rule.

THIRD NAT. BANK OF BOSTON v. MERCHANTS' NAT. BANK OF PROVIDENCE. (Circuit Court of Appeals, First Circuit. October 10, 1899.) No. 286. In Error to the Circuit Court of the United States for the District of Massachusetts. Moorfield Storey and John L. Thorndike, for plaintiff in error. Louis D. Brandeis and Walter F. Angell, for defendant in error. Before COLT, Circuit Judge, and WEBB, District Judge. No opinion. Judgment affirmed on agreement.

UNITED STATES v. BARTRAM et al. (Circuit Court of Appeals, Second Circuit. September 16, 1897). Appeal from the Circuit Court of the United States for the Southern District of New York. Wallace Macfarlane, U. S. Atty. Arthur L. Sherer, Jr., for appellees. Dismissed on consent, pursuant to the twentieth rule. See 77 Fed. 604.

UNITED STATES v. BARTRAM. (Circuit Court of Appeals, Second Circuit. September 14, 1897.) Appeal from the Circuit Court of the United States for the Southern District of New York. Wallace Macfarlane, U. S. Atty. Benjamin Barker, for appellee. Dismissed on consent, pursuant to the twentieth rule. See 77 Fed. 604.

UNITED STATES v. BARTRAM. (Circuit Court of Appeals, Second Circuit. September 16, 1897.) Appeal from the Circuit Court of the United States for the Southern District of New York. Wallace Macfarlane, U. S. Atty. Benjamin Barker, for appellee. Dismissed on consent, pursuant to the twentieth rule. See 77 Fed. 604.

UNITED STATES v. CHAMPION. (Circuit Court of Appeals, Seventh Circuit. June 13, 1899.) No. 585. Appeal from the Circuit Court of the United States for the District of Illinois. S. H. Bethea, for the United States. Joseph B. David, for appellee. Dismissed.

UNITED STATES v. PASSAVANT et al. (Circuit Court of Appeals, Second Circuit. February 16, 1898.) No. 40. Appeal from the Circuit Court of the United States for the Southern District of New York. Wallace Macfarlane,

U. S. Atty. Stanley, Clarke & Smith, for appellees. No opinion. Judgment reversed, pursuant to the decision of the questions certified to the supreme court. 169 U. S. 16, 18 Sup. Ct. 219.

WEAVER v. WILLIAMS et al. (Circuit Court of Appeals, Second Circuit. May 6, 1897.) No. 130. Appeal from the District Court of the United States for the Southern District of New York. Shiland & Honeyman, for appellant. Convers & Kirlin, for appellees. No opinion. Judgment affirmed.

McILWAINE et al. v. ELLINGTON et al. (Circuit Court, W. D. North Carolina. August 4, 1899.) In Equity.

SIMONTON, Circuit Judge. This case is similar to that of These Complainants v. Iseley (C. C.; just decided) 96 Fed. 62. The loan was for $1,000 on 10 shares of stock secured by a mortgage of lands in Greensboro, N. C. The subscription in both cases was made in the same way, submitted through a local agent to the directors of the company at Knoxville, Tenn. And so, in like manner, the proposal for the loan, with the completed note and mortgage, was also presented and submitted for the consideration, determination, and acceptance of the directors at Knoxville; and after such consideration they were accepted and approved, and the loan was made. This case must be decided as the other has been. The defendants will be charged with the principal sum loaned, with interest at 6 per cent. from date, and with all sums paid for taxes and premiums of insurance by the corporation or complainants, with interest from date of such payments, respectively. They will be credited, on the principle of partial payments, with all sums paid by way of stock subscription, interest, and installments of premium. Costs to be paid by defendants.

END OF CASES IN VOL. 96.

INDEX.

ABATEMENT AND REVIVAL.

§ 1. Transfer or devolution of title, right, interest, or liability.

Under Gen. St. Nev. § 3038, which provides that, in case of the transfer of a party's interest in the subject-matter of a pending action, the action may be continued in the name of the original party, or the court may allow the transferee to be substituted, where a plaintiff has so transferred his interest he has no further control over the action, and the court cannot proceed therein until the transferee has appeared or has been brought in by process.—Rodgers v. Pitt (C. C.) 668.

§ 2. Death of party and revival of action.

A suit by the receiver of an insolvent corporation to recover money alleged to have been wrongfully obtained from the corporation when insolvent is in the nature of an action on the case for damages to property, which survives, under V. S. § 2446, and, on the death of the defendant, it may be revived against his executors.—Great Western Min. & Mfg. Co. v. Harris (C. C.) 503.

ACCOUNT.

Accounting by trustee in bankruptcy, see "Bankruptcy," § 10.

ACTION.

Abatement, see "Abatement and Revival."
Against carriers, see "Carriers," § 2.
—— stockholders, see "Corporations," § 2.
—— trustees in bankruptcy, see "Bankruptcy," § 8.
By servant against master, see "Master and Servant," § 1.
Counterclaim, see "Set-Off and Counterclaim."
Criminal prosecutions, see "Criminal Law."
Jurisdiction of courts, see "Courts."
Limitation by statute, see "Limitation of Actions."
Review of proceedings, see "Appeal and Error."
Suits in admiralty, see "Admiralty."
—— in equity, see "Equity."
Survival, see "Abatement and Revival," § 2.
Particular causes or grounds of action, see "Death," § 1; "Libel and Slander," § 2; "Trespass."
—— breach of contract, see "Contracts," § 2.
—— infringement of copyright, see "Copyrights," § 2.
—— infringement of patent, see "Patents," § 8.
—— infringement of trade-mark or trade-name, see "Trade-Marks and Trade-Names," § 3.
—— personal injuries, see "Master and Servant," § 1.
Particular forms of action, see "Trespass," § 2; "Trover and Conversion."
Particular forms of special relief, see "Creditors' Suit"; "Injunction"; "Marshaling Assets and Securities"; "Specific Performance."
—— cancellation of written instrument, see "Cancellation of Instruments."
—— foreclosure of mortgage, see "Mortgages," § 3; "Railroads," § 2.
Particular proceedings in actions, see "Costs"; "Damages"; "Judgment"; "Limitation of Actions"; "Pleading"; "Process"; "Removal of Causes"; "Trial."

ADEQUATE REMEDY AT LAW.

Effect on jurisdiction of equity, see "Equity," § 1.

ADJUDICATION.

Operation and effect of former adjudication, see "Judgment," § 1.

ADMINISTRATION.

Of estate of bankrupt, see "Bankruptcy," § 7.
—— of decedent, see "Executors and Administrators."

ADMIRALTY.

See "Collision"; "Maritime Liens"; "Salvage"; "Seamen"; "Shipping."

§ 1. Evidence, and taking and filing proofs.

Under rule 40 in the district court for the Eastern district of Pennsylvania, relating to taking depositions on commission, if the adverse party desires to be represented at the examination he should furnish the name and address of his representative to the party taking out the commission, or to the commissioner, or the same with his cross-interrogatories, in which case it will be the duty of the commissioner to give such representative notice. — The Westminster (D. C.) 766.

Rev. St. § 866, authorizing any of the courts of the United States to issue commissions to take depositions "according to common usage," does not require a court of admiralty to conform to the practice in the state courts, and it may by rule provide a different method for taking depositions.—The Westminster (D. C.) 766.

ADULTERATION.

See "Food."

AGENCY.

See "Principal and Agent."

AGREEMENT.

See "Contracts."

ALIENS.

§ 1. Immigration.

An immigration officer is not required to take evidence under oath, or to make written findings, on examination, as to the right of an alien to enter the United States; and the evidence on which he acted in making an order of exclusion cannot be re-examined by the courts.—In re Way Tai (C. C.) 484.

The fact that an appeal taken to the secretary of the treasury by an alien from an order of exclusion was determined adversely to the appellant, by an assistant secretary, does not entitle the appellant to release on habeas corpus.—In re Way Tai (C. C.) 484.

Under Act March 3, 1891, § 8, which provides that the removal of an alien from the vessel on which he arrived, by order of the inspection officer, shall not be considered a landing during the pendency of the examination, the fact that an alien has been removed from the vessel and committed by the collector to the custody of a sheriff does not affect his rights.—In re Way Tai (C. C.) 484.

The provisions of the act of March 3, 1891, excluding certain classes of aliens from admission to the United States, and requiring their deportation, do not apply to aliens domiciled in this country and who are returning thereto after a temporary absence.—In re Ota (D. C.) 487.

Under the act of August 18, 1894, the decision of the secretary of the treasury affirming the action of immigration officers in refusing an alien admission to the United States under a law of congress, though clearly erroneous, cannot be reviewed by the courts.—In re Ota (D. C.) 487.

AMOUNT IN CONTROVERSY.

Jurisdictional amount, see "Courts," § 4; "Removal of Causes," § 3.

APPEAL AND ERROR.

§ 1. Decisions reviewable.

The act amending Judiciary Act 1887, § 2, which confers jurisdiction on circuit and district courts of suits on claims against the United States, by providing that such jurisdiction shall not extend to cases brought to recover fees, salary, or compensation for official services of officers of the United States, does not affect the provisions of the act amended relating to appeals, and a judgment rendered by a circuit court prior to the passage of the amendatory act is reviewable on appeal.—United States v. Jacobus (C. C. A.) 260; Jacobus v. United States, Id.

Matters reviewable on appeal from a judgment in an action at law tried to the court stated.—Wright v. Bragg (C. C. A.) 729.

§ 2. Presentation and reservation in lower court of grounds of review.

When an instruction is claimed to carry an implication beyond what is expressed, the exception thereto, under the rules of the circuit court of appeals, should state the particular meaning or implication objected to, and the specification of error must also set out the language of the instruction.—Stewart v. Morris (C. C. A.) 703.

It is error for appellate court on reversal of judgment to render judgment for adverse party upon question of fact not put in issue by pleadings, or submitted to jury on trial.—Bradley v. Hargadine-McKittrick Dry-Goods Co. (C. C. A.) 914.

§ 3. Assignment of errors.

The circuit court of appeals will not consider an assignment of error which fails to set out separately and particularly the error relied on, as required by rule 11.—Chandler v. Pomeroy (C. C. A.) 156.

§ 4. Review.

Matters reviewable on appeal from a judgment in actions at law tried to the court stated.—World's Columbian Exposition Co. v. Republic of France (C. C. A.) 687.

§ 5. Determination and disposition of cause.

If the trial court omits to state in its charge on which party rests the burden of proof of an issue, and counsel does not call its attention to the omission, it cannot be regarded by the appellate court as of sufficient gravity to require a reversal of the judgment.—Stewart v. Morris (C. C. A.) 703.

APPLIANCES.

Liability of employer for defects, see "Master and Servant," § 1.

APPLICATION.

Of assets and securities in general, see "Marshaling Assets and Securities."
—— of partnership, see "Partnership," § 1.

APPROPRIATION.

Of water rights in general, see "Waters and and Water Courses," § 2.

ASSESSMENT.

Of expenses of public improvements, see "Municipal Corporations," § 1.

ASSETS.

Marshaling, see "Marshaling Assets and Securities."
Of partnership, see "Partnership," § 1.

ASSIGNMENT OF ERRORS.

See "Appeal and Error," § 3.

ASSIGNMENTS.

In insolvency, see "Insolvency," § 5.
Transfer of cause of action ground for abatement, see "Abatement and Revival," § 1.

ASSIGNMENTS FOR BENEFIT OF CREDITORS.

See "Bankruptcy," §§ 5–10.

ASSOCIATIONS.

See "Building and Loan Associations."

ASSUMPTION.

Of risk by employé, see "Master and Servant," § 1.

AUTHORITY.

Of agent, see "Principal and Agent," § 1.

BANKRUPTCY.

§ 1. Petition, adjudication, and warrant—Jurisdiction and course of procedure in general.

Where bankrupt, more than a year before enactment of bankrupt law, made an assignment for creditors, it is not proper, on his examination, to inquire into the circumstances of the assignment, unless foundation is laid for belief that property was still held by bankrupt at the time of the enactment of the law.—In re Hayden (D. C.) 199.

§ 2. —— Voluntary proceedings.

Where member of firm files petition in bankruptcy, and seeks discharge from firm and individual debts, but no adjudication is made against the partnership, firm creditors may prove debts against bankrupt, and cause his interest in firm property to be subject to payment, and a discharge of bankrupt will release him as to both classes of debt.—In re Laughlin (D. C.) 589.

Petition seeking discharge from firm debts should set forth names of partners, and pray for discharge from firm debts, and the schedule should list both firm and individual property and debts, and notice should inform creditors that firm creditors are affected, and notice of petition and meeting should be sent to partners.—In re Laughlin (D. C.) 589.

Where petition and schedule as originally filed are insufficient to obtain release from firm and individual debts, it should be amended before adjudication, or adjudication can be set aside, and leave then granted to amend.—In re Laughlin (D. C.) 589.

Where member of firm files voluntary petition, but no adjudication is made against firm, and the schedule includes firm debts, but there is no reference in the proceedings to firm liabilities, firm debts are not affected by discharge.—In re McFaun (D. C.) 592.

Where member of firm files petition to obtain discharge from firm and individual debts, but there is no adjudication against the firm, and no averment laying foundation for discharge as against firm creditors, the adjudication may be set aside, and leave granted bankrupt to file amended petition.—In re McFaun (D. C.) 592.

Where member of firm files petition to obtain discharge from firm and individual debts, petition should set forth names of partners, and pray for discharge from firm debts, and should list individual and firm property and debts, and proper notice should be given to the firm creditors.—In re Hartman (D. C.) 593.

Where petition seeking discharge from firm and individual debts is insufficient as to firm debts, the adjudication may be set aside, and petition amended.—In re Hartman (D. C.) 593.

Where some members of a partnership file petition in bankruptcy, the others not joining, the proceeding is voluntary, unless other partners dissent, and contest the adjudication.—In re Murray (D. C.) 600.

§ 3. —— Involuntary proceedings.

Where petition in involuntary bankruptcy appears sufficient in number and amount of creditors to sustain jurisdiction, but a deficiency is shown, other creditors who have entered their appearance may be reckoned in making up the amount of claims required.—In re Bedingfield (D. C.) 190.

Creditor joining in petition in involuntary bankruptcy for alleged preferential transfer of debtor's property, obtaining a settlement of debt, will not be allowed to withdraw, when his withdrawal would require a dismissal of the proceedings.—In re Bedingfield (D. C.) 190.

Creditors of one who has made general assignment *held* not estopped to maintain petition in bankruptcy because, with knowledge of the assignment, they delayed instituting proceedings for two months; that, pending proposition for compromise, they sold to assignee goods for cash to replenish stock; that they submitted to assignee, at his request, unverified statements of claims; and that an order by the state court for the sale of assignor's goods was submitted to the attorneys for said creditors, and by them indorsed "Seen."—Sinsheimer v. Simonson (D. C.) 579.

Where petition is filed by certain members of a firm praying adjudication against them, and averring nonresidence of other partner, if judge is absent the clerk should report the case to the proper referee.—In re Murray (D. C.) 600.

Where petition is filed by certain members of a firm asking adjudication, but there are other partners who do not join, no adjudication can be had until notice to them.—In re Murray (D. C.) 600.

Where personal service cannot be had on partners of firm not joining in petition in bankruptcy, the court will order publication as in other cases.—In re Murray (D. C.) 600.

Where partners of a firm not joining in petition in bankruptcy contest the adjudication, the referee must certify the case to the judge for determination.—In re Murray (D. C.) 600.

Petition in involuntary bankruptcy cannot be maintained against an incorporated mutual fire insurance company organized under Act Mo. March 21, 1895, it not being a manufacturing, trading, or mercantile corporation, within Bankruptcy Act 1898, § 4b.—In re Cameron Town Mut. Fire, Lightning & Windstorm Ins. Co. (D. C.) 756.

Creditors filing petition in involuntary bankruptcy alleging transfer with intent to prefer have the burden of proving the transfer, the intent, and the debtor's insolvency, unless the debtor fails to produce books and papers and submit to examination, when he incurs obligation of proving solvency.—In re Rome Planing Mill (D. C.) 812.

Intent of involuntary bankrupt to prefer may be presumed from a transfer of a large part of his property, while insolvent, to a single creditor.—In re Rome Planing Mill (D. C.) 812.

On petition of involuntary bankrupt, under Acts 1898, § 3, subd. 3, the petitioning creditors must prove preference obtained by creditor through legal proceedings, that debtor permitted the preference and did not discharge it at least five days before a sale of the property affected, and that he was insolvent when preference was obtained.—In re Rome Planing Mill (D. C.) 812.

Where transfer by insolvent with intent to prefer is basis of petition in involuntary bankruptcy, it is unnecessary to show the intent with which the creditor received the transfer, nor reasonable cause to believe a preference was intended.—In re Rome Planing Mill (D. C.) 812.

In Bankruptcy Act 1898, § 3, subd. 3, the words obtaining preference through "legal proceedings" mean any proceeding in a court of justice by which property of debtor is diverted from his general creditors.—In re Rome Planing Mill (D. C.) 812.

Creditor seeking to have debtor adjudged bankrupt for suffering creditor to obtain preference through legal proceedings need not wait until a sale has taken place, but, if debtor five days before advertised sale has not discharged the preference, may have the sale enjoined.—In re Rome Planing Mill (D. C.) 812.

In order to commit act of bankruptcy by permitting creditor to obtain preference through legal proceedings, it is enough if the debtor remains passive, and allows his property to be taken by one creditor at the expense of the others.—In re Rome Planing Mill (D. C.) 812.

Where issues on petition in involuntary bankruptcy were decided against petitioners, other creditors having no notice charging collusion, who cannot intervene because time for intervention has passed, may bring a new petition, and are not estopped by the former decision.—Neustadter v. Chicago Dry-Goods Co. (D. C.) 830.

Provisions of act that creditors shall have notice of proposed dismissal of proceedings, and that petition shall not be dismissed until after notice, relate only to dismissals withdrawing the case without decision on the merits.—Neustadter v. Chicago Dry-Goods Co. (D. C.) 830.

On the trial of a contested petition in involuntary bankruptcy, in determining the issue as to the solvency or insolvency of the respondent, within the meaning of Bankr. Act 1898, § 1, subd. 15, all the property which he owns is to be reckoned in computing the amount of his assets, except such as he may have transferred or concealed in fraud of creditors, but not excluding property which is exempt from execution by the laws of the state.—In re Baumann (D. C.) 946.

§ 4. —— Warrant and custody of property.

Where receiver of state court has not reduced property of bankrupt to possession, bankrupt court on adjudication will take possession through the trustee.—Southern Loan & Trust Co. v. Benbow (D. C.) 514.

Where property of bankrupt is in control of state court of competent jurisdiction, its possession will not be interfered with.—Southern Loan & Trust Co. v. Benbow (D. C.) 514.

Jurisdiction of bankrupt court to enjoin sale of property of bankrupt under decree obtained by fraud *held* not affected by the fact that the bankrupt has received discharge.—Southern Loan & Trust Co. v. Benbow (D. C.) 514.

The bankruptcy court on petition of trustee will enjoin the officer of a state court, the bankrupt, and all others concerned, from selling property of the estate under a decree obtained in the state court by fraud.—Southern Loan & Trust Co. v. Benbow (D. C.) 514.

Where receiver is appointed to take charge of property of bankrupt until involuntary petition is dismissed or trustee is qualified, the receiver must collect the property, by suit if necessary, and the court can authorize him to institute necessary actions for the recovery of such property. —In re Fixen & Co. (D. C.) 748.

A receiver appointed to take charge of property until qualification of trustee can apply for order summoning certain persons for examination, under Bankruptcy Act, § 21.—In re Fixen & Co. (D. C.) 748.

A bankruptcy court may appoint a receiver to take charge of the property of a person against whom a petition in involuntary bankruptcy has been filed, until trustee is appointed and qualified.—In re Fixen & Co. (D. C.) 748.

Application, after filing petition in involuntary bankruptcy against a retail trader, *held* to show sufficient grounds for appointment of receiver pending the appointment of trustee.—In re Fixen & Co. (D. C.) 748.

A receiver of a bankrupt's estate can examine books of a purchaser of the bankrupt stock, alleged to have been without adequate consideration, as to any matters relating to such purchase.—In re Fixen & Co. (D. C.) 748.

§ 5. Assignment, administration, and distribution of bankrupt's estate —Assignment, and title, rights, and remedies of assignee.

A court of bankruptcy has jurisdiction to order a bankrupt to pay over to trustee money

belonging to his estate, and where bankrupt fails to obey order he may be committed for contempt.—In re Purvine (C. C. A.) 192.

