THE

FEDERAL REPORTER.

VOLUME 97.

CASES ARGUED AND DETERMINED

IN THE

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

PERMANENT EDITION.

NOVEMBER, 1899—JANUARY, 1900.

A TABLE OF STATUTES CONSTRUED IS GIVEN IN THE INDEX.

ST. PAUL:
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36.

BANKRUPTCY.

1. Upon the filing of the petition for review as provided for in section 24 (b) of the act to establish a uniform system of bankruptcy throughout the United States, approved July 1, 1898, the clerk of this court shall docket the cause, and shall forthwith serve a certified copy of the petition upon the respondent or respondents, or his or their solicitor, through the mail or otherwise, together with a notice to the respondent or respondents, to answer, demur, or move to dismiss the said petition, within fifteen days from the date of such notice.

2. The petitioner shall cause a certified transcript of the record and proceedings of the bankruptcy court of the matter to be reviewed to be filed in the clerk's office of this court within thirty days from the date of the filing of the said petition.

3. Upon the filing of such transcript of the record the clerk of this court shall proceed to cause the record to be printed as provided for in the twenty-third rule of this court and furnish counsel on both sides with three copies each.

4. And such causes shall stand for hearing in their regular order. But either side may, upon ten days' notice given to the opposing counsel, have the cause heard, either at term time, or in vacation, or in chambers, upon the briefs, unless at its own suggestion, or for good cause shown, the court shall order oral argument.

5. That all causes coming up by appeal as provided in section 25 of said bankruptcy act shall stand for hearing in this court, either in term time or in vacation, and may be called up by either party upon ten days' notice, as provided in section 4 of this rule.

6. All rules of this court (except as herein modified) shall apply to the proceedings in bankruptcy to which this rule relates.

7. Nothing herein shall prevent the court, from time to time, from making, for special cause, orders diminishing or enlarging the times named herein, or any other order suitable to expedite the proceeding or to prevent injustice.

Adopted Nov. 23, 1899.

JUDGES

OF THE

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

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Hon. JAMES H. BEATTY, District Judge, Idaho.....Boise City, Idaho.
Hon. CHARLES S. JOHNSON, District Judge, Alaska.....Sitka.

[1] Died December 4, 1899.

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CASES

ARGUED AND DETERMINED

IN THE

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

BOARD OF COM'RS OF LAKE COUNTY et al. v. SCHRADSKY.

(Circuit Court of Appeals, Eighth Circuit. September 11, 1899.)

No. 1,187.

JURISDICTION OF FEDERAL COURTS—COLLUSIVE TRANSFER OF CAUSE OF ACTION—DISMISSAL.

In an action in a circuit court by a foreigner against a municipal corporation on coupons from its bonds, where there was evidence sufficient to sustain a claim made by defendant that the coupons in suit were in fact owned by a citizen of the same state, and that their transfer to plaintiff was merely colorable, and for the purpose of enabling the suit to be brought in the federal court, the court should have dismissed the suit, under the fifth section of the act of March 3, 1875 (18 Stat. c. 137), as collusive, or, if not fully satisfied of the collusive character of the transfer, should have granted the defendant's request to submit that issue to the jury under proper instructions.

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

C. S. Thomas (Charles Cavender, W. H. Bryant, and H. H. Lee, on the brief), for plaintiff in error.

H. B. Johnson (Ralph W. Smith, on the brief), for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

THAYER, Circuit Judge. This is a suit on coupons to the amount of $7,642.50, which were detached from certain municipal bonds issued by Lake county, Colo. The board of county commissioners of said county (the defendant below and plaintiff in error here), in its answer to the complaint, alleged, in substance, that Frieda Schradsky (the plaintiff below and the defendant in error here) was not the owner of the coupons when the suit to collect the same was filed in the circuit court of the United States for the district of Colorado; that the said coupons belonged to certain persons, who were citizens of the state of Colorado, who could not maintain an action thereon in their own names in the federal court by reason of such citizenship;

and that the suit had been brought in the name of Frieda Schradsky, an alien, for the sole purpose of enabling the real owners of the coupons to recover a judgment thereon, which they could not recover by suing in their own names in the federal circuit court for the district of Colorado. Testimony was adduced which tended strongly to support this defense, but the trial court refused to dismiss the action for want of jurisdiction, when requested to do so by the defendant below; and it also declined to allow the jury to determine from the evidence, and under proper instruction, as it was requested to do, whether the pretended transfer of the coupons to the plaintiff below was merely colorable and made for the purpose of creating a semblance of jurisdiction. These are the alleged errors which are presented for review.

The fifth section of the act of congress of March 3, 1875 (18 Stat. 470–472, c. 137), declares:

"That if in any suit commenced in a circuit court or removed from a state court to a circuit court of the United States it shall appear to the satisfaction of said circuit court at any time after such suit has been brought or removed thereto, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said circuit court, or that the parties to said suit have been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable or removable under this act, the said circuit court shall proceed no further therein, but shall dismiss the suit or remand it to the court from which it was removed, as justice may require, and shall make such order as to costs as shall be just."

This section of the act of March 3, 1875, was not repealed by the amended and corrected judiciary act of August 13, 1888 (25 Stat. 433, c. 866), as the supreme court held in Manufacturing Co. v. Kelly, 160 U. S. 327, 339, 340, 16 Sup. Ct. 307. Moreover, the court of last resort has frequently decided that the statute in question prohibits the assignee of a cause of action from maintaining a suit thereon in the federal court if the assignment under which he claims is found to be colorable and collusive, and made for the sole purpose of conferring a jurisdiction on the court which it would not otherwise possess. Williams v. Nottawa, 104 U. S. 209; Farmington v. Pillsbury, 114 U. S. 138, 5 Sup. Ct. 807; Manufacturing Co. v. Kelly, 160 U. S. 327, 16 Sup. Ct. 307; County Com'rs v. Dudley, 173 U. S. 243, 19 Sup. Ct. 398. The motive which may have induced the assignor or assignee of a cause of action to make or assent to the assignment is immaterial, and will not in itself impair the assignee's right to sue in the federal court, provided the assignment is real and absolute; the assignor retaining no interest in the thing assigned, or power to direct and control the litigation. But if the assignment of a cause of action is in fact colorable and fictitious, and made for the purpose of conferring jurisdiction on some federal court, it will be disregarded, no matter how formal or absolute it may appear to be. For obvious reasons, persons should not be permitted, by any stratagem or device, to impose on a federal court the settlement of a controversy not involving any federal question, unless it be one which in reality arises and exists as between citizens of different states.

The testimony in the case at bar creates a very strong presumption that the coupons in suit belong to a citizen of the state of Colorado,

and that they were placed in the hands of Frieda Schradsky, the plaintiff below, who is a young woman about 21 years old, and a foreigner, and that she was induced to advance $995.50 thereon, upon the understanding and agreement that, when the coupons were collected by a suit which was to be brought in her name in the circuit court of the United States for the district of Colorado, the sum so advanced should be refunded to her, with interest at the rate of 1 per cent. per month, and that the balance should be paid to the owner of the coupons, who had placed the same in her custody. In other words, the evidence tends very strongly to show that the plaintiff was not the owner of the coupons, but held them for the time being merely as collateral for a loan. It is contended, on the other hand, that the coupons were sold to the plaintiff below for the sum of $7,360, being very near their face value, and a bill of sale to that effect was produced and offered in evidence, in which the pretended vendor acknowledged the receipt of that sum from the vendee. It is clear from the testimony, however, that only $995.50 was paid on account of the alleged purchase, and that no further sum was to be paid by the plaintiff, unless she so elected, until the coupons were collected by a suit in the federal court, which was to be instituted in her name, and that it was understood and agreed that, when collected, all sums advanced by the plaintiff should be refunded to her, with interest thereon at the rate of 1 per cent. a month. We are satisfied, by an examination of the testimony, that the written bill of sale of the coupons which was introduced in evidence does not express, and was not intended to express, the actual agreement of the parties thereto; that it was merely a colorable conveyance, which was devised to create a pretended title to the coupons that would enable the plaintiff below to sue in the federal court, while the actual ownership of the coupons, and the right to control and direct the contemplated litigation, remained with the assignor. We are of the opinion that, under the fifth section of the act of March 3, 1875, above quoted, the trial judge, on the evidence adduced, could have directed a dismissal of the suit as he was requested to do; and that if he was not fully satisfied in his own mind that the assignment upon which the plaintiff relied was colorable and collusive, as charged, he should at least have submitted that issue to the jury, under proper instructions, as he was asked to do, there being abundant evidence tending to establish the fictitious and colorable character of that instrument. The judgment below is accordingly reversed, and the case is remanded for a new trial.

WAGSTAFF et al. v. COLLINS et al.

(Circuit Court of Appeals, Eighth Circuit. September 25, 1899.)

No. 1,161.

1. PUBLIC LANDS—LAND ERRONEOUSLY PATENTED UNDER RAILROAD GRANT—ACTS FOR PROTECTION OF PURCHASERS.

   Complainants' ancestor made a homestead entry on lands which were within the limits of a railroad grant, but, by reason of existing pre-emption rights thereon, at the time the map of definite location was filed, were excepted from the operation of the grant, although the pre-emption claims

were afterwards abandoned, and, under the construction then given to such grants by the land department, the lands on such abandonment passed thereunder. Yielding to such construction, the homestead settler surrendered possession to the railroad company before the time when he could have proved up under his entry, and the company afterwards sold the lands to defendants, who were bona fide purchasers. The lands were subsequently patented under the grant. *Held*, that the title of the purchasers was confirmed by the act of March 3, 1887 (24 Stat. c. 376), supplemented by the act of March 2, 1896 (29 Stat. c. 39), and that complainants could assert no right to the lands by reason of their ancestor's abandoned entry.

2. SAME—RIGHTS OF HOMESTEAD SETTLER BEFORE FINAL PROOF.
A homestead settler on public lands acquires no vested rights therein, as against the United States, prior to the time when, under the law, he becomes entitled to a patent, which deprives congress of the power to vest title to such lands in another.

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

This case was disposed of in the lower court upon demurrer to the amended bill of complaint, the complaint having been adjudged insufficient to warrant any relief. The bill was filed by Daniel R. Wagstaff, Marilla J. Wagstaff, Isabella Wagstaff, Lelah Wagstaff Liebe, Lotta Fern Wagstaff, and Charity J. Goss, the appellants, against Samuel G. Collins, Sewell T. Collins, Michael Spangler, William D. Todd, the Kansas Pacific Railway Company, and the Union Pacific Railway Company, the appellees, and the case thereby made was, in substance, as follows:

The complainants below and the appellants here are the heirs at law of James Wagstaff, who died intestate in the month of January, 1880. On December 26, 1871, the deceased applied to the register and receiver of the United States land office at Denver, Colo., to enter as a homestead the N. ½ of the N. E. ¼, and the N. E. ¼, of section 23, township 4 S., range 68 W., and was allowed to do so; his application being in due form, and the applicant himself duly qualified to make the application. Having made his application, he entered on the land and resided thereon until about September 1, 1874, when he relinquished the possession to the Kansas Pacific Railway Company, which claimed the land as a part of its land grant. On December 11, 1879, the land was patented by the United States to the last-named railway company, as belonging to it under the act and the amendments thereof which granted to it certain lands in aid of the construction of its railroad. 12 Stat. 489; 13 Stat. 356; 14 Stat. 79. Under the provisions of the aforesaid act and its amendments, as subsequently construed in Railway Co. v. Dunmeyer, 113 U. S. 629, 5 Sup. Ct. 566, the land in controversy did not pass to the railway company as a part of its grant, and should not have been patented to it, because when it filed its map of definite location with the secretary of the interior on May 9, 1870, certain parties, to wit, Sylvester Markwell and A. Hopkins, had, respectively, on November 13, 1865, and April 11, 1866, filed pre-emption claims to the land which prevented the railroad grant from attaching thereto, within the rule announced in the Dunmeyer Case. The complainants remained ignorant of the homestead entry that had been made by their ancestor on the land in controversy until on or about August 11, 1891; but after discovering the entry that had been so made, and the facts in relation thereto, they made an application to the register of the United States land office at Denver, Colo., under the provisions of section 2 of the act of June 15, 1880 (21 Stat. 237, 238), to perfect their title and obtain a patent therefor, and at the time of such application made a tender to the United States of the price of the land, at the rate of $1.25 per acre. The bill further alleged that the Kansas Pacific Railway Company conveyed the land in controversy to the appellees Samuel G. Collins and Sewell T. Collins as early as March 6, 1876, before the receipt of a patent; that the grantees in such conveyance well knew that the railway

company had no title to the land, and that James Wagstaff had made a homestead entry thereon, but that, notwithstanding such knowledge, they had taken possession thereof, and still held it, and had mortgaged a part of the tract to secure a promissory note in the sum of $30,000, which mortgage was made on July 30, 1890. The bill appears to have been filed originally on January 6, 1892, and to have been amended on June 12, 1896. The amended bill prayed that the defendants below be adjudged to hold the legal title to the land in trust for the complainants, and that they be required to convey it to them by a good and sufficient deed of conveyance.

H. E. Luthe and John P. Brockway, for appellants.

Willard Teller (H. M. Orahood, on the brief), for appellees.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

THAYER, Circuit Judge, after stating the case as above, delivered the opinion of the court. In view of the averments of the amended bill of complaint, it must be assumed that the land in controversy was properly patented to the Kansas Pacific Railway Company under the rule which prevailed in the land department, and in accordance with which it acted in construing all grants in favor of railroad companies until the promulgation, on March 2, 1885, of the decision in Railway Co. v. Dunmeyer, 113 U. S. 629, 5 Sup. Ct. 566. Prior to the last-mentioned date, the doctrine prevailed that the existence of a pre-emption claim against a tract of land at the time a railroad grant attached thereto did not defeat the grant, if for any reason the pre-emption claim was abandoned or not consummated, but that, upon the failure of the pre-emption claimant to perfect his claim, the land covered thereby inured to the grant as of the date when it became effective. U. S. v. Winona & St. P. R. Co., 165 U. S. 463, 473, 17 Sup. Ct. 368. The inference is plain that as the law was understood and enforced by the land department on December 11, 1879, when a patent for the land in controversy was granted to the Kansas Pacific Railway Company, neither the pre-emption claim in favor of Sylvester Markwell, nor the subsequent one in favor of A. Hopkins, stood in the way of a valid grant to the railway company. At that time these pre-emption claims had doubtless been abandoned by the respective pre-emption claimants, and that fact was established evidently to the satisfaction of the proper officers of the land department, so that, within the law as then construed by the executive branch of the government, the railroad grant became attached to the land at least as early as May 9, 1870, when the map of definite location was filed, and the railway company was entitled to a patent. The same view of the law which actuated the executive branch of the government in granting a patent to the railway company for the land in controversy doubtless induced Samuel G. Collins and Sewell T. Collins, the appellees, to purchase the land from the railway company on March 6, 1876, and it is fair to infer from the allegations of the bill that the same view of the law also influenced James Wagstaff, the complainants' ancestor, to abandon his homestead entry, and submit to the title of the railway company, when it was asserted against him. The bill alleges that the complainants' ancestor was wrongfully and unlawfully ousted from the possession of the land on or about September 1, 1874, but it is not averred that force was employed to

effect the ouster, or that he then claimed that the ouster was wrongful, or that he resorted to legal proceedings of any sort to retain or recover the possession, and, as there are no such averments, it must be presumed that he, in common with the officers of the land department, believed that the railway company's title was paramount, and that he relinquished his claim without contest, on the strength of that belief. Besides, the bill contains allegations to the effect that the complainants' ancestor was in a poor financial condition when the ouster took place; that he was illiterate and ignorant; and that his rights as a settler upon the public domain were not well understood,—from all of which it is evident that in relinquishing his claim the complainants' ancestor did not act involuntarily, in the sense that he was constrained by superior force, or by legal process, but that he acted voluntarily, under a mistaken view of the law.

The settlement of the controversy which this record discloses depends apparently upon the construction and effect of the act of March 3, 1887 (24 Stat. 556, c. 376), and the act of March 2, 1896 (29 Stat. 49, c. 39). The first of these acts is entitled "An act to provide for the adjustment of land grants made by congress to aid in the construction of railroads, and for the forfeiture of unearned lands, and for other purposes," and it was passed for the express purpose of quieting the title to much land lying within the limits of certain railroad land grants that had been clouded by the decision in the Dunmeyer Case, to the effect that the filing of a homestead or pre-emption claim to a tract of land situated within the limits of a railroad land grant, at any time before the company filed its map of definite location in the general land office, withdrew such tract of land from the operation of the grant, although the claim was not prosecuted and was subsequently abandoned. The first section of that act made it the duty of the secretary of the interior to adjust, in accordance with the decisions of the supreme court, the various land grants theretofore made in aid of the construction of railroads. The second section provided, in substance, that the secretary of the interior should demand a relinquishment or reconveyance to the United States of any lands theretofore granted to any railroad company in aid of the construction of its road, which for any cause had been erroneously certified or patented by the United States as a part of its grant, and that the attorney general should bring suits, if necessary, to cancel such patents and certifications. The remaining sections of the act contained provisions that were designed to protect homestead and pre-emption claimants whose entries had been erroneously canceled by the land department on account of any land grant, and also to protect persons who had purchased lands in good faith from any land-grant company. These sections, so far as it is deemed necessary to quote them in full, are as follows:

"Sec. 3. That if, in the adjustment of said grants, it shall appear that the homestead or pre-emption entry of any bona fide settler has been erroneously cancelled on account of any railroad grant or the withdrawal of public lands from market, such settler upon application shall be reinstated in all his rights and allowed to perfect his entry by complying with the public land laws: provided, that he has not located another claim or made an entry in lieu of the one so erroneously cancelled: and provided also, that he did not volun-

tarily abandon said original entry: and provided further, that if any of said settlers do not renew their application to be reinstated within a reasonable time, to be fixed by the secretary of the interior, then all such unclaimed lands shall be disposed of under the public land laws, with priority of right given to bona fide purchasers of said unclaimed lands, if any, and if there be no such purchasers, then to bona fide settlers residing thereon.

"Sec. 4. That as to all lands, except those mentioned in the foregoing section, which have been so erroneously certified or patented as aforesaid, and which have been sold by the grantee company to citizens of the United States, or to persons who have declared their intention to become such citizens, the person or persons so purchasing in good faith, his heirs or assigns, shall be entitled to the land so purchased, upon making proof of the fact of such purchase at the proper land office within such time and under such rules as may be prescribed by the secretary of the interior, after the grants respectively shall have been adjusted; and patents of the United States shall issue therefor, and shall relate back to the date of the original certification or patenting, and the secretary of the interior, on behalf of the United States, shall demand payment from the company which has so disposed of such lands of an amount equal to the government price of similar lands; and in case of neglect or refusal of such company to make payment as hereafter specified within ninety days after the demand shall have been made, the attorney general shall cause suit or suits to be brought against such company for the said amount. * * *

"Sec. 5. That where any said company shall have sold to citizens of the United States, or to persons who have declared their intention to become such citizens, as a part of its grant, lands not conveyed to or for the use of such company, said lands being the numbered sections prescribed in the grant, and being coterminous with the constructed parts of said road, and where the lands so sold are for any reason excepted from the operation of the grant to said company, it shall be lawful for the bona fide purchaser thereof from said company to make payments to the United States for said lands at the ordinary government price for like lands, and thereupon patents shall issue therefor to the said bona fide purchaser, his heirs or assigns: provided, that all lands shall be excepted from the provisions of this section which at the date of such sales were in the bona fide occupation of adverse claimants under the preemption or homestead laws of the United States, and whose claims and occupation have not since been voluntarily abandoned, as to which excepted lands the said pre-emption and homestead claimants shall be permitted to perfect their proofs and entries and receive patents therefor. * * *"

The provisions last aforesaid, which were inserted in the act of March 3, 1887, for the protection of persons who had purchased lands from a railroad company in the belief that the land so acquired fell within the terms of its grant, were further reinforced by a clause which was inserted in a subsequent act, approved on March 2, 1896 (29 Stat. 42, c. 39). This latter act fixed a period within which suits should be brought by the United States to cancel patents that had been erroneously issued under railroad land grants, and in the first section thereof is found the following provision: "But no patent to any lands held by a bona fide purchaser shall be vacated or annulled but the right and title of such purchaser is hereby confirmed. * * *"

The two acts of congress to which reference has been made underwent careful analysis in the recent case of U. S. v. Winona & St. P. R. Co., 165 U. S. 463, 481, 17 Sup. Ct. 368, and the judgment of the court concerning the effect of those acts upon the rights of one who had acquired land by purchase from a railroad company, the title to which had been invalidated by the decision in the Dunmeyer Case, was stated in the following language:

"Our conclusion is that these acts operate to confirm the title to every purchaser from a railroad company of lands certified or patented to or for its

benefit, notwithstanding any mere errors or irregularities in the proceedings of the land department, and notwithstanding the fact that the lands so certified or patented were, by the true construction of the land grants, although within the limits of the grants, excepted from their operation, providing that he purchased in good faith, paid value for the lands, and providing also that the lands were 'public lands,' in the statutory sense of the term, and free from individual or other claims."

The court also held in that case, in substance, that the words "bona fide purchaser," as employed in the acts of March 3, 1887, and March 2, 1896, referred to above, were not used by congress in any technical sense, but were intended to comprehend all persons who had bought land from a railroad company and paid value therefor, acting at the time under an honest belief that they were acquiring a good title; and that such persons were none the less bona fide purchasers, within the meaning of the acts, although they did have knowledge of facts which, but for a mistaken view of the law, would have demonstrated that the vendor company had no title.

The fifth section of the act of March 3, 1887, to say nothing of the act of March 2, 1896, covers the case at bar in all of its essential features, and in terms entitles the appellees to a confirmation of their title. The appellees Samuel G. Collins and Sewell T. Collins received a conveyance of the land in controversy from the Kansas Pacific Railway Company prior to the issuance of a patent to that company, and the land appears to have been the numbered sections prescribed in its grant, and to have been coterminous with the constructed parts of its road. At the time the appellees so acquired the land it was not occupied by adverse claimants under the pre-emption or homestead laws; for, as the bill discloses, the complainants' ancestor had relinquished the possession thereof a year and a half previously under circumstances which must be regarded as voluntary, inasmuch as such relinquishment is not shown to have been in a legal sense involuntary. Moreover, there are no allegations in the bill which will serve to impugn the good faith of the purchasers from the railway company, since they acted in the pursuance of a belief which was then prevalent that the railway company had a perfect title, under the terms of its grant.

It is urged, however, in opposition to this view, that the complainants' ancestor had acquired a vested right in the land by virtue of his homestead claim and residence thereon, of which neither he nor his heirs could be deprived by subsequent legislation, and that the complainants are therefore entitled to the land, to the exclusion of the purchasers from the railway company, although congress clearly intended to confirm the purchasers' title. We are not able to assent to this proposition. In the case of Shiver v. U. S., 159 U. S. 491, 495, 16 Sup. Ct. 54, the doctrine was fully approved that an entry upon public land accompanied by residence thereon, in pursuance of such permission as is given by the land laws of the United States, confers no vested interest in the land until the settler has remained in possession for the length of time or done the acts which under the law entitled him to a patent. Such a settlement, it was said, protects the settler from intrusion by others, but confers no rights as against the United States. This court in Norton v. Evans, 49 U. S. App. 669, 27 C. C. A. 168, and 82 Fed. 804, 807, also applied the same rule, that

had long been applied to pre-emption claimants, to a homestead claimant, holding that an entry by the latter "creates no vested rights as against the United States, and does not interfere with the power of congress by subsequent legislation to dispose of the land"; citing Frisbie v. Whitney, 9 Wall. 187; The Yosemite Valley Case, 15 Wall. 77; Buxton v. Traver, 130 U. S. 232, 9 Sup. Ct. 509; Campbell v. Wade, 132 U. S. 34, 10 Sup. Ct. 9. We think, therefore, that such entry as was alleged to have been made by James Wagstaff, the complainants' ancestor, in December, 1871, and to have been relinquished by him in September, 1874, without contest, and apparently before his entry had been canceled by the officers of the land department, cannot be regarded as creating a vested right in the land which congress was without power to destroy. We think that it was within the power of the legislative branch of the government to confirm the title of the purchasers from the railway company to the land in controversy, and that the act of March 3, 1887, was adequate to accomplish that object. The judgment of the circuit court, dismissing the bill of complaint, is therefore affirmed.

SHINNEY v. NORTH AMERICAN SAVINGS, LOAN & BUILDING CO. et al.

(Circuit Court, D. Utah. February 13, 1899.)

No. 309.

1. RECEIVERS—POWER OF COURT TO APPOINT—FOREIGN CORPORATIONS.
   A court of equity has general power to appoint a receiver for the assets of a foreign corporation within its jurisdiction.
2. SAME—VALIDITY OF APPOINTMENT—COLLATERAL ATTACK.
   An order appointing a receiver, where it was a part of the relief sought by the bill, and the court had jurisdiction, cannot be attacked collaterally.
3. SAME—FEDERAL AND STATE COURTS—ANCILLARY RECEIVERSHIP.
   When a receiver has been appointed for a corporation by a court of the state where it is domiciled, a federal court of another jurisdiction has power to appoint the same person as ancillary receiver in such jurisdiction.
4. REMOVAL OF CAUSES—SUIT FOR APPOINTMENT OF ANCILLARY RECEIVER.
   A suit for the appointment of an ancillary receiver in a different jurisdiction is not ancillary to the suit in which the primary receiver was appointed, but entirely independent, and, if brought in a state court, is subject to removal to a federal court, the same as other causes.
5. SAME—ANCILLARY SUITS—ACTION AGAINST FEDERAL RECEIVER.
   A suit brought against a receiver of a federal court to determine his right to assets claimed by him as such receiver is ancillary to the suit in which he was appointed, and, if brought in a state court, may be removed by the receiver into the federal court by which he was appointed, without regard to the citizenship of the parties or the amount in controversy.

On Motion to Remand to State Court.

Wm. L. Maginnis, for complainant.
P. L. Williams, for defendants.

MARSHALL, District Judge. The plaintiff brought this suit in a state court against the North American Savings, Loan & Building Company, a corporation, Edward B. Graves, its receiver, heretofore

appointed by this court, and the Norwich Union Fire Insurance Company. The object of the suit is to have an account taken of the sum due by plaintiff on a note and mortgage made to the first defendant, and to recover from the insurance company the amount of a policy of insurance on a house, a part of the mortgaged property, and heretofore destroyed by fire, less, however, the sum found due the first-named defendant and its receiver on such accounting. The insurance company admits its liability on the policy, and is willing to pay the same to whomsoever may be determined as entitled thereto. The receiver removed the suit into this court. The plaintiff now moves to remand on the following grounds: (1) That the suit of A. V. McIntosh against the North American Savings, Loan & Building Company, in which suit said receiver was appointed, did not give this court jurisdiction to appoint a receiver; (2) that, even if jurisdiction to appoint a receiver existed, it could not be exercised for the purpose of an appointment ancillary to a primary administration in a state court of another state; (3) that the proceedings for the appointment of a receiver of the assets of the North American Savings, Loan & Building Company in Utah was ancillary to the primary suit in a state court of Minnesota, and hence could not be removed to a federal court; (4) that the value of the matter in dispute in the present case does not exceed the sum of $2,000. These objections will be considered in the order named.

1. The case of McIntosh against the North American Savings, Loan & Building Company was instituted in a state court, and a receiver of the assets of the defendant within the state of Utah was appointed by that court in advance of an appearance by the defendant. The defendant, a foreign corporation, thereafter removed it into this court. Subsequently the receiver so appointed resigned, and the defendant Edward B. Graves was permitted to file a petition in that suit in which it was alleged that he had been appointed the receiver of the North American Savings, Loan & Building Company by a state court of Minnesota, in a suit then pending, and prior to the institution of any proceedings in Utah; that the corporation had been organized under the laws of Minnesota, and had its general offices there; that in said suit the insolvency of the corporation and the necessity for a receiver was shown; that he had duly qualified as such receiver; and he prayed that he might be appointed by this court receiver of the assets of said corporation within Utah, and that such receivership be ancillary to the primary administration of the state court of Minnesota. Thereupon said Graves was appointed as receiver by this court, and he duly qualified as such. In his motion to remand, the plaintiff, Shinney, attacks collaterally the jurisdiction of the court in the case of McIntosh against the North American Savings, Loan & Building Company. He was not a party to that suit, nor is this proceeding appropriate for the correction of any error therein. The propriety of the original appointment of a receiver, or of the appointment of defendant Graves as ancillary receiver, is not material here, if jurisdiction to make the appointment existed. That a general power exists to appoint a receiver of the assets of a foreign corporation within the jurisdiction of the court appoint-

ing is well settled. Williams v. Hintermeister, 26 Fed. 889; Murray v. Vanderbilt, 39 Barb. 140; Trust Co. v. Miller, 33 N. J. Eq. 155; 5 Thomp. Corp. §§ 6860, 6861. And the case of Buswell v. Order of Iron Hall, 161 Mass. 224, 36 N. E. 1065, is a precedent for the appointment here made. Jurisdiction of the person is unquestioned. The corporation was regularly served with process, appeared, and answered the complaint, and has never objected to the jurisdiction. The appointment of a receiver was a part of the relief expressly sought in the suit, and there was an attempt to state a cause of action therefor. If, for the purposes of the argument, it were admitted that the complaint did not state a good cause of action, or affirmatively showed that the plaintiff was not entitled to the relief prayed, the jurisdiction would still exist. An appointment on such a bill would be erroneous, but in no sense void. The action of the court being properly invoked, its determination would not be void for want of jurisdiction, so long as it was within the issues tendered. Reynolds v. Stockton, 140 U. S. 254–269, 11 Sup. Ct. 773; Moore v. Martin, 38 Cal. 428; Ricketts v. Spraker, 77 Ind. 371; In re Latta, 43 Kan. 533, 23 Pac. 655; Young v. Lorain, 11 Ill. 624; Van Fleet, Coll. Attack, § 61.

2. It is admitted that, when a receiver is once appointed by a federal court, other federal courts, through comity, will usually appoint the same person as receiver of the assets within their jurisdiction; but it is argued that, where the appointment is first made by a state court, federal courts are without power to act, in conformity with the principle of comity. No reason for such a distinction is apparent. The state court is of co-ordinate jurisdiction in such matters with the federal court sitting in the same locality. As between the parties, its determination of the insolvency of the corporation and of the need for a receiver is just as conclusive as if had in a federal court. The need for a uniform administration of the assets of an insolvent corporation inheres in the principles of equity, and does not vary with the forum first invoked. It is no unusual thing for a federal court to appoint an ancillary receiver of assets within its jurisdiction in aid of a primary appointment by a state court of another state. Sands v. E. S. Greeley & Co., 31 C. C. A. 424, 88 Fed. 130.

In Rust v. Waterworks Co., 17 C. C. A. 16–20, 70 Fed. 129–133, the circuit court of appeals of the Eighth circuit said:

> "It goes without saying that the court below [United States circuit court for the district of Colorado] had the power, upon the presentation to it of the decree of the court of chancery of the state of New Jersey appointing the plaintiff in error the receiver of the property of this insolvent corporation, and the trustee for its creditors and stockholders, to appoint him receiver and trustee, with the same powers, in the district of Colorado, and to authorize him to sue for and to defend suits against the waterworks company in that district in the name of the corporation or in his own name."

The plaintiff's contention is without merit.