Where conditional sales of personalty unless recorded are by state statute held absolute, property held by bankrupt purchaser under unrecorded bill of sale will vest in trustee, though, as against bankrupt, vendor might have claimed property.—In re Legg (D. C.) 326.

Rights of trustee in bankruptcy to surplus of income payable to beneficiary by trustees under a will determined.—In re Baudouine (D. C.) 536.

Amount of surplus income of bankrupt under a trust under a will may be made available by summary petition in proceedings by referee.—In re Baudouine (D. C.) 536.

State statute providing that surplus income accruing to beneficiary under will shall be liable to claims of creditors *held* not to oblige trustees in bankruptcy to bring bill in equity to subject the surplus.—In re Baudouine (D. C.) 536.

Resulting trust in realty owned by bankrupt *held* to pass to his trustee in bankruptcy, notwithstanding levy of execution and sale thereof, when by state law a resulting trust cannot be sold on execution.—In re Dunavant (D. C.) 542.

Earnings of emancipated minor son cannot be claimed by the father's creditors as assets in bankruptcy.—In re Dunavant (D. C.) 542.

Sale under trust deed bid off to creditor for price exceeding the amount of his own and a superior lien, where no money was ever paid, *held* not to devest title of original owner.—In re Dunavant (D. C.) 542.

Where an Indian, an allottee of agricultural lands in Indian reservation, became a bankrupt, the lands allotted, being exempt under the United States statutes, did not vest in his trustee.—In re Russie (D. C.) 609.

Crops growing on homestead of voluntary bankrupt passed to his trustee.—In re Daubner (D. C.) 805.

Under Bankruptcy Act 1898, § 70, lands acquired by bankrupt under United States homestead law cannot be subject to debts contracted before issuance of patent.—In re Daubner (D. C.) 805.

Trustee is vested with title to all assets of the bankrupt, including collaterals in the hands of creditor; and such creditor cannot hold the same until debt is paid, nor sell or cancel independently of the bankruptcy proceedings, but must surrender them to the trustee when the claim of priority will be adjudicated in the bankrupt court.—In re Cobb (D. C.) 821.

§ 6. —— Preferences and transfers by bankrupt, and attachments and other liens.

The two subdivisions "c" and "f" of section 67 of the bankruptcy act, relating to the effect of an adjudication of bankruptcy upon existing liens upon the property of the bankrupt acquired through legal proceedings, are antagonistic and irreconcilable; and, therefore, in any case of conflict between them, the former must give way and latter prevail.—In re Richards (C. C. A.) 935.

Bankr. Act 1898, § 67, subd. "f," 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, subd. "1," declares that "a person against whom a petition has been filed" shall include a person who has filed a voluntary petition.—In re Richards (C. C. A.) 935.

Where a creditor holding a judgment note of his debtor enters judgment thereon within four months prior to the filing of the debtor's voluntary petition in bankruptcy, the latter being insolvent, the lien of the judgment is annulled by the adjudication in bankruptcy, notwithstanding the fact that the giving of the note itself, 10 months before the bankruptcy proceedings, could not have been set up against the debtor as an act of bankruptcy.—In re Richards (C. C. A.) 935.

All liens obtained through legal proceedings against an insolvent debtor, within four months prior to the filing of a petition in bankruptcy by or against him, are annulled by his adjudication as a bankrupt, irrespective of the question whether the debtor suffered or permitted the lien to be obtained, and irrespective of any knowledge by the creditor of the debtor's insolvency.—In re Richards (C. C. A.) 935.

The lien of a mortgage made and recorded more than four months before petition in bankruptcy against mortgagor is not affected by his adjudication as bankrupt.—In re Dunavant (D. C.) 542.

Where, by state law, lien of judgment attaches to all real property of bankrupt in county, the lien attaching more than four months before petition in bankruptcy is not affected by adjudication.—In re Dunavant (D. C.) 542.

Where creditors impeach deed to son of bankrupt as fraudulent, the bankrupt can plead limitations on action to set it aside when barred by state law.—In re Dunavant (D. C.) 542.

Proceedings by bankrupt's creditors to avoid deed as fraudulent *held* barred by state statutes when facts of transaction were known to creditor's attorney more than three years before filing petition in bankruptcy.—In re Dunavant (D. C.) 542.

The court of bankruptcy will enjoin an action in a state court, by one claiming to own the bankrupt's property, to establish his claim.—Keegan v. King (D. C.) 758.

Payment of a debt in money is a transfer of property, within the purview of Bankruptcy Act 1898, § 60, cl. "a," providing that a debtor shall be deemed to have given a preference if, being insolvent, he has made a transfer of any of his property, and the effect of the enforcement of such transfer will be to enable one of his creditors to obtain a greater percentage of his debt than other creditors of the same class.—In re Ft. Wayne Electric Corp. (D. C.) 803; Worden v. Columbus Electric Co., Id.

Where state law provides that a chattel mortgage shall not be valid against creditors if unre-

corded, nor if it allows mortgagor to retain possession, a mortgage open to these objections will not create a lien entitling mortgagees to possession as against trustees in bankruptcy of mortgagor.—In re Leigh (D. C.) 806.

Transaction between creditor and bankrupt whereby certain loans were made to bankrupt *held*, as to a portion thereof, a preference, voidable under the bankruptcy act; but, as to another portion, creditor was entitled to be paid in full out of the proceeds of the securities.—In re Cobb (D. C.) 821.

§ 7. —— Administration of estate.

The referee has power, on petition of the trustee, to cite the bankrupt to show cause why he should not surrender to the trustee property claimed as assets.—In re Oliver (D. C.) 85.

Bankruptcy court will not retain control over exempt property, to enforce rights of creditor holding note in which bankrupt has waived his right of homestead and exemption.—In re Hill (D. C.) 185.

A bankrupt cannot be compelled to criminate himself on examination before a referee, notwithstanding Bankrupt Act, § 7, provides that no testimony offered by him shall be used in any criminal proceeding.—In re Rosser (D. C.) 305.

Where bankrupt admits possession of $2,500 shortly before proceedings commenced, and refuses to turn it over, or to account for it, he should be committed until he turns over the same.—In re Rosser (D. C.) 308.

A party desiring to have order by referee reviewed must file his petition for review with the referee.—In re Schiller (D. C.) 400.

Objection by bankrupt to regularity of first meeting of creditors because notices were prepared before bankrupt's list of creditors was filed will not be sustained, where such list was not filed within the statutory time.—In re Schiller (D. C.) 400.

The court may order trustee to sell property free from liens preserving and transferring the same to the proceeds of the sale.—Southern Loan & Trust Co. v. Benbow (D. C.) 514.

Where trustee continues to occupy premises leased by bankrupt for storage of goods until sale, landlord is entitled to compensation.—In re Grimes (D. C.) 529.

In proceedings to determine amount of surplus income accruing to bankrupt under trust created by will, to render surplus available to creditors, testamentary trustees may be made parties by petition.—In re Baudouine (D. C.) 536.

At first meeting of creditors any creditor whose debt is provable can examine the bankrupt, though he has not made formal proof of claim.—In re Walker (D. C.) 550.

Where creditor was secured by chattel mortgage and mortgage of realty, and there was doubt as to the property covered by chattel mortgage, and the referee ordered a sale free of incumbrance, approval of the sale was within his discretion.—In re Sanborn (D. C.) 551.

Referee in bankruptcy can order trustee to sell free of incumbrance personalty of the bankrupt covered by chattel mortgage.—In re Sanborn (D. C.) 551.

One summoned to be examined in proceeding in bankruptcy and produce certain books cannot refuse to produce them or answer questions on the ground that they contain nothing relating to the bankrupt's property.—In re Fixen & Co. (D. C.) 748.

Where one under examination in bankruptcy refuses to produce books called for under a direction of counsel made in good faith, he will not be punished for contempt.—In re Fixen & Co. (D. C.) 748.

Under Bankruptcy Act, § 21, it is not necessary to the ruling of examination of witness that there should be a suit pending against the bankrupt or his trustee.—In re Fixen & Co. (D. C.) 748.

A person summoned for examination as a witness, on the application of a receiver appointed by bankruptcy court, cannot refuse to attend on the ground that the order appointing receiver was erroneous.—In re Fixen & Co. (D. C.) 748.

Order for examination of witnesses in bankruptcy proceedings may be made without any showing by receiver or trustee of the facts to be inquired into.—In re Fixen & Co. (D. C.) 748.

Where court of bankruptcy having jurisdiction has taken possession of the bankrupt's property, one claiming to own the property cannot sue the trustee in a state court to establish his title.—Keegan v. King (D. C.) 758.

To compel wife of bankrupt to disclose confidential communications made by husband respecting his property violates Const. U. S. Amend. 4, prohibiting "unreasonable searches and seizures."—In re Jefferson (D. C.) 826.

Where, under state law, wife cannot testify against husband, the wife of a bankrupt cannot be required to disclose communications made by her husband respecting his property.—In re Jefferson (D. C.) 826.

When valid mortgage covers undivided fractional part of real estate out of which bankrupt claims homestead exemption, court will not order trustee to partition land between bankrupt and mortgagee, and set apart a designated portion as homestead, free of mortgage lien, but it may order sale of portions of land not actually occupied as homestead, and apply proceeds in payment of mortgage.—In re Thomas (D. C.) 828.

Where it appears that it would be for the interest of creditors at large of the bankrupt to have real estate which is incumbered by a mortgage taken by the trustee and administered with the balance of the estate, preserving the lien of the secured creditors, a court of bankruptcy has jurisdiction to order the trustee to take possession of such property, and to enjoin the secured creditor and others from selling it or otherwise interfering with it.—In re Booth (D. C.) 943.

When the assets of a bankrupt corporation are insufficient to pay its debts, the trustee, under direction of the court of bankruptcy, has authority to call upon the stockholders to make good the unpaid balance of their subscriptions to the capital stock of the corporation, to an

amount not exceeding the deficiency of the other assets as compared with the debts.—In re Crystal Spring Bottling Co. (D. C.) 945.

Where directors of a corporation have incurred a statutory liability to creditors of the corporation, by contracting debts in excess of the amount allowed by law, or by paying dividends when the company was insolvent, such liability is not assets of the corporation in bankruptcy nor a fund to be resorted to by the trustee; and, consequently, its existence will not prevent the trustee from calling upon stockholders for the unpaid balance of their stock.—In re Crystal Spring Bottling Co. (D. C.) 945.

Referee is not entitled to charge cost of clerical aid.—In re Carolina Cooperage Co. (D. C.) 950.

Under Bankr. Act 1898, § 48a, the court has no authority to allow a trustee a lumping sum in lieu of commissions calculated as the act directs.—In re Carolina Cooperage Co. (D. C.) 950.

§ 8. —— Actions by and against trustee.

When the trustee of a bankrupt corporation calls upon stockholders to make good the unpaid balance of their subscriptions to its capital stock, compliance with the call is to be enforced by a suit in equity in the federal district court in which the estate of the bankrupt is being administered.—In re Crystal Spring Bottling Co. (D. C.) 945.

§ 9. —— Claims against and distribution of estate.

Under Bankruptcy Act 1898, § 63, providing that debts may be proved against a bankrupt which are evidenced by a judgment, a claim of the bankrupt's divorced wife for unpaid alimony under a decree granting a divorce is provable, and she will be enjoined from suing in a state court.—In re Van Orden (D. C.) 86.

Where general manager of trading corporation, who is also a stockholder and director, has been allowed a monthly salary by informal agreement of directors, he will be allowed to prove up against the estate only the reasonable value of his services.—In re Grubbs-Wiley Grocery Co. (D. C.) 183; Ex parte Grubbs, Id.

General manager of mercantile corporation who is also a stockholder and director, with a salary of $100 per month as manager, *held* not a workman or servant of the corporation within the bankruptcy act.—In re Grubbs-Wiley Grocery Co. (D. C.) 183; Ex parte Grubbs, Id.

Where, by the laws of the state, an unrecorded mortgage is good against all except intervening incumbrancers or purchasers, a mortgage given more than four months before voluntary petition in bankruptcy is valid against the trustee, though not recorded until the day the petition was filed.—In re Wright (D. C.) 187.

The proceeds of a homestead exemption will constitute a special fund for distribution to creditors holding waivers of exemption, and they will be compelled to exhaust this fund before coming on the general estate.—In re Woodruff (D. C.) 317; In re McCorvey, Id.; In re Cowdrey, Id.

A court of bankruptcy under Bankrupt Act 1898, c. 2, § 2, has jurisdiction to enforce against property set apart as exempt under the laws of the state the rights of creditors who hold obligations containing a waiver of exemption, though they have not established a specific lien.—In re Woodruff (D. C.) 317; In re McCorvey, Id.; In re Cowdrey, Id.

The bankrupt court may enforce against a homestead the rights of creditors holding bankrupt's note containing waiver of exemptions.—In re Sisler (D. C.) 402.

Expenses of attaching creditor after dissolution of lien by adjudication in bankruptcy in storing attached property *held* entitled to priority of payment out of the estate, where they were necessary.—In re Allen (D. C.) 512.

Where lien of attachment on personalty is dissolved by bankruptcy, the creditors' claim for costs is a provable debt against the estate.—In re Allen (D. C.) 512.

Where judgments against a firm were bought up by a partner, he could prove a claim for the share due him by a co-partner against his individual estate in bankruptcy.—In re Carmichael (D. C.) 594.

Where, on declaration of dividend, money is reserved to pay like dividend on claims disallowed for insufficient proof, and thereafter claim for attorney's fee is presented, it must be paid out of reserved fund in preference to general creditors.—In re Scott (D. C.) 607.

On question of allowance of claim, the referee has a large discretion, and his decisions on questions of fact will not be reversed unless manifestly against the evidence.—In re Rider (D. C.) 811.

Where claim of father against bankrupt son has been allowed by referee, it will not be expunged, on application of other creditors, on the ground that fraud is presumable from the relationship.—In re Rider (D. C.) 811.

Where, under the law of the state, assignee of nonnegotiable judgment note takes it subject to all equities, he cannot prove it against estate of maker unless original payee could have done so.—In re Wiener & Goodman Shoe Co. (D. C.) 949.

Where creditor of corporation is subscriber to corporate stock, he cannot prove his claim until he has paid balance due on his subscription.—In re Wiener & Goodman Shoe Co. (D. C.) 949.

President of business corporation receiving salary of $700 per year for services is not entitled to priority given by Bankr. Act 1898, § 64b, for wages due by corporation.—In re Carolina Cooperage Co. (D. C.) 950.

§ 10. —— Accounting and discharge of trustee.

Under Bankruptcy Act 1898, § 57, cl. "g," providing that the claims of creditors of a bankrupt who have received preferences shall not be allowed unless they surrender their preferences, a creditor who had actually received a preference cannot have his claim allowed without surrendering the preference, notwithstanding the fact

that he had no knowledge or cause to believe that a preference was intended.—In re Ft. Wayne Electric Corp. (D. C.) 803; Worden v. Columbus Electric Co., Id.

Where court appoints agent to make sale of property in hands of marshal, and agent is thereafter elected trustee of the estate and makes the sale, he is not entitled to compensation as agent and also to commission as trustee.—In re Carolina Cooperage Co. (D. C.) 950.

§ 11. Composition.

Provisions of bankruptcy act as to composition with creditors must be strictly construed against those seeking to deprive nonassenting creditors of their right to have debtor's property distributed in the ordinary manner.—In re Rider (D. C.) 808.

Under Bankruptcy Act 1898, § 12, a composition, to be valid, must have been offered to all of the creditors, whether they have proved their debts or not, and must be accepted by a majority in number and amount of all creditors whose claims have been allowed.—In re Rider (D. C.) 808.

Where bankrupt, at first meeting of creditors, procured acceptance of composition by certain creditors whose debts had been allowed, who were a majority in number and amount of the allowed debts at that time, but not a majority of those whose claims were allowed at the hearing as to confirmation of composition, and there was no general notice to creditors, composition will not be confirmed.—In re Rider (D. C.) 808.

The court will not confirm composition where money deposited to cover costs is insufficient.—In re Rider (D. C.) 808.

§ 12. Rights, remedies, and discharge of bankrupt.

Evidence *held* insufficient to show that disappearance of books of bankrupt was brought about by any fraudulent intent on his part to conceal his true financial condition, so as to bar his discharge in bankruptcy.—In re Stark (D. C.) 88.

Destruction or concealment of books by debtor *held* no ground for refusing discharge, unless committed after passage of bankrupt law.—In re Shorer (D. C.) 90.

Evidence *held* insufficient to show fraudulent concealment or destruction of books by debtor, so as to prevent his right to discharge.—In re Shorer (D. C.) 90.

Bankrupt's omission to disclose fund realized by surrender of policies on his life payable to his wife as beneficiary *held* not a fraudulent concealment of his estate, so as to forfeit his right to discharge.—In re Dews (D. C.) 181.

Bankruptcy Act 1898, § 14, b (2), providing that discharge shall not be granted if the bankrupt with fraudulent intent has failed to keep books, does not apply where the failure was antecedent to the passage of the act.—In re Dews (D. C.) 181.

Failure to keep books will not prevent a bankrupt's discharge, unless it is proved that such failure was "with fraudulent intent to conceal his true financial condition."—In re Idzall (D. C.) 314.

Where a bankrupt's system of keeping books was insufficient, but had been persisted in for nine years, and no change was made after passage of bankrupt law, *held*, that court might infer that failure to keep proper books was not "with fraudulent intent to conceal his true financial condition."—In re Idzall (D. C.) 314.

Discharge of a bankrupt being opposed because of concealment of property, creditor has burden of proving concealment, and proof of unexplained former ownership alone is not sufficient.—In re Idzall (D. C.) 314.

A bankrupt's application for discharge may be stayed until definite settlement of rights of creditors claiming authority to enforce their claims against his homestead.—In re Woodruff (D. C.) 317; In re McCorvey, Id.; In re Cowdrey, Id.

Bankrupt *held* to have made a false oath such as would forfeit his right to discharge.—In re Roy (D. C.) 400.

Where debts are proven in which homestead exemption has been waived, trustee in bankruptcy must sell homestead to pay such debts as have the benefit of the waiver.—In re Sisler (D. C.) 402.

Partners *held* not entitled to discharge affecting debts of the firm, when the partnership as such is not in bankruptcy.—In re Meyers (D. C.) 408.

Where creditors have shown assets and a large shrinkage shortly before bankruptcy, if bankrupt fails to reasonably explain the same, he forfeits his right to discharge.—In re Meyers (D. C.) 408.

Where bankrupt fails to schedule corporate stock pledged for its full value under honest belief that it is not worth including, it is no ground for refusing a discharge.—In re Hirsch (D. C.) 468.

The mere fact of failure to list certain property on schedule *held* not ground for refusing discharge.—In re Hirsch (D. C.) 468.

It is no ground of objection to discharge that bankrupt failed to keep books or destroyed them prior to the enactment of the bankruptcy law.—In re Hirsch (D. C.) 468.

Where debtor has kept books and destroyed them after passage of the act, it is ground for refusing discharge, if done with fraudulent intent.—In re Hirsch (D. C.) 468.

The phrase "in contemplation of bankruptcy," in the act of 1898, means contemplation of voluntary petition or involuntary proceedings.—In re Hirsch (D. C.) 468.

A debtor is not in "contemplation of bankruptcy" when no law is in existence, though one is then pending before congress.—In re Hirsch (D. C.) 468.

Evidence of fraudulent destruction of books *held* insufficient to warrant refusal to discharge.—In re Hirsch (D. C.) 468.

Evidence *held* not to show such fraudulent concealment of property from trustee as would

forfeit right to discharge.—In re Hirsch (D. C.) 468.

Specifications in opposition to discharge must definitely allege the facts relied on.—In re Hirsch (D. C.) 468.

Specifications, in opposition to discharge, that bankrupt has not offered to surrender all his property, and is withholding the same, *held* not to sufficiently charge offense of fraudulent concealment or false oath.—In re Hirsch (D. C.) 468.

Where evidence on bankrupt's application is questioned, and where creditors have made no effort through trustee to recover property alleged to have been fraudulently conveyed, *held* a discharge will be granted.—In re Hirsch (D. C.) 468.

Where specifications in opposition to discharge have been overruled, and discharge ordered, the certificate will not issue until 10 days after the order.—In re Hirsch (D. C.) 468.

Agreement between bankrupt and creditor that his exemption shall be allotted by appraisers *held* void, such allotment being the duty of the trustee.—In re Grimes (D. C.) 529.

Where appraisers value entire estate of bankrupt, their inventory is not binding on trustee as respects exempted property.—In re Grimes (D. C.) 529.

Where state law exempts debtor's personal property to be selected, though the personalty consists of a stock of goods not divisible without loss, nor salable except as a whole, the court cannot order trustees to sell the whole and pay bankrupt value of exemptions.—In re Grimes (D. C.) 529.

Where exempt property has been set apart by trustee, the court has no jurisdiction either to defend such property from adverse claims or enforce liens upon it.—In re Grimes (D. C.) 529.

Where bankrupt has no cash to pay storage claims to landlord whose property he has occupied, he may be ordered to sell sufficient personalty for that purpose.—In re Grimes (D. C.) 529.

The court cannot order trustee to pay overdue rent out of property set apart to bankrupt as exempt, though bankrupt had so agreed with landlord.—In re Grimes (D. C.) 529.

Under Bankruptcy Act 1898, § 14, to defeat petition for discharge for failing to keep books, fraudulent intent to conceal true financial condition and contemplation of bankruptcy must be shown.—In re Carmichael (D. C.) 594.

It is no ground for refusing discharge that creditors objecting thereto hold judgment for willful injury to property or claims founded on fraud of bankrupt.—In re Carmichael (D. C.) 594.

Failure to keep proper books of account in a firm business which terminated several years before enactment of bankrupt law is no ground for refusing discharge.—In re Carmichael (D. C.) 594.

The words "contemplation of bankruptcy," as applying to application for discharge, mean contemplation of becoming bankrupt on voluntary petition, or doing an act enabling creditors to obtain adjudication.—In re Carmichael (D. C.) 594.

To defeat application for discharge, it is necessary that specifications in opposition should allege, and creditors prove, commission of one or other of the two acts denounced by the law as ground for refusing discharge.—In re Rhutassel (D. C.) 597.

The question whether or not the debt of a particular creditor is excepted from operation of discharge cannot be tried on application for discharge, on creditor's opposition thereto.—In re Rhutassel (D. C.) 597.

Under General Order No. 32 (32 C. C. A. xxxi., 89 Fed. xiii.), where appearances are entered to oppose discharge, but specifications are not filed within 10 days, it is discretionary with the court to permit them to be thereafter filed.—In re Frice (D. C.) 611.

Under Bankruptcy Act 1894, § 14(b), persons named in the schedule as creditors can oppose his discharge, though they have not proved their claim.—In re Frice (D. C.) 611.

Specifications in opposition to discharge must be circumstantial, and allege a statutory ground for reversal.—In re Frice (D. C.) 611.

Where a state statute exempts from execution all wearing apparel of the debtor, a bankrupt *held* entitled to claim, as exempt, a diamond stud worth $250, habitually worn in the front of his shirt, for the purpose of fastening it together, where no fraud is shown.—In re Smith (D. C.) 832.

Where bankrupt has been arrested on civil process in state court, he cannot be released on habeas corpus, if the debt is one which would not be affected by his discharge in bankruptcy.—In re Baker (D. C.) 954.

Judgment in the name of the state and by the public prosecutor against a father for payment of a monthly sum to the mother for the support of his bastard child *held* not a debt which would be released by discharge in bankruptcy.—In re Baker (D. C.) 954.

§ 13. Appeal and revision of proceedings.

On petition to circuit court of appeals to review order of district court under Bankruptcy Act 1898, §§ 24, 24b, only questions of law will be considered.—In re Purvine (C. C. A.) 192.

Upon an appeal to the circuit court of appeals from the district court in bankruptcy, under Bankr. Act 1898, § 25, the facts as well as the law are before the appellate court for review. But the petition for review, under section 24, subd. "b," which authorizes the circuit courts of appeals to "superintend and revise, in matter of law, the proceedings of the several inferior courts of bankruptcy," is intended as a summary mode of reviewing any alleged erroneous decision upon a question of law, and does not contemplate a review of the facts.—In re Richards (C. C. A.) 935.

A petition to the circuit court of appeals for a review of a decision of the district court sitting in bankruptcy should state specifically the

question of law which was involved and ruled upon by the court, and should be accompanied by a certificate copy of so much of the record as will exhibit the manner in which the question arose, and its determination; and the question of law so presented is the only question which will be decided by the appellate court.—In re Richards (C. C. A.) 935.

On review of decision of referee, counsel desiring to be heard must file exceptions to referee's finding.—In re Carolina Cooperage Co. (D. C.) 604.

Where district court has rendered decree adverse to trustee, in controversy with creditor, and the trustee has lost his right of appeal by expiration of time limited by bankruptcy act, the district court may grant rehearing, on petition thereafter filed to revive his right.—In re Wright (D. C.) 820.

An order of the referee requiring the bankrupt, on his examination, to render to his trustee an account of the profits received by him on the sale of a certain business, and deliver to the trustee the book of account relating thereto, will not be reversed by the court on review, merely on the ground that such accounts, if rendered, might show the money in question was after-acquired property of the bankrupt, and not liable to administration in bankruptcy.—In re Tudor (D. C.) 942.

An order of a referee in bankruptcy, finding that a bankrupt examined before him has money in his possession which he should surrender to his trustee and requiring him to do so, is within his authority and jurisdiction, and will not be reversed by the court of appeal, unless plainly erroneous or based on insufficient evidence.—In re Tudor (D. C.) 942.

When a referee in bankruptcy, upon examination of witnesses, has decided that it is for the interest of an estate in bankruptcy that real property subject to a mortgage should be taken by the trustee and sold in the bankruptcy proceedings, rather than sold by the secured creditors on foreclosure of his lien, the judge will not reverse his decision, on appeal, unless it is manifestly erroneous.—In re Booth (D. C.) 943.

§ 14. Costs and fees.

Where creditor opposes unsuccessfully adjudication in bankruptcy, and property levied on by him is surrendered and sold, the expense of caring for the property in the interim should not be taxed as costs against creditor.—In re Carolina Cooperage Co. (D. C.) 604.

Extra compensation to experts cannot be taxed as costs against a losing party, though stipulation to that effect was made.—In re Carolina Cooperage Co. (D. C.) 604.

Where petition in involuntary bankruptcy was contested by intervening creditor, and issues were determined against him, fees of witnesses summoned by him and by petitioning creditors should be taxed as costs against him.—In re Carolina Cooperage Co. (D. C.) 604.

Under Bankrupt Act 1898, § 2, subsec. 18, where petition in involuntary bankruptcy is filed against corporation, and creditor intervenes and opposes adjudication, but the adjudication is made, costs of the opposition may be taxed against intervener.—In re Carolina Cooperage Co. (D. C.) 604.

Where lien of attachment is dissolved by adjudication, a creditor has no lien for costs incurred in such suit.—In re Young (D. C.) 606.

Under Bankruptcy Act 1898, §§ 40, 48, referees and trustees in bankruptcy are not entitled to commissions on disbursements to creditors entitled to priority and full satisfaction before distribution to general creditors begins.—In re Fielding (D. C.) 800.

Fees allowed out of estate to bankrupt's counsel should not include compensation for unnecessary attendance at examinations nor services rendered bankrupt in litigation over question of discharge, unless the aid was necessary without any fault of bankrupt.—In re Kross (D. C.) 816.

Thirty dollars is a reasonable fee to bankrupt's attorney for professional services up to application for discharge; and a fee of $20 for procuring same, when there is no substantial opposition to its being granted, and the assets are small, and creditors few, is sufficient.—In re Kross (D. C.) 816.

Under Bankruptcy Act, § 64, subd. b, par. 3, the attorney of a voluntary bankrupt may be allowed a fee out of the estate for services necessary to enable bankrupt to bring his case before the court for adjudication.—In re Kross (D. C.) 816.

The court may refuse to allow fees to attorneys for trustee where they had been allowed a fee as attorneys for petitioning creditors covering any services rendered estate.—In re Carolina Cooperage Co. (D. C.) 950.

Where, in involuntary bankruptcy, bankrupt's attorney had no duties to perform except to fill out schedules and give advice, allowance of $25 only will be made.—In re Carolina Cooperage Co. (D. C.) 950.

BANKS AND BANKING.

§ 1. National banks.

The receiver of an insolvent national bank may recover from a stockholder dividends declared and paid after the bank became insolvent, where necessary to meet the demands of creditors.—Hayden v. Williams (C. C. A.) 279.

The receiver of a national bank may be sued in a federal court in relation to a contract made by him on behalf of the estate in the course of its administration.—Gilbert v. McNulta (C. C.) 83.

A judgment recovered by the receiver of an insolvent national bank against a stockholder, on an assessment made by the comptroller, although uncollectible, is not a "bad or doubtful debt," which a court may authorize the receiver to compound, under Rev. St. § 5234.—In re Earle (C. C.) 678.

Shareholders in a national bank who, in good faith, paid an invalid assessment on their stock, on the subsequent winding up of the affairs of the bank by a receiver, and the payment of outside creditors, are entitled, as against the other

shareholders, to repayment of the amount so paid before a general distribution of the remaining assets.—In re Hulitt (C. C.) 785.

Where an officer of a national bank is charged with several offenses, under Rev. St. § 5209, in making at different times false entries in the books, reports, or statements of the association, such offenses may be charged in different counts of the same indictment, as provided in Rev. St. § 1024, as "acts or transactions of the same class of crimes or offenses."—United States v. Berry (D. C.) 842.

BENEFICIAL ASSOCIATIONS.

Building or loan associations, see "Building and Loan Associations."

BILL OF LADING.

See "Carriers," § 1.

BILL OF REVIEW.

See "Equity," § 4.

BONDS.

Municipal bonds, see "Municipal Corporations," § 2.
Sureties on bonds, see "Principal and Surtey."

BROKERS.

§ 1. Rights, powers, and liabilities as to third persons.

A party who made a contract, falsely claiming to represent an undisclosed principal, and stipulating that he should not be personally liable thereon, cannot maintain an action on such contract, either as agent, there being in fact no principal, or as principal, having by his fraud secured immunity from liability thereon as such, and estopped himself to claim rights thereunder correlative with such liability.—Paine v. Loeb (C. C. A.) 164.

BUILDING AND LOAN ASSOCIATIONS.

Where a building and loan association doing business in several states made all its notes and mortgages in the same form, containing a provision that they were made with reference to the laws of Tennessee, in which the association was located, and where the notes were dated and all payments were required to be made, such provisions cannot be construed as intended to evade the usury laws of another state, but will be construed and enforced as Tennessee contracts, in so far as the parties had the power to make them so.—McIlwaine v. Iseley (C. C.) 62.

Under law of North Carolina, borrowing stockholder in insolvent building and loan association is not entitled to cancellation of his mortgage on payment of his loan, or to receive surplus on sale of property under mortgage, until final adjustment of accounts between association and its stockholders.—Lauer v. Covenant Building & Loan Ass'n (C. C.) 775; Ashmore v. Iseley, Id.

A loan contract between a member residing in South Carolina and a building and loan association having its place of business in Washington, D. C., *held* to be a Washington contract, and not subject to the usury laws of South Carolina. —Guarantee Savings, Loan & Investment Co. v. Alexander (C. C.) 870.

CANCELLATION OF INSTRUMENTS.

Cancellation of insurance policy, see "Insurance," § 2.

§ 1. Right of action and defenses.

A deed executed by a sister to a brother, conveying to him in trust for five years her interest in the estate of her deceased father, with full power to deal with the property in his discretion, *held* not improvident under the circumstances, nor fraudulently obtained. — Vrooman v. Grafflin (C. C. A.) 275.

CARRIERS.

§ 1. Carriage of goods.

Act Cong. June 13, 1898, making it the duty of every carrier to issue bill of lading on receipt of acceptance of goods for shipment, to which a stamp must be attached, applies only where the carrier accepts the consignment; and his refusal to accept goods is not a violation of the act.—United States v. Wells, Fargo & Co. Express (D. C.) 835.

§ 2. Carriage of passengers.

A railroad company which authorizes a sale of tickets over its road by another company cannot repudiate the contract made with a passenger who buys a ticket from such agent.—Cowen v. Winters (C. C. A.) 929.

CHANCERY.

See "Equity."

CHANGE OF VENUE.

Of criminal prosecutions, see "Criminal Law," § 3.

CHARTER PARTIES.

See "Shipping," § 1.

CHATTEL MORTGAGES.

§ 1. Requisites and validity.

Execution contemporaneously with chattel mortgage of mere power of attorney, by which mortgagor authorized mortgagee to collect certain notes and dispose of certain property covered by mortgage, did not convert it into assignment void under laws of the Indian Territory, because no inventory or bond was required from assignee. — Bradley v. Hargadine-McKittrick Dry-Goods Co. (C. C. A.) 914.

§ 2. Rights and liabilities of parties.

In action of replevin by chattel mortgagee against third person to recover mortgaged property, defendant is entitled to show in defense

that property was owned by mortgagor's wife, who did not know of or assent to it, unless, by acquiescence or delay in asserting her rights, with knowledge of it, wife has become estopped to question its validity.—Bradley v. Hargadine-McKittrick Dry-Goods Co. (C. C. A.) 914.

CITIES.

See "Municipal Corporations."

CITIZENS.

Citizenship ground of jurisdiction of United States courts, see "Courts," § 3.

CIVIL RIGHTS.

See "Constitutional Law," § 2.

CLAIMS.

Against estate of bankrupt, see "Bankruptcy," § 9.
Of patent, see "Patents," § 5.

CLASS LEGISLATION.

See "Constitutional Law," § 4.

COLLISION.

§ 1. Sail vessels meeting or crossing.

The luffing half a point of a vessel sailing close-hauled, or the subsequent falling off half a point, does not constitute a change of course which would render her in fault under the sailing rules governing the navigation of the lakes, for a collision with a meeting vessel running free.—The Emily B. Maxwell (C. C. A.) 999.

§ 2. Steam vessels meeting or crossing.

Where one of two meeting vessels, on the failure of the other to signal as required by the rules, properly gives the two-blast signal, in accordance with rule 23, she is not required to wait for an answering signal before changing her course accordingly.—The Genevieve (D. C.) 859; The Vulcan, Id.

Evidence as to the fault of a vessel for a collision considered.—The Genevieve (D. C.) 859; The Vulcan, Id.

§ 3. Lights, signals, and lookouts.

Where the fault of one vessel in failing to give proper signals is plainly the cause of another vessel being placed in a dangerous situation, and a collision results, the maneuvers of the latter in attempting to avoid the collision will not be severely scrutinized to place upon her a part of the responsibility.—The Transfer No. 8 (C. C. A.) 253; The R. M. Waterman, Id.

Inspectors' rule No. 5, requiring steamers, on nearing a short bend in the channel where vessels approaching from opposite directions cannot see each other for a distance of half a mile, to give a signal when within half a mile of such bend, is imperative on every steamer "nearing" such bend, whatever may be her intention as to future navigation after she shall have reached it.—The Transfer No. 8 (C. C. A.) 253; The R. M. Waterman, Id.

§ 4. Suits for damages.

In determining, on conflicting testimony, which of two vessels was in fault for a collision, the court will take into consideration the probabilities and presumptions based upon the skill, knowledge, and ability of the crews of the respective vessels, which was the better manned, and the less likely to make a mistake.—The Genevieve (D. C.) 859; The Vulcan, Id.

COMMERCE.

Carriage of goods and passengers, see "Carriers"; "Shipping."

§ 1. Subjects of regulation.

Under Act March 2, 1897, regulating the importation of teas, it is competent for the secretary of the treasury to fix a standard of quality, and to exclude from importation teas below such standard, although in purity, wholesomeness, and fitness for consumption in other respects, they are equal to the standards established.—Buttfield v. Bidwell (C. C. A.) 328.

There is no statute in Arkansas prohibiting importation into the state of laborers alleged to be of a lawless type and a danger to the public peace.—State of Arkansas v. Kansas & T. Coal Co. (C. C.) 353.

§ 2. Means and methods of regulation.

Where a railroad company bound itself by a contract with a city not to discriminate in rates against the city or its inhabitants, a resolution of the city council declaring rates charged by the company between the city and points in other states to be discriminative, and requiring their reduction under penalty of a forfeiture of the contract, is not a law attempting to regulate interstate commerce, but an attempt merely to enforce a lawful contract.—Iron Mountain R. Co. v. City of Memphis (C. C. A.) 113.

Oleomargarine is a lawful subject of commerce; and a state statute (Act Minn. April 19, 1899, § 16) which prohibits the sale of oleomargarine so colored as to resemble butter is unconstitutional and void, in so far as it applies to a sale within the state of oleomargarine manufactured in another state and imported by the agent of the manufacturer, and sold by him in the original and unbroken packages of importation, stamped and marked as required by Act Cong. Aug. 2, 1886 (24 Stat. 209); the product being composed of the materials described in said act as constituting lawful oleomargarine of commerce.—In re Brundage (C. C.) 963.

COMMISSIONERS.

See "United States Commissioners."

COMPENSATION.

Salvage, see "Salvage."

COMPOSITIONS WITH CREDITORS.

From indebtedness, see "Bankruptcy," § 11.

CONDITIONAL SALES.

See "Sales," § 1.

CONSIDERATION.

Of contract, see "Contracts," § 1.

CONSTITUTIONAL LAW.

Enactment and validity of statutes, see "Statutes," § 1.
Subjects and titles of statutes, see "Statutes," § 2.

§ 1. Distribution of governmental powers and functions.

It is not within the power of any court to prescribe rules needful to the welfare or peace of the state, or determine without legislation what class of persons may lawfully come therein.—State of Arkansas v. Kansas & T. Coal Co. (C. C.) 353.

§ 2. Personal, civil, and political rights.

Alien seamen who are being coerced to labor on board an American vessel against their will, and without having voluntarily entered into any contract binding them to such service, are being subjected to involuntary servitude within the United States, in violation of Const. U. S. Amend. 13, and are entitled to a writ of habeas corpus to deliver them from such servitude.—In re Chung Fat (D. C.) 202.

§ 3. Obligation of contracts.

A resolution of a city council declaring a forfeiture of a contract granting an easement and franchise in a street *held* to be a law of the state, within the constitutional provision against the impairment by a state of the obligation of contracts.—Iron Mountain R. Co. v. City of Memphis (C. C. A.) 113.

A statute which merely suspends the operation of a provision of contracts does not become a part of such contracts, made while the statute is in force, and its repeal does not impair their obligation.—Rosenplanter v. Provident Sav. Life Assur. Soc. of New York (C. C. A.) 721.

The prohibition of state legislation impairing the obligation of contracts contained in the federal constitution, and as well a similar prohibition in a state constitution, applies to and protects all contracts, whether made in such state or elsewhere.—Western Nat. Bank v. Reckless (C. C.) 70.

A statute requiring corporations to pay their employés, at least once a month, wages earned during the preceding month, does not deprive corporations of their property without due process of law, by abridging the freedom to make contracts.—Skinner v. Garnett Gold-Min. Co. (C. C.) 735.

§ 4. Privileges or immunities, and class legislation.

Act Cal. §§ 1, 2, relating to corporations (St. 1897, p. 231), requiring corporations to pay employés at least once a month, and prescribing the effect of its violation, do not discriminate against corporations, and are constitutional.—Skinner v. Garnett Gold-Min. Co. (C. C.) 735.

CONTRACTS.

Damages for breach, see "Damages," § 3.
Mental suffering as basis of recovery, see "Damages," § 1.
Of particular classes of parties, see "Carriers," § 2; "Counties," § 1; "Municipal Corporations," § 1.
Particular classes of express contracts, see "Guaranty"; "Insurance"; "Principal and Surety"; "Sales."
—— bills of lading, see "Carriers," § 1.
—— charter parties, see "Shipping," § 1.
Relating to particular subjects, see "Patents," § 6.
—— patented articles, see "Patents," § 7.
—— transportation of passengers, see "Carriers," § 2.
Specific performance, see "Specific Performance."

§ 1. Requisites and validity.

A contract for the sale and purchase of stocks for future delivery, made on the Chicago Stock Exchange, *held* invalid as an option contract, under the Illinois statute.—Clews v. Jamieson (C. C. A.) 648.

The provision contained in the regulations made by the World's Columbian Exposition Company, made known to all intending exhibitors, exempting the company from liability for losses, however originating, was not against public policy, and was a valid part of every contract between the company and an exhibitor, arising from the placing of goods on exhibition.—World's Columbian Exposition Co. v. Republic of France (C. C. A.) 687.

Part payment of wages due employés is not a good consideration for an agreement to extend the time for payment of the remainder.—Skinner v. Garnett Gold-Min. Co. (C. C.) 735.

§ 2. Actions for breach.