3. The third objection confounds the nature of a suit for ancillary receivership. It is in no sense a continuation of, or an incident to, the suit in which the primary receiver was appointed. A judgment against the ancillary receiver does not bind assets beyond the juris-

diction of the court appointing him. Reynolds v. Stockton, 140 U. S. 254, 11 Sup. Ct. 773; Johnson v. Powers, 139 U. S. 156, 11 Sup. Ct. 525. "Where a receiver, administrator, or other custodian of an estate is appointed by the courts of one state, the courts of that state reserve to themselves full and exclusive jurisdiction over the assets of the estate, within the limits of the state." Reynolds v. Stockton, supra. "It rests in the discretion of the court appointing the receiver whether the assets within its jurisdiction shall be distributed under its own direction, or shall be transmitted to the primary receiver. U. S. v. Coxe, 18 How. 105." Sands v. E. S. Greeley & Co., 31 C. C. A. 424–426, 88 Fed. 130–133. The two proceedings are entirely independent. The need for a uniform and equitable distribution of the assets alone moves the discretion of the court of so-called "ancillary jurisdiction" to transmit them to the court of primary jurisdiction. Evidently, to insure equality among creditors, some one court must determine their rights, although the assets may be scattered through many jurisdictions. Among co-ordinate courts, the court of primary jurisdiction is selected for this purpose, not because of any paramount jurisdiction inhering in it, but because of the necessity of making some selection, and of the difficulty of formulating any principle of selection other than that of the first in time.

4. It is true that the matter in dispute in this action does not exceed in value the sum of $2,000, and it would therefore not be removable to this court, except that in a suit pending here the defendant Graves has been appointed receiver of the assets of the North American Savings, Loan & Building Company, that he is sued as such receiver, and the object of the suit is to determine his right to assets claimed by him as receiver. For the purposes of jurisdiction, this suit must be considered as ancillary to the suit pending in this court in which he was appointed receiver, and, as such, cognizable here, irrespective of citizenship of parties or of amount in controversy. White v. Ewing, 159 U. S. 36, 15 Sup. Ct. 1018; State of Washington v. Northern Pac. R. Co., 75 Fed. 333; Carpenter v. Railroad Co., Id. 850; Sullivan v. Barnard, 81 Fed. 886; Bausman v. Denny, 73 Fed. 69. The motion to remand is denied.

PLASTER v. RIGNEY.

(Circuit Court of Appeals, Eighth Circuit. September 25, 1899.)

No. 1,159.

1. DEEDS—PROOF—CERTIFIED COPIES OF RECORD.
   Under Rev. St. Mo. 1889, §§ 4864, 4865, a certified copy of the record of a deed which was properly acknowledged when made, but not in accordance with the law in force when it was recorded, is admissible in evidence, without proof of the execution of the original deed, where the record was made more than 30 years before such copy is offered in evidence.
2. EJECTMENT—EVIDENCE OF OUTSTANDING TITLE.
   In an action of ejectment, where plaintiff claims title through a deed which recites a consideration, a deed from a common grantor to a third person, executed before the one under which plaintiff deraigns title, but

not so proved or acknowledged as to entitle it to record so as to charge subsequent purchasers with notice, and in the absence of proof that the grantee therein was ever in possession of the land or ever claimed title thereto, is not admissible to prove an outstanding title.

3. POWER OF ATTORNEY GIVEN BY LUNATIC—VALIDITY.

A power of attorney given by a lunatic is void, and a deed executed by the grantee by virtue of such power is not admissible against the grantor.

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

John B. Hale and L. H. Waters, for plaintiff in error.

George H. English, for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

THAYER, Circuit Judge. This was a suit in ejectment by which Alice H. Rigney, by her curator, Charles Lyon, the plaintiff below and the defendant in error here, recovered from Elisha Plaster, the plaintiff in error and the defendant below, the possession of certain lands in Carroll county, Mo., which are described as a part of the N. W. ¼ of section 19, township 55, range 23 W. The ouster complained of was laid as having occurred on or about the last day of February, 1877, and the suit was instituted on January 9, 1896. The land in controversy was originally military bounty land, and a patent therefor was issued to Henry Richmond on April 20, 1819. The plaintiff below deraigned her title thereto under a deed from said Richmond to one John Thompson, dated August 21, 1819, and acknowledged the same day before Robert Wharton, mayor of the city of Philadelphia, Pa. This deed was filed for record in Carroll county, Mo., on May 5, 1866. The plaintiff showed an unbroken chain of title under the aforesaid deed in James Rigney, her deceased husband, who died in March, 1871, and a deed from the administrator of her husband, of date October 16, 1872, duly acknowledged and recorded, which vested in her all the title of her said husband. Oral evidence was adduced by the plaintiff which tended to show that there were no improvements on the land in controversy as late as the year 1871; that in the year 1870 and in the year 1871, until his death, her husband was in possession of the land; that in said years he did some plowing on said land, cut some timber thereon, and procured some lumber, with a view of building a house and establishing a home upon the property; and that he also employed a person to look after the possession and prevent trespasses. The plaintiff also produced evidence which tended to show that she was insane at the time her husband died and for some time previous thereto, and was incapable of attending to her business, and remained in that condition until 1895, when she was adjudged insane. The defense which the defendant below interposed was possession under color of title, to wit, a tax deed, for a period which was sufficient, as he claimed, to bar the plaintiff's right of recovery under the statute of limitations. He also sought to avail himself of an alleged outstanding valid title in a stranger.

It is assigned for error, in the first instance, that the trial court

erred in admitting in evidence a certified copy of the deed above mentioned from Richmond to Thompson, of date August 21, 1819, under which the plaintiff below claimed, without requiring proof of the identity of the grantor, or, what is the same thing, without requiring proof of the execution of the original deed, which, at the date of the trial, was nearly 80 years old. It is asserted in behalf of the defendant below that there was no law in force in the state of Missouri warranting the admission of the certified copy of said deed without such proof.. We are constrained to overrule this contention. Two sections of chapter 62 of the Revised Statutes of Missouri of 1889, concerning evidence, are as follows:

"Sec. 4864. * * * All records made by the recorder of the proper county one year before this law takes effect by copying from any deed of conveyance, deed of trust, mortgage, will or copy of a will, or other instrument of writing, whereby any real estate may be affected in law or in equity, that has neither been proved nor acknowledged or which has been proved or acknowledged, but not according to the law in force at the time the same was recorded, shall hereafter impart notice to all persons of the contents of such instruments; and hereafter when any such instrument shall have been so recorded for the period of one year, the same shall thereafter impart notice to all persons of the contents of such instruments, and all subsequent purchasers and mortgagees shall be deemed to purchase with notice thereof.

"Sec. 4865. * * * Certified copies of such records as are contemplated in the next preceding section shall not be received in evidence until the execution of the original instrument or instruments from which such records were made shall have been duly proved according to law, except where such records shall have been made thirty years or more prior to the time of offering the same in evidence."

The copy of the deed in question fell within the language of this statute. The statute in its present form took effect in 1887 (Sess. Laws Mo. 1887, p. 183), more than one year after the original deed was recorded, and the original deed was not acknowledged according to the law in force when the same was recorded, because it was acknowledged before the mayor of a city, who had no power to take the acknowledgment, on May 5, 1866, when the deed was recorded (Gen. St. Mo. 1865, c. 109, § 9), although he had such power, and the acknowledgment was in all respects regular when it was taken. So that, within a technical view of the statute, the copy of the deed was admissible under section 4865, supra, without proof of the execution of the original deed, it having been recorded more than 30 years before it was offered in evidence. But upon a broader view of the question, the copy of the deed was admissible. The statute above quoted is remedial and entitled to a liberal construction. It recognizes the difficulty of proving the execution of many instruments affecting the title to real property which have been of record in the proper office for upwards of 30 years, and it was intended to dispense with such proof after that lapse of time, even in cases where the recorded instrument was not acknowledged at all, or was not so acknowledged as to entitle it to record. A proper degree of respect for the legislature by which the above statute was enacted compels us to hold, as the trial court held (88 Fed. 686, 688), that it did not intend to declare that a copy of a recorded deed which had been defectively acknowledged, or not acknowledged at all, might

be admitted in evidence after the lapse of 30 years from the date of its record without proof of the execution of the original instrument, and at the same time to deny the right to make a similar use of certified copies of recorded deeds which were properly acknowledged or proven, although the original thereof had been of record for an equal or greater period. The supreme court of the state has also expressed its disapproval of such an unreasonable interpretation of the statute. Crispen v. Hannavan, 72 Mo. 548, 555. The copy of the deed in question was properly admitted, as the trial court held.

It is next assigned for error that the trial court erred in refusing to admit in evidence a deed from Henry Richmond to John H. Martin for the land in controversy, which was dated July 20, 1819, and acknowledged the same day, at Boston, Mass., before Samuel Jackson Prescott, who described himself as being a "Notary Public and Justice of the Peace of the Quorum of the County of Suffolk," Mass., which deed was not filed for record in Carroll county, Mo., until February 16, 1865. The defendant below did not deraign title under this deed, but offered it to protect his own possession by proof of an outstanding title in a stranger, and no evidence was offered which tended to show that such a man as Martin ever lived, or that he or any one else had ever been in possession of the land in controversy, or had claimed possession thereof under the aforesaid conveyance. It is conceded that this deed was not acknowledged before such an officer as, at the time it was acknowledged, entitled it to record; for which reason the record thereof would not impart notice of its contents to a subsequent purchaser for value, without the aid of an enabling statute. John Thompson, under whom the plaintiff below claimed, was such a purchaser, as the deed from Richmond to him recited a money consideration ($75) paid and received; and when the deed to Thompson was placed on record on May 5, 1866, there was no law then in force that affected him or his grantee with notice of the prior deed to Martin, although it had been recorded previously. The first legislation in the state of Missouri similar to section 4864 of the Revised Statutes of Missouri of 1889, above quoted, was an act passed on February 2, 1847 (Sess. Laws Mo. 1847, p. 95; Rev. St. Mo. 1855, c. 62, § 46); but the act as originally framed, and as it stood unaltered until long after May 5, 1866, applied only to deeds with defective acknowledgments, but otherwise good as between the parties, that had been placed of record prior to the passage of the act; that is to say, prior to February 2, 1847 (Bishop v. Schneider, 46 Mo. 472, 481, 482; Gatewood v. Hart, 58 Mo. 261, 264). The deed from Henry to Martin, recorded February 16, 1865, was not within the purview of the statute, and did not affect the validity of the Thompson title, under which the plaintiff below claimed. As between the two, the latter was the superior title; Thompson being a purchaser for value without notice, actual or constructive, of the prior conveyance. It follows, therefore, that the conveyance to Martin was not admissible in evidence, because it did not tend to establish a subsisting outstanding title, good as against the plaintiff's title, which facts should have appeared to render it admissible. Henderson v. Wanamaker, 49 U. S. App. 174, 25 C. C. A. 181, and 79 Fed. 736; McDonald

v. Schneider, 27 Mo. 405; Totten v. James, 55 Mo. 494; Greenleaf's Lessee v. Birth, 6 Pet. 302, 312, 313; Jackson v. Hudson, 3 Johns. 375; Peck v. Carmichael, 9 Yerg. 325.

It is claimed finally that error was committed by the trial judge in refusing to admit the following documentary evidence which was offered by the defendants, to wit, a copy of a power of attorney signed by Alice H. Rigney, the plaintiff below, on December 13, 1875, whereby she apparently authorized William Morgan to sell the land in controversy, and a deed for said land subsequently executed by said Morgan, as attorney in fact, on November 1, 1876, whereby he conveyed the land to James S. Bentley. These documents were also offered in proof of an outstanding title in a stranger, but they were not accompanied by any proof of possession thereunder, or of an attempt at any time made by the grantee in the deed to obtain possession, and they were executed 22 years before they were offered in evidence. The title which they tended to establish was therefore a dormant title that had apparently been abandoned for some reason by the person in whom it was vested. Concerning the exclusion of the aforesaid power of attorney and deed, however, we only deem it necessary to say that as the jury subsequently found, under proper instructions of the court, and on oral proof as to the plaintiff's mental condition in 1872, and from that time forward until long subsequent to November, 1876, that she was continuously insane and mentally incompetent to manage her affairs or transact any business, we fail to see that the defendant below was prejudiced to any extent by the exclusion of the aforesaid documents. The oral evidence in question, and the finding thereon by the jury, showed the invalidity, as against the plaintiff, of the pretended outstanding title which the defendant attempted to establish, since a power of attorney executed by a lunatic is held by the court of last resort (Dexter v. Hart, 15 Wall. 9) to be void. The deed executed by Morgan was therefore without force or effect.

In conclusion, it may be said that, from an examination of the record and the instructions of the learned trial judge, it is apparent that the jury must have found that the plaintiff's husband was in possession of the disputed premises, and exercised acts of ownership thereon, for some time in the years 1870 and 1871, or, at least, that neither the defendant nor those under whom he claimed were in possession of the land on October 16, 1872, when the title devolved upon the plaintiff; that the plaintiff was insane at the latter date, and remained in that condition until she was adjudged insane in the year 1895; and that by reason of that fact the defendant could not invoke the statute of limitations to transform a possession which was acquired by him subsequent to October 16, 1872, into a legal title. Such being the view that was taken by the jury on testimony warranting that finding, we are satisfied that no errors were committed which will warrant a reversal. The judgment below is therefore affirmed.

FIDELITY & CASUALTY CO. OF NEW YORK v. LOWENSTEIN.

(Circuit Court of Appeals, Eighth Circuit. October 2, 1899.)

No. 1,180.

1. ACCIDENT INSURANCE—CONSTRUCTION OF POLICY—EFFECT OF PRIOR ADJUDICATION.

In an action on an insurance policy containing a provision which had, prior to the issuance of such policy, been given a uniform judicial construction by the courts of last resort of several states, such construction will be adopted as the one presumably intended by the parties.[1]

2. SAME—DEATH FROM INHALING GAS.

An accident policy contained a provision that the insurance should not cover "injuries, fatal or otherwise, resulting from poison, or anything accidentally or otherwise taken, administered, absorbed, or inhaled." Prior to the issuance of the policy such provision in another policy issued by the same company had been construed by the supreme court of a state, and held not to exempt the company from liability for the death or injury of the insured resulting from the unconscious and involuntary inhaling of illuminating gas while asleep, and in another state policies containing similar provisions had received a similar construction. *Held*, that the same construction would be adopted by the court in an action on such later policy for the death of the insured from the same cause, regardless of the views which the court might hold if the question was res integra.[2]

Sanborn, Circuit Judge, dissenting.

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

O. H. Dean (De Lagnel Berier, William Warner, W. D. McLeod, and Hale Holden, on the brief), for plaintiff in error.

I. J. Ringolsky (L. C. Krauthoff, on the brief), for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

THAYER, Circuit Judge. This action is founded on a policy of accident insurance which was issued to Emanuel Lowenstein, of Kansas City, Mo., the husband, in his lifetime, of Sophia Lowenstein, the defendant in error, who was the plaintiff in the trial court. The policy took effect originally on January 16, 1896, for the term of one year, but was renewed for another year on January 16, 1897, as the plaintiff below claimed, and as the jury appear to have found. The policy in suit insured the plaintiff's husband, Emanuel Lowenstein, "against bodily injuries sustained through external, violent, and accidental means"; and the insurer further agreed that, "if death shall result within ninety days from such injuries, independently of all other causes, the company will pay the principal sum of this policy to Sophia Lowenstein, his wife, if surviving, or, in event of her prior death, to the legal representatives of the assured. * * *" A subsequent provision found in the policy, over which the chief controversy arises, is as follows:

"(5) This insurance does not cover disappearances; nor war risks; nor voluntary exposure to unnecessary danger; nor injuries, fatal or otherwise, result-

[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.

[2] As to accident insurance, see note to National Acc. Soc. of City of New York v. Dolph, 38 C. C. A. ——.

ing from poison or anything accidentally or otherwise taken, administered, absorbed, or inhaled; nor injuries, fatal or otherwise, received while or in consequence of having been under the influence of, or affected by, or resulting directly or indirectly from, intoxicants, anæsthetics, narcotics, sunstrokes, freezing, vertigo, sleep walking, fits, hernia, or any disease or bodily infirmity."

The plaintiff below claimed, and the jury so found, that on the night of February 7, 1897, the plaintiff's husband retired to his room in a hotel in New York City, to which place he had gone temporarily on business, being at the time in a healthy physical and mental condition, and that while asleep in his room he died from asphyxia and suffocation, "the result of unconsciously, involuntarily, and unintentionally, and accidentally" inhaling gas into his lungs while asleep, which had escaped from a gas pipe into said room without the deceased's knowledge. The trial court ruled, in substance, that a death so occasioned was within the provisions of the policy, and entitled the plaintiff to recover. In accordance with that ruling, which is the principal error assigned, there was a verdict and judgment in favor of the plaintiff below.

Whether the foregoing ruling by the trial court was right, and should be upheld in the case at bar, should be determined, we think, not solely with reference to the provisions of the policy as if they had never undergone judicial construction, but in the light of the following well-known facts and circumstances: On March 5, 1889, the court of appeals of New York was called upon to construe an accident policy issued by the Travelers' Insurance Company, which contained a provision, among others, that the insurance granted by its policy should not extend "to any bodily injury of which there shall be no external or visible sign upon the body, * * * nor to any death or disability which may have been caused * * * by the taking of poison, contact with poisonous substances, or inhaling of gas, or by any surgical operation or medical treatment"; and it was held that, in expressing its intention not to be liable for a death occasioned by "inhaling gas," the company must be understood to have meant a voluntary and intelligent act on the part of the insured, as distinguished from one which was unconscious, and in that sense involuntary, and it was accordingly decided that the company was liable under its policy in a case where the insured was asphyxiated by illuminating gas which he unconsciously, involuntarily, and accidentally inhaled while asleep in his room at a hotel. Paul v. Insurance Co., 112 N. Y. 472, 20 N. E. 347. See, also, Bacon v. Association (decided Oct. 11, 1890) 123 N. Y. 304, 25 N. E. 399, and Menneiley v. Assurance Corp. (decided March 3, 1896) 148 N. Y. 596, 43 N. E. 54, where the ruling in the previous case was reaffirmed. The decision of the court of appeals of New York was followed and aproved by the supreme court of Pennsylvania in an opinion which was filed by that court on October 5, 1891, after the case had been twice argued. Pickett v. Insurance Co., 144 Pa. St. 79, 22 Atl. 871. The latter case involved a construction of the same provision which the New York court had previously construed, and the ruling was that a death by inhaling gas was caused by external, violent, and accidental means, within the meaning of the policy, and that, where gas was inhaled

involuntarily and unconsciously by the insured, the insurer was liable, notwithstanding the exception in its policy with respect to death occasioned by the inhalation of gas.

Following these decisions, the Fidelity & Casualty Company of New York, the present plaintiff in error, was sued in the state of Illinois upon a policy that it had issued containing the same provisions as the policy in suit, which we have quoted above. The insured in the Illinois case was asphyxiated in his room at a hotel by illuminating gas which he inhaled unconsciously, involuntarily, and accidentally while asleep at night, and his administrator claimed that the insurer was liable under the provisions of its policy. The case came before an appellate court (Casualty Co. v. Waterman, 59 Ill. App. 297), and was decided on May 28, 1895, about nine months before the policy in suit was originally issued; the court holding that the insurer was liable because the act of the deceased in inhaling gas was neither conscious nor voluntary, but, on the contrary, was found to have been unconscious, involuntary, and accidental. The view taken by the appellate court was subsequently approved by the supreme court of the state on May 12, 1896 (Id., 161 Ill. 632, 44 N. E. 283), about nine months before the policy in suit was renewed.

In view of the foregoing, we are of opinion that the construction placed by the learned judge of the trial court (vide 88 Fed. 474) upon the fifth clause of the policy in suit should be upheld, irrespective of what our view might be if the question was res integra, or if the policy had been executed in this circuit subsequent to the decision in McGlother v. Accident Co., 60 U. S. App. 705, 32 C. C. A. 318, and 89 Fed. 685. The defendant company issued the policy in suit, and doubtless many others of a like character, after it was advised by the decisions to which reference has been made, one of which was a construction of its own contract, that, as interpreted by the courts of last resort in several states, the policy as drawn would not exempt it from liability if a poisonous gas was unconsciously, involuntarily, and accidentally inhaled by the insured, which occasioned his death or injury. It had knowledge, therefore, that, by reason of such adjudications, its policies, if they continued to issue them in the old form, would in all probability be accepted by some, and possibly many, persons, upon the understanding that the company intended to and did in fact assume the species of risk last described. If such was not its intention, its plain duty was to so modify the language of its policies as to make its purpose clear, inasmuch as a slight change in the phraseology theretofore employed would have left no room for doubt or speculation as to its meaning. We are unwilling to concede that an insurance company may continue to issue policies without any modification of their terms, after certain provisions thereof have been construed by several courts of the highest character and ability, and be heard to insist, in controversies between itself and the insured with respect to such subsequently issued policies, that they do not in fact cover risks which they had been judicially adjudged to cover before they were issued. While it may not be accurate to say that under such circumstances a technical estoppel arises in favor of the insured, yet the courts in such cases should

rigidly enforce the rule requiring policies of insurance to be construed most strongly against the insurer, and they should not hesitate to hold that decisions construing a policy adversely to the contention of the insurer thereafter create a doubt as to its proper interpretation of sufficient gravity to be resolved in favor of the insured. National Bank v. Insurance Co., 95 U. S. 673; Anderson v. Fitzgerald, 4 H. L. Cas. 484, 507; Indemnity Co. v. Dorgan, 16 U. S. App. 290, 309, 7 C. C. A. 581, and 58 Fed. 945, 956, and cases there cited. In a case decided by this court (Manufacturing Co. v. Jones, 32 U. S. App. 32, 14 C. C. A. 30, and 66 Fed. 124), where a doubt arose from the form of a contract which was in very general use by a manufacturing company, and which had been prepared by it, whether the contract imposed a joint or a several liability, and different views of that question had been taken by different courts, it was held to be the duty of the party by whom the contract had been prepared to so modify its provisions for future use as to avoid the doubt which had arisen as to its true interpretation, and that, not having done so, the contract would be construed most strongly against the party who had prepared it, in a suit brought by such party to enforce it. The rule observed in that case is strictly applicable to the case at bar, and should lead to an affirmance. No other questions are presented by the record which, from our point of view, require special notice. The jury, we think, were correctly instructed on all the debatable issues, and there was abundant evidence to sustain the verdict. The judgment below is therefore affirmed.

SANBORN, Circuit Judge (dissenting). I am unable to concur in the decision and opinion of the majority in this case. My mind will no more yield its assent to the proposition that an injury from poison involuntarily and unconsciously taken or inhaled is not included within the exception of "injuries fatal or otherwise, resulting from poison or anything accidentally or otherwise taken, administered, absorbed, or inhaled," than it will to the mathematical proposition that two and two are five. The assent to either, and to one as much as to the other, brings to it a certain feeling of self-stultification to which it will not subject itself. It seeks in vain for answers consistent with the former proposition to the questions, if gas is unintentionally and unconsciously taken or inhaled, why is it not "accidentally" taken or inhaled? If it is not, then why is it not "otherwise" taken or inhaled? And how can gas get into the system in any other way than by being "accidentally or otherwise taken, administered, absorbed, or inhaled"?

The suggestion that, when the courts held that an injury or death resulting from unconsciously inhaling gas was not covered by the form of exception contained in the policies against accident, it was the duty of the plaintiff in error to change the form of its policies, and to make its intention to except such a death or injury clear, is robbed of all its cogency by the fact that this company and the other accident insurance companies did just that thing. The exception in Paul v. Insurance Co., 112 N. Y. 472, 20 N. E. 347, was of "any death or disability which may have been caused * * * by the taking

of poison, contact with poisonous substances, or inhaling of gas." When in that case, and in Pickett v. Insurance Co., 144 Pa. St. 79, 22 Atl. 871, the courts held that this exception did not extend to death from accidentally, unconsciously, and involuntarily inhaling gas, the companies abandoned this old form of exception, and inserted one to the same effect as that in the policy here in suit, that "this insurance does not cover * * * injuries, fatal or otherwise, resulting from poison, or anything accidentally or otherwise taken, administered, absorbed, or inhaled." If the intention to except from the insurance all injuries from taking or inhaling poison can be expressed in plainer words or less ambiguous terms than these, they do not occur to me, and I am able to discover but one case in the books before this one which holds that these words do not mean what they seem to me to plainly express, and that is the case of Casualty Co. v. Waterman, 161 Ill. 632, 44 N. E. 283. In that case the court reached its conclusion by interpolating into the exception words which the parties to the contract never placed there, and then held that the death was not within the exception, because it was not within the interpolation which it had itself made. It decided that the exception of death "resulting from poison, or anything accidentally or otherwise taken, administered, absorbed, or inhaled," meant death "resulting from poison, or anything, accidentally or otherwise, consciously, and by an act of volition, drawn into the system by inspiration." But the parties did not restrict their exception to death from anything taken or inhaled "consciously and by an act of volition," but expressly extended it over death from "anything accidentally or otherwise taken or inhaled." What right had that court to abrogate the contract of the parties, and make a new one for them? That decision never commended itself to my reason, and it does not accord with my view of the law. The fact that the supreme court of Illinois in this Waterman Case, while considering the identical exception before us, and the further fact that some of the courts of New York and Pennsylvania, while considering exceptions in the old form disclosed in the Paul Case, held that death caused by involuntarily and unconsciously inhaling gas was not within the exception, does not persuade me that this court should so hold in the case at bar, because these decisions are not conclusive in this court, because they seem to me to be erroneous, and because there are counter decisions of courts of at least equal authority, notably one made by this court, which appear to me to be in accord with the settled rules of construction and with sound principles of law. McGlother v. Accident Co., 60 U. S. App. 705, 32 C. C. A. 318, and 89 Fed. 685, 688, 689; Cole v. Insurance Co., 61 Law T. (N. S.) 227; Early v. Insurance Co. (Mich.) 71 N. W. 500; Pollock v. Association, 102 Pa. St. 230; Nibl. Ben. Soc. & Acc. Ins. § 393; Cooke, Life Ins. § 56. But I refrain from a more extended discussion of this case, and content myself with a reference to the opinion of this court in McGlother v. Accident Co., supra, where my views, and the reasons for them, appear more at length.

McCORD LUMBER CO. et al. v. DOYLE.

(Circuit Court of Appeals, Eighth Circuit. October 2, 1899.)

No. 1,176.

1. FOREIGN CORPORATIONS—SERVICE OF PROCESS ON—STATE LAWS.
A mode of service prescribed by state laws for obtaining jurisdiction over foreign corporations, which is recognized by the local courts as valid, will receive the same recognition by the federal courts, subject to the limitation that such courts will determine for themselves whether the mode prescribed violates the fundamental rights of the defendant not to be condemned unheard, or compelled to answer a complaint in a foreign jurisdiction without a fair and reasonable notice.

2. SAME—REMOVAL OF OFFICE FROM STATE.
The fact that a foreign corporation which had maintained an office in Minnesota, and there contracted a liability, before suit brought in a court of the state to enforce such liability had withdrawn its local office, does not exempt it from being subjected to a personal judgment in such suit, on service made on its president within the state in the mode prescribed by Gen. St. Minn. 1894, § 5200.

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

A. L. Sanborn (Lyman T. Powell and J. L. Washburn, on the brief), for plaintiffs in error.

Thomas J. Davis (Theodore Hollister, on the brief), for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

THAYER, Circuit Judge. The question which this record presents is whether the McCord Lumber Company, one of the plaintiffs in error, which is a Wisconsin corporation, was served with process in such manner and form, and under such circumstances, as warranted the rendition of a personal judgment against it in the state of Minnesota, where the suit was instituted and where the process was served. The question arises in this way: Frank L. Doyle, the defendant in error, sued the lumber company and Warren E. McCord, the other plaintiff in error, in the district court for the Eleventh judicial district of the state of Minnesota, for the breach of a contract alleged to have been made by said Doyle with the lumber company in the state of Minnesota while the latter maintained an office and was transacting business in said state. The alleged contract was executed on the part of the plaintiff below at Duluth, in the state of Minnesota, and was to have been executed by the lumber company at the same place, but when the time for its execution arrived it declined to do so, and announced its refusal to perform at its office in the city of Duluth; so that the cause of action, if any, arose in the state of Minnesota while the lumber company maintained an office and was transacting business in that state. Before the present action was brought the lumber company had ceased to maintain an office in the state of Minnesota, but its president, Warren E. McCord, upon whom service was had, was in that state, engaged for the time being in the transaction of business for and in behalf of his company, when the summons was served. The law of Minnesota (Gen. St. Minn.

1894, § 5200) relative to the service of process on foreign corporations is as follows:

"That the summons or any process in any civil action or proceeding wherein a foreign corporation or association is defendant, which has property within this state, or the cause of action arose therein, may be served by delivering a copy of such summons or process to the president, secretary, or any other officer, or to any agent of such corporation or association, and such service shall be of the same force, effect and validity as like service upon domestic corporations. * * *"

The case was removed to the federal court, and a motion was there made to quash the service.

The service in question having been made on the president of the defendant corporation in the manner aforesaid, for the purpose of enforcing a cause of action which arose in the state of Minnesota while the defendant corporation was there transacting business, was good and sufficient to warrant the rendition of a personal judgment against the corporation by the courts of that state, according to the decision of its highest court. Guernsey v. Insurance Co., 13 Minn. 278 (Gil. 256). It is not always true, however, that a mode of service which is prescribed by the statutes of a state, and is there held sufficient to warrant the rendition of a personal judgment, will also be held to be a good service by the courts of other states or by the federal courts. The fundamental principle that no one shall be condemned unheard, or compelled to answer a complaint in a foreign jurisdiction except upon such notice of the proceeding as is fair and reasonable, must not be violated. And the federal courts, in common with the courts of other states, must be permitted to judge for themselves, when the question is properly raised in an action pending before them, whether the mode of service that has been prescribed by the laws of a particular state satisfies these requirements. With these limitations, it is the established rule that a mode of service prescribed by state laws for obtaining jurisdiction over foreign corporations, which is by the local courts recognized as valid, will obtain similar recognition in the federal courts. Insurance Co. v. French, 18 How. 404; Ex parte Schollenberger, 96 U. S. 369; St. Clair v. Cox, 106 U. S. 350, 1 Sup. Ct. 354; Construction Co. v. Fitzgerald, 137 U. S. 98, 11 Sup. Ct. 36; Goldey v. Morning News, 156 U. S. 519, 5 Sup. Ct. 559; Steamship Co. v. Kane, 170 U. S. 100, 18 Sup. Ct. 526; Insurance Co. v. Spratley, 172 U. S. 602, 19 Sup. Ct. 308.

If the McCord Lumber Company had continued to maintain its office in the city of Duluth until the suit at bar was instituted, it is manifest that it could not claim successfully that the service had upon it was ineffectual to warrant a personal judgment. Nor are we able to concede that the withdrawal of its office from the state of Minnesota, prior to the institution of the suit, affected the validity of the service. The supreme court of the United States has always recognized the right of the several states to provide for the service of process on foreign corporations by the delivery within the state of a summons to one of their executive officers or other representative agents, provided the corporation is there engaged in some business

by permission of the local authorities, although it has at the time no property within the state. St. Clair v. Cox, 106 U. S. 350, 356, 1 Sup. Ct. 354; Insurance Co. v. French, 18 How. 404; and other cases above cited. It has recently recognized the validity of a service made on the agent of a foreign corporation doing business in a state, although the cause of action originated in a foreign country, and although the service in question was not authorized by any local statute. Steamship Co. v. Kane, 170 U. S. 100, 18 Sup. Ct. 526. And, in a still later case (Insurance Co. v. Spratley, 172 U. S. 602, 19 Sup. Ct. 308), service had within a state upon an agent of a foreign insurance company that had once solicited business in the state, but had ceased to do so, and had withdrawn its soliciting agents before process was served, was held valid to warrant the rendition of a personal judgment; it appearing that the company still had some policy holders residing within the state, who paid their premiums to an agent located without its borders. It was held, in substance, that the corporation was still doing business within the state by collecting premiums from a few policy holders who resided therein, and that service upon one of its agents who came into the state casually to investigate a claim under one of its policies was a good service to warrant a personal judgment, there being a local law authorizing the service.