In an action for breach of contract in which the claim for damages is based on a liability incurred in reliance on such contract, defendant cannot defend on the ground that such liability is barred by limitation.—Mathesius v. Brooklyn Heights R. Co. (C. C.) 792.

CONVERSION.

Wrongful conversion of personal property, see "Trover and Conversion."

CONVEYANCES.

Particular classes of conveyances, see "Chattel Mortgages"; "Deeds"; "Mortgages."

COPYRIGHTS.

§ 1. Nature and acquisition.

Under the copyright law, which, to secure a copyright for a painting, requires the filing with

the librarian of congress of a description of the painting, and also a photograph of the same, the photograph cannot constitute the description.—Bennett v. Carr (C. C. A.) 213.

§ 2. Infringement.

In an action to recover the statutory penalty for infringement of a copyright, the requirements of the statute to secure a valid copyright will be strictly construed.—Bennett v. Carr (C. C. A.) 213.

CORPORATIONS.

Particular classes of corporations, see "Building and Loan Associations"; "Municipal Corporations."

—— water companies, see "Waters and Water Courses," § 3.

§ 1. Capital, stock, and dividends.

When a corporation is organized, and a subscription to its stock, previously made, is accepted, such subscription becomes a contract, the parties to which are the corporation on one side, and the subscriber on the other.—McNaught v. Fisher (C. C. A.) 168.

§ 2. Members and stockholders.

Code Civ. Proc. N. Y. § 394, as amended in 1897, which requires actions against a stockholder of a moneyed corporation to enforce a liability created by common law or by statute to be brought within three years after the cause of action accrued, is applicable to an action against a stockholder of a corporation of another state.—Hobbs v. National Bank of Commerce of Kansas City, Mo. (C. C. A.) 396.

Evidence of fraud, in an attempted sale of the property of a corporation by a majority of its stockholders, *held* sufficient to entitle the nonassenting stockholders to a temporary injunction restraining a transfer of the property by the purchaser, pending a suit to determine the validity of the sale.—Eldred v. American Palace-Car Co. of New Jersey (C. C.) 59.

A legislative act depriving a creditor of an insolvent corporation of an existing right of action at law against an individual stockholder for the collection of his debt destroys a remedy for the enforcement of his contract, although it permits a suit in the nature of an accounting in equity, to which all creditors and all stockholders of the corporation are necessary parties, as the two remedies are essentially different.—Western Nat. Bank v. Reckless (C. C.) 70.

The New Jersey statute of March 30, 1897 (Laws 1897, p. 124), which provides that no court of law in the state shall entertain any action by a creditor of a corporation, foreign or domestic, against a stockholder, to enforce any statutory personal liability arising under the laws of any other state or foreign country, is void as to actions to enforce contracts made before its passage, as in violation of the provision of the state constitution prohibiting the passage of any law depriving a party of any remedy for the enforcement of a contract existing when such contract was made.—Western Nat. Bank v. Reckless (C. C.) 70.

The liability of a stockholder in a Kansas corporation to any judgment creditor, created by the constitution and statutes of that state, is one arising upon contract, and an action for its enforcement is transitory, and, in the absence of a statute affecting the right, may be maintained in the courts of any state, or in any federal court having jurisdiction of such matters and of the parties.—Western Nat. Bank v. Reckless (C. C.) 70.

§ 3. Corporate powers and liabilities.

Where a corporation by a contract agreed that certain advances to be made to it should be a lien on its property, and that it would execute such further deeds or documents as should be required to perfect the security, and subsequently a mortgage was required, and was executed by its officers with the knowledge and approval of its directors, who agreed to ratify it, though by reason of the absence of some of their number no meeting could then be held, a court of equity will consider the mortgage as ratified, and enforce it, the money having been advanced in reliance thereon.—Nevada Nickel Syndicate v. National Nickel Co. (C. C.) 133.

A corporation may be estopped to question the validity of a mortgage duly executed by its officers over its corporate seal, though not authorized by any action of its directors, where they individually knew and approved of its execution, but, by reason of the absence of some of their number, a meeting could not be held to take formal action thereon.—Nevada Nickel Syndicate v. National Nickel Co. (C. C.) 133.

Under the statute of Illinois, a sheriff's return of service on a corporation defendant by reading and delivering a copy of the summons to its auditor, without showing that the president could not be found in the county, is insufficient.—Collins v. American Spirit Mfg. Co. (C. C.) 133.

§ 4. Insolvency and receivers.

An arrangement between an insolvent corporation and certain creditors by which the latter were secured preferences, and the fact was to be kept secret to enable the corporation to continue in business, *held* to constitute a fraud in fact upon other creditors, which debarred the creditors so preferred from the right to share equally with other creditors in the assets of the corporation.—United States Rubber Co. v. American Oak-Leather Co. (C. C. A.) 891; American Oak-Leather Co. v. United States Rubber Co., Id.

An unsecured creditor of a corporation which was insolvent and about to suspend business, who secured a preference by advancing to the corporation a further sum to be used in paying claims held by its managing officers, is affected as to all his rights as a creditor by the fraudulent preference of the officers to which he was a party.—United States Rubber Co. v. American Oak-Leather Co. (C. C. A.) 891; American Oak-Leather Co. v. United States Rubber Co., Id.

The keeping secret of an arrangement by which certain creditors of a corporation, which is insolvent, are given preferences, for the purpose of enabling the corporation to continue in business, with the knowledge that such continuance necessarily involves the contracting of

new debts, and that such credit could not be secured if the facts were known, constitutes a fraud upon those who were thus induced to become creditors, although there was no specific intention to defraud them.—United States Rubber Co. v. American Oak-Leather Co. (C. C. A.) 891; American Oak-Leather Co. v. United States Rubber Co., Id.

Where certain creditors of an insolvent corporation secured preferences by an arrangement which was fraudulent as to other creditors, and for that reason deprived them of the right to share with such other creditors in the assets of the corporation, a third preferred creditor, who became a party to the fraudulent transaction by making an agreement to share with them pro rata the proceeds of all collections made by either on their claims, is equally debarred by the fraud, and his claim will be postponed to those of the general creditors.—United States Rubber Co. v. American Oak-Leather Co. (C. C. A.) 891; American Oak-Leather Co. v. United States Rubber Co., Id.

An assignee in insolvency of a Maine corporation, who is given by the statutes of that state a right of action against its stockholders to recover on subscriptions to stock issued without bona fide payment of full value therefor, which right of action did not exist in the corporation, may maintain such an action in a federal court of another jurisdiction.—Dunn v. Howe (C. C.) 160.

Under the statute of Maine making any person subscribing for or agreeing to take stock of a corporation who does not pay for the same liable for its par value to a representative of the corporation, in insolvency for the benefit of its creditors, one to whom stock is voted and delivered, though he has the certificates made in the name of another, is the person liable, where the stock is not paid for, and a subsequent holder to whom the stock has been transferred and new certificates issued cannot be held liable, when it does not appear that the stock was ever owned by the corporation after its original issuance, or that he ever had any dealings in relation thereto with the corporation.—Dunn v. Howe (C. C.) 160.

No assessment by a court is necessary to authorize the receiver or assignee of an insolvent corporation to maintain an action against stockholders to recover unpaid subscriptions, where the deficiency in the assets is equal to the amount of unpaid stock.—Dunn v. Howe (C. C.) 160.

Proof of usurpation, ultra vires, fraud, or gross negligence on the part of the directors will alone justify a court in appointment of a receiver for a solvent corporation at suit of a stockholder.—Griffing v. A. A. Griffing Iron Co. (C. C.) 577.

§ 5. Foreign corporations.

A mortgage executed by a foreign mining corporation on mining ground in California is void unless ratified by the holders of two-thirds of the capital stock, as required by the statute of that state.—Williams v. Gold Hill Min. Co. (C. C.) 454.

COSTS.

In bankruptcy, see "Bankruptcy," § 14.

§ 1. Nature, grounds, and extent of right in general.

When a plaintiff in an action at law or a suit in equity for a money decree recovers less than $500, exclusive of costs, under Rev. St. § 968, he cannot recover his costs, and may, in a case where the court has discretion in the matter, be taxed with the defendant's costs.—Van Siclen v. Bartol (C. C.) 796.

COUNTERCLAIM.

See "Set-Off and Counterclaim."

COUNTIES.

§ 1. Property, contracts, and liabilities.

A county board having statutory authority to select plans for a public building may voluntarily, in the exercise of its discretion, confine its choice to one of a number selected by others, but it has no power to bind itself in advance to do so.—Price v. Board of Chosen Freeholders of Passaic County (C. C. A.) 174.

A letter, issued by a county board to architects, soliciting the submission of plans for a court house in competition, construed, and *held* not to constitute an agreement that the selection should be limited to those which were recommended by a third person who was to act as professional adviser of the board. — Price v. Board of Chosen Freeholders of Passaic County (C. C. A.) 174.

§ 2. Fiscal management, public debt, and securities.

Code N. C. § 1996, providing that "the boards of commissioners of the several counties shall have power to subscribe stock to any railroad company or companies when necessary to aid in the completion of any railroad in which the citizens of the county may have an interest," applies only to railroads which had been commenced prior to the adoption of the constitution of 1868, in which a county has a pecuniary interest, and which have not been "completed."—Board of Com'rs of Stanly County v. Coler (C. C. A.) 284.

COURTS.

Jurisdiction in criminal prosecutions, see "Criminal Law," § 2.
Removal of action from state court to United States court, see "Removal of Causes."

§ 1. United States courts—Jurisdiction and powers in general.

A remedy at law to oust a federal court of equitable jurisdiction must be one which existed at common law when the judiciary act of 1789 was passed, or which has been provided by congress, and a statutory action of forcible entry and detainer not maintainable in a federal court is not such a remedy.—Pokegama Sugar Pine Lumber Co. v. Klamath River Lumber & Improvement Co. (C. C.) 34.

A suit in a federal court to obtain a construction and enforcement of a decree of the same court is ancillary to the former suit, and the court has jurisdiction regardless of the citizenship of the parties.—Jenks v. Brewster (C. C.) 625.

§ 2. —— Jurisdiction dependent on nature of subject-matter.

The exercise by a city of its legislative power of controlling streets, and of making and enforcing contracts with reference to their use by persons and corporations, is an action by the state within the constitutional provision prohibiting states from depriving any person of his property without due process of law, and a federal court has jurisdiction of a suit to enjoin a city from enforcing a resolution which assumes to forfeit the rights of a railroad company in a street, and a threatened forcible eviction of the company thereunder.—Iron Mountain R. Co. v. City of Memphis (C. C. A.) 113.

A resolution of a city council assuming to declare a forfeiture of an easement in a street granted by a contract to a railroad company on the ground of a breach of the contract by the company, and to devest the company of its title and right of possession thereunder, is unconstitutional, as an impairment of the obligation of the contract, if in fact there has been no breach of the contract by the company which, either in fact or law, justifies a forfeiture; and a circuit court of the United States has jurisdiction of a suit to enjoin its enforcement on that ground, though such suit involves the determination of questions of fact as well as law.—Iron Mountain R. Co. v. City of Memphis (C. C. A.) 113.

When the jurisdiction of a federal court is invoked on the ground that the suit arises under the laws of the United States, such facts must be alleged in the bill as to make it affirmatively appear to the court that the proper determination of the suit really and substantially involves a dispute or controversy as to the effect or construction of such law.—Dewey Min. Co. v. Miller (C. C.) 1.

A suit in equity to determine conflicting claims under mining locations on public lands is not within the jurisdiction of a federal court, as involving the construction or effect of the mining laws of the United States, where, so far as appears from the averments of the bill, the only controversy between the parties may be over questions of fact.—Dewey Min. Co. v. Miller (C. C.) 1.

A bill alleging that a patent to a mining claim was obtained by defendant by fraud, and issued without authority of law, and asking that it be decreed to be held in trust for complainants, states a cause of action necessarily involving a federal question.—Cates v. Producers' & Consumers' Oil Co. (C. C.) 7.

It is necessary to the existence of a federal question in a suit that there should be an actual dispute as to the construction of a law of the United States, and that such construction should be material to a determination of the cause; and these must appear from the plaintiff's statement of his own claim, in the form required by good pleading.—California Oil & Gas Co. v. Miller (C. C.) 12.

A bill to quiet title to a mining claim, eliminating all allegations relating to the claims and contentions of defendants, though complainant's claim of title is based on the mining laws of the United States, does not show that the construction or effect of such laws is in dispute.—California Oil & Gas Co. v. Miller (C. C.) 12.

In a suit to quiet title, the complainant need not do more than to allege his own title, and that the defendant claims adversely to him. The nature of the adverse claim, its source, and the manner in which it originated are immaterial, and, if such matters are alleged, they must be disregarded for the purpose of determining whether the bill discloses a federal question.—California Oil & Gas Co. v. Miller (C. C.) 12.

To confer jurisdiction on a federal court of a suit brought by a federal receiver of another court, it is essential that it should involve the jurisdictional amount of $2,000.—Sullivan v. Swain (C. C.) 259.

A federal question to give a circuit court of the United States jurisdiction, either original or by removal from a state court, must appear by the plaintiff's statement to be a necessary part of his claim.—Henuy v. La Compagnie Generale Transatlantique, etc. (C. C.) 497.

§ 3. —— Jurisdiction dependent on citizenship, residence, or character of parties.

A suit between a state and a corporation of another state is not a suit between citizens of different states, giving a federal court jurisdiction on the ground of diverse citizenship.—State of Arkansas v. Kansas & T. Coal Co. (C. C.) 353.

A consolidated railroad corporation formed of corporations of different states, under concurrent legislation of such states, *held* to be the successor in law of one of such corporations, and, as such, a corporation and citizen of the state in which the constituent corporation was created, for the purposes of the jurisdiction of the federal courts.—Smith v. New York, N. H. & H. R. Co. (C. C.) 504.

A suit to cancel a mortgage on real estate is of a local nature, and may be maintained in a federal court of the district where the property is situated, where there is the requisite diversity of citizenship and amount involved to give it jurisdiction, without regard to the residence of the parties.—Cowell v. City Water-Supply Co. (C. C.) 769.

§ 4. —— Jurisdiction dependent on amount or value in controversy.

In a suit in a federal court to set aside a conveyance of property, the value of the property and rights which will be affected if the relief prayed for is granted constitutes the amount in dispute for jurisdictional purposes.—Cowell v. City Water-Supply Co. (C. C.) 769.

Owners in severalty of lots abutting on a city street cannot, by joining as complainants, maintain a suit in a federal court to enjoin the city from levying an assessment on such lots, where the amount of the assessment against the prop-

erty of no one complainant equals $2,000.—Wheless v. City of St. Louis (C. C.) 865.

§ 5. —— State laws as rules of decision.

The decision of the supreme court of a state that certain bonds issued by a county were void for want of power in the county, under the state constitution and statutes, to issue them, is binding on a federal court in a suit upon the same bonds, although the plaintiff was not a party to the state decision, unless at the time the bonds were issued and sold the constitution or statutes had been given a different construction.—Board of Com'rs of Stanly County v. Coler (C. C. A.) 284.

Where the highest court of a state has directly determined that a state statute authorizing counties to issue bonds was not passed in conformity to the requirements of the constitution, and is therefore not a law of the state, such decision is binding on a federal court in a subsequent action brought therein to enforce bonds purporting to have been issued under such statute, though the parties to such suit were not parties to the state decision.—Board of Com'rs of Stanly County v. Coler (C. C. A.) 284.

The fact that the supreme court of a state on one appeal sustained the validity of a statute does not affect its right to declare the statute void on a subsequent appeal, in the same suit, on a ground not presented by the record or considered on the first appeal, nor the weight to be given to such decision by a federal court.—Board of Com'rs of Oxford, N. C., v. Union Bank of Richmond (C. C. A.) 293.

A decision of the supreme court of a state holding municipal bonds void for want of power in the municipality to issue them, the question being one depending on the construction of the state constitution and the validity of state statutes, will be followed by a federal court in an action between the same parties on the same bonds, though, by reason of a nonsuit taken by plaintiff, the decision of the state court did not pass into a final judgment, so as to render the question res judicata.—Board of Com'rs of Oxford, N. C., v. Union Bank of Richmond (C. C. A.) 293.

Under the decisions of the supreme court of North Carolina, a mortgage contract covering land in that state must be construed with reference to its usury laws, without regard to the expressed intention of the parties. *Held*, that a federal court, in a suit to foreclose a mortgage on land in that state, would follow the rule of such decisions as a rule of property.—McIlwaine v. Iseley (C. C.) 62.

The decisions of the supreme court of California, holding that judgment creditors of a mining corporation may question the validity of a mortgage given by the corporation on its real property, on the ground that it was not ratified by the stockholders, as required by the state statute, are local and binding on a federal court.—Williams v. Gold Hill Min. Co. (C. C.) 454.

In a suit for the foreclosure of a mortgage upon real estate situated within the jurisdiction of the court, it is the right and within the power of a circuit court of the United States to conform to any statute of the state regulating the remedy for the enforcement of the mortgage contract.—Deck v. Whitman (C. C.) 873.

§ 6. Concurrent and conflicting jurisdiction, and comity.

Where a federal court, by a suit brought by a railroad company to enjoin the enforcement of a city ordinance on the ground of its unconstitutionality, as impairing the obligation of a contract, has acquired lawful jurisdiction of the subject-matter, it is its duty to protect such jurisdiction by enjoining the prosecution by the city of an action commenced some time afterwards in a state court for the enforcement of the ordinance.—Iron Mountain R. Co. v. City of Memphis (C. C. A.) 113.

A pending suit in a federal court to foreclose a mechanic's lien on property does not deprive a state court of jurisdiction to entertain a suit, brought by one not made a party to the suit in the federal court, to establish a prior lien on a structure erected on such property after the mechanic's lien was filed.—Jenks v. Brewster (C. C.) 625.

A federal court *held* to have acquired prior jurisdiction of the parties and subject-matter of a suit, which would be protected by an injunction restraining the defendants from further proceeding in a suit in a state court.—Rodgers v. Pitt (C. C.) 668.

A federal circuit court has jurisdiction to release, on habeas corpus, a person sentenced to imprisonment upon conviction in a state court of a violation of a penal statute of the state, which statute is void for conflict with the constitution of the United States; but, for comity's sake, it will not exercise this power, unless where large interests, affecting the business of many, or the rights of the public, are so involved that serious consequences would follow from the delay necessary to the prosecution of a writ of error, or unless the state court, in convicting the prisoner under the statute, has disregarded a decision of the United States supreme court upon the question at issue.—In re Brundage (C. C.) 963.

Federal court should not exercise its power to discharge from custody, on habeas corpus, a person held on a state process, on the ground that his detention is in violation of the constitution, when suitable relief can be had through the regular procedure in the state courts.—In re Bradley (C. C.) 969.

Person arrested by state authorities charged with the commission of a crime will not be discharged from custody by a federal court on habeas corpus, on the ground that the offense is charged to have been committed within the limits of grounds ceded as a soldiers' home, and over which the United States have exclusive jurisdiction.—In re Bradley (C. C.) 969.

CREDITORS.

See "Bankruptcy"; "Marshaling Assets and Securities."

Rights and remedies of surety, see "Principal and Surety," § 1.

CREDITORS' SUIT.

After a court has assumed charge of the affairs of a corporation on a creditors' bill alleging insolvency, and has required other creditors to come in and prove their claims, the parties to the record no longer have the right by agreement between themselves to terminate the suit, but an application to dismiss is addressed to the discretion of the court which, in acting upon it, will consider the interest of those who, by its own orders, made at the instance of the parties, have been brought into the litigation.—Johnson v. Miller (C. C. A.) 271.

CRIMINAL LAW.

See "Obstructing Justice."
Adulteration of food, see "Food."
Indictment, information, or complaint, see "Indictment and Information."

§ 1. Nature and elements of crime and defenses in general.

The fact that an act of congress creating an offense against the revenue laws, such as defacing or removing stamps or brands from packages, delegates to an administrative department the duty of designing and preparing such stamps or brands, and regulating the manner of their use, does not render their defacement or removal any the less a statutory offense.—Wilkins v. United States (C. C. A.) 837.

§ 2. Jurisdiction.

The offense of fraudulently securing the transportation of property by a carrier at less than the regular rates, within the provision of the interstate commerce act, is committed at the place where the goods are delivered for transportation, the false billing, etc., made, and the illegal rate secured; and a court in another district, in which the goods were delivered to the consignee, has no jurisdiction of such offense.—In re Belknap (D. C.) 614.

§ 3. Venue.

The only ground which will justify a court in refusing a warrant for the removal to another district, for trial, of a person arrested on a commissioner's warrant based on an indictment found in such other district, is that such indictment does not on its face charge an offense within the jurisdiction of the court in which it was returned.—In re Belknap (D. C.) 614.

CROSS-EXAMINATION.

See "Witnesses," § 1.

CUSTODY.

Of property of bankrupt, see "Bankruptcy," § 4.

CUSTOMS DUTIES.

§ 1. Goods subject to duty, rate, and amount.

Glass tubes for the transportation of chloride of ethyl, so made that the contents can be applied directly therefrom in its use as a local anæsthetic, which are worthless after the contents are exhausted, are not separately dutiable by reason of the provisions of section 19 of the customs administration act of June 10, 1890, as unusual forms of covering designed for use otherwise than for the bona fide transportation of their contents.—In re Hempstead (C. C.) 94.

§ 2. Entry and appraisal of goods, bonds, and warehouses.

It being shown without contradiction that what is known as the "fire process" of assaying ores for lead is exclusively used in assays made for commercial purposes, such method, and not the "wet process," is the one which the secretary of the treasury is required by the positive provisions of paragraph 6 of the sundry civil appropriation act of March 2, 1895 (2 Supp. Rev. St. p. 430), to adopt in making assays of imported ores for the purpose of the assessment of duty thereon, as such provisions were not repealed by paragraph 181 of the tariff act of 1897 (Act July 24, 1897), but apply to the assessment of duties thereunder.—In re Puget Sound Reduction Co. (C. C.) 90.

DAMAGES.

For particular injuries, see "Libel and Slander," § 2; "Nuisance," § 1.
Recovery for wrongful conversion, see "Trover and Conversion," § 1.

§ 1. Grounds and subjects of compensatory damages.

Mental anguish and distress cannot be the basis for a recovery of damages for a breach of contract.—McBride v. Sunset Telephone Co. (C. C.) 81.

§ 2. Exemplary damages.

Where the general passenger agent of a railroad company deliberately repudiated tickets sold by his authority, and, under his orders, a passenger who had purchased one of such tickets in good faith was ejected from a train, he is entitled to recover exemplary damages.—Cowen v. Winters (C. C. A.) 929.

§ 3. Measure of damages.

Defendant who contracted for the services of a third person, to be furnished by the other party, and for which defendant agreed to pay a stipulated sum, *held* liable, on a breach of the contract, for such sum as damages.—Mathesius v. Brooklyn Heights R. Co. (C. C.) 792.

DEATH.

Of party to action ground for abatement, see "Abatement and Revival," § 2.

§ 1. Actions for causing death.

Under the statutes of Oregon, adopted by act of congress as the laws of Alaska, the wrongful or negligent killing of a person in Alaska creates a cause of action in favor of his administrator, though appointed in a different state, where the decedent was domiciled, which may be enforced in any court having jurisdiction of the subject-matter and the parties.—Erickson v. Pacific Coast S. S. Co. (C. C.) 80.

A right of action for wrongful death is governed by the law of the place where the tort which caused the death was committed.—Erickson v. Pacific Coast S. S. Co. (C. C.) 80.

Under Rev. St. Ohio, § 6135, a foreign administrator suing for a death by wrongful act is the real party to the suit, and may bring the action in the federal court, although the beneficiaries reside where the death occurred.—Popp v. Cincinnati, H. & D. Ry. Co. (C. C.) 465.

DEBTOR AND CREDITOR.

See "Bankruptcy."

DECLARATION.

In pleading, see "Pleading," § 1.

DEEDS.

Cancellation, see "Cancellation of Instruments."
Married women, see "Husband and Wife," § 1.

§ 1. Construction and operation.

Under the Indiana statute requiring a grantor, if it is his intention to create by a conveyance an estate less than one of inheritance, to express such intention in his deed, a proviso in a deed, following the granting clause that the grantee shall take only a life estate, with remainder in fee to others, is a sufficient expression of intention to limit the estate of the first grantee to a life interest.—Williams v. Hedrick (C. C. A.) 657.

A deed of a life estate, with remainder in fee to the children of the life tenant if he should leave any surviving him, and, if not, to his nephew, who was named, the life tenant being without children, vested the nephew with an estate in remainder, subject to divestment by the death of the life tenant leaving children, which he may maintain any proper action to protect.—Williams v. Hedrick (C. C. A.) 657.

DEFAMATION.

See "Libel and Slander."

DELIVERY.

Of mortgage, see "Mortgages," § 1.

DEMURRER.

In pleading, see "Equity," § 3.

DEPOSITIONS.

In admiralty, see "Admiralty," § 1.

DESCENT AND DISTRIBUTION.

See "Executors and Administrators."

DISCHARGE.

From indebtedness, see "Bankruptcy," § 12.

DISCLAIMER.

Affecting claim of patent, see "Patents," § 4.

DISTRIBUTION.

Of estate of bankrupt, see "Bankruptcy," § 9.

DOCUMENTS.

As evidence in civil actions, see "Evidence," § 1.

DUTIES.

Customs duties, see "Customs Duties."
Excise duties, see "Internal Revenue."

EMPLOYES.

See "Master and Servant."

EQUITY.

Equitable estoppel, see "Estoppel," § 1.
Particular subjects of equitable jurisdiction and equitable remedies, see "Cancellation of Instruments"; "Creditors' Suit"; "Injunction"; "Marshaling Assets and Securities"; "Receivers"; "Specific Performance."
—— suits for infringement of patents, see "Patents," § 8.

§ 1. Jurisdiction, principles, and maxims.

A remedy at law, in order to exclude jurisdiction of a federal court of equity, must be practical, and as efficient to the ends of justice and its prompt administration as the remedy in equity.—Pokegama Sugar Pine Lumber Co. v. Klamath River Lumber & Improvement Co. (C. C.) 34.

Where a complainant's right to the possession of real property of which he has been forcibly dispossessed by defendant rests upon equitable grounds, an action of ejectment does not afford him an adequate remedy which will deprive a federal court of equity of jurisdiction.—Pokegama Sugar Pine Lumber Co. v. Klamath River Lumber & Improvement Co. (C. C.) 34.

Municipal corporations cannot be enjoined from use of funds, nor can the funds be subjected to payment of judgment, where there is a remedy by mandamus.—Safe-Deposit & Trust Co. of Baltimore v. City of Anniston (C. C.) 661.

Equity gives no relief where there is a legal remedy in theory, though inadequate in practice.—Safe-Deposit & Trust Co. of Baltimore v. City of Anniston (C. C.) 661.

§ 2. Laches and stale demands.

A court of equity will not refuse to reform a release in aid of an action at law for a personal injury on the ground of laches in commencing the suit, where a reasonable excuse is shown, and it does not appear that the delay will result in the loss of material evidence to the defendant in the action.—Wabash Ry. Co. v. Lumley (C. C. A.) 773.

A holder of bonds secured by trust deed who permits the trustee to conduct foreclosure proceedings in such a fraudulent manner as to render the decree and sale thereunder void, without making any objection or calling the court's attention to the facts, is guilty of such laches as will, if unexcused, preclude him from maintaining a suit to set aside such decree and sale.—Cutter v. Iowa Water Co. (C. C.) 777.

§ 3. Pleading.

A bill is not demurrable because it contains prayers for alternative relief, where they are not inconsistent, are founded on the same facts, and are responsive to the allegations of the bill.—McGraw v. Woods (C. C.) 56.

A bill in equity to subject funds of a municipal corporation to payment of a judgment is demurrable, where allegations fail to show trial or inadequacy of remedy by mandamus.—Safe-Deposit & Trust Co. of Baltimore v. City of Anniston (C. C.) 661.

A bill seeking the vacation of a decree and of subsequent proceedings based thereon as void is not multifarious because it alleges, as grounds of such invalidity, fraud on the part of parties to the decree, and also invalid action by the court.—Cutter v. Iowa Water Co. (C. C.) 777.

A bill containing prayers for alternative relief which are antagonistic, and depend on different states of facts which are inconsistent, is multifarious.—Cutter v. Iowa Water Co. (C. C.) 777.

§ 4. Bill of review.

A bill, filed by one not personally a party to a prior decree of the court, attacking the validity of such decree, and asking its vacation because of matters outside of the decree itself, and not alleged to have been newly discovered, is not a bill of review.—Cutter v. Iowa Water Co. (C. C.) 777.

ESTATES.

Created by deed, see "Deeds," § 1.

ESTOPPEL.

Of married woman, see "Husband and Wife," § 1.

§ 1. Equitable estoppel.

A lessor *held* to have waived a failure by the lessee to comply with the terms of the lease by acquiescence, and to be estopped to declare a forfeiture on account of such breach of contract.—Pokegama Sugar Pine Lumber Co. v. Klamath River Lumber & Improvement Co. (C. C.) 34.

EVIDENCE.

See "Witnesses."

Admiralty, see "Admiralty," § 1.

In action for slander, see "Libel and Slander," § 2.

§ 1. Documentary evidence.

In a suit between the receiver of a national bank and a stockholder, the books of the bank are evidence to establish acts of the corporation and its financial condition at a particular time, though not as to dealings between the corporation and the defendant.—Hayden v. Williams (C. C. A.) 279.

EXCEPTIONS, BILL OF.

Necessity for purpose of review, see "Appeal and Error," § 2.

EXCISE.

Duties, see "Internal Revenue."

EXECUTORS AND ADMINISTRATORS.

See "Wills."

§ 1. Actions.

A legatee cannot maintain an action against a former executor of the will for an alleged devastavit where there is an administrator c. t. a., except in case the latter cannot properly represent the estate, or refuses to act; and a request by such administrator, in response to a demand for bringing suit, for such information in regard to the evidence as will show the probability of a recovery, cannot be construed as a refusal to sue.—McGrotty v. Fletcher (C. C.) 264.

§ 2. Foreign and ancillary administration.

Under Rev. St. Ohio, § 6133, a foreign administrator may bring an action for death by wrongful act, as authorized by sections 6134, 6134a, 6135.—Popp v. Cincinnati, H. & D. Ry. Co. (C. C.) 465.

EXEMPLARY DAMAGES.

See "Damages," § 2.

FACTORS.

See "Brokers."

FEDERAL COURTS.

See "Courts," §§ 1–5.

FEDERAL QUESTIONS.

Ground for removal of cause, see "Removal of Causes," § 1.

—— for jurisdiction, see "Courts," § 2.

FEES.

In bankruptcy, see "Bankruptcy," § 14.

FOOD.

An indictment for removing a brand from a package containing oleomargarine *held* sufficient.—Wilkins v. United States (C. C. A.) 837.

FORECLOSURE.

Of mortgage, see "Mortgages," § 8; "Railroads," § 2.

FORFEITURES.

Of insurance, see "Insurance," § 8.

GUARANTY.

§ 1. Requisites and validity.

A promise made by an individual that the terms of a subscription to the stock of a corporation should be complied with by the corporation is without consideration, as a guaranty to a subscriber who had previously paid for and received his stock.—McNaught v. Fisher (C. C. A.) 168.

HABEAS CORPUS.

§ 1. Jurisdiction, proceedings, and relief.

The sufficiency of the evidence on which an accused was committed by a magistrate is not open to review in a proceeding by habeas corpus, but where, although there was evidence of the commission of the offense, there was no competent evidence even tending to incriminate the person charged, he should be discharged on habeas corpus.—Ex parte Jones (C. C.) 200.

HEARING.

In admiralty, see "Collision," § 4.

HUSBAND AND WIFE.

§ 1. Wife's separate estate.

Under the Indiana statute relating to married women, a married woman who conveys realty for the purpose of enabling the grantee to make a mortgage thereon, which he does to one having no knowledge of the facts, is estopped from setting up the invalidity of the transaction to defeat the mortgage.—Bragg v. Lamport (C. C. A.) 630.

IMMIGRATION.

Regulation, see "Aliens," § 1.

IMPROVEMENTS.

Public improvements, see "Municipal Corporations," § 1.

INDIANS.

The provision of the general act of July 4, 1884 (23 Stat. 96), giving Indians the right to avail themselves of the homestead laws, and providing that patents for homesteads taken by Indians shall be of legal effect and declaring that the United States will hold the land in trust for 25 years, during which time it shall be exempt from taxation, is prospective only in its operation, and does not affect land to which an Indian had perfected his right of homestead under Act 1875, prior to its passage.—United States v. Saunders (C. C.) 268.

Act Jan. 18, 1881 (21 Stat. 315), relating to homesteads acquired by Indians, is a special act which, by its terms, applies only to the Winnebagoes of Wisconsin, and a clause in a patent issued to an Indian of a different tribe, for a homestead acquired under Act March 3, 1875, which clause embodies the provision of Act 1881, § 5, prohibiting the alienation of the land for 20 years, is void.—United States v. Saunders (C. C.) 268.

There is no ground upon which the United States can maintain a suit in equity against the grantees of an Indian who are in possession of land conveyed to such Indian by a patent issued by the land department, containing a provision prohibiting its alienation for the purpose of annulling the deed to defendants, in the absence of a law forfeiting the grant in case of such alienation.—United States v. Saunders (C. C.) 268.

The insertion of a void provision in a patent for a homestead, restricting the grantee's right of alienation, does not affect the validity of the patent to convey the title.—United States v. Saunders (C. C.) 268.

INDICTMENT AND INFORMATION.

See "Obstructing Justice."

§ 1. Requisites and sufficiency of accusation.

Regulations made by an executive department, in pursuance of authority conferred by congress, have the force of law, and the courts will take judicial notice of their existence and provisions; hence an indictment for the violation of such a regulation, which is made an offense by statute, need not set out such regulation.—Wilkins v. United States (C. C. A.) 837.

An indictment containing counts charging defendants jointly with offenses, and other counts charging one as principal and the other as accessory, considered, and *held* good on demurrer.—United States v. Berry (D. C.) 842.

INFRINGEMENT.

Of patent, see "Patents," § 8.
Of trade-mark, see "Trade-Marks and Trade-Names," § 3.

INJUNCTION.

§ 1. Preliminary and interlocutory injunctions.

An injunction restraining certain classes of persons from coming into the state dissolved, the courts having no power to grant the same.—State of Arkansas v. Kansas & T. Coal Co. (C. C.) 353.

INSOLVENCY.

See "Bankruptcy."
Of corporation, see "Corporations," § 4.

INSURANCE.

§ 1. The contract in general.

A policy of life insurance which by its terms remains in force for one year, but is renewable from year to year during the life of the insured

by the payment of stipulated premiums, is a "term contract for one year or less," within the meaning of Laws N. Y. 1892, c. 690, which excepts such contracts from those requiring notice before forfeiture for nonpayment of premiums.—Rosenplanter v. Provident Sav. Life Assur. Soc. of New York (C. C. A.) 721.

§ 2. Cancellation, surrender, abandonment, or rescission of policy.

Where the holder of a life insurance policy in a mutual company refused to pay a mortuary call, and announced to the company that he had "quit" on account of dissatisfaction with an increase in the rate of assessments, such action terminated the contract, and there can be no recovery on the policy on his subsequent death, regardless of the question of the legality of the company's action in increasing the rate of assessment.—Ryan v. Mutual Reserve Fund Life Ass'n (C. C.) 796.

§ 3. Forfeiture of policy for breach of promissory warranty, covenant, or condition subsequent.

A policy of life insurance, issued subject to the laws of New York, *held* forfeited by its terms for nonpayment of premiums.—Rosenplanter v. Provident Sav. Life Assur. Soc. of New York (C. C. A.) 721.

Under Laws N. Y. 1877, c. 321, requiring life insurance companies to mail a notice to policy holders at least 30 days before the maturity of a premium payment, to entitle it to declare a forfeiture for the nonpayment due, a notice mailed September 1, of the maturity of a payment on October 1, is ineffectual.—Rosenplanter v. Provident Sav. Life Assur. Soc. of New York (C. C. A.) 721.

§ 4. Payment or discharge.

Insurance company *held* not to have elected to pay a loss in money, so as to preclude it from exercising an option to repair given it by the policy, by participating in an appraisal of the amount of the damage.—Langan v. Ætna Ins. Co. (C. C.) 705.

§ 5. Actions on policies.

A provision of a life insurance policy that no suit shall be maintained thereon, "unless the same shall be commenced within twelve months after the death of said insured," is ambiguous, and the limitation will be enforced in accordance with the plain meaning of its terms, where the declaration counts on the contract alone, and alleges no extrinsic facts excusing delay in bringing suit.—Kettenring v. Northwestern Masonic Aid Ass'n (C. C.) 177.

INTERNAL REVENUE.

A team and wagon used for the conveyance of liquors being removed with intent to defraud the government of the tax thereon, in violation of Rev. St. § 3450, are not subject to forfeiture where they were so used without the knowledge or consent of the legal owner, and he was guilty of no negligence.—United States v. Two Barrels Whisky (C. C. A.) 479.

There is no statute of the United States requiring or permitting a collector of internal revenue to make or certify copies of reports on file in his office, and a state has no authority, either in its sovereign capacity or as a litigant, to impose such duty upon him.—In re Comingore (D. C.) 552.

The reports made by a distiller or by a storekeeper or other officers to a collector under the internal revenue laws are in no sense public records, but are the private property of the United States, the custody and use of which the secretary of the treasury has the lawful authority to control by proper regulations.—In re Comingore (D. C.) 552.

A regulation promulgated by the commissioner of internal revenue, with the approval of the secretary of the treasury, prohibiting collectors from producing their records or copies thereof for use by third persons or for use as evidence in behalf of litigants in any court, is a binding regulation, and a state court has no authority to require a collector to violate it, or to punish him for contempt because of his refusal to do so, or his refusal to testify to the contents of such records.—In re Comingore (D. C.) 552.

INTERSTATE COMMERCE.

Regulation, see "Commerce."

INVENTION.

See "Patents."

ISSUES.

Presented for review on appeal, see "Appeal and Error," § 2.

JUDGES.

See "Courts."

JUDGMENT.

Review, see "Appeal and Error."

§ 1. Conclusiveness of adjudication.

Where a decree determining rights of one not a party to the suit is affirmed on appeal, such rights become res judicata in the suit, and cannot be relitigated on a supplemental bill filed after the cause is remanded.—Voorheis v. Blanton (C. C.) 497.

JURISDICTION.

Actions for causing death, see "Death," § 1.
Amount in controversy, see "Courts," § 4; "Removal of Causes," § 3.
Criminal prosecutions, see "Criminal Law," § 2.
Of habeas corpus proceedings, see "Habeas Corpus," § 1.
Particular courts, see "Courts."

LETTERS PATENT.

For inventions, see "Patents."

LIBEL AND SLANDER.

§ 1. Words and acts actionable, and liability therefor.

While every individual has an absolute right to refuse any business relations with another,

such right is limited to his own individual action, and if without just cause, and through ill will, malice, or other evil motive, he influences others to do the same, he is guilty of an actionable wrong.—Chiatovich v. Hanchett (C. C.) 681.

The publication by employers of a notice to their employés intended to influence them against associating with or trading with a third person, under threat of discharge, if made without justifiable cause and from motives of malice or ill will, is actionable. — Chiatovich v. Hanchett (C. C.) 681.

§ 2. Actions.

On the question whether a publication was defamatory, it is competent for the plaintiff to show the understanding of the meaning of the words used by persons who read it, and who resided in the community and knew both the parties.—Chiatovich v. Hanchett (C. C.) 681.

In an action for libel in which plaintiff was entitled to recover damages for injury both to his reputation and his business, a verdict for $4,700 will not be held excessive.—Chiatovich v. Hanchett (C. C.) 681.

Where a publication is capable of a construction that is defamatory, a defendant cannot complain that the question whether or not it was defamatory is submitted to the jury.—Chiatovich v. Hanchett (C. C.) 681.

LIENS.

See "Maritime Liens."

Effect of proceedings in bankruptcy, see "Bankruptcy."

LIMITATION.

Of claim of patent, see "Patents," § 5.

LIMITATION OF ACTIONS.

§ 1. Statutes of limitation.

The general rule is that, in respect to the limitation of actions, the law of the forum governs, and while the courts will enforce a limitation established under the law of another state, when applicable, they will not do so to the exclusion of the law of the forum.—Hutchings v. Lamson (C. C. A.) 720.

§ 2. Pleading, evidence, and province of court and jury.

Unless a declaration shows affirmatively a case outside of all exceptions declared in a statute of limitations, the question of limitation cannot be raised by demurrer, but the facts which exclude the exceptions must be set up by plea.—Hutchings v. Lamson (C. C. A.) 720.

LOAN COMPANIES.