We are of opinion, therefore, that the mere withdrawal by the defendant company of its local office from the city of Duluth, after it had there contracted a liability, did not exempt it from being served in the mode prescribed by the local statute. Moreover, the defendant corporation seems to have been still engaged in business in the state of Minnesota when service was obtained, since its president was then in the state for the purpose of conferring, in behalf of his company, with a certain other corporation with which it had business relations. The law of the state prescribes a mode of service which is reasonable in the class of cases to which it applies, and no reason is perceived why the service in question should not be regarded as valid by the federal courts. No other questions are presented by the assignment of errors which can be noticed by this court, and the judgment below is therefore affirmed.

In re NEWBERRY.

(District Court, W. D. Michigan, S. D. October 4, 1899.)

No. 12.

JURISDICTION OF COURTS OF BANKRUPTCY—SUITS BY TRUSTEES.

Bankr. Act 1898, § 23b, providing that "suits by the trustee shall only be brought or prosecuted in the courts where the bankrupt might have brought or prosecuted them, if proceedings in bankruptcy had not been instituted," is a limitation upon the jurisdiction of circuit courts of the United States, but does not affect the jurisdiction in bankruptcy conferred upon the district courts by other clauses of the act; and a court of bankruptcy has jurisdiction of a suit by a trustee to recover property alleged to have been transferred by the bankrupt in fraud of his creditors, notwith-

standing that the trustee, the bankrupt, and the defendant are all citizens of the same state.

In Bankruptcy.

George Clapperton, for bankrupt.
Dunham & Dunham, for creditors.

SEVERENS, District Judge. In this matter an application has been made on behalf of the trustee for leave to file a bill or petition for the purpose of recovering certain real estate which the creditors claim the bankrupt has transferred to another for the purpose of defrauding them. A question is made, upon the construction of the provisions of the bankruptcy act, in respect to the jurisdiction of this court to entertain such a bill; it being claimed that as the bankrupt, the trustee, and the proposed defendants are all citizens of this state, and residents of this district, by section 23b of the act cognizance of such a controversy can only be taken by the state court. The construction of section 23 and of section 2 in respect to this matter of jurisdiction is somewhat obscure, and different constructions have been placed upon those provisions. Burnett v. Mercantile Co., 91 Fed. 365; In re Sievers, Id. 366; Carter v. Hobbs, 92 Fed. 594. It is to be noted that by section 70a the trustee, upon his appointment and qualification, shall be vested, by operation of law, with the title of the bankrupt, as of the date he was adjudged a bankrupt, to "(4) property transferred by him in fraud of his creditors." The result is that all such property is brought under the control of the court, whose officer such trustee is. Section 2 of the act invests the district courts "with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in bankruptcy proceedings"; and among the matters of which jurisdiction is given is to "(7) cause the assets of the bankrupt to be collected, reduced to money and distributed, and determine controversies in relation thereto, except as herein otherwise provided." There could be no doubt, I think, that, if it were not for the provisions of section 23, the matter of the present application would be subject to the jurisdiction thus conferred. By section 23 it is provided:

"(a) The United States circuit court shall have jurisdiction of all controversies at law and in equity as distinguished from proceedings in bankruptcy between trustees as such, and adverse claimants concerning the property acquired or claimed by the trustee, in the same manner, and to the same extent only, as though bankruptcy proceedings had not been instituted and such controversy had been between the bankrupt and such adverse claimants. (b) Suits by the trustee shall only be brought or prosecuted in the courts where the bankrupt whose estate is being administered by such trustee, might have brought or prosecuted them, if proceedings in bankruptcy had not been instituted, unless by consent of the proposed defendant."

I think that all of these provisions of section 23 are to be construed with reference to each other, and that the "suits by the trustee" refer to suits which the trustee shall elect to bring in the circuit court, and so construed there is no conflict between sections 2 and 23. A suit brought by the trustee in the circuit court can only be brought in a court where the bankrupt himself might have

been plaintiff. I therefore reach the same conclusion as that arrived at by Judge Baker in Carter v. Hobbs, above cited, although upon a slightly different ground. An anomalous state of things would be presented if the bankruptcy court, which is charged with the duty of prompt action in collecting and distributing the estate of the bankrupt, should be compelled to await and be balked by the pendency of proceedings in another court having a jurisdiction entirely foreign to its own, and in no manner subject to it. The reasons for finding, if fairly practicable, a construction which will avoid such inconvenience, are quite fully stated by Judge Baker in the case above cited, and, indeed, are obvious. My conclusion, therefore, is that this court has jurisdiction, and the leave applied for is granted.

In re SCANLAN et al.

(District Court, D. Kentucky. October 20, 1899.)

BANKRUPTCY—PRIORITY OF CLAIMS—WAGES OF LABOR.

A creditor of a bankrupt, who describes himself as a traveling salesman, and was employed by the bankrupt in that capacity at an annual salary of $5,000, is not a workman, nor a clerk or servant of his employer, within the meaning of Bankr. Act 1898, § 64b, according priority of payment out of bankrupt estates to "wages due to workmen, clerks or servants."

In Bankruptcy. On review of decision of referee in bankruptcy disallowing a creditor's claim to priority of payment.

J. B. McCormick, for claimant.
Joyes, Jarvis & Swope, for trustee.

EVANS, District Judge. C. A. Weaver proved his claim in this case for $300 for services rendered as a "traveling salesman" for the bankrupts within three months before the filing of the petition, and claimed a priority for the amount under section 64b (4) of the bankruptcy act. Weaver was employed by the bankrupt company as a traveling salesman at a salary of $5,000 per annum, and, the referee having refused to allow the priority claimed by him, he has petitioned the court to review that decision. The clause of the bankruptcy law referred to is in the following language: "The debts to have priority * * * shall be: * * * (4) 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 hundred dollars to each claimant." The determination of the question involved depends upon what is the correct meaning of the words "workmen, clerks or servants," and whether a traveling salesman is such an employé as would come within the proper definition of any one of those words. It is argued that the definition should be controlled by the definition in the bankruptcy act of the phrase "wage earner." While the court thinks it possible that that definition may throw some light upon the question, yet it is not at all clear that congress had in mind wage earners merely as defined by the act when it used the language in section 64 which has just been quoted. The bankruptcy act in express terms excluded wage

earners from the list of those against whom an involuntary petition in bankruptcy might be filed, and, in order that there might be no doubt as to what persons should be included in that term, defined it in the first section to mean an individual who works for wages, salary, or hire at a rate of compensation not to exceed $1,500 per year. If the same thing had been intended by congress in section 64, doubtless it would have used the words "wage earner" there instead of the language actually employed. This makes it necessary to endeavor to ascertain their meaning from other sources, and there would seem to be nothing to indicate that congress used the words "workmen, servants and clerks" in any other than their ordinary signification. Taking up each of them separately, we find that Webster defines a clerk to be one who is employed to keep records or accounts; a scribe; an accountant. And the Century Dictionary defines a clerk to be one who is employed in a shop or warehouse to keep records or accounts; one who is employed by another as a writer or amanuensis. The court cannot resist the conclusion that these definitions describe the intention of congress in its use of the word "clerk." Webster defines "servant" as being, among other things, a person who is employed by another for menial offices, or for other labor, and is subject to command; a subordinate helper. The Century Dictionary says that a servant is one who exerts himself or labors for the benefit of a master or employer; an attendant; a subordinate assistant. Bouvier's Law Dictionary adopts Webster's definition of this word, and it is also approved in the case of Flesh v. Lindsay, 115 Mo. 1, 21 S. W. 907. Bouvier adds to this definition that they are called menial servants from living infra mœnia,—within the walls of the house,—and also says that persons that are laborers hired by the day's work or any longer time are not considered servants. While in general terms, therefore, any one is a servant who serves another, still the court is of opinion that congress used the word "servant" in section 64 of the bankruptcy act in the general sense given in the definitions above. Webster defines a workman to be a man employed in labor, whether in tillage or manufacture; a worker; hence, especially, a skillful artificer or laborer. The Century Dictionary gives the definition as a man who is employed in menial labor, whether skilled or unskilled; a worker; a toiler; specifically, an artificer, a mechanic or artisan, a handicraftsman. While Bouvier defines a workman generally as one who labors, one who is employed to do business for another, the court is of opinion that congress used the word "workman," in the section referred to, in the general sense covered by the definitions of the lexicographers above given. It seems to the court that none of those definitions cover such a "traveling salesman" as the creditor in this case describes himself to be. It might be difficult, and possibly undesirable, to attempt to define with too much precision the exact character of employé who would come within the language of section 64, but it seems to the court to be very clear that the claimant in this case is not a "workman," a "servant," or a "clerk," within the contemplation of that clause of the bankruptcy law. For these reasons, the decision of the referee is approved.

In re DUPREE.

(District Court, E. D. North Carolina. July 1, 1899.)

1. BANKRUPTCY—TIME OF FILING PETITION.
   Under Bankr. Act 1898, § 3b, providing that a petition in involuntary bankruptcy may be filed within four months after the commission of an act of bankruptcy by the defendant, the four months are to be reckoned by excluding the day on which the act of bankruptcy is committed, and including that on which the petition is filed.
2. SAME—FILING DUPLICATE OF PETITION.
   The court acquires no jurisdiction in a case of involuntary bankruptcy unless the duplicate originals of the petition required by the act are both filed within four months after the commission of the act of bankruptcy alleged; and, where the petitioning creditors filed only one copy of the petition within four months, the court has no authority to allow them to file the other after the expiration of that time, but will dismiss the petition on motion of the respondent.
3. SAME—CLERK'S DOCKET.
   Under general order No. 1 in bankruptcy (18 Sup. Ct. iv.), providing that "the clerk shall keep a docket" which "shall contain a memorandum of the filing of the petition," the docket should show that the petition was filed in duplicate, as required by the statute, if this requirement of the law is really complied with.

In Bankruptcy.

J. C. Clifford, for bankrupt.

PURNELL, District Judge. This case seems to be in all respects similar to, and governed by the argument and decision reported in, Re Stevenson (May 16, 1899) 94 Fed. 111, by Bradford, District Judge. For the reasons stated in that opinion, it is held: The four months after the commission of an act of bankruptcy within which, under the provisions of the bankrupt act of July 1, 1898, a petition in involuntary bankruptcy must be filed, are to be so computed as to exclude the day on which such act was committed,—the 5th day of January, 1899. The bankrupt act requires the filing within the specified period of four months of a petition in duplicate,—one copy for the clerk, the other for service on the alleged bankrupt; and, where a petitioner has within that period filed only one copy of the petition, the court has no authority after the expiration of such period to permit the filing of a second copy. The various provisions of the bankrupt act clearly disclose a legislative intent that proceedings in bankruptcy shall be conducted and closed with all reasonable expedition, and, while it is true that a petition may be filed at such time on the last day of the period of limitation as to render impossible either the service or issuance of process within that period, it was nevertheless the manifest intention of congress that the duplicate copy for service should be filed within that period, ready to be served with all convenient speed. Rule 11 in bankruptcy, prescribed by the supreme court (18 Sup. Ct. v.), authorizes the court to allow corrections to be made of errors, insufficiencies, and uncertainty in the petition or schedules, but not practically to repeal the legislative declaration that petitions must be filed in duplicate within the four months specified. Rule 1 in bankruptcy (18 Sup. Ct. iv.) pro-

vides that the clerk's docket shall contain a memorandum of the filing of the petition, but does not mention a copy of the petition; and, as the petition is to be filed in duplicate, the docket should show such filing. Hence the petition herein is dismissed, and the petitioning creditors will be taxed with the costs, including therein an attorney's fee of $25 for J. C. Clifford, Esq., the bankrupt's attorney.

In re KIMBALL.

(District Court, W. D. Pennsylvania. July 15, 1899.)

No. 401.

BANKRUPTCY—PREFERENCES—ENJOINING EXECUTION SALE.

The court of bankruptcy has jurisdiction, by injunction, to forbid an execution creditor of the bankrupt from proceeding to sell property on which a levy had been made at the date of the adjudication in bankruptcy, where the execution constitutes an unlawful preference, and is contrary to the provisions of the bankruptcy law.

In Bankruptcy. On application for injunction.

McCready & Moore, for petitioner.
G. Urquhart, for execution creditors.

BUFFINGTON, District Judge. Where the personal property of the bankrupt at the date of the adjudication is subject to the levy of a pending execution, the right of this court to enjoin the execution creditor, if the execution is an unlawful preference and contrary to the provisions of the bankrupt act, is clear. In re Mallory, 1 Sawy. 88, Fed. Cas. No. 8,991; Blake, Moffitt & Towne v. Francis-Valentine Co., 89 Fed. 695. The prima facie case now made out is sufficient to warrant our enjoining Swift & Co., the plaintiffs in an alleged unlawful preference execution now pending in the hands of William H. Benedict, constable, from further procedure thereon pending a determination of the alleged unlawful character of the same, and until further order of the court. The property levied on, or its proceeds, will, of course, remain subject to any existing rights of Swift & Co., and will be subjected to the same as they shall hereafter be adjudged. Let an order in accordance with these views be prepared.

In re CORNELL.

(District Court, S. D. New York. October 5, 1899.)

1. BANKRUPTCY—OPPOSITION TO DISCHARGE—CONCEALMENT OF PROPERTY.

Specifications in opposition to a bankrupt's application for discharge, on the ground of his having concealed property from his trustee in bankruptcy, must be supported by evidence showing the existence of property in the bankrupt, or in trust for his use, at the time of filing the petition in bankruptcy.

2. SAME—DECISION ON APPLICATION FOR DISCHARGE—SUIT PENDING IN STATE COURT.

A court of bankruptcy will not stay its decision upon a bankrupt's application for discharge, to await the result of a pending action in a state court wherein creditors of the bankrupt seek to set aside a transfer of

property made by him before the adjudication of bankruptcy, and which they allege to have been fraudulent as to creditors, the same plaintiffs opposing the bankrupt's discharge on the ground of the same alleged fraud; for the issues are not identical, nor would the decree of the state court determine the right of the bankrupt to be discharged.

In Bankruptcy. On opposition to bankrupt's application for discharge.

In February, 1899, Oliver H. P. Cornell was adjudged bankrupt on his voluntary petition, and in due course filed an application for his discharge. Specifications in opposition thereto were presented by Crawford, Simpson & Crawford, judgment creditors of the bankrupt, and the matter was referred to Morris Wise, referee in bankruptcy, to find and report the facts. It appeared that, on April 13, 1896, the bankrupt assigned all his interest in the estate of his deceased mother, ascertained by the surrogate's court of New York to be worth $30,000, to his brother Frank Cornell, for a consideration amounting to more than the value of the interest assigned, and consisting in part of the cancellation of a debt due from the bankrupt to his said brother, and in part of the undertaking of the latter to pay certain judgments of record against the bankrupt. A few days after the making of this assignment, Crawford, Simpson & Crawford recovered a judgment against the bankrupt, and, in October, 1897, began an action in the supreme court of New York, against the bankrupt and his brother, to set aside the assignment described above, on the ground of its having been in fraud of the rights of the plaintiffs and other creditors. This action was still pending at the time of the bankrupt's application for discharge. The objecting creditors based their opposition to the petition for discharge in part on the alleged fraudulent character of the assignment, and in part on the pendency of the creditors' suit in the New York court, urging that the issue of fraud as against creditors, made in that suit, was identical with the issue arising on their opposition to the bankrupt's discharge. The referee decided that he would hold the papers pending the decision of the action in the state court, and would not consider or pass upon the question as to whether the specifications had been sustained by the evidence. To this decision the bankrupt excepts.

Quincy A. Gates, for bankrupt.

BROWN, District Judge. The issue in the creditors' suit is not identical with that presented under the specifications in opposition to discharge. A decision adverse to the defendants in the creditors' suit would not necessarily determine the right to discharge. If one of the intents of the assignment of April 13, 1896, was to hinder payment of the existing suit, that would authorize a decree for the plaintiff and yet be no sufficient ground to deny a discharge under the bankrupt act. To have this effect there must be evidence of concealment of property from the trustee. Section 29. This can only be made out by evidence of some remaining property in trust for the bankrupt's use existing at the time of the petition in bankruptcy. The specifications do not in terms charge this; but assuming them to be sufficient to raise the question, the evidence (all of which is returned to me, after the hearing was closed) proves sufficiently that the assignee, Frank Cornell, had paid out considerably more than all the value acquired by the assignment, and has been even allowed a claim of $5,000 and upwards for still further advances to the bankrupt, which shows clearly that there was no property of the bankrupt remaining, or concealed by him, at the time of the petition. The specifications are therefore disproved, and the discharge is granted.

In re KLEIN.

(District Court, N. D. Illinois.)

BANKRUPTCY—INTERVENTION OF TRUSTEE IN PENDING SUITS.

Where, at the time of an adjudication in bankruptcy, property of the bankrupt is in the hands of a receiver appointed by a state court in a suit brought against the bankrupt by a judgment creditor, the trustee in bankruptcy, when appointed, should intervene in such suit in the state court, by petition, for the protection of the interests of the general creditors of the estate; and, to enable him to do this, the court of bankruptcy will, for a reasonable length of time, restrain all parties from the further prosecution of the action in the state court.

In Bankruptcy.

In 1898, Gustav L. Klein made a voluntary assignment for the benefit of his creditors pursuant to the laws of Illinois, but, after the estate had been administered thereunder for about a year, the proceeding was discontinued, upon the petition of a majority of the creditors, in accordance with the statute, and an order was made directing the assignee to pay over the funds in his hands to Klein. Thereupon, McVeagh & Co., judgment creditors of Klein, filed a creditors' bill in the state court against Klein, his assignee, and the bank in which the funds of the estate remained on deposit. In this suit a receiver was appointed, who demanded and received from the bank the money of Klein deposited with it. At this juncture, Klein was adjudged bankrupt on his voluntary petition, and petitioned for the appointment of a temporary trustee of his estate, showing the pendency of the creditors' bill and the appointment of a receiver, and alleging the danger that the funds might be disbursed before a permanent trustee could be appointed. A temporary trustee was appointed, and he attempted to intervene in the action pending in the state court by petition setting up his title and the pendency of the proceedings in bankruptcy, and prayed for a stay of proceedings. This petition was heard by the state court, and dismissed for want of equity. Thereupon the temporary trustee filed his petition in the court of bankruptcy, setting up the same facts, and asking for an injunction against all the parties to the suit in the state court, forbidding the further prosecution of that suit. A restraining order was entered as prayed. The respondents filed their answer setting up all the proceedings in the state court, and particularly the application of the temporary trustee in that court, and the adjudication upon his petition denying the same, and alleging the solvency of the complainants and intervening petitioners in the creditors' bill, and averring that no advantage could be lost to the estate of the bankrupt even if the receiver, under decree, should pay over the funds in his hands to the judgment creditors. Respondents moved to dissolve the restraining order. Pending the hearing on this motion, a permanent trustee of the bankrupt's estate was appointed, but no decision had as yet been rendered by the state court in the creditors' suit.

W. A. Taylor, for trustee in bankruptcy.
Wheeler & Silber and Joseph W. Moses, for judgment creditors.
Charles A. Butler, for bankrupt.

KOHLSAAT, District Judge. In this case, since the argument, a permanent trustee has been appointed. No decree has been entered in the matter of the creditors' bill in the state court. In order that a proper record may be made in that suit, the permanent trustee should intervene therein by petition, and obtain a decision on his petition, so that he may, if upon legal advice he concludes so to do, perfect an appeal in case that court decides against his contentions. This court has heretofore interfered by restraining order, for the purpose of enabling the creditors to appoint a permanent trustee, and to give

such trustee time within which to intervene in the suit in the state court for the protection of whatever rights the general creditors may have in the funds held by the receiver appointed by the state court. The restraining order will be continued in force five days longer for that purpose, and will then be dissolved.

In re RUSSELL.

(District Court, N. D. Iowa, W. D. September 11, 1899.)

1. BANKRUPTCY—VOLUNTARY PETITION—PARTNERSHIP.
   Where a voluntary petition in bankruptcy avers that the petitioner and another were partners, and prays an adjudication of the firm as bankrupt, but not of either partner, and the other member of the firm is not notified and does not appear, an adjudication in bankruptcy against the petitioner as an individual is unauthorized, and will be set aside.
2. SAME—DISCHARGE FROM PARTNERSHIP AND INDIVIDUAL DEBTS.
   Where a member of a partnership, filing his individual petition in bankruptcy, seeks to be discharged from the claims of creditors of the firm, as well as from his personal debts, the petition must state the fact; and it must be so stated in the notices for the first meeting of creditors, in the petition for discharge, and in the notices thereof to creditors.

In Bankruptcy. On application by the bankrupt for discharge.

E. P. Farr, for bankrupt.

SHIRAS, District Judge. The petition originally filed avers that John L. Russell and John F. Offel were partners under name of Russell & Offel, and prays that the firm be adjudged to be bankrupt, but does not ask that either partner be adjudged to be bankrupt. I find no amendment to the petition in these particulars. The petition is signed by Russell alone. No appearance was entered by Offel. On April 28, 1899, John L. Russell was individually adjudged to be bankrupt. The petition for discharge prays that Russell be granted a discharge from all debts provable against his estate, but does not refer to the partnership debts in any form. As there was no notice given to Offel, the firm could not be adjudged to be bankrupt. Gen. Orders No. 8 (32 C. C. A. xi., 89 Fed. vi.). The petition does not pray for an adjudication of Russell as an individual, and there is no foundation in the record for the adjudication that was entered. The adjudication entered is set aside, and the case is again sent to the referee for further proceedings. The petitioner should amend his petition. If it is proposed to have the firm adjudged bankrupt, as well as the partners, the petition should so show, and notice of the proceedings, under Gen. Orders No. 8, must be given to Offel unless he voluntarily joins in the proceeding. If it is not proposed to adjudicate the firm, the petition must show that Russell was a member of the firm, and must aver that he asks a discharge against firm creditors as well as individual creditors; and this fact must be set forth in the notice given to creditors of first meeting, also in the petition for discharge and in the notice to creditors thereof. The safer plan is to give notice to Offel to have the firm adjudged bankrupt.

ROBINSON v. WHITE et al.

(District Court, D. Indiana. June 30, 1899.)

No. 5,950.

1. BANKRUPTCY—SUITS BY TRUSTEES—JURISDICTION OF STATE AND FEDERAL COURTS.

In actions by trustees in bankruptcy to set aside fraudulent conveyances, assignments, or transfers by the bankrupt on the ground of their being void at common law, or as being in contravention of the bankruptcy act, the state courts and the district courts of the United States, as courts of bankruptcy, have concurrent jurisdiction; and the court which first takes cognizance of such action will have the right to dispose of it finally to the exclusion of the other.

2. SAME—RES JUDICATA.

Where a trustee in bankruptcy brought an action in a state court to set aside certain fraudulent conveyances by the bankrupt and certain judgments against him, and recovered judgment therein, but, being doubtful of the jurisdiction of the state court, brought a bill in the court of bankruptcy to obtain a decree for the same purpose and between the same parties, *held*, that the judgment of the state court was conclusive on the bankruptcy court, and would not be there reviewed or revised, and the bill must be dismissed.

In Equity. On demurrer to bill.

Willis Hickam, for complainant.

Inman H. Fowler, Lamb & Beasley, Henry C. Jordan, John L. Duncan, Cyrus E. Davis, and Morris, Newberger & Curtis, for defendants.

BAKER, District Judge. This is a bill in equity, filed by the complainant as trustee of the bankrupt for the purpose of setting aside various conveyances, transfers, and judgments alleged to have been made and suffered by the bankrupt for the purpose of cheating, hindering, and delaying the creditors of the bankrupt, and in fraud of the bankrupt act. It further proceeds to state the institution of a suit brought by a large number of the creditors against the parties who had received such conveyances, transfers, and judgments fraudulently for the purpose of setting them aside and subjecting the property so conveyed and transferred to the satisfaction of their claims, and the appointment of the present trustee as a receiver by the circuit court of Owen county, Ind. The complaint further shows that after the institution of this suit and the appointment of a receiver, James F. Davis was adjudged a bankrupt by this court on his own petition, and that the said John C. Robinson, receiver under appointment of the circuit court of Owen county was chosen trustee by the creditors of the bankrupt. The complaint further shows the institution of a suit in the Owen circuit court by the trustee for the purpose of setting aside the various conveyances, transfers, and judgments which were sought to be set aside in the creditors' bill pending in said court on behalf of the creditors. It further shows the consolidation of the suit brought by the creditors with the suit brought by the trustee, and that upon issues duly formed in such consolidated suit a trial was had, and a judgment obtained in the Owen circuit court adjudging fraudulent and void a large number of

the conveyances, transfers, and judgments so sought to be set aside, and refusing as to certain matters to find that they ought to be set aside as fraudulent and void. The object of this suit is to procure a decree for the same purpose and between the same parties as the decree obtained in the Owen circuit court, on the ground that there is doubt whether the Owen circuit court had jurisdiction of the subject-matter and of the parties. In the complaint reference is made to the decision of this court in the case of Carter v. Hobbs, reported in 92 Fed. 594. The court did not mean, by anything decided in that case, to cast any doubt upon the jurisdiction of the courts of this state to entertain jurisdiction and try suits for any cause of action whatever brought by the trustee of a bankrupt against parties who fraudulently or otherwise were in possession of any portion of the bankrupt's estate, or who were indebted to the bankrupt. The sole question considered in the case of Carter v. Hobbs, supra, was whether or not jurisdiction over such causes of action was exclusively in the courts of the state, and the court was of the opinion that in causes of action growing out of fraudulent assignments, conveyances, or transfers this court had jurisdiction co-ordinate with the courts of the state of suits brought by the trustee for the purpose of setting them aside on the ground that they were fraudulent and void either at common law or under the bankruptcy act. All that the court affirmed in that case was that in such cases as that upon which the decision in the case of Carter v. Hobbs was rendered the district court, as a court of bankruptcy, had concurrent jurisdiction with the courts of the state. This court has never entertained any doubt that the courts of the state were invested with complete and plenary jurisdiction over fraudulent transfers and conveyances concurrent with this court, and that whichever of the two courts first took cognizance of the case had the right finally and exclusively to dispose of the same. In my opinion, there is no doubt whatever that the Owen circuit court had jurisdiction over the parties and of the subject-matter, and that its decision in the case is conclusive, and can only be reviewed for error in the supreme court of the state. This court disclaims all authority and power to revise collaterally the judgment of a court of co-ordinate jurisdiction which has taken cognizance of a cause, and has tried and disposed of the same. The judgment of the Owen circuit court, in the opinion of this court, until reversed by the supreme court of the state, is binding and conclusive alike upon the parties and upon this court. While it is true that the complaint states facts sufficient in the former portion of it to constitute a good cause of action, the latter portion of the complaint shows that the cause of action so stated has passed into judgment in a court of competent jurisdiction. It is well settled that where a complaint in one part states a good cause of action, and in another part of it states matter which constitutes a complete bar, it will be bad on demurrer. The demurrer must be sustained, and the bill dismissed, at the costs of the complainant.

BACON v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. September 25, 1899.)

No. 1,066.

1. NATIONAL BANKS—FALSE REPORT BY OFFICER—VOLUNTARY REPORTS.
To constitute the offense of making a false report of the condition of a national bank, within Rev. St. § 5209, it is not necessary that such report, when made by an officer of the bank to the comptroller, should have been made in response to a call or request of the comptroller.

2. CONSTITUTIONAL LAW—UNREASONABLE SEARCHES AND SEIZURES.
The constitutional inhibition against unreasonable searches and seizures is a limitation upon the power of the state to make such searches and seizures for its own benefit, and has no reference to the unauthorized acts of individuals.

3. NATIONAL BANKS—PROSECUTION OF OFFICERS—EVIDENCE UNLAWFULLY OBTAINED.
The fact that a letter written by the comptroller of the currency to the president of a national bank, which formed a part of the official correspondence of the bank, was taken by some individual from a box marked as containing private papers of the president, and was afterwards given to the officers of the United States, does not render such letter inadmissible in evidence on the part of the government in a prosecution of the president for a violation of the national banking laws.

4. SAME.
Books of a national bank, which were turned over to officers of the United States by the receivers of a state bank which succeeded such national bank, are not inadmissible in evidence on behalf of the government in the prosecution of an officer of the bank for a violation of the national banking law on the ground that they were unlawfully obtained in violation of the constitutional provision against unreasonable searches and seizures.

5. SAME—BOOKS OF BANK AS EVIDENCE.
In view of the provisions of the national banking act requiring the books of a national bank to be truthfully kept, by making it an offense to make false entries therein, proof that books are those of a national bank in which the record of its daily business was kept raises a presumption that they were properly kept, which renders them admissible in evidence without further proof, when offered by the government in a criminal suit against an officer of the bank for making false reports.

6. SAME—FALSE REPORTS—EVIDENCE OF INTENT.
On the trial of the president of a national bank, charged with having made a false report of its condition to the comptroller, prior reports, attested by him, containing false statements, together with testimony that such misstatements were called to his attention by an examiner prior to his making the report in question, are admissible on the question of intent.

7. SAME—OVERDRAFTS—OVERDRAFT NOTES.
Where the account of a depositor with a national bank shows that he has drawn out more money than has been credited to him, the excess constitutes an overdraft, and is required to be so reported in the bank's statement to the comptroller. The fact that the depositor has given the bank a note to secure overdrafts, where it has not actually been discounted, and the proceeds placed to his credit on the books, does not warrant the reporting of such overdraft under the head of "loans and discounts."

8. SAME—EVIDENCE—HARMLESS ERROR.
The admission of expert testimony as to the meaning of certain entries in a report made by a national bank to the comptroller is not prejudicial error, conceding the construction of the report to be properly a matter of law for the court, where it appears that the witnesses correctly interpreted such entries.

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

George Sutherland and John M. Zane (Hiram E. Booth, on the brief), for plaintiff in error.