See "Building and Loan Associations."

MARITIME LIENS.

§ 1. Creation, operation, and effect.

The conversion, by the master, of goods shipped on a vessel, constitutes a tort, and a claim therefor against the vessel is entitled to priority over claims for supplies furnished prior to the tort.—The Escanaba (D. C.) 252.

MARRIED WOMEN.

See "Husband and Wife."

MARSHALING ASSETS AND SECURITIES.

A surety on a bond, upon which a large number of actions at law were pending in a federal court, and against whom, as such surety, there were other outstanding claims, in all aggregating a sum largely in excess of the penalty of the bond, *held* entitled to maintain a suit in equity in such court, as ancillary to the actions at law pending therein, as the only means by which it could be protected in the payment of claims, and by which the fund in its hands in which all claimants were entitled to share could be equitably distributed.—American Surety Co. of New York v. Lawrenceville Cement Co. (C. C.) 25.

It is no objection to the entertainment of an ancillary suit in equity by a federal court for the application and distribution of a fund to establish claims, against which a large number of actions are pending in the same court, that an original bill could not be maintained because of the citizenship of parties, and that, as an ancillary suit, only those having actions pending in that court can be made parties, while there are other claimants, where the court can make partial distribution between the parties, and at the same time protect the rights of those not parties. —American Surety Co. of New York v. Lawrenceville Cement Co. (C. C.) 25.

MASTER AND SERVANT.

See "Seamen."

§ 1. Master's liability for injuries to servant.

The doctrine of the assumption of risk by a servant is that it is a term of the contract of employment express or implied, and no right of action accrues to the servant for an injury due to such risk, because, under the contract, the master has violated no legal duty in failing to protect the servant from dangers, the risk of which he agreed to assume. — Narramore v. Cleveland, C., C. & St. L. Ry. Co. (C. C. A.) 298.

In the absence of statutory provision, a switchman employed in the yards of a railroad company assumes the risk incident to unblocked switches and guard rails where, in general, there are no blocks used in such yards and the servant has been employed therein for such a length of time that, in the exercise of ordinary observation, he must have known such fact.—Narramore v. Cleveland, C., C. & St. L. Ry. Co. (C. C. A.) 298.

Under the Ohio statute (85 Ohio Laws, p. 105), requiring railroad companies to block the

frogs, switches, and guard rails on their tracks, under penalty of a fine, an employé remaining in the service of a company without objection, though knowing that the company has not complied with the statute, does not assume the risk of injury from unblocked switches and guard rails.—Narramore v. Cleveland, C., C. & St. L. Ry. Co. (C. C. A.) 298.

In an action by a servant to recover for a personal injury, the question whether the master was negligent in failing to properly instruct the servant *held* to be for the jury.—Richardson v. Swift & Co. (C. C. A.) 699.

A switchman whose daily duty it is to couple and handle defective cars taken from trains for repair assumes the extra risk incident to their defective condition.—Chesapeake & O. R. Co. v. Hennessey (C. C. A.) 713.

Where it was a part of the regular duties of a switchman to couple and handle defective cars which were placed on a side track used almost exclusively for such cars, the presence of a car on such track was notice to him of its probable defective condition, which cast upon him the duty of examining for himself as to the particular defect before attempting to handle it.—Chesapeake & O. R. Co. v. Hennessey (C. C. A.) 713.

Where a servant has notice of the general risks and dangers of his employment, such as that many of the cars he is required to handle as a switchman are broken and defective, the master is not chargeable with negligence in failing to notify him of each particular defect.—Chesapeake & O. R. Co. v. Hennessey (C. C. A.) 713.

A mate of vessel, in directing the use by seaman of unsafe rope, without first testing its strength, *held* guilty of negligence which rendered vessel liable for injury to seaman resulting from breaking of rope.—The Ethelred (D. C.) 446.

A seaman *held* not guilty of negligence in using rope as directed by the mate, where its appearance did not indicate it to be unsafe, and he had no knowledge of the length of time it had been in use.—The Ethelred (D. C.) 446.

Owners of ship which was not bound to furnish tackle for the use of contractors in loading cannot be held liable for the death of stevedore, employed by such contractors, caused by breaking of tackle which was rigged by stevedores themselves.—Jeffries v. De Hart (D. C.) 494.

A seaman cannot recover damages from the ship for an injury received while obeying an order which is shown to have been a proper and usual one under the circumstances, and where the service required did not involve unusual risk.—The Pegasus (D. C.) 623.

Declaration in action by servant for personal injuries *held* demurrable for want of particularity.—De Luca v. Hughes (C. C.) 923.

§ 2. Liabilities for injuries to third persons.

Evidence *held* insufficient to establish an allegation of negligence in the master of a ship, in employing an incompetent winch man, which would render the ship liable for an injury to an employé of stevedores engaged in loading the ship.—The Anaces (D. C.) 856.

MEASURE OF DAMAGES.

See "Damages," § 3.

MINES AND MINERALS.

§ 1. Title, conveyances, and contracts.

A bill to quiet title in complainant to an oil claim under the placer-mining laws, which alleges that defendants have entered upon the ground, and have extracted and removed oil therefrom, and are engaged in sinking a well, and which asks an injunction to restrain them from proceeding with such work, and from taking and removing oil, is in effect a bill to obtain possession, and admits the possession of defendants; hence it is not cognizable by a federal court of equity, the remedy being at law.—California Oil & Gas Co. v. Miller (C. C.) 12.

MORTGAGES.

By foreign mining corporation on mining ground, see "Corporations," § 5.
Personal property, see "Chattel Mortgages."

§ 1. Requisites and validity.

A mortgage signed, acknowledged, and delivered to an agent of the mortgagee, on its subsequent acceptance by the mortgagee, takes effect by relation as of the date of such delivery, as against an intervening conveyance, where the equities of the parties require such application of the doctrine of relation.—Bragg v. Lamport (C. C. A.) 630.

§ 2. Construction and operation.

Where a married woman conveyed property to her son for the purpose of enabling him to mortgage the same to evade the statute prohibiting her from becoming surety, a reconveyance by the son, after executing the mortgage, but before its final acceptance by the mortgagee, does not charge the latter, who had no notice of the reconveyance except constructively from the record, with a knowledge of the invalidity of the transaction, so as to relieve the original grantor from the estoppel created by clothing her son with the apparent title.—Bragg v. Lamport (C. C. A.) 630.

A deed to a married woman, subject by its terms to a mortgage recited therein, which the grantee assumes and agrees to pay as a part of the consideration, does not vest the title in the grantee free from such mortgage, although it had not at the time been accepted by the mortgagee, and although the grantee was in fact the real owner of the property when it was mortgaged, and there was no consideration for the assumption agreement, such clause being effective at least as a recognition of the mortgage as a lien.—Bragg v. Lamport (C. C. A.) 630.

The fact that a conveyance by a married woman shows on its face that the grantee is her son does not charge a mortgagee from the son with notice that the conveyance was made for the purpose of enabling the son to make the mortgagee in evasion of the statute prohibiting a married woman from charging her property as surety.—Bragg v. Lamport (C. C. A.) 630.

§ 3. Foreclosure by action.
A foreclosure suit is substantially a proceeding in rem, and a federal court has power, on the confirmation of the sale therein, to order a conveyance of the property by the master in accordance with the general practice.—Deck v. Whitman (C. C.) 873.

MUNICIPAL CORPORATIONS.

See "Counties."
Water supply, see "Waters and Water Courses," § 3.

§ 1. Public improvements.
The powers of cities and villages, under the Illinois statute, to determine the method of paying for local improvements, defined.—City of Pontiac v. Talbot Pav. Co. (C. C. A.) 679.

One making a contract with a city which is indebted to the full amount permitted by the state constitution is charged with notice of such fact, and, if the contract purports to charge the city with any liability, the parties are in pari delicto, and the creditor cannot maintain an action in a court of equity to enforce any claim against the city based on such contract.—Gamewell Fire-Alarm Tel. Co. v. City of Laporte (C. C.) 664.

A corporation contracting with a city to construct for its use a fire and police telegraph system, with knowledge that the city was already indebted to the full constitutional limit, *held* not entitled to equitable relief.—Gamewell Fire-Alarm Tel. Co. v. City of Laporte (C. C.) 664.

§ 2. Fiscal management, public debt, securities, and taxation.
The officers of a town cannot, by any agreement or by the payment of interest on bonds, estop the town from raising the question of the legal existence or constitutionality of the statute under which such bonds were issued.—Board of Com'rs of Oxford, N. C., v. Union Bank of Richmond (C. C. A.) 293.

Where a town had no power under the constitution and statutes of the state to issue bonds to a railroad company, the defect cannot be cured nor such bonds rendered valid by the consent of its officers to a compromise judgment, by which it issued a smaller amount than that voted, the question of the town's power not being involved or determined by the judgment.—Board of Com'rs of Oxford, N. C., v. Union Bank of Richmond (C. C. A.) 293.

NAMES.

See "Trade-Marks and Trade-Names."

NATIONAL BANKS.

See "Banks and Banking," § 1.

NEGLIGENCE.

Causing death, see "Death," § 1.
Employers, see "Master and Servant," § 1.
Of servant, see "Master and Servant," § 1.
Telegraph or telephone companies, see "Telegraphs and Telephones," § 1.

§ 1. Acts or omissions constituting negligence.
Under the Illinois statute of 1897, neither an owner, lessee, nor occupant of a building can be held liable by reason of a failure to provide the same with fire escapes, where the inspector of factories, who is given by the statute the power to designate the one of such persons upon whom the duty rests, has served no notice making such designation.—McCulloch v. Ayer (C. C.) 178.

NUISANCE.

§ 1. Public nuisances.
The receiver of a water company is not liable for an injury received by a person in falling over the top of a stop box projecting above the surface of the street, and constituting a public nuisance, where the box, when constructed, was placed flush with the surface of the sidewalk, and its projection was caused by the removal of the sidewalk from around it by some one other than the water company or its receiver.—Mahoney v. City of Helena (C. C.) 790.

OBSTRUCTING JUSTICE.

The fact that one indicted for offense against United States, having no relation to interstate commerce law, was interrogated, and testified as to matters upon which indictment was based, when witness before grand jury in the investigation of charge of violation of the interstate commerce law, affords no ground for plea in abatement.—United States v. Price (D. C.) 960.

OFFICERS.

Particular classes of officers, see "Receivers"; "United States Commissioners."

PARTIES.

Character ground of jurisdiction, see "Courts," § 3.
Death ground for abatement, see "Abatement and Revival," § 2.
Transfer of interest ground for abatement, see "Abatement and Revival," § 1.

PARTNERSHIP.

§ 1. Rights and liabilities as to third persons.
The fact alone that a partnership owning stock in a corporation allowed it to stand on the books in the name of one of the partners, in order to qualify him to act as a director, does not create an estoppel against the firm or its creditors which will render the stock subject to the individual debts of such partner, although he may have represented himself as the owner, and secured credit thereby, where it is not shown that his creditors knew that the stock stood in his name, or were influenced by the fact.—New York Commercial Co. v. Francis (C. C.) 266.

PASSENGERS.

See "Carriers," § 2

PATENTS.

§ 1. Subjects of patents.

A process involving merely the mechanical operation of a combination of mechanical elements, as in the case of a rasp-cutting machine, is not the proper subject of a process patent.—Stokes Bros. Mfg. Co. v. Heller (C. C.) 104.

§ 2. Patentability.

There was no invention in devising a chest and neck protector, as a substitute for a sweater, in bicycle riding, consisting of a collar fastening at the back, and a flap depending in front.—Way v. McClarin (C. C. A.) 416.

To sustain the defense of anticipation, it is necessary that the anticipatory matter should clearly show the invention subsequently patented in such manner as to enable any person skilled in the art or science to which it relates to construct and practically use the invention for the purposes contemplated by the subsequent patent.—McNeely v. Williames (C. C. A.) 978; Williames v. McNeely, Id.

Where an inventor has devised a machine or tool for doing work which previously had been done only by hand, and the utility of the device is at once recognized by the trade, a court will not declare the patent void for want of invention simply because the result accomplished may be effected by the modification of an old structure used for a different purpose.—Reynolds v. Buzzell (C. C. A.) 997.

Mere utility does not establish patentability; and it is not every slight improvement that is the result of inventive faculty.—Shoe v. Gimbel (C. C.) 96.

A patent is not invalid because all the elements of the claim are contained in a prior patent to the same inventor, when such prior patent also has in combination additional mechanism necessary to enable the device to accomplish the purpose for which it was designed, and when the subsequent patent discloses a new and distinct use for one of the remaining elements.—Ryan v. Newark Spring Mattress Co. (C. C.) 100.

It is not sufficient to constitute anticipation that the device relied on might, by modification, be made to accomplish the function performed by that of the invention.—Ryan v. Newark Spring Mattress Co. (C. C.) 100.

There is no invention in simply applying to an enameled flanged scale pan a protecting metal ring or rim which overlaps the edge of the pan and the bottom edge of the flange.—Chatillon v. Forschner (C. C.) 342.

The mere secret practice of a process or the physical presence of a product or manufacture in this country is insufficient as an anticipation, unless and until the public acquires or may acquire therefrom such knowledge as will enable one skilled in the art to practice the invention.—Acme Flexible Clasp Co. v. Cary Mfg. Co. (C. C.) 344.

That a foreign patent may anticipate a United States patent, the description and drawings should be sufficiently full, clear, and exact to enable persons skilled in the art to readily practice the invention of such United States patent.—Springfield Furnace Co. v. Miller Down-Draft Furnace Co. (C. C.) 418.

In ore concentrators there was no patentable invention in constructing a machine with supporting strips always at a slight inclination from the vertical, and capable of adjustment to change the inclination, in place of an earlier machine having vertical supports, susceptible of adjustment to the desired inclination.—Johnston v. Woodbury (C. C.) 421.

One obtaining a patent in this country for an invention made by him abroad, prior to any patent or publication abroad, but after introduction into commercial use, may, to avoid the defense of prior use in this country, carry his invention back to the actual date thereof abroad.—Hanifen v. Price (C. C.) 435.

§ 3. Requisites and validity of letters patent.

The lapse of a foreign patent, for the nonpayment of an annuity, pending an application for a United States patent for the same invention, does not render the latter patent void when issued.—Welsbach Light Co. v. Apollo Incandescent Gaslight Co. (C. C. A.) 332.

§ 4. Disclaimers.

Where a patent for a metal saw having its teeth hardened to their base line or thereabouts only was broad enough to cover circular saws and back saws, as well as band saws and hack saws, *held*, that it was within the proper functions of a disclaimer to limit the patent to hack saws and band saws.—Thompson v. N. T. Bushnell Co. (C. C. A.) 238.

Delay in filing a disclaimer until a month and a half after the circuit court of appeals had suggested the necessity thereof *held* not unreasonable.—Thompson v. N. T. Bushnell Co. (C. C. A.) 238.

Disclaimer, to be effective, under Rev. St. § 4917, must be of some material or substantial part of the thing patented of which the patentee was not the inventor, but which he had previously claimed as new.—Cambria Iron Co. v. Carnegie Steel Co. (C. C. A.) 850.

§ 5. Construction and operation of letters patent.

"Asphalt," used in a patent, is not limited to the Trinidad deposit, or to the so-called "American mixture," but includes the bituminous paving material used in France and elsewhere.—United States Repair & Guaranty Co. v. Assyrian Asphalt Co. (C. C.) 235.

An element specifically enumerated in the specification, and necessary to make an operative device, must be read into the claim, though not specifically mentioned therein.—Miller v. Mawhinney Last Co. (C. C.) 248.

§ 6. Title, conveyances, and contracts.

Equity has no jurisdiction of a suit simply for the purpose of construing a patent, and, if the ultimate object sought is the payment of royalties, and the suit is based on the contract, it must be dismissed, though discovery and accounting is prayed for.—Perry v. Noyes (C. C.) 233.

§ 7. Regulation of dealings in patent rights and patented articles.

In an action in a federal court in Ohio for penalties for wrongfully marking articles as patented, defendant is entitled, under the Ohio statutes, to have the separate causes of action arising from each marking, or at least from the markings done on each day or time of marking, separately stated and numbered.—Hoyt v. Computing Scale Co. (D. C.) 250.

§ 8. Infringement.

A patent owner is entitled to protection against the repetition of accidental infringement. —Thompson v. N. T. Bushnell Co. (C. C. A.) 238.

A circuit court of appeals is not required, by considerations of comity, to follow the decision of a circuit court of another circuit upon questions relating to the validity of a patent.—McNeely v. Williames (C. C. A.) 978; Williames v. McNeely, Id.

Where one of two officers who organized an infringing company had previously been a licensee of plaintiff's, and the other had recently compromised for past infringements, *held*, that their knowledge was the knowledge of the company, so as to preclude it from claiming that infringement was entered upon in the belief that plaintiff's rights were worthless and abandoned.—Ryan v. Newark Spring Mattress Co. (C. C.) 100.

Equity will decline jurisdiction, when the patent expires 10 days after commencement of the suit, and no motion for a preliminary injunction is made, and there is no showing of special circumstances rendering an action at law inadequate. — Overweight Counterbalance Elevator Co. v. Standard Elevator & Mfg. Co. (C. C.) 231; Same v. Eaton & Prince Co., Id.; Same v. Crane Elevator Co., Id.; Same v. J. W. Reedy Elevator Mfg. Co., Id.

A bill based on a number of patents covering separate devices having separate uses, so that no one machine employs them all, is void for multifariousness. — Louden Machinery Co. v. Montgomery Ward & Co. (C. C.) 232.

The facts relied on to estop a defendant from denying the validity of the patent sued on must be clearly established, and not rest on mere inference.—Burrell v. Elgin Creamery Co. (C. C.) 234.

A delay of 10 years, after knowledge of an alleged infringement, and correspondence with defendant, who in good faith contended for a construction avoiding infringement, *held* to be such laches as would bar all relief in equity.—Starrett v. J. Stevens Arms & Tool Co. (C. C.) 244; Same v. Athol Mach. Co., Id.

The customary rule that on an application for a preliminary injunction, as between conflicting decisions of two circuit courts of appeals of other circuits as to the validity or construction of the patent, that one will be followed which was rendered on a final hearing, rather than one on a preliminary motion, does not govern the court, where the latter goes equally into the merits, and the court rendering it has previously had the same patent before it in other suits.—Maitland v. Graham (C. C.) 247.

Failure of plaintiff, after notifying defendant to cease infringing, to comply with his promise to furnish the latter with a copy of the patent as soon as he received one from the patent office, *held* not to estop him from claiming full damages where defendant, without inquiring further, continued to infringe for more than a year and a half.—Jennings v. Rogers Silver-Plate Co. (C. C.) 340.

A mere remark of the examiner, in rejecting two of three claims, to the effect that there did not appear to be any material difference in the claims, *held* not to estop the patentee from claiming the construction shown by the specification and remaining claim, which was allowed in its original form.—Acme Flexible Clasp Co. v. Cary Mfg. Co. (C. C.) 344.

A delay of fourteen years, with knowledge that defendant is manufacturing an infringing device, is laches sufficient to bar a decree for an accounting.—Covert v. Travers Bros. Co. (C. C.) 568.

A circuit court should follow the decisions of the courts of another circuit as to the construction and validity of a patent where such decisions involve the same issues and the evidence is substantially the same.—Duff Mfg. Co. v. Norton (C. C.) 986.

§ 9. Decisions on the validity, construction, and infringement of particular patents.

The Covert patent, No. 208,157, for an improvement in rope clamps, is void because of anticipation and lack of novelty and invention. —Covert v. Travers Bros. Co. (C. C.) 568.

Gassett and Fisher patent, No. 227,102, and Means patent, No. 273,377, for improved connectors for electric track circuits, construed, and *held* not infringed.—Union Switch & Signal Co. v. Philadelphia & R. R. Co. (C. C. A.) 761.

Gassett patents, Nos. 233,746 and 246,492, for electric railway signaling apparatus, construed, and *held* not infringed.—Union Switch & Signal Co. v. Philadelphia & R. R. Co. (C. C. A.) 761.

The Low patent, No. 238,940, for an improvement in dentistry, construed, and *held* not anticipated, valid, and infringed.—International Tooth-Crown Co. v. Kyle (C. C.) 442.

The Palmer patent, No. 251,630, for a bed or mattress supporting frame, construed, and *held* not anticipated, valid, and infringed.—Ryan v. Newark Spring Mattress Co. (C. C.) 100.

The Williames patent, No. 256,089, for an improvement in heating apparatus, *held* valid and infringed as to claims 1 and 3, and not anticipated and valid as to claims 2, 5, and 7.—McNeely v. Williames (C. C. A.) 978; Williames v. McNeely, Id.

The Sperry patent, No. 267,032, for a fanning mill, is void for want of invention.—Sperry Mfg. Co. v. J. L. Owens Co. (C. C.) 975.

Westinghouse patent, No. 270,867, for improvements for electric circuits for railway signaling, is void because of prior use and prior description in publication.—Union Switch & Signal Co. v. Philadelphia & R. R. Co. (C. C. A.) 761.

The Lawrence patent, No. 295,180, for a process of treating milk with fatty and other matters, is void because of anticipation and lack of invention.—Burrell v. Elgin Creamery Co. (C. C.) 234.

The Chatillon patent, No. 304,172, for an improvement in scale pans, is void for want of invention.—Chatillon v. Forschner (C. C.) 342.

The Swett patent, No. 314,204, for a staple fastener for wooden vessels, construed, and *held* not anticipated, valid, and infringed.—Acme Flexible Clasp Co. v. Cary Mfg. Co. (C. C.) 344.

The Buzzell patent, No. 317,622, for a tool for grinding and polishing the front of boot and shoe heels, *held* valid, not anticipated, and infringed.—Reynolds v. Buzzell (C. C. A.) 997.

The Miehle patent, No. 317,663, for improvements in printing machines, construed, and *held* not anticipated, valid, and infringed as to claim 1.—Miehle Printing-Press & Manufacturing Co. v. Campbell Printing-Press & Manufacturing Co. (C. C.) 226.

The Fay patent, No. 319,215, for spring calipers and dividers, construed, and *held* not infringed.—Starrett v. J. Stevens Arms & Tool Co. (C. C.) 244; Same v. Athol Mach. Co., Id.

The Miehle patent, No. 322,309, for improvements in printing machines, construed, and limited in view of the prior state of the art, and *held* not infringed as to claims 1, 2, and 4.—Miehle Printing-Press & Manufacturing Co. v. Campbell Printing-Press & Manufacturing Co. (C. C.) 226.

The Fowler patent, No. 328,019, for an improvement in saws for cutting metal and other hard substances, construed, limited, and *held* valid and infringed.—Thompson v. N. T. Bushnell Co. (C. C. A.) 238.

The Bywater patent, No. 374,888, for improvements in knitted fabrics, producing Astrakhan cloth, construed, and *held* not anticipated, valid, and infringed.—Hanifen v. Price (C. C.) 435.

The Stokes patents, No. 376,400, and 397,254, for rasp-cutting machines, construed, and *held* valid, and not infringed.—Stokes Bros. Mfg. Co. v. Heller (C. C.) 104.

The Dixon patent, No. 382,032, for an improvement in air brakes, construed, and *held* limited as to claims 3 and 5 to a modification of the Westinghouse system, and not infringed.—Westinghouse Air-Brake Co. v. New York Air-Brake Co. (C. C. A.) 991.

The Stokes patent, No. 383,999, for a rasp as an improved article of manufacture, construed, and *held* valid, and not infringed.—Stokes Bros. Mfg. Co. v. Heller (C. C.) 104.

The Smith patent, No. 395,668, for a boot or shoe last, construed, and *held* not infringed as to claim 2.—Miller v. Mawhinney Last Co. (C. C.) 248.

The Jones process patent, No. 404,414, for an improved method of mixing molten pig metal, construed, and *held* not infringed as to claim 2.—Cambria Iron Co. v. Carnegie Steel Co. (C. C. A.) 850.

The Rawson patent, No. 407,963, for improvements in incandescent mantles for gaslights, is not void because of the lapse for want of payment of an annuity of a previous French patent for the same invention, pending the application for the United States patent.—Welsbach Light Co. v. Apollo Incandescent Gaslight Co. (C. C. A.) 332.

The Stokes patent, No. 408,936, for a process or method of forming teeth on a rasp blank, is void as covering the mere function of a machine.—Stokes Bros. Mfg. Co. v. Heller (C. C.) 104.

The Anderson patent, No. 412,155, for an improvement in electric railway contact devices, construed, and *held* valid and infringed.—General Electric Co. v. Railway Electric Light & Power Co. (C. C.) 563.

The Richardson patent, No. 412,296, for improvements in fastenings for gloves and other articles, must be limited to the precise form shown and described, and is not infringed by the fastener of the Adams patent, No. 566,731.—Ball & Socket Fastener Co. v. C. A. Edgarton Mfg. Co. (C. C. A.) 489.

The Hawley patent, No. 447,179, for an improvement in combined downward and upward draught furnaces, is void because of anticipation and want of invention.—Springfield Furnace Co. v. Miller Down-Draft Furnace Co. (C. C.) 418.

The Hawley patent, No. 447,179, for an improvement in downward-draft furnaces, construed narrowly, and *held* not infringed as to claim 1.—Hawley Furnace Co. of New England v. Braintree & W. St. Ry. Co. (C. C.) 221.

The Barrett patent, No. 455,993, for an improvement in lifting jacks, *held* valid and infringed as to claims 1, 2, and 3.—Duff Mfg. Co. v. Norton (C. C.) 986.

The Orr patent, No. 456,202, for improvements in fireproof buildings, is void for want of invention, in view of the prior state of the art.—New Jersey Wire-Cloth Co. v. Merritt (C. C.) 216.

The Johnston patent, No. 490,849, for an improvement in ore concentrators, is void for want of invention.—Johnston v. Woodbury (C. C.) 421.

The Ericson patent, No. 491,012, for a bicycle bell, which is sounded by bringing a friction roller into contact with the tire of the wheel, construed, limited, and *held* not infringed by the bell of the Barker patent, No. 608,146.—Nutter v. Brown (C. C.) 229.

The Perkins patent, No. 501,537, for an improvement in the method of repairing asphalt pavements, was anticipated by the Crochet French patent of June 10, 1880.—United States Repair & Guaranty Co. v. Assyrian Asphalt Co. (C. C.) 235.

The Barrett patent, No. 511,923, for an improvement in lifting jacks, does not disclose patentable invention, and is void.—Duff Mfg. Co. v. Norton (C. C.) 986.

The Westinghouse patent, No. 538,001, for an improvement in air brakes, construed, and *held* not infringed.—Westinghouse Air-Brake Co. v. New York Air-Brake Co. (C. C. A.) 991.

The Parmly patent, No. 540,800, for an electric arc lamp, construed, and *held* not anticipated, valid, and infringed.—Elliptical Carbon Co. v. Solar Carbon & Manufacturing Co. (C. C.) 413.

The Davey patent, No. 555,434, for an improvement in pegging machines, construed narrowly, and *held* not infringed as to claims 1, 2, 3, and 10.—Davey Pegging-Mach. Co. v. Isaac Prouty & Co. (C. C.) 336.

The Shoe patent, No. 558,218, for an improvement in bicycle saddles, is void for want of patentable invention, and, even if conceded to be valid, must be strictly limited to the forms shown and described.—Shoe v. Gimbel (C. C.) 96.

The Perkins patent, No. 560,599, for an apparatus for repairing asphalt pavements, *held* valid and infringed.—United States Repair & Guaranty Co. v. Assyrian Asphalt Co. (C. C.) 235.

The Leslie patent, No. 581,123, for an improvement in temporary binders commonly known as "perpetual ledgers," is void, as to claims 8 to 13, inclusive, for want of patentable invention. —William Mann Co. v. Hoffman (C. C.) 237.

The Way patent, No. 593,954, for chest and neck protectors, is void for want of patentable invention.—Way v. McClarin (C. C. A.) 416.

PATENTS ENUMERATED.

ENGLISH.

756. Knitted fabrics 435
859. Metal mixers 853
2,027. Furnaces 225
2,382. Metal mixers 853
2,603. Heating apparatus 978, 980
2,926. Furnaces 225
3,672. Metal mixers 855

FRENCH.

182,538. Air brakes 996

UNITED STATES.

DESIGN.

23,654. Mirror frame 341

ORIGINAL.

5,200. Printing machines 227
39,000. Fanning mills 977
43,026. Fanning mills 978
56,912. Fanning mills 978
57,977. Spring calipers and dividers..... 246
69,292. Spring calipers and dividers..245, 246
95,742. Scale pans 343
110,657. Spring calipers and dividers..245, 246
126,743. Mattress frames 103
130,661. Electric railway signaling apparatus 761, 762
136,051. Process of treating milk..... 235
162,369. Railroad block signaling apparatus 763
170,040. Mattress frames 103
170,333. Mattress frames 103
173,428. Pegging machines 337
175,478. Spring calipers and dividers..... 246
189,762. Scale pans 343
202,302. Mattress frames 103
208,157. Rope clamps 568
217,838. Air brakes 996
227,102. Connectors for electric track circuits 761, 762, 765
227,839. Shoe heel grinders.....997, 998
233,561. Pegging machines 338
233,746. Electric railway signaling apparatus 761, 762
237,586. Mattress frames 102, 103
238,940. Artificial teeth 442
244,282. Staple fasteners 346
246,492. Electric railway signaling apparatus 761–763
251,630. Mattress frames 100, 103
256,089. Steam-heating apparatus 978, 979
264,516. Process of treating milk..... 235
267,032. Fanning mills 975
270,867. Electric railway signaling apparatus 761, 762, 764
271,276. Hoisting carriers 233
273,377. Connectors for electric track circuits 761, 762, 765
285,110. Ore concentrators 427
295,180. Process of treating milk..... 234
304,172. Scale pans 342
304,345. Printing machines 229
304,689. Pegging machines 338
314,204. Staple fasteners 344
315,587. Metal mixers 852
317,622. Shoe heel grinders.....997, 998
317,663. Printing machines 226–229
319,215. Spring calipers and dividers..244–246
321,640. Shoe lasts 250
322,309. Printing machines 226–229
325,129. Ore concentrators 427
327,425. Metal mixers 852
328,019. Metal saws 238
334,164. Bicycle saddles 98
335,740. Spring calipers and dividers..... 246
339,289. Bicycle saddles 98
359,607. Electric railways 563, 564
360,070. Air brakes 991–996
374,888. Knitted fabrics 435
376,400. Rasp cutters 104–108
376,837. Air brakes 991–996
376,872. Air brakes 995
382,032. Air brakes 991
383,999. Rasp cutters 104–106
393,940. Pulleys 233
393,941. Pulleys 233
395,668. Shoe lasts 248
396,310. Electric railways 563–565
397,124. Pulleys 233
397,254. Rasp cutters 104–108
397,451. Electric railways 563–565
398,305. Pegging machines 338
404,414. Metal mixers 850
407,963. Incandescent mantles 332
408,638. Electric railways 563, 564
408,936. Rasp cutters 104–106
412,155. Electric railways 563, 564, 568
412,296. Glove fasteners 489
433,172. Bicycle saddles 98
444,126. Pegging machines 338
447,179. Furnaces 221, 418
448,827. Air brakes 994
455,993. Lifting jacks 986, 987, 990
456,202. Fireproof buildings 216

490,849. Ore concentrators 422
491,012. Bicycle bells 229
492,906. Pegging machines 338
501,537. Asphalt pavements 235, 236
511,923. Lifting jacks 986, 987, 990
536,183. Pegging machines 338, 340
538,001. Air brakes 991, 993, 997
540,800. Electric arc lamps..... 413
542,349. Asphalt pavements 236
555,434. Pegging machines 336
558,218. Bicycle saddles 96
560,599. Asphalt pavements 236
566,731. Glove fasteners 489
571,157. Scale pans 344
580,379. Pegging machines 337
581,123. Binders 237
593,954. Chest protectors 416, 417
608,146. Bicycle bells 229, 230

REISSUED.

5,938. Railroad block signaling..... 761

PERSONAL INJURIES.

See "Negligence."
To employé, see "Master and Servant," § 1.

PETITION.

In bankruptcy, see "Bankruptcy," §§ 1–4.

PLEADING.

Indictment or criminal information or complaint, see "Indictment and Information."
In equity, see "Equity," § 3.
Statute of limitations, see "Limitation of Actions," § 2.

§ 1. Declaration, complaint, petition, or statement.

Declaration need not set out cause of action with such particularity as to needlessly subject plaintiff to peril of fatal variance at trial. —Coughlin v. Blumenthal (C. C.) 920.

POLICY.

Of insurance, see "Insurance."

PRACTICE.

In admiralty, see "Admiralty."
In bankruptcy, see "Bankruptcy," §§ 1–4.
In equity, see "Equity."
In habeas corpus proceedings, see "Habeas Corpus."
Particular proceedings in actions, see "Costs"; "Judgment"; "Limitation of Actions"; "Removal of Causes"; "Trial."
Procedure in criminal prosecutions, see "Criminal Law."
—— of particular courts, see "Courts."
—— on review, see "Appeal and Error."

PREFERENCES.

Effect of proceedings in bankruptcy, see "Bankruptcy," § 6.

PREMIUMS.

For insurance, see "Insurance," § 3.

PRINCIPAL AND AGENT.

§ 1. Rights and liabilities as to third persons.

Where the parties to a contract agree upon an agent, who is given discretionary power in carrying out the contract on the part of one party, he becomes the agent of both, and his acts within the scope of his agency are binding upon both.—Nevada Nickel Syndicate v. National Nickel Co. (C. C.) 133.

PRINCIPAL AND SURETY.

§ 1. Rights and remedies of surety.

A surety on a bond cannot require the obligees to exhaust the property and assets of the principal before enforcing the obligation of the bond, or to await the collection of indemnity by the surety.—American Surety Co. of New York v. Lawrenceville Cement Co. (C. C.) 25.

PROCESS.

Service on corporation, see "Corporations," § 3.

§ 1. Defects, objections, and amendment.

It is the practice of federal courts to dispose of objections to the sufficiency of the service summarily on a motion to quash the return, rather than by a jury trial on a plea in abatement, regardless of the state practice.—Benton v. McIntosh (C. C.) 132.

PROOF.

Taking and filing proofs in admiralty, see "Admiralty," § 1.

PROPERTY.

Particular species of property, see "Copyrights"; "Shipping"; "Trade-Marks and Trade-Names."

PUBLIC DEBT.

See "Counties," § 2; "Municipal Corporations," § 2.

PUBLIC IMPROVEMENTS.

By municipalities, see "Municipal Corporations," § 1.

PUBLIC LANDS.

Appropriation of water rights, see "Waters and Water Courses," § 1.

PUBLIC NUISANCE.

See "Nuisance," § 1.

RAILROADS.

Carriage of goods and passengers, see "Carriers."

§ 1. Sales, leases, traffic contracts, and consolidation.

A contract by which a railroad company granted to an express company exclusive express privileges and facilities on the entire system of which its road formed a part, acting with the approval of the other roads of the system, *held* to be entire, and to have been terminated as to all the roads concerned by the sale of the contracting road in foreclosure proceedings, and the refusal of the purchaser to renew or continue the contract as to the remaining roads, which it then had no authority to represent.—Smith v. Wells, Fargo & Co. (C. C.) 375.

Railroad corporations created by concurrent legislation of two or more states, having a joint interest in the operation of the entire line of road extending through or into such several states, are jointly liable for a tort committed in its operation in either state.—Smith v. New York, N. H. & H. R. Co. (C. C.) 504.

§ 2. Indebtedness, securities, liens, and mortgages.

Purchaser of a railroad at foreclosure sale is not entitled to claim, reimbursement for taxes, and interest accruing against the property prior to the sale, and while in the hands of a receiver, but not matured, from the earnings of the receivership, as against the mortgagees, unless the terms of the decree or order of sale or special equitable considerations entitle him thereto.—Terre Haute & L. Ry. Co. v. Harrison (C. C. A.) 907.

Facts considered under which it was *held* that a purchaser of a railroad at foreclosure sale was not entitled to be reimbursed from the earnings of the road while in the hands of a receiver for taxes and interest on mortgage bonds accruing prior to the sale.—Terre Haute & L. Ry. Co. v. Harrison (C. C. A.) 907.

It is within the powers of a railroad company to become guarantor of a contract made by a construction company for the services of an engineer, to be rendered in the construction of its road, and it is not relieved from liability by a subsequent change in its plans by which the services are not required.—Mathesius v. Brooklyn Heights R. Co. (C. C.) 792.

§ 3. Receivers.

The jurisdiction of a court to appoint a receiver for a railroad does not depend absolutely on the right of the complainant, as alleged in his bill, to the appointment.—Farmers' Loan & Trust Co. v. Centralia & C. R. Co. (C. C. A.) 636.

A committee appointed by the bondholders of a railroad company with power to represent them in all matters for the protection of their interests and legal rights has no authority to consent, in their behalf, to the issuance of receivers' certificates, to be made a lien prior to the mortgage, the proceeds to be used in payment of claims not entitled to priority.—Farmers' Loan & Trust Co. v. Centralia & C. R. Co. (C. C. A.) 636.

Notice to a trustee in a mortgage securing railroad bonds of an application by a receiver for authority to issue receivers' certificates, where the trustee has not been served with process or appeared in the suit, does not render the order for the issuance of the certificates binding on the trustee or the bondholders, or preclude them from attacking the validity of the certificates, when subsequently brought into court.—Farmers' Loan & Trust Co. v. Centralia & C. R. Co. (C. C. A.) 636.

RECEIVERS.

Of corporations in general, see "Corporations," § 4.
Of railroad companies, see "Railroads," § 3.

§ 1. Appointment, qualification, and tenure.

A court has no jurisdiction to appoint a receiver for a corporation, either original or ancillary, except in a pending suit.—In re Brant (C. C.) 257.

§ 2. Management and disposition of property.

A receiver cannot appeal from an order directing him as to the administration of the estate.—Hunt v. Illinois Cent. R. Co. (C. C. A.) 644.

REMOVAL OF CAUSES.

§ 1. Origin, nature, and subject of controversy.

Complaint on its face *held* to raise a federal question, under the interstate commerce clause, and the fourteenth amendment to the constitution of the United States, giving the federal court jurisdiction on removal.—State of Arkansas v. Kansas & T. Coal Co. (C. C.) 353.

An action brought in a state court against receivers appointed by a federal court is removable under the removal acts, where the requisite amount is involved, regardless of the citizenship of the parties.—Tompkins v. MacLeod (C. C.) 927.

§ 2. Citizenship or alienage of parties.

Where a declaration in a state court in form charges a joint tort against two or more defendants, the cause is not removable by one defendant, as involving a separable controversy, on the ground that the facts stated do not constitute a cause of action against him, that being a matter for the determination of the state court.—Evans v. Felton (C. C.) 176; Birch v. Same, Id.

§ 3. Amount or value in controversy.

The amount involved in suit for injunction, in determining jurisdiction of federal court, is the value of the right to be protected, or the extent of the injury to be prevented.—State of Arkansas v. Kansas & T. Coal Co. (C. C.) 353.

§ 4. Proceedings to procure and effect of removal.

Where a plaintiff institutes a suit in a court of a state of which neither he nor the defendant is a resident, he cannot object to the right of defendant to remove the cause to the federal court of the district on the ground that defendant is

not a citizen or resident of such district.—Cowell v. City Water-Supply Co. (C. C.) 769.

Under Code S. C. § 156, where service of summons is made by publication, the service is not completed for the purpose of determining the time when the defendant is required to answer, within the removal act, until the expiration of six weeks from the date of first publication.—Tenney v. American Pipe-Mfg. Co. (C. C.) 919.

§ 5. Proceedings in cause after removal.

An objection to the sufficiency of the return of service on a defendant may be made after the cause has been removed to a federal court.—Collins v. American Spirit Mfg. Co. (C. C.) 133.

RES JUDICATA.

See "Judgment," § 1.

REVENUE.

See "Customs Duties"; "Internal Revenue"; "Taxation."

REVIEW.

See "Appeal and Error."

Bill in equity, see "Equity," § 4.

RISKS.

Assumed by employé, see "Master and Servant," § 1.

SALES.

On foreclosure of mortgage, see "Mortgages," § 3.

§ 1. Conditional sales.

Where contract of conditional sale is made in one state, but provides for delivery in another, it is governed, in a contest between the vendor and trustee in bankruptcy of vendee, by the law of the latter state.—In re Legg (D. C.) 326.

SALVAGE.

§ 1. Right to compensation.

Evidence considered as bearing on the amount and apportionment of compensation for salvage services rendered by a tug in preventing the drifting of an unmanageable ship on shore in a storm.—The Sir Robert Fernie (D. C.) 348.

SEAMEN.