John W. Judd, for the United States.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

THAYER, Circuit Judge. James H. Bacon, the plaintiff in error, was indicted and tried in the circuit court of the United States for the district of Utah for certain offenses denounced by section 5209 of the Revised Statutes of the United States. The indictment under which he was tried contained eight counts, but at the conclusion of the evidence the court withdrew from the consideration of the jury the first, second, fifth, and seventh counts, and a conviction was had on the third and fourth counts only. The charge contained in the third and fourth counts, of which the accused was found guilty, was, in substance, that in a report made by him, as president of the American National Bank of Salt Lake City, to the comptroller of the currency, on December 28, 1893, which purported to show the true condition of said bank on December 19, 1893, he had stated under oath that the sum due from individual depositors to said bank on account of overdrafts was only $5,755.93, whereas in truth and in fact the amount then due on account of overdrafts was $14,479.82, as the defendant well knew, and that such false report was made with intent to injure and defraud said bank, and to deceive any agent who might be appointed by the comptroller of the currency to examine its affairs. It was admitted by the defendant below in the course of the trial—and concerning that fact there was no controversy—that the books of the American National Bank of Salt Lake City showed overdrafts on the part of individual depositors at the close of business on December 19, 1893, which amounted in the aggregate to $14,479.82. But it was claimed by the defendant that certain depositors whose accounts appeared to be overdrawn at that time to the amount of $8,723.89 had theretofore executed and delivered notes to the bank to cover any possible overdraft of their respective accounts which might subsequently occur, and that in making up his report to the comptroller on December 28, 1893, the defendant had deducted the latter sum from the total amount of the overdrafts as disclosed by the books, and had reported it to the comptroller of the currency under the head of loans and discounts, although the so-termed overdraft notes had not in fact been discounted, and the proceeds thereof passed to the credit of the respective makers on the books of the bank. The defendant further claimed that he had so reported a portion of the overdrafts amounting, as aforesaid, to $8,723.89, because he had been advised previously by a bank examiner by the name of Lazear that that was the proper way to report overdrafts when the bank held notes representing the same, and that he had so acted in the utmost good faith without criminal intent. He was contradicted on this point, however, by Lazear, from whom he claimed to have

received the aforesaid advice; the latter testifying, in substance, that previous to the commission of the alleged offense he had given no such advice to the accused, but had instructed him, on the contrary, that advances to customers appearing on the books as overdrafts should be so reported to the comptroller of the currency. The trial judge allowed the jury to decide this controverted issue of fact. He also allowed the jury to determine, in the light of all the testimony, whether the bank, on December 19, 1893, did in fact hold notes to the amount of $8,723.89, representing a portion of the aggregate overdraft which the books then disclosed; and he instructed the jurors, in substance, that if they believed that a portion of the overdraft was thus reported by the accused as loans and discounts, in pursuance of an honest belief that that was the proper way to report them in making the report complained of, then there was no such intent to defraud or deceive as would support a conviction. In view of these facts, we must assume either that the jury disbelieved the testimony tending to show that the bank held notes as claimed on December 19, 1893, representing a portion of the overdraft, or that they found that, even if the bank did hold such notes, the accused was well aware that the entire overdraft disclosed by the books on that day should have been reported as an overdraft, and that the evidence established an intent on the part of the defendant either to deceive or defraud.

With this explanation of the general features of the case, we proceed to consider the alleged errors that have been called to our attention. When the prosecution, to sustain the issue on its part, offered in evidence the copy of the report referred to in the indictment, purporting to show the condition of the American National Bank of Salt Lake City on December 19, 1893, which was duly authenticated under the hand and official seal of James H. Eckels, comptroller of the currency, and in connection therewith offered the original report, the signature of the defendant to the original report seems to have been admitted by his counsel to be genuine. Both the original report and the copy thereof were objected to, however, by the defendant below on the ground that the prosecution had not shown that the report was made in pursuance of a request therefor regularly issued by the comptroller of the currency, which objection was by the court overruled, and an exception was saved. Section 5211 of the Revised Statutes requires every national banking association to make not less than five reports each year to the comptroller of the currency, according to a form prescribed by that officer, which reports, as the statute declares, must be verified by the oath or affirmation of the president or cashier of the association in whose behalf the report is made, and attested by the signature of at least three of its directors. The statute further provides that such reports shall be transmitted within five days after the receipt of a request therefor from the comptroller, and that the latter officer shall have power to call for special reports whenever, in his judgment, the same are necessary. The objection to the report which was made by the defendant was, in substance, that it had not been shown that the report was made in

obedience to a requisition from the comptroller, the claim being that by the provisions of section 5209 of the Revised Statutes, under which counts 3 and 4 of the indictment were framed, no offense is committed if a bank officer does make a false report to the comptroller of the currency in relation to the condition of the bank, unless the report is made in obedience to a request from the latter officer. It will be observed that section 5209, in defining the offense of making a false report, contains no such limitation as that sought to be imposed. The language of the law is general that "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," etc., "shall be deemed guilty of a misdemeanor, * * *" which language may as well include a false report voluntarily made by a bank official to the comptroller of the currency to influence his action, and accomplish some fraudulent purpose, as a false report made in pursuance of a call or request from that officer. We perceive no reason why a false report or statement made voluntarily to the comptroller of the currency in relation to the condition of a national bank for the purpose of inducing some action on the comptroller's part, or of forestalling certain action which he contemplates taking, should not be deemed an offense, as well as the making of a false report pursuant to a call or request from that officer, provided the act is done with the intent specified in the statute. The law was designed, we think, to prevent bank officials and employés from making any false entry in the books of the bank, and from making any false representations concerning its financial condition and resources in any report or statement which they may see fit to make in behalf of the bank to the comptroller of the currency, or to persons appointed to examine its condition, for the purpose of influencing their action. The reasons given in U. S. v. Booker, 80 Fed. 376, for holding that the report referred to in section 5209 is not restricted to the reports specified in sections 5211, 5212, but comprehends as well other reports made in behalf of national banking associations, commend themselves to our judgment as in all respects sound. Moreover, if it should be conceded that section 5209 has reference only to false reports that are made to the comptroller pursuant to his request, we should nevertheless feel constrained to hold that, when the report in this case was admitted in evidence, the proof was adequate to create a presumption that the report had been made in obedience to a request from the comptroller, and that no further evidence on that point was necessary to warrant its admission. It emanated from a high public office. It was made on a form that had been prescribed by the comptroller of the currency for use by national banks when reports as to their condition were called for. The copy of the report was duly authenticated under the hand and seal of that officer as a copy of an original report, properly on file in his office; and upon the assumption that the law affords no warrant for the making and filing of such reports in the office of the comptroller without a precedent request a presumption naturally arose from the fact that the report had been

accepted and filed that it had been duly called for by the comptroller. We think, therefore, that the objection to the introduction of the report was rightly overruled.

Misbehavior of the attorney for the United States in the presence of the jury is next relied upon to secure a reversal of the judgment below. This charge is predicated upon the following occurrence: In the course of the trial a letter from the comptroller of the currency to James H. Bacon, the defendant, as president of the American National Bank, was offered in evidence by the government; and upon its being established to the satisfaction of the court that the letter had been taken by force from a locked box marked "James H. Bacon. Private Papers," while the box was in the custody of officers of the law of the state of Utah, and that it had subsequently been turned over to the United States district attorney, the court ruled that the letter was inadmissible. Thereupon the attorney for the prosecution laid the letter upon the table before the defendant's attorney, and asked him to produce it. The trial judge ruled that the defendant could produce it or not, as he might elect, and in view of that ruling the letter was not read. Such was the misconduct of the attorney on account of which complaint is made. Other portions of the record disclose the following facts which are pertinent to the exception now under consideration: The American National Bank of Salt Lake City ceased doing business on February 24, 1894, and on that day turned over all of its books, papers, and assets to the defendant below, who immediately organized a state bank known as the Bank of Salt Lake, and in this way the papers, books, and assets of the defunct institution passed into the custody of the newly-organized state bank. The latter bank subsequently became embarrassed, and receivers thereof were duly appointed in the course of legal proceedings instituted against it in the courts of the state. These receivers, having obtained possession of the books and papers of the American National Bank, including the aforesaid letter addressed by the comptroller of the currency to its president, gave the federal authorities access thereto when an investigation into the affairs of the last-named bank was inaugurated, which resulted in an indictment being returned against the defendant. In the course of this investigation all of the books and papers in question passed into the custody of the United States marshal for the district of Utah, with the consent of the receivers of the state bank, where they remained until they were used upon the trial of the defendant in the lower court. Upon this state of facts we think that the complaint made of the misconduct of the attorney for the United States is without merit, and that the objection subsequently made to the use of the books and papers of the American National Bank as evidence against the accused, because of the manner in which they had been obtained by the prosecution, is equally untenable. The letter which was written by the comptroller of the currency to the defendant as president of the American National Bank was admissible in evidence against the defendant if it threw any light upon the acts charged in the indictment, and the ruling of the learned trial judge in excluding it would seem to have

been erroneous, in view of all the facts which the bill of exceptions discloses. It was in no sense a private paper of the defendant, because it was addressed to him as president of the American National Bank, and formed a part of the official correspondence between the comptroller and said bank; and although it be true that some one had extracted it from a locked box marked "James H. Bacon. Private Papers," while the box was in the possession of the receivers of the Bank of Salt Lake, yet, as no officer of the government was concerned in that act, we are of opinion that such fact did not affect its admissibility. It is held very generally that, if an individual by an illegal search or seizure obtains possession of an article or document, the state may nevertheless make use of the same as evidence against the person from whom they were wrongfully obtained to convict him of a crime; and that the inhibition found in article 4 of the amendments to the federal constitution, and in many state constitutions, against unreasonable searches and seizures is a limitation upon the power of the state to make such searches and seizures for its own benefit, and has no reference to unauthorized acts of individuals. Gindrat v. People, 138 Ill. 103, 27 N. E. 1085; Shields v. State, 104 Ala. 35, 16 South. 85; Com. v. Dana, 2 Metc. (Mass.) 329, 337; State v. Flynn, 36 N. H. 64; 1 Greenl. Ev. § 254a, and cases there cited. This, in our opinion, is a reasonable doctrine, when we remember that the common law has always afforded ample remedies for illegal acts committed by individuals, and that the inhibition against unreasonable searches and seizures found in the organic law owes its origin to acts of that nature which at one time were frequently committed by the sovereign on the pretense that they were necessary for his own protection or the protection of the state. If it be true, then,—as we think it is,—that the letter in question was admissible against the defendant notwithstanding the manner in which it had fallen into the hands of the government, it can scarcely be pretended that the action of the attorney for the United States in laying it down on the counsel table, and then calling for its production, was such misconduct on his part as would justify a reversal of the judgment. There is even less reason for holding that the books of the American National Bank had come into the possession of the government in such a way that they could not be used against the accused for the purpose of convicting him of a crime.

The books of the bank, when they were offered in evidence by the government were further objected to by the defendant below on the ground that no testimony had been adduced to show that they had been properly kept. This objection was overruled, and error is assigned on account of that ruling. The government did prove, however, that the books in question were the books of the American National Bank, in which it had been accustomed to keep a record of its daily business transactions, and that the books had been kept according to what is known as the "Boston System" of bookkeeping, by which system original entries are made on slips called "debit" and "credit" slips. The defendant against whom the books were offered was the chief executive officer of the bank, and as such actu-

ally had control and direction of its affairs while it was a going concern. Besides, the act of congress under which the bank was organized in effect enjoined that its books should be truthfully kept, since section 5209 of the Revised Statutes, heretofore cited, made it an offense, punishable by imprisonment, for any officer or agent of the bank to make any false entry in its books. In view of these considerations, we are of opinion that a presumption existed that the books in question had been truthfully or properly kept, and that it was unnecessary to fortify that presumption with additional proof, when the books were produced, and proved to be the regular books of account of the bank. We have no fault to find with the rule which is enunciated in some cases that the books of a corporation cannot be used by the corporation without independent evidence showing that they are correct, for the purpose of establishing an indebtedness to itself on the part of its stockholders or directors. Rudd v. Robinson, 126 N. Y. 113, 26 N. E. 1046. But we are unwilling to sanction the doctrine that in a proceeding against the president of a national bank to convict him of making a false report to the comptroller of the currency concerning its financial condition the books of the bank, although properly identified as such, cannot be used by the prosecution as evidence to show its condition, without first producing other evidence to show that they have been truthfully kept, and are in all respects correct. This latter rule would impose a burden upon the government which it should not be compelled to assume. Inasmuch as the act under which national banks are organized makes it the duty of all officers and employés of such institutions to make no entries in their books except such as are correct and truthful, the government should be entitled to rely upon the presumption that such duty has been faithfully performed until the contrary thereof is established.

We have next to consider an exception that was saved to the admission of three reports to the comptroller of the currency concerning the condition of the American National Bank of Salt Lake City, which were made respectively in behalf of the bank on July 12, 1892, May 4, 1893, and July 12, 1893, and antedated the report on which the indictment was based. These reports, though admitted in evidence, are not set forth in the bill of exceptions, which only contains fragmentary portions of certain oral testimony that seems to have been given in relation thereto by a bank examiner by the name of Lazear. An appellate court would probably be justified in refusing to notice the exception in question because of the imperfect condition of the record. We have, however, considered such of the testimony as has been preserved, with a view of ascertaining, as best we may, what influence these reports and the oral testimony in relation thereto may have had upon the result of the trial, and whether it appears with sufficient certainty that a prejudicial error was committed. The bill of exceptions shows that Lazear examined the American National Bank in September, 1893; that in the course of such examination he had the aforesaid reports in his possession, and compared them with the books of the bank, to ascertain if they were

correct, and corresponded with the books at the time they purported to have been made; that in the course of that examination he conferred frequently with the defendant, Bacon, who was at the time president of the bank, and had attested the reports, and called his attention to mistakes therein, by reason of which they did not reflect the true condition of the bank as shown by its books. The record does not clearly disclose all of the alleged mistakes that were so pointed out, because the reports and much of the testimony in relation thereto have been omitted. It must be presumed, however, in aid of the judgment below, that they were made clear to the trial court by means of the reports and oral testimony. Enough appears in the bill of exceptions to satisfy us that one of the alleged mistakes to which the defendant's attention was especially called by Lazear consisted in a manipulation of the cash in one of the reports, by means of which the amount of cash on hand was exaggerated to the extent of $3,017.50 by reporting an overdraft to that amount as cash actually on hand. Lazear testified that he called the defendant's attention to this item in the report, and advised him at the time that it was a false entry. It is obvious that the reports to which the objection was addressed, the testimony of Lazear in relation thereto, and his conversations with the defendant concerning the same, were admitted by the trial court solely for the purpose of enabling the jury to decide with what intent any false entry found to be contained in the subsequent report of December 28, 1893, was made by the accused. The trial court charged the jury, in substance, that such was the purpose of its admission, and that the defendant was not on trial for, and could not be convicted of, making a false report other than the one charged in the indictment. The instructions in this particular were in all respects fair and correct. The conclusion which we have formed on this branch of the case is that the trial court was justified in admitting the aforesaid reports in connection with the oral testimony of Lazear in relation thereto, because of the tendency of the evidence to establish the purpose with which the acts charged in the indictment were committed. The false report alleged in the indictment was made within four months succeeding the examination of the bank by Lazear, and if it be true that in the course of that examination the defendant's attention was directed to false statements contained in previous reports which he had attested, such testimony would have a natural tendency to convince a jury that the false report complained of in the indictment was not due to ignorance or inadvertence, but was inspired by a fraudulent purpose. This court approved of the admission of similar testimony for the purpose of establishing guilty knowledge in the recent case of Dow v. U. S., 49 U. S. App. 605, 27 C. C. A. 140, and 82 Fed. 904, 909, and upon the assumption which we are forced to make in view of the condition of the record that the reports and testimony of Lazear in relation thereto showed errors and inaccuracies therein to which defendant's attention was invited, no doubt can be entertained that the evidence to which the exception was taken was properly admitted. Allis v. U. S., 155 U. S. 117, 119, 15 Sup. Ct. 36.

A further exception was noted by the defendant's counsel to a portion of the charge of the trial judge wherein he instructed the jury, in substance, that an overdraft arises when a customer of a bank draws from that bank more money than is standing to his credit in his account with the bank; that such a sum so appearing from a depositor's account to be overdrawn is an overdraft, and should be reported as such in reports made to the comptroller of the currency, although arranged for or covered by a note in the hands of the bank, called an "overdraft note." It is urged that this instruction was erroneous; that, whenever a bank takes a note to secure a possible overdraft in a depositor's account, any sum subsequently overdrawn by the depositor not exceeding the amount of the note should be reported, not as an overdraft, but as a loan or discount; and that the instruction was highly prejudicial to the defendant because if it was true, as he claimed, that the bank held overdraft notes to the amount of $8,723.89 on December 19, 1893, then the aggregate overdraft on that day was correctly reported, no matter what the books of the bank may have shown. The definition of the term "overdraft" which was given by the trial judge is substantially the same as the one formulated by Judge Sanborn in U. S. v. Allis, 73 Fed. 175, 178, and we think that it was correct, as applied to the state of facts disclosed by the present record, inasmuch as it was not claimed that any of the so-called "overdraft notes," if the same actually existed, had ever been discounted by the bank, and the proceeds thereof carried to the credit of the makers. When a depositor's account with a bank shows that he has drawn and been charged with more money than he has deposited, or more than has been placed to his credit on the books of the bank, it is usually said that his account is overdrawn, and that an overdraft exists. This is the ordinary meaning of the word "overdraft," as used among bankers. It must be presumed, therefore, that when the comptroller of the currency calls upon a national bank for a report of its condition, and, as in the case at bar, asks for a statement of the amount of overdrafts "secured" and "unsecured," he uses the word in the sense last indicated, and desires a statement of the total amount which customers of the bank have drawn in excess of the sums that have been placed to their credit on the books of the bank. Loans that a depositor effects by overdrawing his account are very different from those effected in the usual course of business by discounting commercial paper, and it is doubtless true that the practice of requiring a particular statement of irregular loans of that character in reports made to the comptroller is due to the fact that, if they are shown to be large, they excite suspicion, and tend to impair confidence in the management of the bank, and to insure greater watchfulness on the part of the comptroller. We think, therefore, that when that officer calls upon a bank for a statement of overdrafts, the report, to be truthful, and in conformity with law, should include overdrafts covered by what are termed "overdraft notes," unless such notes have been discounted, and the proceeds thereof actually carried to the credit of the depositor on the books of the bank. It follows from what has been said that the instruction complained of was prop-

erly given, and that the case was properly left to turn on the intent which had actuated the defendant in misrepresenting the amount of the overdrafts.

Some other exceptions were noted during the trial, which are of less importance than those heretofore considered, and need not be spoken of at length, although they have received due attention. Among the number is one which was taken to the trial court's definition of the phrase "reasonable doubt," but, as the definition given was, in substance, the same as one that was approved in Dunbar v. U. S., 156 U. S. 185, 15 Sup. Ct. 325, the exception cannot be regarded as tenable. A president of another national bank in Salt Lake City, who was familiar with reports made by such banks to the comptroller of the currency, and also with the forms upon which such reports are required to be made, was called by the prosecution to testify as an expert as to the meaning or signification of certain entries in the report of date December 28, 1893, on which the indictment in the present case was based. An exception was taken to the admission of this testimony, and to the admission of similar testimony given by another witness, on the ground that it was not a proper subject-matter for expert testimony, the document being in writing, and the proper interpretation thereof being, as it is claimed, a matter of law for the court. With reference to this criticism it is sufficient to say that it is not suggested that the witnesses in question misinterpreted any of the entries in the report, and to our mind it is obvious that they did not do so. Therefore, if it should be conceded that the duty of construing the report rested upon the court, yet it is clear that no harm was done by admitting the testimony, of which the accused is entitled to complain. Upon the whole, we have reached the conclusion that no legal cause is disclosed by the record for disturbing the judgment of the lower court. We should have been better pleased with the result if the sentence imposed had been less severe, but we are not authorized to review the action of the lower court in that respect. It must also be borne in mind that the more full and accurate knowledge of all the facts and circumstances attending the commission of the offense which was possessed by the trial judge enabled him, probably, to better determine what was adequate punishment. The judgment below is accordingly affirmed, and the defendant below is hereby ordered to surrender himself to the custody of the United States marshal for the district of Utah on the filing of the mandate in execution of the sentence heretofore imposed by the trial court.

CLEVELAND TARGET CO. v. EMPIRE TARGET CO. et al.

(Circuit Court, D. New Jersey. October 5, 1899.)

1. PATENTS—INFRINGEMENT—TARGET TRAPS.

Letters patent No. 391,908, dated July 15, 1884, issued to Philip Marqua, for improvements in sending-traps for flying targets, sustained, and *held* to have been infringed as to claims 2, 3 and 5 by the defendant.

2. SAME—CONSTRUCTION OF CLAIM.

In view of the prior state of the art and particularly of letters patent No. 322,714, issued to Albert H. Hebbard, and letters patent No. 330,704, issued to Fred Holz, if letters patent No. 371,839, dated October 18, 1887, issued to Charles C. Hebbard for improvements in target-traps can be sustained at all, claim 1 must receive a construction so strictly limiting and confining it to the specific device described in the specification and shown in the drawings as to avoid the charge of infringement.

This was a suit in equity by the Cleveland Target Company against the Empire Target Company, A. H. Hebbard, Charles C. Hebbard, and William H. Rankin for the infringement of certain patents relating to improvements in traps for sending flying targets.

E. A. Angell, for complainant.

H. C. Lord, for defendants.

BRADFORD, District Judge. The bill charges infringement of letters patent No. 301,908, dated July 15, 1884, issued to Philip Marqua, and No. 371,839, dated October 18, 1887, issued to Charles C. Hebbard, and contains the usual prayers. Both of these patents relate to improvements in traps or sending apparatus for flying targets and are held and owned by the complainant. The defences relied on as to both patents are lack of novelty and of invention and non-infringement, and, as to the Marqua patent only, also estoppel and failure to disclaim. The drawings of the Marqua patent are as follows:

Fig. 1.

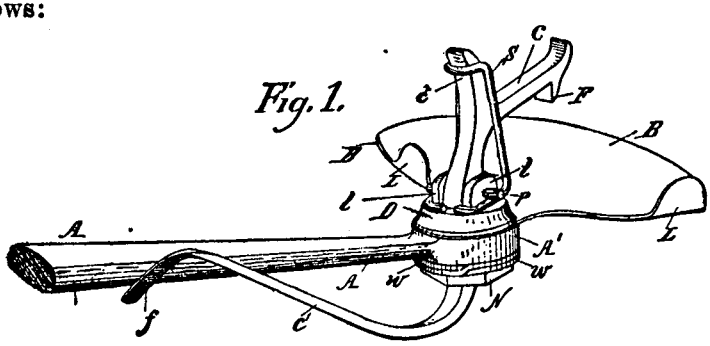


Fig. 2.

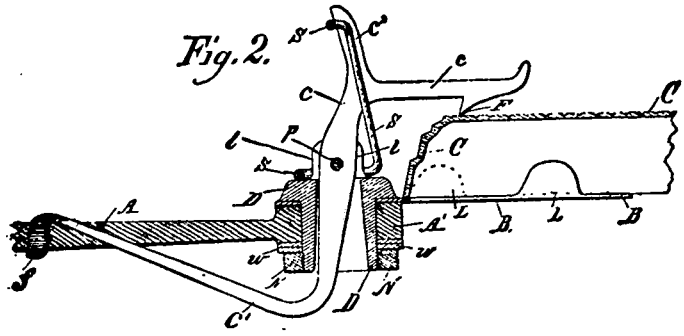


Fig. 3

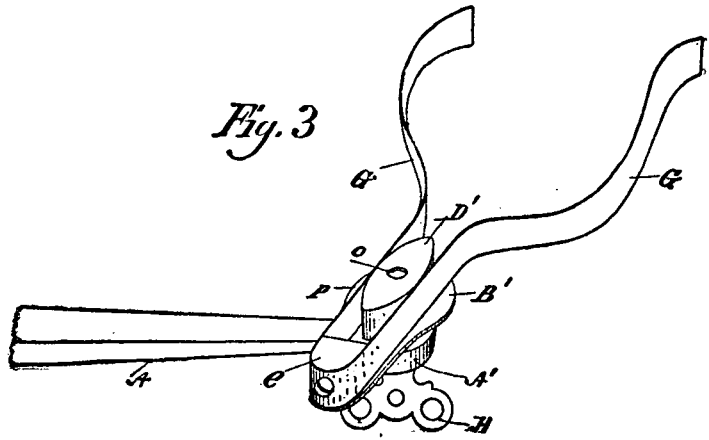
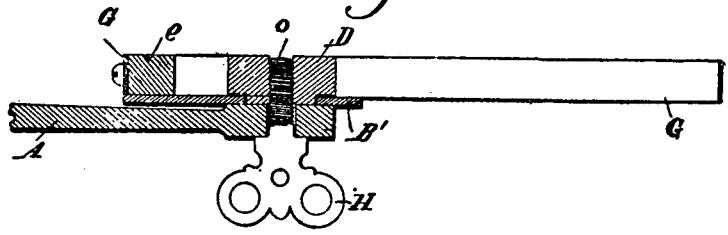


Fig. 4.



Marqua thus described the objects and operation of the mechanism set forth in his patent:

"My invention relates to 'traps' or sending apparatus used in projecting clay targets or 'pigeons' into the air for sporting purposes, its object being to render the same more efficient and produce a more perfect flight of the target, and also to adapt the same to a sending of a 'tongueless' target. Such traps, as at present used, employ a pivoted arm carrying the target usually secured thereto by a tongue, and by the partial rotation of the arm upon its pivot and the sudden arresting of its movement the target is projected into the air with an independent rotary motion. The flight thus imparted is not always uniform or satisfactory, but may be rendered so by imparting to the target a sudden impulse at the instant of projection independently of the carrying-arm. One of the objects of my invention is to produce a trap capable of imparting this sudden and independent impulse; and to this end it consists in mounting upon the main sending-arm an independent pivoted carrier, which, by the movement of the arm and at the instant of arrest, is swung around upon its pivot by its own centrifugal force, and suddenly thrown into line with the main arm as an extension thereof, releasing the target at the culmination of the instantaneous independent impulse which imparts additional force both in projection and rotation. This feature of my invention may be independently used with traps adapted to targets either with or without tongues. The remaining features of my invention relate more especially to the means for projecting a tongueless target, and consist in holding and releasing apparatus, as hereinafter more fully described. In the drawings accompanying and illustrating this specification, I have shown a form of apparatus in which all these features are embodied. Fig. 1 is a perspective view of the apparatus complete; Fig. 2, a vertical longitudinal section of the same; Figs. 3 and 4, similar perspective and sectional views of a modified construction. In the drawings, A designates the

ordinary sending-arm of a trap, the latter being of any approved construction, and requiring here no special illustration or description. To the outer end of the arm A, I attach a pivoted extension, B, which forms the carrier of the target C, a shallow cylindrical cup of fragile material, which in the present case, Fig. 2, is shown tongueless. The carrier is an approximately triangular or semicircular holder, preferably formed of sheet metal, having a turned-up edge at two or more points, as at LL, forming guide-stops for the target when placed in position upon the bottom of the holder B. In the present case I employ, also, a spring-catch in the form of a bell-crank lever pivoted upon the carrier, with one arm, c, bent forward as a trigger, resting upon the target and holding it by pressure downward upon the carrier, and the other arm, c', extending rearward beneath the main arm A, in such relation that in the independent pivotal movement of the carrier when the latter reaches its ultimate position, the arm c' is brought beneath the main arm A, and by a suitably-curved extremity, f, acting against the main arm as a cam, the trigger end c is forced upward against the force of a spring, S, and the target released. The construction of the parts in the present case is as follows: The outer end of the sending-arm A is formed into an enlarged cylindrical head, A', perforated vertically. A hollow stud, D, is fitted to this perforation, serving as a pivot and retaining-bolt for the plate or carrier B, which is similarly perforated. The pivot D passes through the head A', and is secured above by its enlargement, and below by a screw-nut, N, with an intervening spring-washer, w. The bell-crank trigger passes through the opening of the stud D, being pivoted above between two lugs, l l, rising from the upper end of the stud at the sides of the perforation. The pivot-pin p, passing through the lugs and trigger, is extended laterally and forms a holder for the spring S, which is bent horizontally around the lugs, and rises thence vertically behind and engages with a vertical extension, c^2, of the trigger-arm. The operation is as follows: The trap being set, the target is placed in position upon the holder and secured beneath a tooth, F, of the forward extension of the trigger-arm. The holder is then thrown back to an acute angle with the arm A upon the side from which the movement of the latter proceeds. By the swinging of the main arm the carrier is impelled by its own centrifugal force to rotate upon its pivot in the same general plane and direction, and at the moment of arrest of the main arm by its provided stop the carrier is suddenly swung outward to its extreme position, and by the action of the trigger mechanism the target is at the same instant released, the swing of the carrier and the centrifugal force of the target acting against the holding-flange or tongue L as an abutment, imparting to the target a rapid whirling motion, which, with the sudden access of projecting force at the moment of release, gives a perfect and absolutely controllable flight, regulated by the degree of impelling force. In the modified form of apparatus shown in Figs. 3 and 4, the carrier consists of two arms formed to clasp the target around its marginal wall, and to release it by spreading apart. The construction is as follows: The clasping-arms G G, formed to embrace and hold the target, as described, are secured at their rear ends to a stud or block, e, rising from a plate, B', pivoted to a stud or block, D', which in turn is pivoted upon the enlargement A' of the main arm A. The stud D' is somewhat elliptical in horizontal section, with its lower portion cylindrical, forming the pivot for the plate B',—an arrangement permitting the stud to be adjusted with its longer axis in any desired relation to the main arm A without interfering with its function as a pivot for the plate B'. The adjustment is effected and the stud secured to the enlargement A' by means of a thumb-screw, H, constituting also the pivot of the stud D', the object of the adjustment being to place the elongated stud D' in such relation to the axis of the main sending-arm that when the pivoted carrier (consisting in this case of the plate B' and the arms G secured thereto) is swung around by its centrifugal force the arms will be separated by impinging against the extremities of the stud E and release the target at the proper moment."

The claims of the Marqua patent in suit are as follows:

"1. In a trap or sending apparatus for flying targets, a sending-arm provided with a pivoted extension constituting the target-carrier, which, by the motion and arrest of the sending-arm, is independently rotated upon its pivot by centri-

fugal force into a position elongating the main arm, and projects the target by a sudden rotary impulse, substantially as set forth.

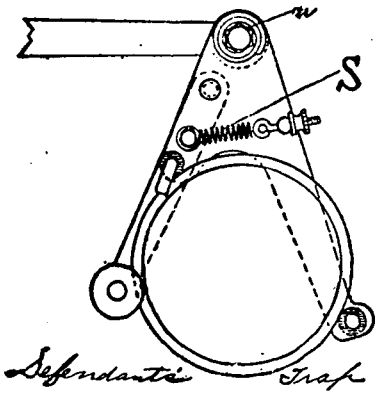
2. In a trap or sending apparatus for flying targets, a sending-arm provided with a pivoted extension carrying the target, and having an independent rotation by centrifugal force, in combination with target holding and releasing mechanism automatically actuated to release the target at the moment of extreme extension of the sending-arm, substantially as set forth.

3. In a sending apparatus for flying targets, in combination with a pivoted sending-arm having a pivoted target-carrying extension, a spring-catch adapted to hold the target and release the same automatically at the proper instant of time, as set forth.

4. In a target-sending apparatus, in combination with the main arm A and pivoted carrier B, the trigger c, provided with the releasing-arm c' f, and holding-spring S, substantially as and for the purpose set forth.

5. In a target-sending apparatus, the combination of the main arm A and pivoted extension B, provided with automatic holding and releasing devices, with the adjustable spring-washer w, for regulating the frictional resistance to centrifugal action of the carrier, substantially as set forth."

The charge of infringement as to these claims is confined to claims 2, 3 and 5. The device of the Empire Target Company, hereinafter called the defendant—for it is substantially the only defendant in the case,—which is alleged to infringe, is represented by the following drawing:



It consists of a target holder or carrier pivoted to the outer end of the throwing arm of a sending trap and provided with mechanism for the disengagement of a tongueless target at the instant of its flight from the trap. Its construction and operation are well described in a general manner by counsel for the defendant as follows:

"At the outer end of the sending-arm, there is pivoted what is termed the carrier, which is designed to hold the target and from which the target is thrown. * * * The carrier is formed of sheet metal, and is composed of two fingers, one pivoted on the other. A small spring is secured to said fingers, and draws them toward each other, and gives to them the grasp which holds the target. One end of the spring is secured to an eye-bolt on which is a thumb-nut. The tension of the spring and, hence, the grasp of the fingers is adjusted by the nut. One finger has on its outer end a rubber covered post. Oppositely placed on the other finger, is a metal post capped with a small metallic disk. Near the crotch is another rubber covered post, with a hook top. A target placed in the carrier, is engaged by the three posts. The trap is set by bringing the sending-arm around back of the catch. In modern practice the carrier is placed in line with the sending-arm. When the trap is sprung, the carrier at

the first impulse, by reason of its inertia, falls back of, or lags after, the sending-arm. This momentary backward movement of the carrier breaks the shock, incident to the starting of the arm. As soon as the carrier gets under motion the manifestation of inertia known as centrifugal force becomes active, and this swings the carrier outwardly on its pivot, to a position in line with the sending-arm. During this outward movement, which may be termed a catching-up movement, the carrier moves somewhat faster than the sending-arm. This initial lagging action of the carrier also reduces the radius of the arc, forming the path for the target, and thus, the momentary retarding of carrier reduces very materially the releasing or centrifugal force of the target. As the carrier swings out, the centrifugal force is suddenly increased by reason of the increased radius and the swing of the carrier on its pivot. The tension of the spring on the carrier is so regulated that the grasp on the target is not sufficient to withstand this sudden acquisition or jerk of centrifugal force, so that the target overcomes the grasp of the fingers approximately at the moment the carrier reaches the position in line with sending-arm, and thus releases itself."