The master of a ship and a seaman are fellow servants in all matters pertaining to the navigation of the ship while on a voyage from one point to another, and each assumes the risk of the other's negligence in the discharge of the duties incident to their common employment.—Olson v. Oregon Coal & Navigation Co. (D. C.) 109.

Shipping articles construed, and *held* not to entitle Chinese seamen to release by reason of the fact that the vessel had departed from its accustomed business and route, by entering the service of the United States government as a transport.—In re Chung Fat (D. C.) 202.

Except in the cases provided for in Rev. St. § 4527, where shipping articles have been signed, and a seaman is thereafter unwarrantably discharged by the master, there can be no lien as for wages unless services have in fact been rendered. A seaman engaged for a voyage, but not signed or shipped, has no lien for wages or for expenses incurred.—The Glenesslin (D. C.) 768.

SEPARABLE CONTROVERSY.

Removal from state court, see "Removal of Causes," § 2.

SET-OFF AND COUNTERCLAIM.

§ 1. Subject-matter.

The right of a defendant to plead matters by way of counterclaim under the Minnesota statute considered.—Ecorse Transp. Co. v. Earhart (C. C.) 925.

SHIPPING.

See "Admiralty"; "Collision"; "Maritime Liens"; "Salvage"; "Seamen."

§ 1. Charters.

Where no actual damage was sustained by the charterer of a vessel by the refusal of the master to load a cargo for a Cuban port, because by reason of the immediate declaration of war between the United States and Spain she could not have cleared for the voyage, a libel by the charterer for breach of the charter contract will not lie.—The Willowdene (D. C.) 569.

§ 2. Liabilities of vessels and owners in general.

The owners of a vessel can only be held liable for torts of the master which were committed while acting within the scope of his employment, and, where he joins with others in wrongfully taking supplies and other property from another vessel, the owners are only liable for the value of such supplies as were applied to the use and benefit of their vessel, and which the master would have had authority to procure in their behalf.—Guttner v. Pacific Steam-Whaling Co. (D. C.) 617.

SIGNALS.

Of vessels, see "Collision," § 3.

SPECIFIC PERFORMANCE.

§ 1. Contracts enforceable.

A contract construed, and *held* valid and enforceable in part; but, in view of its not having been performed as contemplated by the parties, the enforcement of a further provision *held* unconscionable.—Nevada Nickel Syndicate v. National Nickel Co. (C. C.) 133.

STATES.

See "United States."

STATUTES.

Adoption by United States courts of state laws as rules of decision, see "Courts," § 5.
Of limitation, see "Limitation of Actions," § 1.
Revenue laws, see "Internal Revenue."

§ 1. Enactment, requisites, and validity in general.

Under the constitution of North Carolina, to sustain the power of a county to issue bonds and levy a tax for their payment it must be shown that the yeas and nays on the passage of the act under which such power is claimed were recorded on the journal of each house, and, by virtue of the constitutional provision requiring such record to be made, the journals are the evidence of the fact.—Board of Com'rs of Stanly County v. Coler (C. C. A.) 284.

§ 2. Subjects and titles of acts.

The provision of the California constitution that an act shall embrace but one subject, which shall be expressed in the title, does not require that the title shall be an abstract of the contents of the act, and a provision of an act intended to secure its enforcement is valid, though not mentioned in the title.—Skinner v. Garnett Gold-Min. Co. (C. C.) 735.

STATUTES CONSTRUED.

UNITED STATES.

CONSTITUTION.

Amend. art. 5 305
Amend. art. 13 202
Amend. art. 14 353
Amend. art. 14, § 1..... 113
Art. 1, § 10..... 113

STATUTES AT LARGE.

1789, Sept. 24, ch. 20, 1 Stat. 73..... 34
1875, March 3, ch. 131, 18 Stat. 420...268, 269
1881, Jan. 18, ch. 23, § 5, 21 Stat. 315.... 268
1884, July 4, ch. 180, 23 Stat. 96..... 268
1886, Aug. 2, ch. 840, 24 Stat. 209....837, 963
1887, March 3, ch. 373, § 2, 24 Stat. 552.. 260
1888, Aug. 13, ch. 866, 25 Stat. 436..... 927
1888, Aug. 13, ch. 866, § 1, 25 Stat. 433... 769
1889, March 2, ch. 382, 25 Stat. 858..... 614
1890, June 10, ch. 407, § 19, 26 Stat. 139.. 94
1891, March 3, ch. 551, 26 Stat. 1084..... 487
1891, March 3, ch. 551, § 8, 26 Stat. 1085 484
1893, Feb. 11, ch. 83, § 1, 27 Stat. 443.... 960
1894, Aug. 13, ch. 280, 28 Stat. 278..... 25
1894, Aug. 18, ch. 301, 28 Stat. 390...484, 487
1895, Feb. 8, ch. 64, 28 Stat. 645.....859, 999
1895, March 2, ch. 189, par. 6, 28 Stat. 910 90, 91
1897, March 2, ch. 358, 27 Stat. 604..... 328
1897, July 24, ch. 11, par. 181, 30 Stat. 166 90, 91
1898, June 13, ch. 448, 30 Stat. 448..... 835
1898, June 27, ch. 503, 30 Stat. 494..... 260
1898, July 1, ch. 541, subch. 2, § 2, 30 Stat. 545 317
1898, July 1, ch. 541, § 1, subd. 1, 30 Stat. 544 936
1898, July 1, ch. 541, § 1, subd. 15, 30 Stat. 544 946
1898, July 1, ch. 541, § 2, 30 Stat. 545.... 748
1898, July 1, ch. 541, § 2, subd. 6, 30 Stat. 546 537
1898, July 1, ch. 541, § 2, subd. 18, 30 Stat. 546 604
1898, July 1, ch. 541, § 3, 30 Stat. 546.... 748
1898, July 1, ch. 541, § 3, subd. 3, 30 Stat. 546 813
1898, July 1, ch. 541, § 4b, 30 Stat. 547... 756
1898, July 1, ch. 541, § 5h, 30 Stat. 548... 589
1898, July 1, ch. 541, § 7, 30 Stat. 548.... 305
1898, July 1, ch. 541, § 12, 30 Stat. 549... 808
1898, July 1, ch. 541, § 14, 30 Stat. 550... 468, 594
1898, July 1, ch. 541, § 14b, 30 Stat. 550.. 88, 314, 597, 611
1898, July 1, ch. 541, § 14b(2), 30 Stat. 550 181
1898, July 1, ch. 541, § 17, 30 Stat. 550... 597
1898, July 1, ch. 541, § 21, 30 Stat. 552... 748
1898, July 1, ch. 541, § 24, 30 Stat. 553... 192
1898, July 1, ch. 541, § 24b, 30 Stat. 553.. 192, 935
1898, July 1, ch. 541, § 25, 30 Stat. 553... 935
1898, July 1, ch. 541, § 25a, 30 Stat. 553.. 820
1898, July 1, ch. 541, § 40, 30 Stat. 556... 800
1898, July 1, ch. 541, § 48, 30 Stat. 557... 800
1898, July 1, ch. 541, § 48a, 30 Stat. 557.. 950
1898, July 1, ch. 541, § 57g, 30 Stat. 560.. 803
1898, July 1, ch. 541, §§ 58, 59, 30 Stat. 561. 830
1898, July 1, ch. 541, § 59f, 30 Stat. 562... 190
1898, July 1, ch. 541, § 60a, 30 Stat. 562.. 804
1898, July 1, ch. 541, § 63, 30 Stat. 562... 86
1898, July 1, ch. 541, § 64, 30 Stat. 563... 512
1898, July 1, ch. 541, § 64b, 30 Stat. 563.. 183, 816, 951
1898, July 1, ch. 541, § 67, 30 Stat. 564... 935, 936
1898, July 1, ch. 541, § 70, 30 Stat. 565... 536, 805

REVISED STATUTES.

§§ 161, 251, 321..... 552
§ 700 729
§ 753 969
§ 866 766
§ 968 796
§ 1014 614
§ 1024 842
§ 2296 805
§ 3450 479
§ 4527 768
§ 4886 344
§ 4887 332
§ 4917 850
§ 4923 344
§ 4956 213
§ 5209 842
§ 5234 678

CALIFORNIA.

CONSTITUTION.

Art. 1, §§ 13, 21..... 735
Art. 4, § 24..... 735
Art. 12, § 15..... 454

LAWS.

1880, April 23, p. 131, ch. 118..... 454
1897, March 29, p. 231, ch. 170, §§ 1, 2... 735

ILLINOIS.

STARR & CURTIS' ANNOTATED STATUTES 1896.

Volume 1.

Page 736 679
Pages 1293–1298 648

LAWS.

1897, May 27, p. 223, §§ 1, 3, 4.....178, 179

INDIANA.

CONSTITUTION.

Art. 13 664

BURNS' REVISED STATUTES 1894.

Volume 2.

§ 3348 657

Volume 3.

§§ 6960–6964 630

LAWS.

1881, April 16, p. 527, ch. 60..... 630

MASSACHUSETTS.

LAWS.

1872–73, p. 124, ch. 171, § 3..... 505

MINNESOTA.

GENERAL STATUTES 1894.

§ 5237, subd. 1..... 925

LAWS.

1899, April 19, ch. 295, § 16..... 963

MISSOURI.

LAWS.

1895, March 21, p. 200..... 756

NEVADA.

GENERAL STATUTES 1895.

§ 3038 668

NEW JERSEY.

CONSTITUTION.

Art. 4, § 7, par. 3..... 70

LAWS.

1897, March 30, p. 124, ch. 50..... 70

NEW YORK.

CODE OF CIVIL PROCEDURE.

§ 394 396

LAWS.

1873, June 12, p. 1100, ch. 737..... 449
1875, April 29, p. 157, ch. 181..... 449
1877, May 23, p. 342, ch. 321.....721, 722
1892, May 18, p. 1930, ch. 690..... 722

NORTH CAROLINA.

CONSTITUTION.

Art. 2, § 14..... 284

CODE.

§ 1996 284

OHIO.

REVISED STATUTES 1890.

§§ 2731, 2734, 2735..... 578
§§ 6133–6135 465

LAWS.

1888, March 23, p. 105..... 298

SOUTH CAROLINA.

CODE OF CIVIL PROCEDURE 1893.

§ 156 919

TEXAS.

REVISED STATUTES 1895.

Art. 2397 832

VERMONT.

STATUTES 1894.

§ 2446 503

STOCKHOLDERS.

Of corporations, see "Corporations," § 2.

SUBSCRIPTIONS.

To corporate stock, see "Corporations," § 1.

SUMMONS.

See "Process."

SURETYSHIP.

See "Principal and Surety."

SURVIVAL.

Of cause of action, see "Abatement and Revival," § 2.

TARIFF.

See "Customs Duties."

TAXATION.

See "Internal Revenue."

Assessments for municipal improvements, see "Municipal Corporations," § 1.

§ 1. **Liability of persons and property.** Debts owned by a nonresident of the state of Ohio, evidenced by notes and mortgages on real estate within the state, are not taxable there,

under Rev. St. Ohio, §§ 2731, 2734, 2735, unless the possession and control of the securities for the purpose of investment and reinvestment have been surrendered by the owner to a resident agent.—Jack v. Walker (C. C.) 578.

§ 2. Tax titles.

Where a purchaser of land at tax sale foreclosed his lien by suit to which the life tenant only was made defendant, and the land was sold under the decree for the full amount of the lien, the interest of the life tenant only passed by the sale, and the lien on the interest of the remainder-man was thereby extinguished. — Williams v. Hedrick (C. C. A.) 657.

The fact alone that purchasers of property at tax sale were stockholders in a corporation which then owned the legal title to the property is not sufficient to constitute such purchase a payment of the taxes in favor of a subsequent purchaser of the property at the foreclosure sale. —Jenks v. Brewster (C. C.) 625.

TELEGRAPHS AND TELEPHONES.

§ 1. Regulation and operation.

A complaint in an action against a telephone company, alleging that by reason of the failure of defendant to deliver a message sent to plaintiff by his son as his agent, and plaintiff's consequent failure to respond to such message as he would have done had he received it, his wife and children became estranged from him, and his family was broken up, states no ground for the recovery of more than nominal damages.—McBride v. Sunset Telephone Co. (C. C.) 81.

TERMS.

Of patents, see "Patents," § 3.

TICKETS.

For carriage of passengers, see "Carriers," § 2.

TITLE.

Statutes, see "Statutes," § 2.
To mineral lands, see "Mines and Minerals," § 1.

TOOLS.

Liability of employer for defects, see "Master and Servant," § 1.

TORTS.

See "Libel and Slander."
Employés, see "Master and Servant," § 2.
Particular torts, see "Negligence"; "Nuisance"; "Trespass"; "Trover and Conversion."
—— causing death, see "Death," § 1.
—— maritime torts, see "Collision."

TRADE-MARKS AND TRADE-NAMES.

§ 1. Marks and names subjects of ownership.

The word "Waltham" on watches has acquired a secondary meaning as designating the watches manufactured by the American Waltham Watch Company, and its use by another manufacturer without some accompanying statement clearly distinguishing its watches from those manufactured by such company, and in a manner to deceive purchasers, constitutes unfair competition.—American Waltham Watch Co. v. Sandman (C. C.) 330.

The word "continental" is a generic term, the right to use which cannot be exclusively appropriated by any individual or corporation.—Continental Ins. Co. v. Continental Fire Ass'n (C. C.) 846.

§ 2. Title, conveyances, and contracts.

The Continental Insurance Company, a New York corporation, has acquired no right to the exclusive use of the word "continental" in connection with the business of fire insurance which entitles it to an injunction against the use of the name "Continental Fire Association" by a Texas insurance corporation, in the absence of proof of fraud or unfair competition.—Continental Ins. Co. v. Continental Fire Ass'n (C. C.) 846.

§ 3. Infringement and unfair competition.

One infringing on trade-mark should not be allowed, at the peril of the owner of the trademark, to experiment with the purpose of stealing the custom of a business rival, and shielding himself from the consequences of the infringement.—Bass, Ratcliff & Gretton v. Christian Feigenspan (C. C.) 206.

Trade-mark for pale ale *held* infringed by defendant's mark.—Bass, Ratcliff & Gretton v. Christian Feigenspan (C. C.) 206.

One who has counterfeited a legitimate trademark cannot show as a defense that it has been accompanied by descriptions rendering it unlikely that the public has been deceived.—Bass, Ratcliff & Gretton v. Christian Feigenspan (C. C.) 206.

Courts should not recognize, in favor of infringer of trade-mark, fine distinctions between different articles of merchandise of the same general nature.—Bass, Ratcliff & Gretton v. Christian Feigenspan (C. C.) 206.

Where, in a suit to enjoin the infringement of a trade-mark and unfair competition, the purpose and effect of defendant's acts complained of are not clear on the pleadings, and can better be determined after a hearing on the merits, the disposition of issues raised by exceptions to the answer will be deferred until a hearing is had. —E. T. Fairbanks & Co. v. Des Moines Scale & Manufacturing Co. (C. C.) 972.

Where it appears that complainant had knowledge of the alleged infringement of its rights by defendant for many years before suit was brought, the case made by the bill is fully met by the answer, and no showing of defendant's insolvency is made, a preliminary injunction will not be granted.—E. T. Fairbanks & Co. v. Des Moines Scale & Manufacturing Co. (C. C.) 972.

TRESPASS.

§ 1. Acts constituting trespass, and liability therefor.

The taking of property from one in rightful possession without his consent is a trespass, al-

though no resistance is offered, or force used.—Guttner v. Pacific Steam-Whaling Co. (D. C.) 617.

§ 2. Actions.

Seamen who remained on board ice-bound vessel after she had been abandoned by master and others of the crew were lawfully in possession of the stores and other property on board belonging to the owners, and may maintain trespass therefor against the owners of another vessel which took such stores and property off the vessel without their consent.—Guttner v. Pacific Steam-Whaling Co. (D. C.) 617.

TRIAL.

In action for slander, see "Libel and Slander," § 2.
Suits in admiralty, see "Collision," § 4.

§ 1. Taking case or question from jury.

The rule that, where there is doubt of the right of a party to go to the jury, the doubt should be resolved in favor of the right, is especially applicable when the issue is one of negligence, which ordinarily must be determined by inference from the circumstances proved, rather than upon direct evidence.—Richardson v. Swift & Co. (C. C. A.) 699.

§ 2. Trial by court.

In an action at law tried to the court without a jury, on a written stipulation of the parties, a circuit court may make either special findings or a general finding, but cannot make both, and, where special findings are made, one stating a conclusion of law on the general issue is not to be regarded as a general finding.—Wright v. Bragg (C. C. A.) 729.

TROVER AND CONVERSION.

§ 1. Actions.

In an action to recover for the wrongful taking and conversion, by a stranger to the title, of property which was in the rightful possession of plaintiff, the measure of damages is the full value of the property converted, and defendant cannot limit the recovery to the value of the plaintiff's interest therein.—Guttner v. Pacific Steam-Whaling Co. (D. C.) 617.

UNITED STATES.

Courts, see "Courts," §§ 1–5; "Removal of Causes."
Indians, see "Indians."

§ 1. Property, contracts, and liabilities.

Where there have been recoveries on the bond of a contractor for public work, given under the provisions of Act Aug. 13, 1894 (28 Stat. 278), in favor of the United States, and also of individuals, aggregating a sum in excess of the penalty of the bond, the equitable principle of pro rata distribution will be applied both as between the individual creditors, and as between them and the United States.—American Surety Co. of New York v. Lawrenceville Cement Co. (C. C.) 25.

UNITED STATES COMMISSIONERS.

The powers exercised by a United States commissioner in the examination of a person charged with an offense are those common to all examining magistrates. To authorize him to commit, he need not be convinced of the guilt of the accused, but the proof should be such as to afford good reason to believe that the offense was committed, and by the accused. Otherwise, it is his duty to discharge.—Ex parte Jones (C. C.) 200.

VENDOR AND PURCHASER.

Purchasers at tax sale, see "Taxation," § 2.

VENUE.

Criminal prosecutions, see "Criminal Law," § 3.

WAIVER.

See "Estoppel."

WATERS AND WATER COURSES.

§ 1. Appropriation of rights in public lands.

The riparian rights acquired by a patentee of public lands defined.—Cruse v. McCauley (C. C.) 369.

The riparian rights of the owner of land, acquired by settlement and entry under the public-land laws, accrue, at latest, at the time of his application for entry or the filing of his declaratory statement.—Cruse v. McCauley (C. C.) 369.

§ 2. Appropriation and prescription.

Acts *held* insufficient to constitute an appropriation of water from a stream.—Cruse v. McCauley (C. C.) 369.

The date of the appropriation of water from a stream, given in the recorded notice, is not conclusive against the appropriator, and he may show that the actual appropriation was made at an earlier date, as against one whose appropriation was in fact later, but prior to the date stated in the notice.—Cruse v. McCauley (C. C.) 369.

A delay of 10 months, after the posting of a notice of intention to appropriate water from a stream for irrigating purposes, before the commencement of work on the ditch, *held* unreasonable, and the work not to relate back to the notice.—Cruse v. McCauley (C. C.) 369.

The record of a notice of the appropriation of water, in the records of a county in Montana, at a time when there was no law authorizing such record, was of no force or validity, and a certified copy of such record is not admissible in evidence.—Cruse v. McCauley (C. C.) 369.

§ 3. Public water supply.

The granting by a village in New York of a franchise to a water company, merely authorizing the company to lay its pipes in the streets, does not affect the right of the village, under the state statute to construct waterworks of its own.—President, etc., of Colby University v. Village of Canandaigua (C. C.) 449.

WILLS.

See "Executors and Administrators."

§ 1. Rights and liabilities of devisees and legatees.

A contract between life beneficiaries of the income from trust funds under a will for the division of such income construed, and *held* not to include the corpus of the fund, in which some of them had a contingent interest.—Chandler v. Pomeroy (C. C. A.) 156.

WITNESSES.

§ 1. Examination.

Where the attention of a witness on cross-examination is called to a statement in a letter which he admits having written, which statement, standing alone, is inconsistent with his testimony in chief, it is the privilege of counsel introducing the witness to inspect the entire letter for other statements which may qualify or explain the expression admitted. — Wright v. Bragg (C. C. A.) 729.

The limits of amnesty extended by 27 Stat. 443, c. 83, § 1, to witness in cause or proceeding based upon alleged violation of the interstate commerce law, stated.—United States v. Price (D. C.) 960.

WRITS.

See "Process."

Particular writs, see "Habeas Corpus"; "Injunction."

WEST PUBLISHING CO., PRINTERS AND STEREOTYPERS, ST. PAUL, MINN.