It may here be added that the pivoted extension or carrier in swinging on its pivot moves in the same plane as the sending-arm or in a plane substantially parallel thereto, and that the holding mechanism of the carrier is such that the periphery of the target after the trap is sprung and until the target is disengaged from the trap moves in the same or substantially parallel plane.

The defendant contends that the claims of the Marqua patent cannot on a fair reading and particularly in view of the prior state of the art be so broadly construed as to bring the alleged infringing device within them. And, further, that such a construction would necessarily result in the nullification of the claims by reason of certain alleged anticipating patents and other anticipatory matter. What was the prior state of the art as disclosed in the record? The earliest date assigned for the Marqua invention is the early part of July, 1883. When inanimate targets began to supersede live pigeons in the sport of trap-shooting, glass balls sometimes filled with feathers were principally used. The glass ball thus employed was unsatisfactory. It could not well be thrown a sufficient distance. Its flight was too regular to resemble that of a live pigeon, and it was consequently too easily hit by the marksman. George Ligowsky received letters patent No. 231,919, dated September 7, 1880, for a concave or dish-shaped flying target. He described his invention in part as follows:

"My improvement consists in constructing flying targets in such a manner as to cause them to imitate more closely the flight of a bird as soon as the device is projected from a suitable trap or 'sender.' This result is accomplished by giving to such targets a concave or dished or saucer shape, whose rim is slotted to receive a tongue of thin sheet metal or other light material, which tongue is to be inserted between the jaws of any trap capable of projecting the target in the manner desired. The target, being thrown by a force thus applied near its periphery, has an axial rotation imparted to it that insures the utmost accuracy of flight, while the concavity of the device serves to partially imprison the air as soon as the momentum of the target is spent. Consequently the target descends gradually, and is not broken in case it falls on hard ground. * * * The arm or spring of the trap carrying the aforesaid clamp is then allowed to swing around very quickly in a horizontal or inclined plane and to be suddenly arrested, thereby releasing the target from the clamp. Evidently the target will now be projected into the air with a velocity proportioned to the strength of the actuating spring, and, being thrown by a force applied to its periphery, said target has imparted to it a very rapid axial rotation that in-

sures the utmost accuracy of flight. * * * The tongue E, instead of being applied to the target, may constitute part of the trap or sender, being in this case so arranged as to readily slip out of the slot D when said trap is sprung; or said tongue may be twisted so as to have somewhat of a spiral shape for the purpose of imparting a wabbling motion to the target."

Having invented such concave or dish-shaped flying target, Ligowsky afterwards received letters patent No. 252,230, dated January 10, 1882, for an improved target trap. In the description of this patent he says:

"The object of this invention is to furnish a trap especially adapted for throwing the peculiar form of flying targets seen in letters patent No. 231,919, granted to me September 7, 1880; and the trap consists essentially, of a spring-lever, target-clamp, trigger, adjustable standard, and devices for maintaining said standard at any desired inclination. * * * The trap is usually employed for imparting a horizontal flight to the target. * * * When this sweeping motion of the lever has attained its maximum velocity the tongue of the target is automatically disengaged from the clamp r' s', and said target skims off with a spinning action that closely imitates the flight of a quail; but the moment this maximum velocity has been reached the further sweep of the lever is gradually arrested on its own coil p, thereby preventing a violent jar or concussion, and thus obviating the breakage of the target, which latter, being composed of a fragile material, would be shattered to pieces in case the lever should be checked with a sudden stop, as is customary with those traps employed for throwing the ordinary balls."

Ligowsky's trap in connection with his improved target undoubtedly possessed great merit and met with much success and constituted a distinct and marked advance in the art of projecting flying targets. The target used in the trap had a tongue extending from its periphery consisting at first of a strip of pasteboard glued to the target and afterwards of an integral extension of the edge of the target. The tongue was inserted in a spring clamp at the outer end of the sending-arm, the initial position of the target being such that a straight line drawn through its center and tongue would be practically at right angles with the arm, and the tongue being held in the clamp with such pressure as to offer frictional resistance sufficient to prevent its escape before the arm attained its maximum velocity. Although Ligowsky's target patent contemplated a target with a twisted or spiral tongue to give a "wabbling motion to the target" as well as a target with a straight tongue, in practice the latter was used. When held in position, the concave side of the target was downward and its periphery was approximately in the plane in which the sending-arm moved. The trap being sprung, the sending-arm carried the target by its tongue, if operating normally, until an instant after the arm had attained its greatest speed, when by reason of the partial arrest of the arm through the resistance of its own spring coil, and the momentum of the target, the latter swung around and released its tongue from the spring clamp with a jerk or flip and entered upon its flight with considerable velocity and rotary motion. When the sending-arm was adjusted to move in a plane nearly parallel to that of the horizon a skimming movement was imparted to the target, said to resemble the flight of a bird. The meritorious features of the Ligowsky mechanism are obvious. His trap threw a saucer-shaped target which, unlike the glass ball, could be made to sail or skim through the air. It threw the target in such manner as to impart

to it through its sudden swing around its tongue, as held in the spring clamp a moment before its discharge, a rapidity of rotation much greater than it would have acquired from the motion of the sending-arm without such terminal swing. It carried the periphery of the target and discharged it approximately in the plane in which the sending-arm moved. The result was that the target attained a longer and in other respects more satisfactory flight than had theretofore been secured. There were, however, in the Ligowsky device inherent limitations of usefulness for the purpose for which it was intended. The insertion of the clay tongue of a target in the spring clamp was not calculated to insure a nice adjustment of the plane of the target's periphery in its relation to the plane of motion of the sending-arm, and the resistance of the air to the tongue of the target when rapidly spinning after its disengagement from the trap could not fail to disturb its plane of rotation, largely overcome its rotary motion and injuriously affect the evenness and length of its flight. The presence of the tongue also prevented an even rotation of the target on its axis, which is considered indispensable to the most desirable flight. The movement of the target through the air was too irregular and uncertain. Indeed, it is doubtful whether Ligowsky fully appreciated the importance of securing an even rotation of the target in view of his suggestion of a device to give it a "wabbling motion." In practice it often happened that pasteboard tongues became loose, clay tongues were not strong enough to resist the shock of the trap, and clay targets were too strong readily to be broken with shot. Nicholas Fischer received letters patent No. 281,183, dated July 10, 1883, for a cylindrical cup-shaped flying target made of clay or similar material. In the description of his device he says:

"My invention relates to flying targets, sometimes called 'clay pigeons,' designed to be projected into the air by suitably-constructed mechanism and used as a mark for shooting practice. Such targets are made in shallow-dish form, of burned clay or other fragile material, and are thrown into the air in an approximately horizontal position, and a rapid axial rotation at the same time imparted to them by the sending-mechanism. It will be obvious that it is desirable that such targets should be made of as light a weight as possible and free from any feature of construction offering an impediment to rotation while in the air. As heretofore constructed, such targets have been of dish form, with a radial tang or projection, either formed as part of the target or of other material attached thereto, or with a slot or opening in the peripheral flange for engagement with the throwing-arm of the sending mechanism. By the mechanism usually employed, the sending force was thus applied by such tang or slot to the peripheral flange in such manner as to require special strengthening of the flange, either by thickening or providing the same with a strengthening-fillet, or by other special devices, thereby adding unduly to the weight and creating impediments to the proper sending and rotation of the target, and impairing the freedom and proper movement while in its flying course in the air. Moreover, these features of construction form a serious addition to the cost, which it is desirable to avoid in view of their necessary destruction in the using. My invention obviates all these difficulties; and it consists in the construction of a target of plain, cylindrical, or dish form, without tang, slot, fillet or thickening of any part, and generally lighter in construction than those now in use, it being intended to throw this target by means of a swinging arm provided with a resisting-guideway, whereby the target is projected into the air by centrifugal force, and the rotation imparted to it by the resistance of the guideway acting centripetally upon the target from without,

the force being thus applied in a direction and in a manner enabling the thinnest and lightest shell target to be freely used, and thereby securing a perfect movement in the air when projected from the trap, and the minimum of cost in production. * * * By reason of the construction thus described, the target may be propelled much farther into the air, is enabled to maintain itself much longer in flight, and is not so subject to the action of gravity, but is more perfectly controlled by the gyratory forces, and is, indeed, in all respects essentially improved in cost, construction and efficiency in use."

While the Fischer patent covers a target and not a trap, the description and the accompanying drawings disclose trap mechanism which marks another material advance in the art of throwing targets. A device is shown for projecting a tongueless cup-shaped target with a cylindrical periphery capable of even rotation on its axis. The box or case containing the target is rigidly attached to and forms an extension of the sending-arm and is adapted to carry the target, during the swinging of the arm and until the flight begins, in such position that the plane of its periphery is coincident with the plane in which the arm moves or with a plane parallel thereto. The containing-box or case is square or rectangular and open at one side to permit the escape of the target and is so adjusted to the sending-arm that two of the closed sides are each at an angle of about 135° with the line of the arm, the other closed side being at an angle of about 45° with that line and inclining toward the direction in which the arm moves in swinging forward. The last mentioned side forms a guideway for the target. After the trap is sprung, centrifugal force acting upon the target through the swinging of the arm causes its periphery to press against and roll from its initial position along the guideway in escaping from the box, with the result that the target by the time of its disengagement acquires considerable rotary motion in the proper plane. The trap device thus disclosed clearly shows an improvement upon the Ligowsky trap in two important particulars. It threw a target which, being tongueless, could evenly rotate on its axis with comparatively little atmospheric resistance to its rotation; and it threw a target with axial rotation in the proper plane. It lacked, indeed, one feature of the Ligowsky trap, namely, the terminal swing of the target on its tongue in the spring clamp, which in the earlier device contributed so largely to the rapidity of the target's rotation. It is questionable, however, whether this omission was not fully, if not more than, supplied in the later device by the rolling of the target on the guideway in passing through and escaping from the containing-box or case. But both the Ligowsky and Fischer traps in construction and operation fall far short of the mechanism disclosed in the Marqua patent. The Marqua trap presents a combination of parts not diclosed either by Ligowsky or Fischer, co-operating in such manner as to produce a much more satisfactory flight of a target, namely, the combination of a sending-arm and a pivoted target carrier provided with mechanism for holding and releasing a tongueless saucer or cup shaped target, so constructed and adjusted as to throw the target more accurately in the desired direction, with increased axial rotation and projectile velocity and with its periphery in the proper plane. Neither the Ligowsky nor the Fischer trap disclosed the pivoted carrier, which

largely augments both the rapidity of rotation and the initial velocity of the target. Neither of them disclosed any mechanism by which the target could be accurately projected in any desired direction; the target escaping from the Ligowsky trap by wrenching its tongue out of the spring clamp, and from the Fischer trap by rolling out of the containing-case. Marqua's invention clearly was not anticipated by Ligowsky nor disclosed by Fischer; and I have not found anything in the prior state of the art, as shown by the record, to negative patentable novelty in it. That it possesses patentable utility there can be no doubt. The witness North, who has had large experience with trap mechanism, speaking generally of the pivoted carrier adapted to throw a tongueless target with its periphery in the plane of motion of the sending-arm, says:

"With the carrier pivoted to the arm of the trap, as is used in all successful target traps, a flight of sufficient distance anywhere from 40 to 100 yards can be obtained, the direction of the target in its flight can be guided and kept at any desired point, and the breakage and balks in the traps is so reduced to amount to but a very small percentage of the number of targets trapped. I have known instances of 1,000 or more targets being thrown with but one or two breaking in the trap, while with a carrier rigidly fastened to the arm a very unsatisfactory flight is obtained, the target having a wabbling motion and the flight rarely ever reaching over 30 to 35 yards, which is not up to the required distance as governed by the rules of target-shooting, and the direction of the flight varies very greatly, and in my experience was impossible to control, while the breakage in the trap was so great that it would be an impossibility to market a trap with a carrier of that description."

He further states that a pivoted carrier "by swinging on its pivot, cushions the force of the blow and does not break the target."

The defendant claims that the Marqua invention was anticipated by trap mechanism invented by Charles F. Stock, and patented in March, 1884. The complainant's contention in this connection is two-fold: first, that as between the Marqua and Stock devices priority of date of invention must be assigned to the former, and, secondly, that the Stock patent does not cover, or, indeed, disclose the Marqua invention. The latter of these positions will first be considered. Stock received letters patent No. 295,302, dated March 18, 1884, for an "improved device for throwing targets." In the description he says:

"This invention relates to that class of target-throwing devices known as 'clay-pigeon and ball traps,' wherein a throwing-arm swinging upon a center is employed; and the invention consists in the employment of a novel device at the outer end of the throwing-arm for holding the target, the same being adapted to retain the target during the swing of the arm and to release it at the proper time for causing it to be properly projected into the air."

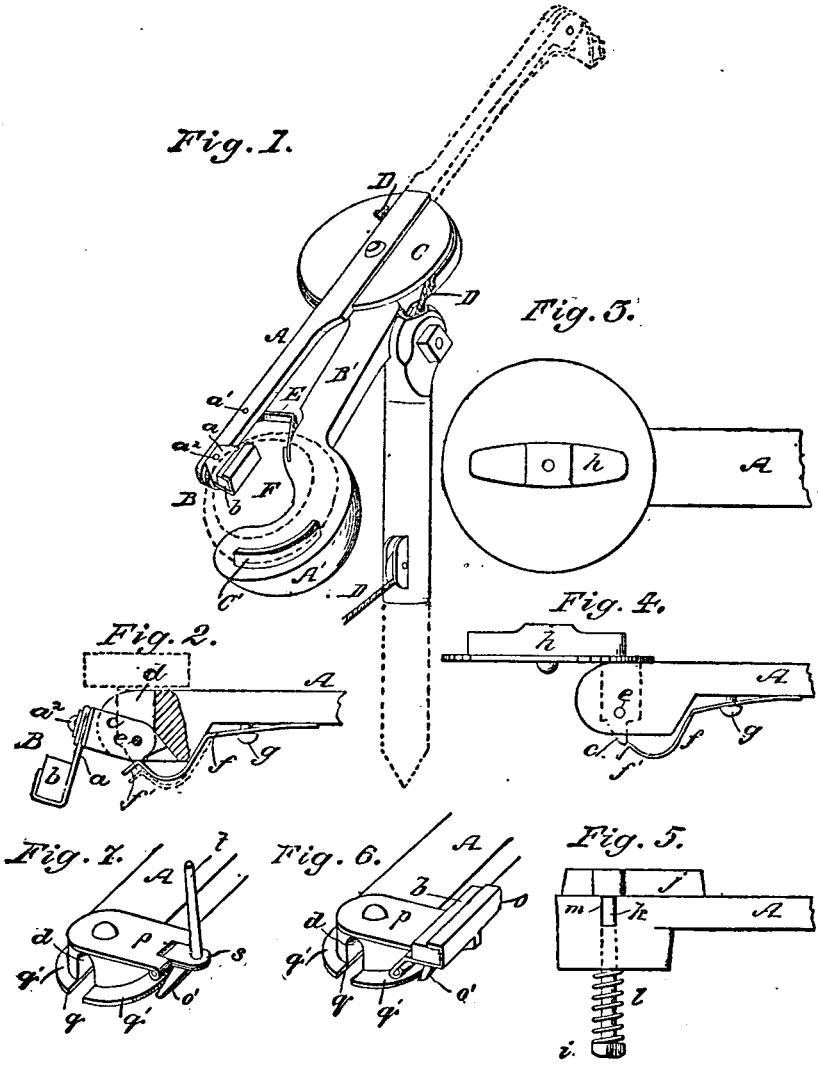
The claims are as follows:

"1. The combination, with the throwing-arm of a target-throwing device, of a clip for holding the target, arranged to automatically drop below the upper surface of the throwing-arm for releasing the target, substantially as described.

2. The target-holding clip, consisting of the pivoted plate, p, having the plate o, provided with toe o', hinged to it, in combination with the slotted plate q, all adapted to be operated substantially as described."

Seven drawings accompany and are referred to in the specification, showing five forms of mechanism. Four of them are adapted to

throw tongueless cup-shaped targets with a cylindrical periphery, and the fifth, represented by Fig. 7, to throw "glass balls or other targets having small orifices." The drawings are as follows:



In the device shown in Figs. 1 and 2 there is a flat tongue c, beveled or brought to a point at its lower end, inserted in the slot d, of the sending-arm, and there hinged or pivoted to the arm on the pin e, the point of the tongue, before the disengagement of the target, resting against the bent end f' of a friction spring f, secured to the lower side of the arm. The upper end of the tongue can swing outwardly through the slot on its hinge-pin or pivot whenever the

pressure of its lower point overcomes the resistance of the bent end of the friction spring, by which the tongue is held in position at right angles with the upper side of the arm "with considerable force." The clip B is composed of the bent plate a, provided with the rubber block b and hinged or pivoted at a^2 to the upper end of the tongue in such manner as to swing laterally. When the trap is set the plate is at right angles with the arm and the rubber block parallel thereto, the block being within and against the periphery of the target on the side in the direction of the initial motion of the arm, and the opposite portion of the periphery resting on the stationary part A′ of the trap, against the lip C′. After the trap is sprung and during the accelerated swing of the arm centrifugal force acting upon the target and plate causes the latter to swing forward on its pivot, with the target bearing against the block, practically in the plane of motion of the arm, until the direction of such force approximately comes into line with the slot containing the tongue, when the same force acting upon the target and clip, the center of gravity of the two conjointly being above the hinge-pin or pivot e, overcomes the resistance of the friction spring and causes the upper portion of the tongue carrying the plate to move outwardly and downwardly through the slot, thus deflecting the plate and block from and impelling them below the plane of motion of the arm and permitting the target to escape from the trap. In the device shown in Figs. 3 and 4, a plate, having the button h pivoted upon it, is rigidly attached to the tongue c, which rests against the bent end of a friction spring. The tongue is pivoted in a slot in the sending-arm as in Fig. 2. When the trap is set the target rests on the plate, the button being within and against the periphery of the target in the direction of the initial motion of the arm. After the trap is sprung centrifugal force acting upon the target causes it with its own swing to turn the button on its pivot until, with the sweep of the arm, the same force acting upon the plate, tongue and target, is supposed at the proper time to overcome the resistance of the friction spring and cause the upper portion of the tongue to move outwardly and downwardly through the slot thereby deflecting and removing the plate and button from the plane of motion of the arm and allowing the disengagement of the target. In the device shown in Fig. 5, a plate j, is attached to the upper end of the bolt k, which passes through the end of the sending-arm and has the coil-spring l around it to act between the under side of the arm and the nut i. There is a transverse slot m in the arm adapted to receive the plate. The plate has arms of unequal length. When the trap is set the plate rests across the slot and on the upper side of the sending-arm and in line with it, the shorter arm of the plate being farther out on the sending-arm than the longer, and the plate being within and against the periphery of the target in the direction of the initial motion of the arm. After the trap is sprung centrifugal force acting upon the target is supposed to cause it to turn the plate until the latter reaches such position that the coiled spring will draw it quickly into the slot and thereby release the target. The device shown in Fig. 6 is so similar to that disclosed by Figs. 1 and 2 as to require no explanation here. Fig. 7 shows a device operating on the same

principle as that in Fig. 6, and varies from it only so far as to be adapted to throw "glass balls or other targets having small orifices." While these several devices, except the last, show a pivot or bolt on or about which the block, button or plate in contact with the periphery of the target swings or rotates through the action of centrifugal force, whereby during the sweep of the sending-arm the target acquires or has imparted to it additional rotary motion, they are essentially different from the Marqua mechanism, not only in their principle of construction, but in their mode of operation and in their efficiency. They do not present the same combination of parts or equivalent parts co-operating in substantially the same manner to perform the same function. Whether they can or cannot properly be said to disclose a pivoted carrier is not necessarily a controlling question in the case. It may involve merely a dispute about terms. Marqua's device was of a very meritorious character and his patent should be "construed in a liberal spirit to sustain the just claims of the inventor." Such liberality can within proper limits be displayed as well by resorting to a narrow construction to avoid anticipation, as to a broad one fully to secure to an inventor the fruits of his invention. It is true that it is not expressly stated in any of the claims of the Marqua patent that the target carrier or the target is to rotate in any given plane. But the claims must be read in the light of the description and drawings, and so read they cover mechanism adapted to impart to the target rapid axial rotation in the plane or substantially in the plane of motion of the sending-arm and to project the target from the trap without changing the plane of its rotation. Such rotation without change of plane is absolutely indispensable to a satisfactory flight. Figs. 1 and 2 in the Marqua patent disclose a pivoted carrier B, on which a target rests with its rim in a plane parallel to that of the motion of the sending-arm and so near it as to be practically in the latter plane. The periphery of the target is in contact with the guide-stops L L, and the spring S causes the tooth F to press on the upper side of the target. The target is thus securely held during the swinging of the sending-arm and until the moment of its disengagement in the proper plane. When the tooth F rises the target escapes without any disturbance of the plane of its rotation. So in Figs. 3 and 4 of the same patent the target is securely held in the proper plane between the resilient clasping-arms G G until the moment of its disengagement and when these arms open the target is discharged without any such disturbance. It is obvious that such result cannot be accomplished by the device shown in Figs. 1 and 2 of the Stock patent. After the trap is sprung and until the disengagement of the target, while its periphery on one side is in contact with the rubber block b, there is no mechanism to hold the rim of the target in the proper plane. Gravity tends to cause the unsupported portion of the target to fall and the resistance of the air to its upper side by reason of its form probably has, within certain limits, the same tendency, when the sending-arm moves at only a slight angle to the plane of the horizon, and in so far as the rim of the target may approximate to the proper plane, the result is due to the overcoming to a greater or less extent of these tendencies

by centrifugal force. On the other hand, when the sending-arm moves at a considerable angle to the plane of the horizon, atmospheric resistance to the under side of the target has a tendency to raise the unsupported side of the target above the plane of motion of the arm and cause the target prematurely to escape from the trap. When the sending-arm in its sweep has reached that point where through centrifugal force the pivoted tongue c is about to overcome the resistance of the bent end of the friction spring f and fall forward and downward through the slot, the side of the rubber block b in contact with the periphery of the target is at a right angle to the plane of motion of the sending-arm, the periphery of the target, if it has not previously escaped, pressing against it through the action of centrifugal force upon the target. When the resistance of the friction spring is overcome the block moves downward with increasing rapidity, changing the angle of its side in contact with the target until from a right angle it becomes nearly parallel to the plane of motion of the sending-arm. During the forward and downward swing of the block, if the rim of the target be not broken, one or probably two things will occur further to disturb the plane of rotation of the target. Until the side of the block in contact with the target has so far approached parallelism with the plane of motion of the sending-arm as to permit the rim of the target to drag over that side, the downward motion of the block will through its frictional contact with the rim of the target carry the side of the rim with which it is in contact downward, substantially changing and further disturbing the plane of motion. As soon as the contactual side of the block reaches such a point in its descent as to permit the rim of the target to drag over and away from it without being broken, the rim, if the target be moving with sufficient velocity, will pass up at least a portion of the inclined plane of that side of the block, whereby the opposite side of the rim will be impelled downward, thus causing still another change in the plane of the target's rotation. Substantially the same faults are inherent in the device shown in Fig. 6 of the Stock patent; and such of these faults as arise from the escape of the rim of the target from a descending block inhere in the device shown in Figs. 3 and 4. It is unnecessary to discuss the device shown in Fig. 7 for reasons already expressed. Fig. 5 presents a device materially different in its construction and intended operation. It is not stated in the specification that the plate j is rigidly attached to the bolt k nor that while the sending-arm is swinging and before it reaches the point where the target should be disengaged a comparatively large proportion of its rim is not in contact with the upper surface of the arm. But that these are facts is plainly to be inferred from the drawing. The resistance of the air to the exposed portion of the under side of the target when the sending-arm moves at a considerable angle to the plane of the horizon has the tendency to force the target upward and cause its premature escape, although possibly in less degree than in the device shown in Figs. 1, 2 and 6. But, aside from this fault, the mechanism on its face as well as on the other evidence in the case must be held to be inoperative. The target is intended to be released by the dropping

of the plate j into the transverse slot through the action of the coiled spring l between the nut i and the under side of the sending-arm. If the pressure of the spring is sufficient to cause the plate to drop "quickly into the slot," as contemplated by Stock, it is difficult to conceive that the same pressure would not cause such frictional contact between the upper surface of the sending-arm and the under surface of the plate, and also between either the upper end of the spring and the under side of the arm or the lower end of the spring and the upper side of the nut, as effectually to resist the tendency of the plate to turn, as intended, through the action of centrifugal force upon it and the target in contact with it. On the other hand, if the pressure of the spring is not sufficient to cause the plate to drop quickly into the slot, but is slight enough to allow it to turn under the action of centrifugal force to the position where it was contemplated that it should drop therein, one or more of several things can hardly fail to happen. The plate may, if turning with sufficient rapidity relatively to the line of the sending-arm, jump the slot, and, unless the target has prematurely escaped, prevent its release or break its rim, or possibly through a disturbance of the plane of motion of the target by atmospheric resistance, as above mentioned, the rim of the target may drag over the ends of the plate, further disturbing its plane. So, in the device shown in Fig. 6 the toe o′ may jump the slot d with similar results. If the plate drops into the slot comparatively slowly, the rim of the target will either be broken against the plate through the sudden arrest of the lateral motion of the latter relatively to the sending-arm, or will drag over its ends, losing the proper plane of rotation. The evidence fully supports these conclusions. The fault of the mechanism consists, not in defective workmanship, but in the principle of its construction. Mechanism having such vital defects cannot in any legitimate sense be called operative. Careful examination of the several devices shown in the Stock patent has satisfied me that by reason of the manner in which the target is released from a descending block or plate with which its periphery has been in contact through the action of centrifugal force, not only is the target, if disengaged unbroken, caused when entering upon its flight to rotate in a wrong plane, but its axial rotation is so slow and its projectile velocity so small and the direction of the flight so uncertain as to render these devices valueless. That no one of them possesses the same combination of parts as that disclosed in the Marqua patent and covered by claims 2, 3 and 5, or, indeed, by any of the claims, or of equivalent parts co-operating in substantially the same manner to perform the same function as the Marqua mechanism, namely, the projection of a target from a trap with axial rotation in the plane of motion of the sending-arm or in a plane parallel thereto, is clear from the drawings and description. The doctrine of equivalents certainly should not be strained in favor of the Stock mechanism. In view of the substantial difference in function between the two inventions, it is unnecessary to enter into a minute comparison of the several parts forming the combination in the one with those forming the combination in the other. The Stock claims are limited to mechanism by which the target is intend-

ed to be released by the dropping of the part with which, through the action of centrifugal force, it is in contact, toward or below the plane of the upper surface of the sending-arm. No such feature is shown in or covered by the Marqua patent. The Stock mechanism itself discloses an invention different from that of Marqua. Neither the Stock patent nor his invention was an anticipation of the Marqua trap. It is proper to add that the patent was only a paper one. No traps were manufactured and sold under it. The invention was worthless. It was practically an unsuccessful and abandoned experiment. The conclusion reached on this branch of the case renders it unnecessary to consider the question of priority of invention as between Stock and Marqua.

The defendant claims that the Marqua invention was anticipated by certain mechanism invented by A. H. Hebbard and alleged to have been used at Knoxville, Tennessee, in the latter part of 1882. It is also contended that this mechanism included the pivoted carrier feature and was of such a character, even if not anticipating the Marqua patent, as to require the Marqua claims to be so narrowly and strictly construed as to negative infringement. Much evidence on this subject has been adduced on each side. It presents probably the most serious question in the case. It satisfactorily appears that Marqua conceived the idea of a carrier for a tongueless cup-shaped target pivoted to the outer end of the sending-arm and revolving on that pivot during the sweep of the arm, July 4, 1883; that thereafter during the same month he reduced his conception to a drawing plainly disclosing the parts and principle of the mechanism; that the mechanism so disclosed contained all the essential features of his invention as patented; that during or about October, 1883, he furnished a sufficient drawing of such mechanism to the witness Cook, who was a skilled blacksmith for the Marqua Manufacturing Company; that Cook commenced the construction of the mechanism during or about November, 1883; and that it was completed and successfully used in public in March, 1884. Marqua applied for his patent April 11, 1884. The intervals which elapsed between the completion of the first drawing made by Marqua and the delivery of the drawing to Cook, and between the time of such delivery and the commencement of the work of construction by him, and between the time of such commencement and the completion of the mechanism, are also satisfactorily explained. The evidence shows that there was no abandonment or laches on the part of Marqua. The date of his invention, therefore, may be carried back to the end of July, 1883, if not earlier in that month. Did Hebbard before the end of July, 1883, form a complete conception of a pivoted target carrier and fully embody that conception in a drawing, model or otherwise? If he did, a further question will have to be considered on this branch of the case. If he did not, no invention he subsequently may have made could anticipate or otherwise affect the Marqua claims. In a suit brought in 1888, in the circuit court for the Northern district of Ohio, by the Peoria Target Company against the complainant herein, hereinafter referred to as the Peoria-Cleveland case, on the Stock reissue patent, No. 10,867, dated September 13, 1887, among

the defences set up were non-infringement, the absence of inadvertence, accident or mistake on Stock's part with respect to the original Stock patent already discussed, and the alleged Hebbard prior invention and use. The court held, among other things, that there was "no error in the application, specification, and claims of the original Stock patent through accident, inadvertence or mistake such as would entitle the patentee to a reissue thereof with new and broader claims," and therefore that claims 3 and 4 of the reissue patent were void; that claim 1 of that patent had not been infringed; and further, on a state of proofs somewhat different from that here disclosed, that Hebbard conceived and reduced to successful practice in public a pivoted target carrier prior to December 8, 1882. 47 Fed. 728. The circuit court of appeals affirmed the decree on the first two grounds of defence above mentioned, but made no allusion to the alleged prior invention and use by Hebbard. 7 C. C. A. 197, 58 Fed. 227. Under these circumstances the question of priority may properly be considered an open one. A. H. Hebbard testifies to the effect that in the summer of 1882 he devised and constructed a target carrier for what was known as the "Saturn target," having brass prongs within which the target was held; that the carrier was attached to the end of the sending-arm of a Ligowsky trap by a bolt or pin passing through the clamp and end of the arm in such manner as to allow the carrier, subject to the regulating resistance of a tension-spring, to swing on the bolt or pin; that when the trap was sprung the carrier moved out in a line with the sending arm, and centrifugal force caused the target to release itself from the prongs of the carrier; that the inner face of the prongs on one side of the target was roughened, the prongs on the other side of the target being smooth, causing the target in escaping to acquire axial rotation; that exhibits "Hebbard's First Throwing Device" and "Ligowsky Trap Arm" represent with substantial correctness his first carrier and its mode of attachment to the sending-arm; that he threw targets from this carrier in the presence of a number of persons in Knoxville, in 1882, and the device "worked fairly well"; that subsequently in 1882 he made another pivoted carrier device composed of wire and consisting of "two prongs with a parallel wire directly over it," for a tongueless clay target; that the second carrier was pivoted in like manner as the first, the wire on one side of the target being covered with leather to impart through frictional resistance axial rotation; that exhibit "Hebbard's Second Target Throwing Device" correctly represents the second carrier, with the exception of the leather wrapping; that he threw clay targets with this device in the presence of several persons; that shortly after making his second carrier he conceived the idea of a target "provided with a central hub in the center of a concave disk, the hubs extending slightly above and below the bottom of the device"; that he constructed a brass model to throw the target and made the target out of a tin box cover, inserting a wire through its center to represent its hubs; that exhibit "Hebbard's Third Target Throwing Device" is the same model which he made; that he tested this device on the arm of a Ligowsky trap and found that it worked satisfactorily; that it was made and finished

within three or four weeks after October 8, 1882; that he showed it to his father, who according to the evidence died December 8, 1882, and also to others at the same time; that the only change he notices in the model is the absence of the leather which originally was "on the curved finger that bears on the outer ring of the target"; that soon after making the model and before the death of his father, he constructed or caused to be constructed a full sized carrier, which was attached in the same manner as the others to the arm of a Ligowsky trap, and threw from it in the presence of a number of persons tongueless clay targets having a "hub or axle in the center"; and that he was so satisfied with the result that he turned his attention to "suitable compositions other than clay from which to construct targets." The testimony of Charles C. Hebbard in this connection is substantially to the same effect as that of his brother with some minor variations, principally as to dates. He states positively that prior to the death of his father the pivoted target carrier was devised and used in public by his brother. The witness Powell testifies to the effect that in 1882 he worked as blacksmith for the Knoxville Iron Company and knew the Hebbard brothers and their father; that during the lifetime of the father he forged for A. H. Hebbard a device for holding a saucer-shaped target having a hub, consisting of "one piece forked and one crooked arm concaved at one end," and represented by exhibit "Powell sketch," which he more particularly describes; that he made the sketch the day before testifying; that he knows how the parts of the carrier were put together; that he cannot state positively how the device was to be used—"it was fastened to the trap"; that the prongs held the target; and that he has seen the device used at a distance but does not remember when. He does not state how the carrier was attached to the sending-arm,—whether pivotally or rigidly. The witness Lyle testifies to the effect that he was formerly a target maker and first became familiar with targets and target traps in 1882 in Knoxville; that in July of that year he saw a carrier in the possession of one of the Hebbards which, when the trap was set, was placed at an angle to the sending-arm, and, when the trap was sprung, "would come around straight and deliver the target with a spinning motion in the air;" that the Hebbards made a great many other carriers; that one of them was called by A. H. Hebbard a "pie-fork" and was "made out of steel wire and had two prongs, and each prong had a bar bent back on it to hold the target in place"; that it was "pivoted on to an arm and used in about the same way" as the first mentioned carrier; that it threw a clay target and closely resembled exhibit "Hebbard's Second Target Throwing Device"; that exhibit "Hebbard's Third Target Throwing Device" was the next carrier he saw in the possession of the Hebbards; that it was pivoted to the arm; that he saw it before the father of the Hebbard brothers died; that he saw a full-sized trap with a target carrier that was pivoted to the sending-arm, and he thinks this was in the latter part of 1882; that he saw the several carriers in use, although he does not specifically state when; and that he last saw the brass model about 1892. The witness Dow testifies to the effect that the first target carrier made by A. H. Hebbard

that he saw was the one called the "pie-fork," and was "made of two parallel strips of steel the right width to admit of a target"; that it was attached to the arm of a Ligowsky trap; that his impression is that it was "riveted in some way" to the arm; that in the first experiments it was tied to the arm and "when the arm was released it flew out"; that he saw clay targets thrown with this device; that afterwards the carrier "did not have that wrist motion, rigid, I expect"; that the next carrier he saw had the wrist motion and was "a device that would imitate, as near as possible, the action of the wrist on the human arm"; that it was a little brass model and is the exhibit "Hebbard's Third Target Throwing Device"; that it was made in the summer or early in the fall of 1882 and was used to throw little tin targets; and that afterwards an enlarged device, similar in construction and action to the model, was made and used before the death of the Hebbard father. In 1890 the Peoria Target Company brought suit in the circuit court for the Northern district of Ohio against the Standard Target Company and the Hebbard brothers on the Stock reissue patent above mentioned. The alleged Hebbard use was set up by way of defence, and the Hebbard brothers, S. A. Hebbard, their mother, Mary A. Hebbard, wife of Charles C. Hebbard, Dow, Lyle, Powell, S. Van Gilder and R. Van Gilder, among others, testified in support of such alleged use. The controversy was adjusted between the parties without reaching a decree. By stipulation of counsel the testimony of the above witnesses in that case, as well as certain affidavits therein used in opposition to a motion for a preliminary injunction, have been made part of the evidence in this case. By like stipulation certain testimony and affidavits hereinafter referred to, produced in the Peoria-Cleveland case, have also been made part of the evidence herein. In the Peoria-Standard case S. Van Gilder testified to the effect that in the spring of 1883 he met A. H. Hebbard in Knoxville and told him that he, Van Gilder, was at work on a trap and target, and that the trouble he found "was to get a device to throw targets without breaking," and that he "had been experimenting with a flexible steel spring, describing the same to Mr. Hebbard as being on the principle of a limber switch with a mud ball on the end of it, but the device would not work satisfactorily at all times"; that Hebbard said he "was working on a target, and his idea was that it should be thrown something after the manner of throwing a rock with a man's fingers, and that he was experimenting with his ideas trying to get up something that would beat the old Ligowsky clay bird"; and that Hebbard did not show him any target trap or device for throwing targets. R. Van Gilder testified in the same case to the effect that he was one of the witnesses whose names appear on letters patent No. 299,783, dated June 3, 1884, issued to A. H. Hebbard for an improved flying target, the application for which was filed November 23, 1883; that before he signed the application he had some conversation with Hebbard "about some device or invention for throwing a target, taking as a model the arm from the elbow down, using the thumb and first two fingers for holding the target, with wrist motion to throw it"; and that he had no idea how long before Hebbard made his applica-

tion for a patent this conversation occurred, "but it was before this application. It is my impression that it was some time before." In the same case Mary E. Hebbard testified to the effect that A. H. Hebbard was living with her family in Knoxville in 1882; that in that year he "was engaged in inventing a target trap"; that she recollected seeing "different models that he had and I recollect that he had such models before his father died"; that he threw targets in the yard with his "improved trap" and tried "to interest his father in his invention"; that she remembered seeing exhibits "Hebbard's First Target Throwing Device," "Hebbard's Second Target Throwing Device" and "Hebbard's Third Target Throwing Device," or devices resembling them, before the death of old Mr. Hebbard; that the Hebbard brothers made "drawings, or lead pencil sketches" of the invention A. H. Hebbard was making "on the side of the house where the porch was" and stood "in the walk illustrating with their arm and hand how they intended to have it work. In doing so they would bend their arm at the wrist inwardly and then as they threw their arm out they would throw their wrist out, moving the wrist joint. And I remember that they had pieces of cardboard which they would throw and make spin through the air"; and that she thought "Hebbard's Third Target Throwing Device" was the original which she saw in the fall of 1882. S. A. Hebbard testified in that case to the effect that Albert Hebbard, her husband, died December 9, 1882; that while she lived in Knoxville A. H. Hebbard was engaged in improving flying targets and target traps; that her two sons "and some of their friends often experimented with Albert's invention out in the yard, and I remember of my husband and myself often sitting on the porch watching them"; that during the summer of 1882 she saw appliances like the three target throwing device exhibits above mentioned in the possession of A. H. Hebbard; that she particularly recollected "Hebbard's Third Target Throwing Device"; that her sons spoke of "their father's mind failing, as they noticed that he did not take as much interest as he used to in things that they were inventing, and they seemed disappointed about it"; and that the last named device was packed among her sons' guns and other things when they moved from Knoxville to Cleveland. Charles C. Hebbard wrote to John P. Onderdonk, October 8, 1882, as follows:

"October 8th, 1882.

Friend J. P. O.—

Yours at hand. Father is about the same, altho' I think he is gradually growing weaker and he seems to be losing interest in everything, seldom going down to the shop now. If anything happens will let you know. You are pretty well up on patents, and infringements, etc., and I have a point I wish you would give us your opinion on. You know what the clay pigeon is with its pasteboard tongue or handle on the side for throwing it, well, sometimes these pigeons get wet and the tongues come off as they are glued on and Al. has got a device for throwing these, which grasps around the target and is pinned into the end of arm of trap where the tongue goes, it is smooth on one side and covered with leather on the other, so that it will spin as it comes out. Now what we want to know is would this clamp be considered the same as the tongue on the clay pigeons, it answers the same purpose, but does not go off with the target, but stays, of course, in the trap. Will enclose a sketch showing how the thing works. Kind regards to George and Dora.

"Yours as ever, Chas."

Certain photographs taken in 1884 and 1885 are in evidence as exhibits showing target traps with carriers made by the National Target Company with which the Hebbard brothers were connected; but these traps, with one exception, so photographed, are not claimed by the defendant to have been constructed prior to the summer or fall of 1884. The exception is the trap mechanism shown in exhibit "Hebbard Lockport Photograph." This photograph was taken not earlier than February, 1884. The evidence does not disclose when the particular mechanism appearing in it was constructed. Much expert testimony has been adduced on each side with respect to this photograph, the defendant contending that it clearly shows a pivoted carrier and the complainant claiming to the contrary.

The foregoing statement fully and fairly presents in effect all evidence in this case legitimately tending directly or indirectly to prove that A. H. Hebbard prior to the end of July, 1883, conceived and invented a pivoted target carrier adapted to swing on the end of the sending-arm of a trap. The evidence as so presented undoubtedly is strong. It is necessary, however, in order to determine its just weight, not only carefully to scrutinize it, but also to consider certain facts disclosed in the case which strongly tend to show that Hebbard did not invent or form the conception of a pivoted carrier in 1882, nor until after July, 1883. To establish the alleged Hebbard defence, the evidence taken as a whole must be full, clear and satisfactory, leaving no substantial doubt as to priority of invention by him. Has this requirement been met? The vital question is not whether Hebbard invented a target carrier in 1882 or in 1883 prior to the end of July. That he constructed and experimented with target carriers in 1882 there can be little or no doubt; nor that he made target holding devices for Saturn targets, tongueless Ligowsky clay targets and targets having hubs, in the order named. It is whether prior to the later date he invented a pivoted target carrier. With the exception of the brass model "Hebbard's Third Target Throwing Device," no target carrier claimed to have been constructed by him before the date of Marqua's invention has been produced as an exhibit. No drawing, photograph or other representation produced in evidence is claimed to have been made prior to that date. Nor is it claimed that, when any drawing, photograph or other representation in evidence exhibiting a target carrier was made, any target carrier alleged to have been constructed prior to the date named was present. With the exception of the Onderdonk letter above quoted, there is no correspondence or other writing in evidence describing or referring to any target carrier alleged to have been constructed before that date. It is clearly shown, and it is not disputed, that the brass model was not made or devised until after the Onderdonk letter was written. The evidence as to the time of its construction and that it is now in the same condition as when constructed is wholly oral. So, aside from that letter, the contention that Hebbard invented a pivoted target carrier before the date of Marqua's invention ultimately rests upon oral testimony, and from it is derived whatever probative force the various exhibits may possess. But little importance is to be attached to the Lock-

port photograph and the theories of the experts concerning it. It may or may not disclose a pivoted carrier. Apparently it does. If in January or February, 1884, the Hebbards were in possession of a pivoted carrier it would by no means follow that such carrier had been invented before the end of July, 1883. The Onderdonk letter is indefinite and inconclusive. According to the defendant's theory it was written by one who was familiar with a pivoted target carrier to another who personally had no knowledge of such a carrier, in order to ascertain the opinion of the latter whether the device therein referred to would infringe. The sketch mentioned in the letter is not in evidence. It is somewhat improbable, to say the least, that if the device embodied the pivoted feature so intelligent a man as his testimony shows the writer to be should not, in view of the purpose for which the letter was written, have plainly stated such feature. What the sketch may have disclosed or whether it contained such a statement is purely conjectural. The letter on its face is just as applicable to a carrier rigidly attached to the sending-arm as to a pivoted carrier. It evidently referred to the second carrier made by Hebbard called the "pie-fork" and used to throw tongueless Ligowsky clay targets; as it does not mention any device for Saturn targets, and the carrier for targets having hubs had not then been constructed. According to the testimony one side of the "pie-fork" was covered with leather and the other was smooth, so that the target in escaping from it acquired a rotary or spinning motion. Ligowsky received his target patent in September, 1880, and his trap patent in January, 1882. In the former patent it is stated that "the target, being thrown by a force thus applied near its periphery, has an axial rotation imparted to it," and in the latter, that "when this sweeping motion of the lever has attained its maximum velocity the tongue of the target is automatically disengaged from the clamp r' s', and said target skims off with a spinning action." The Ligowsky target acquired rotary motion from the turning of the tongue in the clamp. The tongueless target used by Hebbard acquired rotary motion through its escape from between the jaws or sides of a carrier offering unequal frictional resistance. So far as the spinning of the target was concerned the same purpose which was answered by the tongue and clamp in Ligowsky's trap was effected in the "pie-fork" mechanism by the sides or jaws of the carrier. The word "spin" as used in the letter clearly is referable to the target and not to the carrier, and the word "clamp" to the carrier. There is nothing in the letter to indicate that it had reference to a pivoted carrier, and it is very unlikely that such a carrier was in the mind of the writer, as he did not mention it. Much of the oral evidence adduced in support of the alleged Hebbard use is loose and unsatisfactory. Powell does not state how the carrier he forged was attached to the sending arm. R. Van Gilder's testimony is not in the least inconsistent with the priority of Marqua's invention. He states that he has no idea how long before he signed Hebbard's application for his target patent he had the conversation with him testified to, but says that it is his "impression that it was some time before." The application was not filed until about four months—possibly a little less, probably

a little more—after the date of Marqua's invention. S. Van Gilder names the spring of 1883 as the time of his conversation with A. H. Hebbard. His testimony was given in November, 1890. It is true he fixes the date with reference to the target-shooting tournament in 1883. But there was a similar tournament in Knoxville in the spring of 1884 and the witness was living there at the time. It appears from the evidence that Hebbard or the National Target Company with which he was identified, used a target trap containing a pivoted carrier in Knoxville in the spring of 1884. The witness does not state that he had no conversation with Hebbard subsequently to the one testified to on the subject of traps and targets. It may well be that he was mistaken as to the year when it occurred. Furthermore, the statement attributed to Hebbard is indefinite and inconclusive. The testimony of S. A. Hebbard and Mary A. Hebbard is not entitled to much weight on the question when the pivotal feature of the carrier was first conceived and used. They, like the Van Gilders, testified in 1890. They may be right as to the general appearance of the several carriers made in 1882, and wrong as to their alleged pivotal attachment in that year. Their statements as to the brass model and the resemblance of certain exhibits to mechanism constructed in 1882 may reasonably be taken with some grains of allowance. Lyle worked for the Hebbard brothers or for companies with which they were connected from early in October, 1882, until sometime in 1892. He testified in the Peoria-Standard case as well as in this suit. His evidence here presents greater particularity of detail than his evidence in the former case. This circumstance does not add weight to his testimony. He undoubtedly remembers the fact that Hebbard or the National Target Company constructed a pivoted carrier, but he may have misstated the time when he first saw such a carrier. If priority of invention by Hebbard can be established it must rest upon the statements of the Hebbard brothers and Dow. The affidavits and testimony of these three witnesses disclose such inconsistencies, community of error and self-contradictions with respect to important points as seriously to challenge their evidence as to the date of invention of the pivotal feature of the carrier. A. H. Hebbard in his affidavit in the Peoria-Standard case states positively that he conceived his invention in the latter part of 1881, and Charles C. Hebbard, in his affidavit in the same case, states with equal positiveness that his brother in the latter part of 1881 communicated to him his conception of his invention. In this case they testified that the conception was first formed and communicated in the summer of 1882. Dow and the two Hebbards, in their affidavits in that case, state positively that the brass model was in existence in July or August, 1882. Referring to this model A. H. Hebbard says: "In the summer, July or August, 1882, I made a model of my conception, which model accompanies this affidavit;" Charles C. Hebbard says: "The next summer, in July or August, he made the model referred to in his affidavit, * * * and showed it to me and my father. * * * My father died in December, 1882, and from this fact I am positive as to its having been in the summer of 1882 that the model was made." Dow says: "I recollect distinctly of having seen

this model in July or August of 1882." These statements are irreconcilable with the Onderdonk letter of October 8, 1882, which refers to a holding device for a tongueless Ligowsky clay target, and not for a target with hubs. In the present case A. H. Hebbard states in his direct examination that the brass model, as nearly as he can remember, was made "directly after my other experiments in the summer of 1882," and, on cross examination, that "I should say it was made some time after the Onderdonk letter, possibly three or four weeks." Charles C. Hebbard states, on his direct examination, that the model was made "some time between June and September, I think; but I cannot state positively the exact day or month when it was made, but I know it was made some three months, or it might have been only two, before my father died;" and, on cross examination, that it was made "some time between September and December of 1882, to the best of my recollection;" but probably after the Onderdonk letter was written. Dow states, on his direct examination, that the brass model was made in the "latter part of the summer or early part of the fall of 1882; I could not say within a month or two months, but it was somewhere between those seasons;" and, on cross-examination, that it was made "some time in the fall of 1882; he made that before the old man died. * * * It was before bad weather, it was before cold weather set in." Attention is drawn to this testimony, not so much on account of discrepancies between statements in direct and those on cross examination, as by reason of the marked contrast its general uncertainty presents to the unqualified assertion in the affidavits of those witnesses that the brass model was in existence in July or August, 1882. It is extremely improbable that these witnesses, when making affidavit, severally and independently of each other fixed July or August as the date of the model, and, if they communicated with each other as to the date to be named, it is remarkable, in view of the showing of facts made in their testimony, that they should all have been so positive in their misstatement. There is another misstatement of date by them of a graver character. In their affidavits the Hebbard brothers state positively that exhibit "Hebbard Photograph A," disclosing a trap with a pivoted carrier, was taken in the spring of 1883. Dow in his affidavit says: "I recognize this photograph as one taken by the Hebbard boys of a Ligowsky trap with one of Albert's target holders pivoted to the arm which we used to throw targets from, and at which we shot in the spring of 1883." The date thus assigned was several months prior to both the Stock and Marqua inventions. The witness Eldridge made an affidavit in the Peoria-Cleveland case, September 27, 1890, in which, referring to an affidavit previously made by him in the Peoria-Standard case, he says: "At the time of making this affidavit I was not certain about the date when I saw the traps and glass birds like Photograph A and at first refused to name any date to either Hebbard or his attorney, but Hebbard said it was in 1883, and not having any other date to go by, I stated in my affidavit 'I think this was in the spring of 1883.' Since making that affidavit I have refreshed my memory on the subject and I am now able to say positively that it was in 1884 and

not in 1883 that I first saw this trap like Photograph A." Now it is established beyond controversy by the evidence, and the Hebbard brothers and Dow in their testimony both in the Peoria-Standard case and in this suit admit, that "Hebbard Photograph A" was not taken before the spring of 1884. This gross misstatement of date by these three witnesses on a vital point required a satisfactory explanation. No such explanation has been given. Dow in his affidavit makes two other assertions that demand attention. He says, referring to a trap containing a pivoted carrier, shown in exhibit "Hebbard Photograph B": "In April, 1884, I went with Mr. Albert H. Hebbard to Louisville, and we exhibited the trap and target again to the shooters of Louisville. I am certain of this date because I was married in February, 1884, and I know my wife accompanied me on the trip in April." Here is a positive and circumstantial statement of date. In his testimony in the Peoria-Standard case, in reply to a question whether he had any correction to make with respect to the date of his visit to Louisville as given in his affidavit, he says: "I have; well I simply made a mistake in the date of my marriage. I thought that I was married in February, 1884, as also did my wife, but upon looking afterward at some letters that I had received from numerous friends on that occasion, and which I have now, I find that it was 1885 instead of 1884." His wife did not testify. He further says in his affidavit: "I know that all the different forms of construction made by Albert Hebbard of his throwing apparatus had the target holder pivoted to the throwing-arm; he never made any other way." In his testimony in the Peoria-Standard case he states that he thinks that the "pie-fork" had pivotal action on the end of the sending-arm. In the present case, referring to the "pie-fork," he testifies: "My impression is that it was riveted in some way. * * * It did not have that wrist motion; rigid, I expect." There are other inconsistencies and self-contradictions on the part of these three witnesses to which it is unnecessary particularly to refer. The foregoing instances are enough to show that their testimony is of a generally unreliable character and justly to cause some suspicion to attach to it. Further, there are certain facts disclosed in the case which render it in the highest degree improbable that any one of these three men had any conception of a pivoted target carrier before the latter part of November, 1883. The first Hebbard patent for trap mechanism including such a carrier was No. 322,714, dated July 21, 1885, issued to A. H. Hebbard. The date of the application was May 19, 1885. If a pivoted carrier was invented by Hebbard in 1882, it is difficult, if not impossible, satisfactorily to explain the delay in filing the application. If it was not invented in 1882 there is no evidence showing its subsequent invention prior to the date of Marqua's invention. A. H. Hebbard received letters patent No. 299,783, dated June 3, 1884, for "improvements in flying targets." The application was filed November 23, 1883. In the description he states:

"In the drawings, A represents the trap or 'sender.' * * * I do not wish to be understood as confining myself to the particular construction herein shown, as the objects of my invention may be obtained by other forms of construc-

tion in which the periphery of the concave disk rolls on an arm and the journals slide for the purpose of imparting an axial rotation."

A pivoted carrier is neither disclosed nor suggested by the specification or drawings. If Hebbard had prior to the filing of this application invented a pivoted carrier, it is remarkable that he should not, in view of the fact that he describes not only the target but also trap mechanism, have applied for a patent covering the pivotal feature of the carrier. The evidence shows that both of the Hebbards are intelligent men fully competent to understand the character and scope of the flying target patent. Charles C. Hebbard wrote to F. A. Fouts, a patent solicitor, December 13, 1883, relative to the target invention, as follows:

"We have yours of the 8th inst., containing notice that the patent for flying target had been allowed. We are very much pleased with the manner you have conducted our applications for patents, as we had no idea you would get the target application through without modifying the claims. We think you have obtained very strong claims."

A. H. Hebbard, in his affidavit in the Peoria-Standard case, referring to the above patent, says:

"The patent drawing was made in Washington under the direction of my patent solicitor, Mr. Frank A. Fouts, from a sketch I sent to him. I cannot say for certain now whether that sketch showed the clip pivoted to an arm, but I think it did. When the papers came back to me to be sworn to before filing, there was no drawing with them, and I never saw the drawing until the patent was issued. I was not acquainted with the work of procuring patents, and did not give the papers that attention; I should now, after my experience in such matters."

Charles C. Hebbard, in his affidavit in the same case, says:

"When the patent was applied for, I wrote the letter to the solicitor describing the clip and enclosing a sketch of it made by my brother. I am quite sure that the sketch sent showed the clip pivoted to an arm, but it may not have shown it; but my letter to him described the clip as swinging around when the throwing arm was arrested. When the papers were sent to us by the solicitor, there was no drawing with them, and the fact that the clip was not described as being pivoted to the arm was not noticed. In fact, we did not consider the fact that the clip was pivoted to the arm the essential feature of the invention. The holding of the target in a clip was to us the chief feature," &c.

The letter to Fouts, above referred to, is of much importance in this connection, and is as follows:

"Oct. 8th, 1883.

Frank A. Fouts, Esq.,
Washington, D. C.

Dear Sir:—We inclose you drawings for an improvement in flying targets and will give you the best description we can and will let you put in shape. By getting a copy of Ligowsky patent, No. 231,919, you will observe that he claims a concave slotted flying target, with a detachable tongue, etc. Now, what we want to do is to patent an article that does away with the slot in the periphery and the detachable tongue, etc., at the same time is cheaper and overcomes the weak points as described in the newspaper cutting attached. To accomplish this we make a circular disk, either singular or double concave, provided with hubs or axles, at or near its center, preferably of the same material as the disk. These hubs or axles are for the purpose of holding the periphery of target when placed in the suitable trap or sender in such manner that when force is applied to project it therefrom, will give the target a spinning or axial rotation that will cause its flight to resemble that of a bird. The lower hub or axle projecting below the base of disk will also protect the target from break-

ing when it descends to the ground. To use the target you will see by reference to the drawing, that it is placed between arm 'A' and the spring jaws, 'B' 'B.' The jaws 'B' 'B' bearing upon the hubs or axles will press the periphery of the target firmly against the arm 'A' (which is covered with any soft or elastic material,) so that when the trap is sprung and the arm 'A' swings quickly around and then suddenly arrested, it will cause the hubs to slip on jaws 'B' 'B' and the periphery of target will roll on arm 'A' and when released will give to the target a very rapid spinning motion or axial rotation, that will cause it to float edgewise to the air. We do not wish to limit ourselves to any particular shape or proportions as the features of our invention are attained by any construction that will permit a concave disk to have axial rotation imparted to it by means of friction applied to its central hubs or axles or its periphery. You can letter the drawings and describe them much better than we can. Enclose find check for $25.

"Yours respectfully, Chas. C. Hebbard."

That the significance of this letter may be fully appreciated it must be read in the light of certain facts briefly to be adverted to. The evidence shows that the varibus target carriers made by A. H. Hebbard prior to the date of the letter, whether for Saturn targets, tongueless Ligowsky clay targets or targets with central hubs or axles, were so constructed as to impart through unequal frictional resistance axial rotation to the target. Such rotation could be acquired when the carrier was rigidly attached to the sending-arm. It could also have been acquired if the carrier had been pivotally connected with the arm. The fact of axial rotation is of itself wholly indeterminate of the mode of attachment of the carrier. The Hebbard brothers and Dow testified that as early as 1882 they recognized the importance of having the carrier pivotally attached to the arm. A. H. Hebbard testifies as follows:

"XQ. 384. Did you regard the pivoting of the throwing device to the main arm of the trap as an essential feature of the throwing device as it was constituted by you in your constructions in the fall of 1882? A. Yes, I did. XQ. 385. And you so regarded it at that time? A. Yes; we knew that it was necessary to have it swing on the end of the arm. * * * XQ. 389. Was it then your opinion in the summer of 1882 that the pivoting of the carrier materially increased the length of throw of the target? A. Yes, it was. * * * XQ. 391. You knew at that time the distinction in the character of the throw obtained by the two devices, the pivoted device and the device attached rigidly; the time I refer to is the period of your experiments in the summer and fall of 1882? A. Yes, I did. XQ. 392. Did you have any thought at all, in the years 1882 or 1883 of applying for a patent for the essential feature of your throwing device as you had then constructed it? A. I don't know whether I had or not; I couldn't say positively."

Charles C. Hebbard testifies as follows:

"XQ. 208. Please tell me what the pivoting of that device—second target throwing device—had to do, in your judgment, with the successful throwing of a target without a tongue? A. It had all to do with it, I might say. * * * XQ. 212. You have stated that the pivoting of the device on the throwing arm had all to do with the successful throwing of the tongueless target. Will you please explain definitely what you mean? A. That is my opinion, but others have differed from me at times. The fact that all the traps now on the market have a pivoted throwing device bears out the statement that it is the most successful way of throwing a tongueless target. XQ. 214. What did you do or accomplish in 1882 with this device or with the 'Third Target Throwing Device' that the Ligowsky trap did not do? A. We proved to our own minds that we could throw a tongueless target by means of a pivoted carrier, and laid the foundation for all the improvements that have been made since in pivoted carriers, and which are now used by the company you represent."

Dow testifies as follows:

"XQ. 68. When this device—'Hebbard's Third Target-Throwing Device,' was produced, the little brass model I mean, do I correctly understand that you recognized at that time the beneficial results which were obtained by pivoting the device on the throwing-arm so as to obtain this wrist-motion? A. Yes, I did. XQ. 69. What did you understand them to be? A. I understood it to be something that would throw a target better than anything we had ever seen up to that time. * * * XQ. 105. But you were satisfied with the throwing device in the fall of 1882? A. Yes. XQ. 106. Do you know why it was, Mr. Dow, that Mr. Hebbard did not apply in the fall of 1883, or earlier, for a patent on a throwing device instead of one on a target? A. No, I don't know why it was."

Recurring now to the Fouts letter of October 8, 1883, that letter with its enclosed sketch or drawing was intended to and did furnish the data for the preparation of the specification and drawings of the Hebbard flying target patent No. 299,783. It does not bear out the assertion of Charles C. Hebbard that in it he "described the clip as swinging around when the throwing arm was arrested." It contains no such statement. It says that "when the trap is sprung and the arm 'A' swings quickly around and then suddenly arrested, it will cause the hubs to slip," &c. It does not mention the swinging or revolution of a clip or carrier on a pivot. The lettering of the mechanism, whatever it was, disclosed in the drawing, apparently corresponds with the lettering of the drawing accompanying the specification of the target patent; "A" indicating the arm, and "B" "B" that portion of the clip or carrier between which and the arm the target was held. As before observed, a pivoted carrier is neither shown nor indicated by the drawing or specification of the patent. Not only is the letter silent on the subject of a pivoted carrier, but it contains a statement which strongly tends to exclude the idea that the writer had any knowledge of a pivoted carrier. The letter is not confined to a description of the target for which a patent was desired. It deals with trap mechanism from which the target was to be thrown. It describes the mechanism, but stops short of a pivoted carrier. It states: "We do not wish to limit ourselves to any particular shape or proportions as the features of our invention are attained by any construction that will permit a concave disk to have axial rotation imparted to it by means of friction applied to its central hubs or axles or its periphery." Such a construction, it has been shown, does not require the pivoting of a carrier. Nothing is said about an increase in axial rotation or in the flight of the target resulting from the pivoting of a carrier. If the Hebbard brothers and Dow in 1882 knew of a pivoted carrier and appreciated its importance, as they say they did, why was it that no application was made to have it patented at or before the time of applying for the target patent? There is no satisfactory explanation. To hold that they then possessed that knowledge would be to disregard the laws ordinarily governing human conduct. Why was it that Charles C. Hebbard, when he undertook in the Fouts letter of October 8, 1883, to describe trap mechanism, did not go further and disclose a pivoted carrier? This omission possibly might have been accounted for on the hypothesis that the Hebbards were unwilling to disclose

to any one an unpatented invention regarded by them as having great value. But such an hypothesis is in direct conflict with the statements of both of them. A. H. Hebbard, in his affidavit in the Peoria-Standard case, said in reference to the drawing inclosed in the Fouts letter: "I cannot say for certain now whether that sketch showed the slip pivoted to an arm, but I think it did." Charles C. Hebbard in his affidavit in the same case said: "I am quite sure that the sketch showed the clip pivoted to an arm, but it may not have shown it." He further says that "when the papers were sent to us by the solicitor, there was no drawing with them, and the fact that the clip was not described as being pivoted to the arm was not noticed." The improbability of the latter statement, on the hypothesis that he and his brother then appreciated the importance of the pivotal feature, is such as to require no comment. It often happens that the gross improbability of an alleged occurrence outweighs and overcomes the affirmative testimony of many witnesses. Especially is this true as to the defence of anticipation in patent suits. Taking the evidence for and against the alleged Hebbard use as a whole, together with all reasonable inferences to be drawn from it, it has not been established clearly, satisfactorily and beyond substantial doubt, that A. H. Hebbard invented a pivoted target carrier prior to the date of Marqua's invention. On the contrary, in view of the vagueness, inconsistencies, self-contradictions and inherent improbabilities disclosed in the evidence in support of the alleged use, and aside from any consideration of bias on the part of some of the witnesses, a preponderance of evidence shows that, while Hebbard prior to the end of July, 1883, constructed carriers capable of imparting axial rotation to targets, he did not until several months after that time have any conception of a pivoted carrier.

The contention that the complainant is estopped from denying that A. H. Hebbard invented a pivoted carrier prior to the date of Marqua's invention, by reason of the fact that in the Peoria-Cleveland case the complainant herein set up by way of defence that Hebbard anticipated Stock's invention, which defence was sustained by the circuit court, clearly cannot be maintained. That case and the present controversy being between different parties, there was no estoppel of record. Nor do the circumstances disclose the essential elements of an estoppel in pais or equitable estoppel. It does not appear that the defendant has been led to incur any expense or assume any liability on account of the attitude of the Cleveland Target Company in that case. It is true that there is some inconsistency between the position taken by the complainant in this suit and the Peoria-Cleveland case respectively. But this inconsistency does not indicate fraud or want of good faith. In the former case the complainant herein was standing on the defensive and had a right to seek the judgment of the court on the evidence, by no means insignificant, tending to show priority of invention by Hebbard. To raise that question did not involve unfair dealing. Nor does it display inequitable conduct on the part of the complainant on the evidence in this case to deny priority of invention by Heb-

bard. The defence based on failure to disclaim cannot be sustained. The conclusion reached as to the alleged Hebbard use and also as to estoppel negatives the existence of any obligation on the part of the complainant to enter a disclaimer as to any of the Marqua claims.

On the question of infringement it is important to assign to Marqua's invention its proper rank. Its distinctive feature is the pivoting of a target carrier on the end of a sending-arm in such manner as to impart to the target at the moment of its disengagement increased axial rotation substantially in the plane of motion of the arm and increased projectile velocity. He was the first to accomplish this result. His invention constituted a distinct, substantial and important advance in the art. With respect to its pivotal feature his was a pioneer invention. In Westinghouse v. Brake Co., 170 U. S. 537, 561, 568, 18 Sup. Ct. 718, 723, the court said:

"To what liberality of construction these claims are entitled depends to a certain extent upon the character of the invention, and whether it is what is termed in ordinary parlance a 'pioneer.' This word, although used somewhat loosely, is commonly understood to denote a patent covering a function never before performed, a wholly novel device, or one of such novelty and importance as to mark a distinct step in the progress of the art, as distinguished from a mere improvement or perfection of what had gone before. * * * We have no desire to qualify the repeated expressions of this court to the effect that, where the invention is functional, and the defendant's device differs from that of the patentee only in form, or in a rearrangement of the same elements of a combination, he would be adjudged an infringer, even if, in certain particulars, his device be an improvement upon that of the patentee."

In Miller v. Manufacturing Co., 151 U. S. 186, 207, 14 Sup. Ct. 318, the court said:

"The range of equivalents depends upon the extent and nature of the invention. If the invention is broad or primary in its character, the range of equivalents will be correspondingly broad, under the liberal construction which the courts give to such inventions."

The character of the Marqua invention is such as to entitle the claims of the patent to considerable liberality of construction. The charge of infringement has been restricted to claims 2, 3 and 5. Claim 2 is as follows:

"2. In a trap or sending apparatus for flying targets, a sending-arm provided with a pivoted extension carrying the target, and having an independent rotation by centrifugal force, in combination with target holding and releasing mechanism automatically actuated to release the target at the moment of extreme extension of the sending-arm, substantially as set forth."

The elements forming the combination covered by this claim are, first, a sending-arm, second, a pivoted extension carrying the target and having an independent rotation by centrifugal force, and, third, target holding and releasing mechanism automatically actuated to release the target at the moment of extreme extension of the sending-arm. The alleged infringing device clearly discloses the first two elements of the claim. Does it disclose the third element? The defendant contends that the target holder in its device is not "automatically actuated" to permit the escape of the target, and, further, that its device, while including target holding mechanism, does not embrace target "releasing" mechanism. It is unnecessary,

even were it practicable, to undertake an exact definition of the phrase "automatically actuated" as applicable to mechanical devices. In common parlance the terms "automatic" and "automatically actuated" mean self-acting, but as usually employed have not such a restricted signification as is claimed by the defendant. The disengagement of the target either from the defendant's device or the Marqua carrier is not a direct, but only an indirect, effect of the application of the force by which the trap is set in motion. In either case the escape of the target is dependent on the pivotal swing of the carrier relatively to the line of the sending-arm and results from the action or movement of parts in the swinging carrier. The fact that the target is disengaged from the defendant's carrier by forcing apart its jaws or fingers under the action of centrifugal force, while it escapes from the Marqua carrier through the raising of a tooth or trigger from its upper surface or the turning of the clasping-arms on an elliptical or otherwise elongated stud does not justify the contention that the mechanism in the latter case is automatically actuated and in the former is not. In the Ligowsky trap patent, No. 252,230, it is stated that "when the sweeping motion of the lever has attained its maximum velocity the tongue of the target is automatically disengaged from the clamp r' s'." Yet in the Ligowsky device the target releases itself by dragging its tongue out of the spring clamp. The term "automatic" is constantly applied to valves, although their action depends on the pressure of liquids or other fluids against them. So the operation of automatic car couplers is dependent on the action on them of the parts to be coupled. In Westinghouse v. Brake Co., 170 U. S. 537, 545, 18 Sup. Ct. 711, the court speaking of car-brake couplings said:

"These couplings were automatically detachable; that is, while they kept their grip upon each other under the ordinary strains incident to the running of the train, they would readily pull apart under unusual strains, as when the car coupling broke and the train pulled in two."

It is unnecessary to multiply instances. The defendant's target holder is clearly automatically actuated to permit the escape of the target. It also contains target releasing mechanism. The distinction between mechanism automatically actuated to release a target and mechanism automatically actuated to allow a target to release itself is unsubstantial. In either case the target is released. While Marqua showed in the drawings and specification of his patent two forms of his invention, his monopoly was not confined to the specific devices described, but included equivalent combinations of parts operating on the same principle and substantially in the same manner. Claim 2 must be held to have been infringed by the defendant's device, unless the contention now to be noticed can be sustained. It is urged that Marqua contemplated the disengagement of the target through a sudden arrest, partial or total, of the sending-arm, the pivotal movement of the carrier taking place at the instant of such arrest; that his claims should be so read as to include this idea; and that the disengagement of the target from the defendant's trap is effected on a different principle, the target

being released by centrifugal force alone and independently of the arrest of the sending-arm. It is further urged that claim 1 clearly requires the arrest of the sending-arm for the disengagement of the target and that, unles the other claims be so considered as to include the same requirement, there has been a misjoinder. Several claims for the same mechanical invention as employed in different modes may properly be joined. The fundamental conception embodied in Marqua's invention is a combination of parts co-operating in such manner that the projectile velocity and axial rotation of the target in the proper plane, when entering upon its flight, are the resultant of the sweep of the sending-arm and the partial revolution of the target carrier on its pivot. And in order to secure a high degree of projectile velocity and axial rotation for the target, the patent requires that its disengagement shall occur approximately at the instant the end of the sending-arm shall have attained its greatest velocity and when the pivotal swing of the carrier shall have brought it into line with the sending-arm as an extension thereof. Marqua may not be technically accurate in his references to natural laws, but the specification and drawings clearly disclose the nature and operation of his invention. He was not so much concerned with scientific nomenclature as with practical results. In the description he states that "in the drawings A designates the ordinary sending-arm of a trap, the latter being of any approved construction, and requiring here no special illustration or description." In claim 1 he restricts himself to a combination in which the target carrier "by the motion and arrest of the sending-arm, is independently rotated upon its pivot by centrifugal force into a position elongating the main arm, and projects the target by a sudden rotary impulse." Claim 2 contains no such restriction in terms. There the carrier has "an independent rotation by centrifugal force" and releases the target "at the moment of extreme extension of the sending-arm" independently of any arrest thereof. Had claim 1 not referred to an arrest of the arm, the argument drawn from the description that such an arrest should be read into all the claims would have had much greater force. But in view of the fact that Marqua, while incorporating such a requirement in claim 1 omitted it from all the others, and especially from claim 2, it is inadmissible to suppose that he intended so to restrict the scope of claim 2. Marqua did not contemplate an instantaneous and total arrest of the sending-arm at the point of its maximum velocity. Such an arrest would have broken or endangered the trap mechanism. He first used his invention on the arm of a Ligowsky trap. Ligowsky in his trap patent describes the sweep of the arm as being gradually arrested. He says: "The moment this maximum velocity has been reached the further sweep of the lever is gradually arrested on its own coil p, thereby preventing a violent jar or concussion, and thus obviating the breakage of the target." Nor did Marqua contemplate that the pivotal swing of the carrier should result solely from either a sudden or gradual stoppage of the arm. On the contrary he states in the description that "by the swinging of the main arm the carrier is impelled by its own centrifugal force to rotate upon its pivot in

the same general plane and direction." By varying the tension of the spring-washer w, shown in Figs. 1 and 2, Marqua's invention will permit the disengagement of the target at or immediately before the moment the end of the sending-arm reaches the point of its greatest velocity, or prevent its escape until the arrest of the arm, as may be desired. The difference between the operation of the invention where the target is released before and where it is released after the partial arrest of the arm is more apparent than real. In either case the target escapes practically at the instant the arm has attained its greatest velocity. In either case the velocity and rotation of the target are the resultant of the sweep of the arm and the pivotal swing of the carrier. Whether by a partial arrest of the arm before the disengagement of the target its rotation is increased at the expense of its projectile velocity is problematical. Possibly the degree of tension of the spring washer might affect the result. Marqua had knowledge of the Fischer trap. He examined the one from which Fischer targets were thrown July 4, 1883. There is no direct evidence showing whether the target escaped from the Fischer trap before or after the arrest of the sending-arm. But it may fairly be inferred from the trap construction shown in the Fischer target patent, No. 281,183, that the target was disengaged before such arrest. Fischer describes the target as rolling on the guide-way b', and being guided by it "until it leaves the case." If the arm were sensibly arrested before the escape of the target from the case the periphery of the target could hardly fail to leave the guide-way before emerging from the case. Undoubtedly Marqua contemplated a use of his invention in such manner that the target would be disengaged after the partial arrest of the sending-arm. The description and claim 1 show this. But there can be little doubt that he also contemplated that his invention might be so used that the target would be released without such arrest. Otherwise it would be difficult, if not impossible, to explain the presence of claim 2. In view of the foregoing considerations an arrest of the sending-arm cannot be read into that claim, nor can it be held that there is a misjoinder of claims. Claim 3 is as follows:

"3. In a sending apparatus for flying targets, in combination with a pivoted sending-arm having a pivoted target-carrying extension, a spring-catch adapted to hold the target and release the same automatically at the proper instant of time, as set forth."

The elements in this combination are, first, a pivoted sending-arm, second, a pivoted target carrying extension, and, third, a spring-catch adapted to hold the target and release the same automatically at the proper instant of time. The defendant's trap discloses the first two elements. Does it contain a spring-catch? In Figs. 1 and 2 of the Marqua patent the spring-catch consists of a trigger-arm provided with a tooth F, which is pressed against the upper surface of the target by the action of the spring S, and holds the target and automatically releases it at the proper moment. In Figs. 3 and 4 the resilient clasping-arms G G perform the same function. In the defendant's device the spring S causes the target to be caught between the arms of the carrier, where it is held and at the proper

moment automatically released. The arms of the carrier in connection with the spring constitute the spring-catch and perform the same function as the spring-catch in the Marqua invention. In each case the catching or clasping device is intended to prevent the disengagement of the target under the action of centrifugal force until "the proper instant of time," namely, the moment the sending-arm is approximately at the point of its maximum velocity. Within the scope of equivalency as applicable to a patent of the character of that in suit the defendant's device must be held to contain the spring-catch of claim 3. Claim 5 is as follows:

"5. In a target-sending apparatus, the combination of the main arm A and pivoted extension B, provided with automatic holding and releasing devices, with the adjustable spring-washer w, for regulating the frictional resistance to centrifugal action of the carrier, substantially as set forth."

Here the elements are, first, a sending-arm, second, a pivoted extension provided with automatic holding and releasing devices, and, third, the adjustable spring-washer w, for regulating the frictional resistance to centrifugal action of the carrier. It is contended that the alleged infringing device does not disclose such a spring-washer. It is admitted that it contains a spring-washer w, but it is claimed that its function is not to regulate frictional resistance to the pivotal swing of the carrier under the action of centrifugal force, but merely to secure a smoothly working joint. The most effective pivotal swing of the carrier is obtained where it occurs during the latter part of the onward sweep of the sending-arm and when the arm is comparatively near the point of its maximum velocity. The function of the spring-washer in Marqua's invention is to prevent too early an outward swing of the carrier during the sweep of the sending-arm. By checking or delaying pivotal action of the carrier until the arm has attained great velocity, its terminal swing will be both more sudden and rapid, resulting in increased projectile velocity and rotation of the target. It is admitted that the defendant's spring-washer can be used for regulating frictional resistance to the pivotal swing of the carrier, but it is denied that it is so used. It is an adjustable spring-washer, however, and any one using the defendant's trap can, at will and without the least difficulty, by employing the means furnished by the defendant, regulate the tension in such manner as to cause the spring-washer to offer frictional resistance to the swing of the carrier under the action of centrifugal force. The complainant's expert on this point makes the following statement which is wholly uncontradicted:

"These screw-threaded pivots upon which the pivoted extensions turn are provided with check-nuts, so that when they are adjusted to any desired amount of tension of the spring-washers, these check-nuts will, by screwing them up against the underside of the outer ends of the sending-arms immovably secure such pivots in the desired positions for the spring-washers to offer the desired resistance to the centrifugal action of the carrier."

The bill must be sustained in so far as it charges infringement of claims 2, 3 and 5 of the Marqua patent.

The charge of infringement as to the Hebbard patent No. 371,839, is confined to claim 1, which is as follows:

"1. In a trap for flying targets, the combination of a V-shaped frame of sheet spring metal pivoted to the throwing-arm at its apex, a strip secured above one arm of the frame in a plane parallel to the same, a hook, and a spring-actuated stud provided with a yielding sleeve upon the other arm, as and for the purpose shown and set forth."

In view of the prior state of the art and particularly of the Hebbard patent No. 322,714, and Holz patent No. 330,704, if the Hebbard patent in suit can be sustained at all, claim 1 must receive a construction so strictly limiting and confining it to the specific device described in the specification and shown in the drawings as to avoid the charge of infringement.

Let a decree for the complainant be prepared in accordance with this opinion.

C. & A. POTTS & CO. v. CREAGER et al.

(Circuit Court of Appeals, Sixth Circuit. October 23, 1899.)

No. 625.

1. PATENTS—ANTICIPATION—CLAY DISINTEGRATOR.
   The Potts patent, No. 322,393, for a clay disintegrator, which consists of a rotating cylinder carrying cutting bars fixed in longitudinal grooves, and projecting beyond the surface of the cylinder, acting in combination with a vibratory plate mounted on a shaft opposite the cylinder, and moved automatically towards the cylinder in operation, so as to continue to press the clay against it as the successive portions are cut away by the cutting bars, was not anticipated by anything in the prior art, and is valid; also *held* infringed as to claim 6.

2. SAME—IMPROVEMENT ON PRIOR DEVICE—INVENTION.
   The Potts patent, No. 368,898, for an improvement on the machine shown in patent No. 322,393, to the same patentees, for a clay disintegrator, the improvement consisting of the substitution of a smooth roller for the vibratory plate shown in the older patent, does not disclose patentable invention, and is void.

Appeal from the Circuit Court of the United States for the Southern District of Ohio.

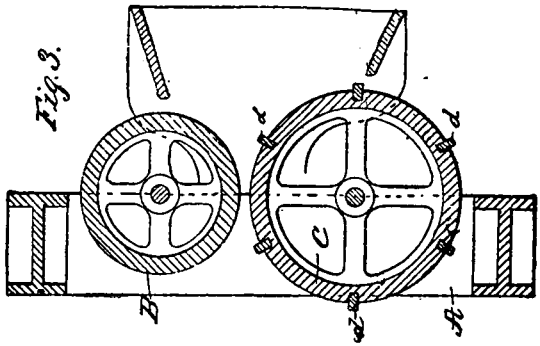
This is an appeal from a decree dismissing a bill for the infringement of a patent. The case has a somewhat peculiar history. The complainant, Potts & Co., an Indiana corporation, filed its bill against the firm of Jonathan Creager's Sons, of Cincinnati, to restrain the infringement of patent No. 322,393, issued July 14, 1885, to Clayton Potts and Albert Potts, for a clay disintegrator; and also of a patent issued August 23, 1887, to the same inventors, for an improvement upon the prior patent. Issues were made up by the filing of an answer and replication, and the circuit court, after a hearing upon the merits, dismissed the bill. 44 Fed. 680. The plaintiff then appealed to the supreme court, and that court, after a full hearing, found the patent to be valid, found the defendants to have infringed it, reversed the decree of the circuit court, and directed a decree for the complainant. Potts & Co. v. Creager, 155 U. S. 597, 15 Sup. Ct. 194. Upon the coming down of the mandate, and the entry of the interlocutory decree finding the issues for the complainant, and directing a reference, the defendants filed a petition for rehearing on the ground of newly-discovered evidence. The petition was allowed to be filed, and, after an examination of the evidence, the circuit court set aside the decree for the complainant, and entered a new decree, dismissing the bill. 71 Fed. 574; 77 Fed. 454. The complainant then had recourse to a proceeding in mandamus in the supreme court to compel the circuit court to comply with the decree of the supreme court. On this application the supreme court held that the action of the circuit court in setting aside the decree entered in accordance with the mandate was irregular and void; that a petition for rehearing in

such a case could properly be addressed only to the supreme court, or to the circuit court after leave had been obtained from the supreme court to file such a petition in the circuit court; and directed the writ to issue. Thereupon the circuit court restored the decree, which it had, without authority, set aside, and the defendants applied to the supreme court for leave to file a petition for rehearing on the same ground already irregularly presented to the circuit court. Leave was granted. A petition for rehearing was filed in the circuit court, and the circuit court, Judge Sage presiding, upon a rehearing, set aside the former decree, and again dismissed the bill. The present appeal is from the second decree dismissing the bill upon the petition for rehearing.

The substance of the two patents upon which the bill is founded is stated by Mr. Justice Brown, for the supreme court, in 155 U. S. 597, 15 Sup. Ct. 194, as follows: "In the first patent, No. 322,393, the patentees stated the object of their invention to be 'to disintegrate the clay by means of a revolving cylinder, which shall remove successive portions from a mass of clay which is automatically pressed against the cylinder.' This was accomplished by a cylinder containing a series of steel bars, fitted into longitudinal grooves in the periphery of the cylinder, where they were secured by flush screws at each end, by means of which they were adjusted, so as to present a sharp corner, projecting above the surface of the cylinder. Opposite the cylinder was a strong vibratory plate, mounted on a shaft, so as to swing in its bearings, by the aid of an eccentric wheel. The opposed sides of the cylinder and the upper and central portions of the plate formed a trough, one side of which approached and receded from the other at intervals, and which had at the bottom a narrow opening of constant width. In the operation of the machine, the plate was swung back, so as to leave as large an opening as possible, and the moist, untempered clay was thrown into the trough between the cylinder and the upper portion of the plate. By a rapid revolution of the cylinder, successive portions of the clay were removed from the mass, carried through the narrow opening by means of the scraping bars, and at the same time the upper portion of the plate moved slowly towards the cylinder; thus keeping the mass of clay in close contact with the cylinder, as successive portions were removed. The only claim alleged to be infringed was the sixth, which reads as follows: '(6) In a clay disintegrator, the combination with cylinder, A, having a series of longitudinal grooves, of the scraping bar, c, and adjustably secured in said grooves for the purpose specified.' In the second patent, No. 368,898, which was for an improvement upon the first, there was substituted in lieu of the swinging plate, shown by the first patent, as co-operating with the revolving cylinder, a plain cylinder set opposite the cutting cylinder, and revolving therewith in close proximity, so that the raw clay might be fed, shredded, and discharged in an even and continuous manner, in readiness to be taken directly to the pug or other mill. The patentees further stated in their specifications: 'The machine shown in our letters patent No. 322,393 was provided with a swinging or vibrating plate to co-act with the cutting cylinder in effecting the shredding of the clay which was fed between them. In such machine the abutting surface of the vibrating plate furnished a rest or bearing for the clay in presenting the same to the action of the cutter knives. This abutting surface was limited in extent and unchanging in position, so that it became rapidly worn. By substituting the revolving roll for the vibrating plate, this objection is greatly lessened. The roll constantly presents new surfaces to the cutters, so that the wear is even and regular throughout its circuit. If any inequalities exist in the roll at the outset, these become rapidly reduced, so that by use the cylinder wears more and more true, and acts thus with constantly better effect. Aside from cheapness in construction, the revolving roller or cylinder machine will work wet or sticky clays with perhaps one-third of the power necessary in treating such clays in the vibratory plate machine. Such plate tends constantly to crowd or squeeze the passing clays, whereas the revolving roll yields continuously, so that clogging is less apt to occur at the same time that the clay is finely and evenly shredded; the cutter cylinder moving, by preference, more rapidly than the companion feed roll, in order to accomplish this effect. Prior to our invention, it has been very common to employ, in clay mills, sugar mills, and the like, a set of rolls between which the material passed as the rolls were revolved; but in such machines the operation of the rolls was merely to break up the clogs of clay, and squeeze

or crush the same, whereas, by our invention, the clay is positively cut into fine shreds or clippings, in much better condition to be tempered and molded than by the old forms of disintegrating machines.' "

The following drawing illustrates the main features of the machine, so far as the same are material to the present case:



Defendants were charged with infringing the first and second claims of this patent, which read as follows:

"(1) In the supporting frame of a clay disintegrator, a rotating cylinder longitudinally grooved, and carrying cutting bars in and projecting beyond the grooves, in combination with a smooth-faced rotating cylinder adapted to carry and hold the clay against the cylinder having the cutting bars thereon, which latter cut or shred the clay, and pass the same between the cylinders, substantially as set forth.

"(2) In clay disintegrators, the combination, with the main supporting frame and with a rotating cylinder fixed therein, and having longitudinal cutting bars projecting beyond the face thereof, of a positively revolving companion cylinder fixed opposite thereto in said frame, and having a smooth face or surface, with which said cutting bars directly co-operate to shred or clip the clay, as the same is fed by and passed between said cylinders, substantially as described."

The art, and the relation of the inventions to the art, are described by Mr. Justice Brown as follows: "Beds of clay are composed of different strata; and the first step necessary to be taken in the manufacture of such clay is a thorough mixing of the strata, and the reduction of the clay to a suitable condition. Otherwise, the product will contain laminations, will shrink unevenly, and check in burning, scale or peel off in use, and be less valuable than products made of clays which are first thoroughly mixed and tempered, and reduced to a homogeneous mass, before being manufactured into the product. Prior to the Potts inventions, various methods seem to have been employed to secure this result. The clay had been sometimes spaded up in the autumn, subjected to the action of the frost during the winter, and then to the operation of the old-fashioned grinding pit. A mud wheel had also been used. The 'soak pit' was another means used to accomplish the same result; the clay being deposited in a pit of water, and allowed to remain until the soaking process had reduced it to the desired condition. These methods were slow and expensive. Both grinding machines and crushing rolls had been adopted in comparatively recent years. Their action was simply to crush the clay, the different strata being pressed together and made more compact, and the clay discharged from the rolls in cakes or sheets,—a condition that made the tempering very difficult, as the clay thus treated would not readily receive or absorb the water. The object of the Potts inventions was not to crush the clay as had been previously done, but to disintegrate and pulverize it, leaving it in a loose condition, fitted to absorb the water readily. Their machines consisted substantially of a cylinder moving at a high speed, having longitudinal bars fixed in its periphery with sharp projecting corners, and a fixed abutment in close proximity thereto,—in the first patent a swinging plate, in the

second a smooth cylinder,—and a positive feeding device, by which the clay was forced between the main cylinder and the abutment. The longitudinal bars thus operated to strike the mass of clay quick, sharp blows, in rapid succession, and cut or shred small portions therefrom, which were deposited beneath the machine, thoroughly mixed in their different strata, and with rough, torn, or ruptured edges,—a condition best adapted to receive or absorb water and be easily and thoroughly tempered."

Mr. Justice Brown in the opinion examined eight prior patents cited as anticipations of the Potts patent: One to Robert Butterworth, for an improvement in machines for grinding apples,—a cylinder with adjustable cutting knives or blades on its periphery, having serrated edges, and cutting or grinding the apples against a plate; one to Ennis, for a machine used in the preparation of paper pulp, and consisting of a revolving cylinder armed with longitudinal knives, and a stationary plate also armed with knives mounted beneath it in close proximity thereto; a patent to Frost, for a grinding cylinder for paper engines, and consisting of a skeleton cylinder armed with sharp cutting blades secured adjustably, so as to be moved out from the axis of the cylinder as they wear; a patent to Van Name, for a roller for grinding mills, provided with blades arranged in longitudinal grooves around the surface parallel with the axis, made alternately of hardened steel and soft iron, so that in use the soft material will wear more rapidly than the hard, and produce a corrugated roller; one to Peabody, for a cotton-seed huller, exhibiting a rotary cylinder armed with knives set in grooves, each having a chisel-shaped cutting edge, and adjustable for the purpose of increasing or diminishing the cut; one to Mayfield, for a grinding mill, adapted for general use among farmers, consisting of a cylinder provided with knives or plane bits set in longitudinal grooves; one to J. W. Smith, for the purpose of preparing wheat for grinding, in which a cylinder is employed similar to that of the Mayfield patent, with a series of plane bits projecting from the periphery, and adjustably bolted to the cylinder; and one to Rudy, for an improvement in clay pulverizers, consisting of the pulverizing roller in combination with separate concave springs or an elastic bed for supporting the clay while the roller revolves therein. In this last machine, the clay falls through a sieve, and descends to a second cylinder, and then to a third. The rollers are fluted, and cast in a series of sections. Of the Rudy patent, the court said that the process employed was rather a grinding than a disintegrating process, and that such a machine would be inoperative, except, perhaps, where the clay was dry and of light consistency, and that the cylinder evidently operated upon a wholly different principle from that of the Potts patents. In addition to these, the court considered two patents for improvements in the making of bricks,—one a patent to Alexander, wherein the clay was passed between double spiral-toothed grinding and crushing rollers, and then between plain cylindrical rollers; and one to Alsip and Drake, which had a fluted or corrugated cylinder in combination with a smooth-faced companion cylinder, between which the clay was passed and crushed. Other patents for straw cutters, machines for pressing tobacco, pulp engines, peat machines, feed boxes for roller mills, and machines for removing hair from hides were before the court, and also a machine known as the "Creager Wood-Polishing Machine," having a cylinder provided on its periphery with a series of projecting strips or bars of glass, not differing materially in form from plaintiff's scrapers, and like them fitted into longitudinal grooves. The machine was used for polishing boards, which were run between the cylinder and a support and pressure roller journaled underneath, and connected with an automatic adjustable contrivance. The court said that, if the Creager machine had been used for an analogous purpose, it would evidently have been an anticipation of the Potts cylinder, since the substitution of steel for glass strips would not, of itself, have involved invention. The court then considered how far there might be the exercise of the faculty of invention in the transfer from one art to another of a device for accomplishing a different purpose, and held that such a transfer might involve invention where the arts were not analogous or nearly related, the question being more or less dependent on the amount of change required to adapt the device, as found in the one art to the other. Mr. Justice Brown states the conclusion of the court as follows: "As a result of the authorities upon this subject, it may be said that, if the new use be so nearly analogous to the former

one that the applicability of the device to its new use would occur to a person of ordinary mechanical skill, it is only a case of double use; but if the relations between them be remote, and especially if the use of the old device produce a new result, it may, at least, involve an exercise of the inventive faculty. Much, however, must still depend upon the nature of the changes required to adapt the device to its new use. Applying this test to the case under consideration, it is manifest that, if the change from the glass bars of the Creager wood exhibit to the steel bars of the Potts cylinder was a mere change of material for the more perfect accomplishment of the same work, it would * * * not involve invention. But not only did the glass bars prove so brittle in their use for polishing wood that they broke and were discarded after half an hour's trial, but they would undoubtedly have been wholly worthless for the new use for which the Pottses required them. Not only did they discard the glass bars, and substitute others of steel, but they substituted them for a purpose wholly different from that for which they had been employed. Under such circumstances, we have repeatedly held that a change of material was invention. * * * None of the cylinders to which our attention has been called resembled the Potts cylinder so closely as does this. None of them were used for the purpose of disintegrating, as distinguished from crushing or grinding, clay. The result appears to have been a new and valuable one; so much so that, within a short time thereafter, defendants themselves obtained a patent upon a machine of their own to accomplish it."

The court then proceeds to the question of infringement, and holds that the operation of the defendants' machine is the same as that accomplished by the Potts machine, and that it accomplishes the same results. The court, in support of its conclusion as to the operation of the patented device, quotes from the trade circular of the defendants, advertising their own machine, as follows: "Unlike the ordinary roller process, the action of the disintegrator is to remove small portions, by cutting from the clay fed into the hopper on the same principle as shaving and whittling, and does not roll the clay into sheets, thus making it unfit for proper manipulation. The past season we have put out many of these machines in difficult clays, and made it an obligation to work the clay, both wet and dry, and each machine has done its work well, and to the entire satisfaction of the purchasers."

The defendants, on rehearing, introduced a good many other patents prior to the complainant. One was issued to Thomas Mills and George Mills, for granulating or disintegrating the kernels of cocoanuts and other like substances, by the combined action of a toothed cylinder, a grooved plate, and a toothed roller. The kernels of the cocoanut are fed first to the feed roller, which in turn feeds them and maintains them in contact with the teeth of the cylinder, holding them in position to be acted on by the teeth of the cylinder, and the combined action carries them forward, to be acted on by the teeth of the cylinder against the grooves of the plate. Another is the Gregg patent, of 1879, for an improvement in disintegrating devices for pulverizing clay for brickmaking. The apparatus consists of a pair of crushing rollers, combined with a rotating brush or shaft armed with a series of flexible blades, which is placed beneath the rollers so as to act upon the clay passing between them as set forth. The roller shown in the drawing is tapered or conical, and smooth, but the specifications state that cylindrical rollers may be employed. The rotating brush consisted of a series of elastic metallic blades or beaters, secured radially, and mounted immediately beneath the line of contact of the rollers, and is rapidly rotated by means of the gearing apparatus. The specifications say that the action of the rapidly rotating brush blades upon the clay, which falls upon them from the rollers above, completes and perfects the crushing operation, breaking up the bands and strips which may be produced by the rollers when the clay is plastic, and reducing it to a thoroughly comminuted state. The evidence of complainant's witnesses was that the wet clay would soon clog up the rotating brush, and that it would then become only a smooth roller. It was further in evidence that the machine never was operated, and that the patent for it was sold, with many other patents, at auction, for $25. The Dodson patent, for a disintegrating machine, was also produced at the rehearing. It was issued in 1883, and showed a rotary part and a fixed abutment, consisting of sections between which the material to be disintegrated was operated upon. The rotary part had V-shaped circumferential ribs or

projections, and the abutment had corresponding V-shaped grooves. The material was subjected to the crushing or disintegrating action of the movement of the rotary part in the abutment. The patent suggests that, by adjusting the abutment, the degree of fineness of disintegration could be varied. This patent is not shown to have ever been used in the trade.

The Newell patent, also introduced at the rehearing, issued in 1878, for a certain new and useful improvement in grinding mills, consisted of two rollers, running together at different speeds, so that the grinding was effected by the material passing between them, and at a speed at least equal to that of the more slowly moving roller, in order that the material could not be heated by the mill becoming choked. Each cylinder had a series of angular rings on its surface, which rings had shallow teeth, meshing with the teeth of the opposing cylinder. The cylinders revolved at different speeds. The triangular teeth or corresponding cavities tapered in depth and width from the base outward, the intention being to hold the material with the slow roller, and to cut and crush it with the fast one, without having the cavity that forms the tooth or detent large enough to permit the material to escape unground in its passage between the rotating rollers.

In addition to these patents, evidence was introduced of prior uses of clay disintegrators, one known as the "Moore Disintegrator," which was used at Elizabethport, N. J., in 1878, and for five years thereafter. It was provided with two sectional rolls of equal size. Each section had a set of teeth along its entire circumference, equidistant from the sides, and had also a smooth surface. The width of the teeth was one-half the width of the section, the remaining portion of which constituted the smooth surface. The teeth of each roll meshed against the smooth surface of the other roll, leaving a space of three-eighths of an inch between the smooth surface and the end of the teeth. One of these rolls was made smaller than the other, in order to obtain a differential speed. As the clay passed through the machine, it was cut in shreds about an inch wide and three-eighths of an inch thick, and about two inches long. The clay then went through a pug mill into the brick machine. The same witness (Rossi) testifies to the use of a disintegrator which he himself constructed. There was in his factory a pair of smooth rollers to grind the clay, through which the lumps did not feed well. The witness ordered grooves to be cut on each roller, and inserted steel bars, so that, as they struck the lumps of clay, they kept them from sliding back. The grooves were cut so that the bars were extended spirally across the face of the roller. The clay is said to have been cut into shreds, and from the rolls it went into the pug mill. It was used for about six months, and was then sold at auction for old iron. The difference in revolution between the wheels in the Moore and the Rossi machines was as 75 to 90 per minute. It further appeared that the machine was used to break up the large clods or lumps before putting the clay into the soak pit, where it was left to absorb water and disintegrate, after which it was run through smooth rolls to separate or crush the stones, then through a pug mill, and thence to a brick machine. It appeared that the machine was discarded, and another machine substituted. The same witness testified to another machine for disintegrating, built in 1881, called the "Watson Machine." It differed from the Moore machine in that the teeth were round, and set in rows projecting about an inch beyond the face of the roll, the rows on one roll working between the rows of its companion roll, the cylinder between the rows forming the abutment. The witness stated that after the clay was passed through the Watson machine it was run through a pair of small rolls, then through a pug machine, and then into the brick machine; that one of the rolls was made to run only 75 revolutions in a minute, and the other about 90; and that the machine was discarded, and replaced by other machines.

Another alleged prior use is what is known as the "Archenbroon Apple Grinder." It does not differ from the Butterworth apple grinder, a patent for which was before the supreme court in the original case. It is said that the Archenbroon machine suggested to one John S. Smith the construction of the clay disintegrator, on the principle of the apple grinder. Application was made for a patent by Smith, which was declared to be in interference with the Potts application. The Potts firm bought Smith's interest for $300, and obtained from him a concession of priority, and the interference proceedings were dismissed. It appears that, in the practical operation of Potts' second

patent, the revolutions of the smooth roller are about 200 a minute, and of the grooved roller are 750 a minute.

W. H. H. Miller and Chester Bradford, for appellant.

Edward Boyd and E. E. Wood, for appellees.

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

TAFT, Circuit Judge (after stating the facts). Judge Sage held that the prior uses and the patents introduced in the supplementary proceedings, which were not before the supreme court, showed that the clay disintegrator, like that of the Potts machine, could not be a pioneer invention, because the disintegration of clay, as distinguished from crushing it and pulverizing it, was not a new result. He found in the opinion of the supreme court ground for the inference that the conclusions of the supreme court as to the validity of the Potts patent were based on the assumption that it effected wholly a new result in the art of the treatment of clay for the manufacture of brick, and as the new evidence, in his view, showed that the disintegration was an old result, or, at least, had been accomplished in prior machines, patented and unpatented, the discovery of the roller of Potts, in his first machine, did not involve the exercise of invention. No new evidence was introduced upon the subject of infringement, and we may assume from the decision of the supreme court, as well as from the evidence before us, that the defendants' machine is so like the plaintiff's that the only question now presented to us is of the validity of the complainant's patent. The supplemental record disclosed a great many more machines than were before the supreme court, for crushing, pulverization, and disintegration of clay in its preparation for the brick machine. But we do not find from the evidence that the operation of any of these machines for the disintegration of clay was so successful as to lead to their general adoption by the trade, or to work a change in the older and more laborious methods in preparing clay for brick machines, graphically described by Mr. Justice Brown in his opinion. It is clearly established by the evidence that the Potts machine is a success. Nearly all the witnesses who testified to the contrary are prejudiced by their general interest in the litigation, and, as infringers of complainant's patents, are contradicted by their conduct. The weight of such evidence, moreover, is much impaired by the trade circulars issued by the defendants, showing the success of machines which infringe and resemble, in every way, the Potts machine. The operation of the Potts machine described by Mr. Justice Brown shows that it embraces the rapid revolution of the cylinder with longitudinal blades upon it, arranged with reference to the mass of clay to be disintegrated, so that the knives upon the surface of the cylinder shall strike with hard blows the mass of clay, and clip off or tear off from the mass presented to the cylinder bits of the clay, and carry them into a receptacle below. In the first patent the element which fed the clay to the cylinder was a vibrating plate. In the second patent a slow-moving, smooth roll was substituted for the vibrating plate, and this smooth roll slowly moved and fed the clay to be struck by

the knives upon the rapidly revolving cylinder. Now, it may be that the other machines called "disintegrators" accomplish the same result, but they accomplish it by the use of two cylinders, each armed with cutting, crushing, or disintegrating projections, which intermesh, and which effect the disintegration in the same general method as crushing is effected by smooth rollers. The speeds with which the two rollers are operated differ but little in the Moore, Rossi, and Watson machines, and, while they may have effected disintegration, they certainly did not do it in the same way and upon the same principle as that seen and employed in the Potts devices. Conceding that disintegration of the clay, sufficiently complete to introduce it at once into the pugging mill or the brick machine without having recourse to the soak pit, was accomplished before the Potts invention, we are nevertheless of opinion that the operation of the Potts device is so different from that of the prior devices, and is so much more efficient than they are shown to be, that it is still entitled to the reward of a limited monopoly. It is difficult at first to distinguish between the pulverizing and crushing operation and that of disintegrating. In a wide sense, "disintegration" necessarily takes place in the operation of crushing and pulverizing. The supreme court uses the term, however, in the sense of tearing apart, piece by piece, or shredding. In no clay machine but the Potts do we find this kind of disintegration. It is true that the Moore, Rossi, and Watson machines are described as shredding the clay, but, on cross-examination, it was made quite apparent that the machines as operated would not tear the clay piece by piece, for the differential speed of the two rollers was not great enough for this. Moreover, the product was afterwards subjected to the "soak pit," an indication that the clay was not in the desired condition, for it was to make the soak pit unnecessary that the Potts machine was invented. We do not think that the disintegration of apples or of cocoanut kernels is so analogous to the disintegration of wet clay that the ingenuity shown in the adoption of the device for disintegrating clay can be minimized by reference to these other arts. We are justified in this conclusion by the fact that the supreme court did not find that the Butterworth patent, for disintegrating apples, which was quite as near in operation and principle to the Potts device as either the Mills or the Archenbroon mill, was a reason for depriving Potts of the right to a patent. The Gregg patent, it is quite clear, was impracticable, and, though it professes to comminute the clay, it is shown by the evidence to have probably been a complete failure, and never to have gone into use at all. The Dodson patent was an instance of the intermeshing of projections on the surface of an abutment with corresponding projections on the surface of a cylinder. It is not shown to have produced disintegration of the clay, and is one of those wrecks and failures of inventive genius that are constantly found lining the path of the successful inventor, who takes the last step which wins.

We think Judge Sage erred in his conclusion that the supreme court's decision rested wholly on the pioneer or primary character of the Potts machine in accomplishing an entirely new result, and, even if that were the ground of the decision, it does not at all follow

that the supreme court would not have reached the same conclusion, because of the difference in the means or method employed, and greater efficiency thereby secured, in the Potts machine over any shown in the preceding art. If, as contended by counsel for defendants, the Newell machine will disintegrate clay better with its intermeshing surfaces on the face of two rollers than the Potts machine, the defendants have the right to use the Newell machine.

In reaching our conclusions of fact in this case, we have not been unmindful of the abuses which the strict rules enforced in the allowing of the rehearings were adopted to prevent. Where an elaborate opinion of the court of last resort upon the evidence is published, and the weaknesses of the losing side are clearly brought out, and the defeated party is thereafter given an opportunity to strengthen the defects of his case by evidence as to transactions long past and machinery long since cast into the scrap heap, there is great danger that the exigencies of the case may lead witnesses to round out evidence beyond that which exact truth would permit. Such evidence must be taken with great caution, and weighed in the light of this danger.

Objection is made by the defendants that the sixth claim of the complainant's patent is simply for a cylinder with longitudinal grooves and scraping bars, adjustably secured in a groove, and that the other elements shown in the patent cannot be read into it in order to make it a combination patent. We understand the supreme court in its decision to have treated this as a combination claim, or, at least, to have held that it was for the element in the clay-disintegrating machine to be used in combination with the opposing and other elements necessary to secure disintegration of the clay by the methods specified in the patent. The supreme court intimates in its opinion that the substitution for the vibrating plate of a smooth roller did not involve invention, and therefore the second patent was not valid as an improvement over the first. It supports, however, the validity of the first patent, and the sixth claim thereof, as for the element in a disintegrating machine of the cylinder, constructed according to the claim, in combination with a vibrating plate or the equivalent thereof, which shall feed the mass of clay to the armed cylinder, and hold it to be clipped off or disintegrated, piece by piece, by the rapid revolution of the cylinder. It is impossible, therefore, to determine the validity of the claim in the light of the prior art, without considering the other parts of the old machines with which the alleged anticipatory cylinder co-operates in them. We have therefore felt justified, as the supreme court did, in looking at the combination in each of the old patents, to determine whether the revolving cylinder, with its peculiar functions, in the Potts patent, had been anticipated. We hold, therefore, that the first Potts patent is valid and is infringed, but that the second Potts patent is invalid, because it shows no patentable improvement over the first. Other questions have been made by appellant, but, in view of our conclusion, it is not necessary for us to consider them. The decree of the circuit court is affirmed in so far as it dismisses the bill on the second Potts patent, and is reversed in so far as it dismisses the bill

on the first Potts patent, with directions to enter a decree finding the validity of the first Potts patent, and ordering a reference for damages. The costs of appeal are taxed against the appellees.

MAGIC LIGHT CO. v. ECONOMY GAS-LAMP CO.

(Circuit Court of Appeals, Seventh Circuit. October 3, 1899.)

No. 584.

1. PATENTS—INFRINGEMENT—DESIGN FOR GAS-GENERATING LAMP.
   The Williams design patent, No. 30,147, for a fixture for generating and burning gas from liquid hydrocarbons, *held* not infringed.
2. SAME—GAS-GENERATING LAMPS.
   The essential feature of the device shown in the Williams patent, No. 606,435, for an improvement in gas-generating gas fixtures, is a generating tube with the bore tapering towards its discharge end, to permit the pressure from the gas generated to be exerted more freely backward in the tube, and to secure an even flow from the discharge end; and, in view of the limitations placed on the claims of the patent by the amendments made to meet objections of the patent office, it cannot be held to cover a device having a generating tube of uniform bore, and in which uniformity of flow is secured by packing the tube with asbestos wicking.
3. SAME—MECHANICAL EQUIVALENTS.
   A patent covers only known equivalents, and where it is clear from the proceedings in the patent office that when a patent was granted it was not known that a different device was the mechanical equivalent of one described therein, and its equivalency was expressly denied by the patentee, the mere fact that such device is subsequently shown to accomplish the same result as that of the patent does not render its use for that purpose an infringement.
4. SAME—CONSTRUCTION OF CLAIMS—LIMITATION BY AMENDMENT.
   The effect of the amendment of claims to meet the requirements of the patent office as a limitation of the scope of the patent does not rest upon the doctrine of equitable estoppel, but the estoppel in such case is in the nature of one by contract, and its scope in a particular case is a matter of interpretation and construction of the terms used, according to their fair meaning, and with reference to the intention of the parties as disclosed by the proceedings.
5. SAME—METHOD OF CONSTRUCTION.
   Where it is plain that an amendment of his claims by an applicant was for the purpose of making a particular construction a distinctive feature of his invention, and he explicitly denied the utility of a different construction to accomplish the result intended, his patent cannot be construed to cover such method of construction.

Appeal from the Circuit Court of the United States for the Northern Division of the Northern District of Illinois.

James H. Peirce, for appellant.

Chas. L. Dobson and Ephraim Banning, for appellee.

Before BROWN, Circuit Justice, and WOODS and JENKINS, Circuit Judges.

WOODS, Circuit Judge. This appeal is from an interlocutory decree of injunction against infringement of claims 1, 2, 3, 4, 5, 11, 12, and 14 of letters patent No. 606,435, issued on June 28, 1898, to John F. Williams for improvements in gas-generating gas fixtures,

and of a design covered by letters patent No. 30,147 granted to the same patentee on February 7, 1899. Of the accompanying drawings, Fig. 1 of the first patent sufficiently represents the design of the second patent. Fig. 2 is an enlarged representation of the corresponding parts of Fig. 1. The third figure represents the design and construction of the lamp made by the appellant. The design covered by the second patent is described in the specification as follows:

"The fixture consists of two curved arms, A and B, connected at their upper ends to a fitting or casting, C, from which extends a straight section, D. A reservoir, E, is mounted upon said section, D, and a hook, F, extends up from the reservoir. To the lower end of the arm, B, there is fixed a fitting or casting, G, and from the horizontal branch of the fitting extends an arm, H, which stops just short of a projection, I, extending out from a coupling or casting, J, secured to the lower end of arm, A. Extending down from the coupling, G, is an arm, K, its lower end being bent at right angles, forming a horizontal arm, L. A similar arm, M, extends down from coupling, J, and is formed with a horizontal arm, N, the ends of the arms, L and N, being connected to a casting or fitting, O, which forms the burner-support."

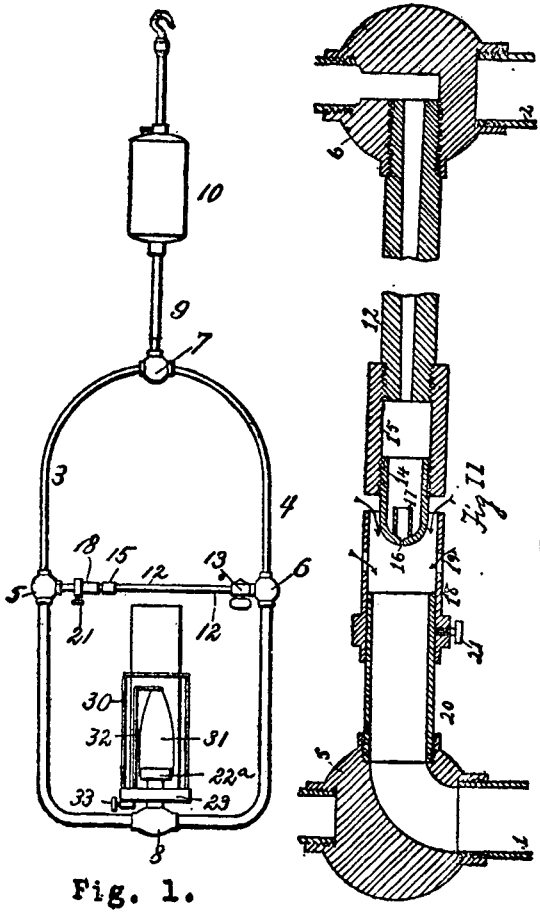
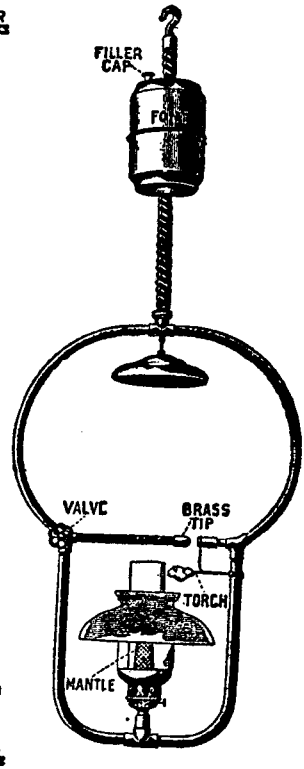


Fig. 1.



Magic Lamp.

In respect to this it is enough, besides referring to the drawings, to say that the lamp of the appellant resembles no more closely the design of the patent than it resembles other lamps and gas fixtures which are shown to have been in earlier use. In other words, infringement has not been proved.

It is necessary to quote only the first and fourteenth claims of the first patent, since the others mentioned are like the first in respect to the point of controversy. They read as follows:

"(1) In a device for generating and burning gas from liquid hydrocarbons, the combination of a suitable supply-pipe; a gas-generating pipe connected thereto and provided with a gradually-decreasing internal bore towards its discharge end; a discharge-outlet for said generating-pipe; a burner; a mixing-chamber intermediate said burner and outlet; and means for admitting air into said mixing-chamber." "(14) A fixture for generating and burning gas from liquid hydrocarbons, comprising in combination a tube or pipe, 9, having a reservoir connected thereto; supply-pipe, 4; a gas-generator, 12, connected to pipe, 4, and provided with a suitable valve; a mixing and conducting pipe, 1, into which the gas is discharged; an air-inlet for said mixing-pipe, and means for controlling it; a pipe, 3, connecting pipe, 9, and pipe, 1; a pipe, 22, communicating with the mixing-pipe; a chimney mounted on said pipe, 22, below the generator, 12; and a mantle of incandescing material mounted in said chimney."

Pipe 12 of the drawings is the "gas-generating pipe" of the claim. The tapering passage therein, according to the specification, is preferably formed from a tube having a straight passage by placing therein a rod, filed or dressed to form the passage, the rod being held in place by frictional contact. That form of construction is explicitly covered by the thirteenth claim of the patent. The operation of the apparatus, as affected by the narrowing passage, is thus described:

"The liquid hydrocarbon passing from the vessel, 10, through the tubes, 9 and 4, to the vaporizing-tube, 12, is there vaporized by the heat from the flame concentrated through the chimney arranged in close proximity under said tube. The tube, 9, being larger than the tube, 4, and the tube, 4, larger than the vaporizing-tube, and the passage in the vaporizing-tube decreasing in size from inlet to outlet, it is apparent that by reason of the constant decrease in size of the passage from the inlet of the liquid into the pipe, 9, to the exit of the vapor from the vaporizing-tube, any back pressure in the tubes generated during the process of vaporization meets the least possible frictional resistance, and the exit of the vapor will be steady, and cannot puff and blow and cause uneven pressure. In other words, by the arrangement and construction of the passages as shown, but leaving them otherwise clear of any packing or filling material, the particles or molecules of the liquid as they expand or are converted into gas may exert their pressure in a rearward direction, and not tend, as in the usual burners, to force the gas out through the tip under uneven impulses."

This feature of the invention is emphasized by the proceedings in the patent office. The claims first presented did not embody it, and were rejected upon reference to prior patents. To avoid the references the feature was introduced, first without specifying in the first and third claims in which direction the passage should narrow, but finally, in response to the specific demand of the office, defining the direction by inserting the words "towards its discharge end." The advantages of the tapering bore were explained at length by the attorneys of the applicant in the letter of January 14, 1898, in which the following statement was made, distinguishing the tapering bore from other means for retarding the flow of the liquid:

"The tapering bore, however, is to be distinguished from those burners in which the passages are filled with sand, cotton, and the like, for retarding the flow of the liquid. They have just the opposite effect from the chamber with the gradually decreasing bore, in that as the liquid is converted into gas the sudden expansion thereof cannot act in a rearward direction, but must of necessity force the gas out through the discharge opening."

And again in the letter of March 29, 1898, they said:

"Regarding the German patent cited against claims 4, 13, and 14 [present claims 4, 10, and 11], it is apparent from examiner's statement that it has no tapering longitudinal bore; and, inasmuch as neither the Corby nor the Davis patent have it, the reference would seem to be unavailable. In connection with the German patent, and any other which may have the supply tube or the generating chamber filled with wire netting, asbestos, sand, or the like, we would say that we are informed that they do not produce the result here obtained, namely, the steady flow of the gas. Any fluid which has once passed, and is then converted into gas, will exert its explosive force towards the outlet, and consequently will produce a puffing flame."

The response of the office was:

"Claims 1, 3, and 10 are rejected on Haggerty of record, which shows the full matter specified. These claims do not recite the generating tube as tapering towards the discharge end, which, by applicant's argument, is the essential feature of this generating tube."

This objection and others having been obviated by the necessary amendments, the letters were allowed to issue.

The lamp made by the appellant differs from that of the patent in that the bore in its generating tube is without taper, "and is stuffed with a filler of asbestos wicking," and the sole question is whether by reason of that difference the proof of infringement fails. An important phase of the question has not been referred to in the discussion. A patent covers only known equivalents. Except that the desired result is effected by both constructions, there is in the record no evidence of mechanical equivalency between the two, and that they were not known to be equivalent means for producing the desired result when the patent in suit was applied for and issued is put beyond doubt by the correspondence already quoted. The principle on which the tapering tube was supposed to act was explained, and it was said, on information derived presumably from the patentee, that wire netting, asbestos, or the like, in the supply tube or in the generating chamber, "do not produce the result here obtained, namely, the steady flow of the gas"; and to emphasize the proposition, by explanation of the theory of action, it was added that "any fluid which has once passed, and is then converted into gas, will exert its explosive force towards the outlet, and consequently will produce a puffing flame." Experience demonstrates that this is not true when there is an asbestos wicking in the generating chamber, but it remains true that the asbestos wicking so used in a tube of even bore was not known to the patentee, and probably not to others, as the mechanical equivalent of the tapering bore for the purpose attributed to the latter; and, now that such wicking in the tube is shown to produce the desired result, it is yet unproved that both forms of construction operate in the same or a similar way to produce the desired result. The doctrine of Corning v. Burden, 15 How. 252, is familiar, that "it is for the discovery or invention of some practicable method or means of producing a beneficial result or

effect that a patent is granted, and not for the result or effect itself." See Westinghouse v. Power-Brake Co., 170 U. S. 537, 555, 18 Sup. Ct. 707.

While further discussion is not necessary to a determination of the case as presented, it may be of use to consider to what extent the claims are limited by the amendments made to meet the rulings of the patent office. On that subject it is to be observed that the doctrines of equitable estoppel, or estoppel in pais, invoked in behalf of the appellee, are not involved or applicable. The estoppel which arises in such cases is of the nature of estoppel by contract, and its scope in a particular case, like the meaning of a contract, is a matter of the interpretation and construction of the terms used according to their fair meaning. In Ball & Socket Fastener Co. v. Ball Glove-Fastening Co., 5 U. S. App. 588, 651, 7 C. C. A. 504, and 58 Fed. 824, it was said, "The rule touching the effect of such amendments has been several times laid down by the supreme court in patent cases, although it is only a peculiar application of the general principles of law relating to the interpretation of instruments." At the same time, as was said in Reece Buttonhole Mach. Co. v. Globe Buttonhole Mach. Co., 21 U. S. App. 244, 370, 10 C. C. A. 203, and 61 Fed. 967, "it defeats the very essence of this rule to extend it to what was inserted inadvertently, or to push the construction of what was thus inserted in one direction, when it is plain from the whole transaction that the parties inserting were looking in another." There is no danger of such a mistake of the meaning of what was done in the case before us. That there was an intelligent purpose, compelled by the explicit requirement of the patent office, to make the tapering bore the distinctive feature of the combination, there is no room for doubt; and, not stopping at that, the possibility of substituting an asbestos or other filling in a tube of uniform bore was denied. Whatever, therefore, might otherwise have been the scope of the patent, it cannot be allowed to include what was expressly and so clearly excluded. The same considerations forbid that the fourteenth claim should be deemed to have in this respect a wider scope. These views seeming to exclude the possibility of evidence to sustain the charge of infringement, the decree below is reversed, and the cause remanded, with direction to dismiss the bill.

ARLINGTON MFG. CO. v. CELLULOID CO.

(Circuit Court of Appeals, Third Circuit. September 22, 1899.)

No. 30.

1. PATENTS—INVENTION.
   It is not enough to sustain a patent for a compound that it shall be novel and useful, but its production must also involve invention or discovery.
2. SAME—PYROXYLINE COMPOUNDS—IMITATION ONYX.
   The Stevens & Harrison patent, No. 546,360, for a method of producing a pyroxyline compound in imitation of onyx, is void for want of patentable novelty and invention; the method described having been anticipated by the France method of making imitation agate and carnelian, and also by the method disclosed in the Mehling patent, No. 211,860, for a method of manufacturing artificial stone veneer.

8. SAME—ARTICLES OF CELLULOID.
The Thurber & Schaefer patent, No. 542,452, for improvement in celluloid articles, and in the process of manufacturing the same, is void for want of invention in either the product or method of production.

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

J. R. Bennett, for appellant.

J. E. Hindon Hyde and Frederic H. Betts, for appellee.

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

BRADFORD, District Judge. This is an appeal from an interlocutory decree sustaining letters patent No. 546,360, issued September 17, 1895, to Stevens & Harrison, and No. 542,452, issued July 9, 1895, to Thurber & Schaefer. Both patents are owned by the appellee. The defenses are lack of novelty and of invention and noninfringement. This appeal has twice been argued, by reason of the retirement of Judge Butler from the bench after the first hearing and before a conclusion was reached as to the disposition of the case.

The claims of patent No. 546,360 are as follows:

"1. The method of producing a pyroxyline compound in imitation of onyx, consisting, first, in forming the light-tinted parts in solidified strata; second, cutting through these strata across their edges; third, inserting coloring matter between the cut parts, and, fourth, solidifying the whole into blocks, shapes or masses, substantially as described.

2. The method of producing a pyroxyline compound in imitation of onyx, consisting, first, in forming the light-tinted parts in solidified strata; second, cutting through these strata across their edges; third, inserting a pyroxyline composition of a different color between the cut parts, and, fourth, solidifying the whole into blocks, shapes or masses, substantially as described.

3. A pyroxyline compound in imitation of onyx, consisting of two or more light tints in solidified strata with lines of a different color breaking through or crossing the edges of these light-tinted strata, substantially as described.

4. A rod or sheet of pyroxyline composition in imitation of onyx, consisting of two or more light tints with streaks of a darker color breaking through or interspersed with the lighter tints, substantially as described."

This patent cannot be sustained on the ground merely that the production of a pyroxyline compound in imitation of onyx or its production in the manner described in the specification was novel. It is necessary that such production should also have involved invention. As was said in Thompson v. Boisselier, 114 U. S. 1, 11, 5 Sup. Ct. 1047:

"It is not enough that a thing shall be new, in the sense that in the shape or form in which it is produced it shall not have been before known, and that it shall be useful, but it must, under the constitution and the statute, amount to an invention or discovery."

The properties and characteristics of celluloid and other pyroxyline compounds were understood long before the date of the alleged invention. It was known that they could be rendered plastic by heat and when in that condition moulded or pressed into such shapes or forms as might be desired. It was also known that by the introduction of coloring matter different colors or tints could be imparted to the finished product and that by subjecting, while plastic, two or more sheets or pieces of celluloid different in color or tint to a rolling or other kneading or mixing process the different colors or tints

could be blended in such manner in the finished product as to present a variegated, veined, mottled or clouded appearance, and cause such product to imitate a variety of natural objects or substances. Indeed in the specification of the patent it is said:

"Solid or massive pyroxyline compounds, as is well known, owe their commercial importance largely to their susceptibility to coloring treatment and manipulations essential to the production of imitations of natural substances—like mottled amber, tortoise-shell, veined ivory, carnelian, &c. * * * Methods of coloring the pyroxyline compositions used are well known and it is unnecessary to describe the coloring-matter or pigments used."

In view of the prior state of the art as disclosed in the record, we do not think that either the production or the method of production of the onyx base involved invention, but rather the exercise of judgment and skill in the selection and combination of colors and in the regulation of the amount of rolling or kneading which the plastic celluloid should undergo in order to effect the desired blending of tints and shades. Was there patentable novelty or invention in the cutting of the layers or strata of the celluloid and the insertion between the cut parts of coloring matter for the imitation of the streaks or veins of the natural onyx? It appears that the complainant and its predecessor, The Celluloid Manufacturing Company, as early as 1884 manufactured and have since continued to manufacture from celluloid imitation agate and carnelian by the method described and claimed in the France application for a patent for "Improvements in Manufacture of Pyroxyline Compounds, such as Pyralin, Celluloid, etc." We quote from the application as follows:

"In practicing this invention I adopt the following method, susceptible of infinite variation, of extreme simplicity, and by which every possible form of agate may be imitated with great accuracy. I first prepare sheets of two colors, mottled in the manner commonly used in known processes for imitating gray agate, a description of which will fully explain my invention as applied to all. When sufficient sheeting is prepared to form a cake the sheets are placed one upon another, and to the upper side of every alternate sheet a thin veneer is applied, said veneer being formed from a thin, transparent sheet, suitably colored. The color in the present instance is of the kind known as 'ruby.' The veneer is attached to the sheet by passing them together between the calendering rolls. The sheets are then cut up into strips, each of the latter measuring about two inches from top to bottom. Being cut from the flat side of the sheet they are easily manipulated and bent to any desired shape. They are then 'laid up' in the press, the strips having veneer attached being so placed that the veneer sheet rests on its edge, and with substantially equal intervals between the veneers. When the cake is formed the finished sheets are cut, or planed, from the top of the cake, so that the sheets of veneer will appear therein as fine lines, or bands, of color running across the face of the sheet. The strips may be laid in various ways, and with the veneer at any distance apart, so that a great variety of novel effects may be produced. * * * I have stated that the sheets are cut into strips of about two inches from top to bottom, these being laid up in the press to form a cake, strips having veneer attached being inserted at regular intervals. It should be mentioned that the thickness and width of these strips are matters which are left to the judgment and taste of the manipulator, as they are capable of an infinite variation without departing from my invention. * * * What I claim is—

1. The method described for manufacturing pyroxyline compounds in imitation of agate and similar minerals, said method consisting in forming sheets of said compounds of suitable colors and mottling, attaching a colored veneer to the upper face of the upper sheets, cutting said sheets in strips, laying up said strips in the press with the veneers upon their edges and at suitable in-

tervals, pressing the whole into a cake and cutting, or planing the finished sheets from said cake, substantially as described.

2. The method described for producing pyroxyline compounds in imitation of agate, the same consisting in forming strips of said compound of suitable colors, attaching to a suitable number of such strips thin sheets of colored veneer, laying up said strips in a press with the veneers at stated intervals and arranged upon their edges, pressing the whole into a cake and cutting the same into sheets, substantially as described.

3. As a new article of manufacture, a sheet of pyroxyline compound in imitation of agate, consisting of suitably colored portions separated by lines of different colors, said lines being formed of thin portions of a similar compound of different color united in a homogeneous mass with the other parts, substantially as described."

By the method above described the veneer containing the coloring matter used for producing the veined or streaked effect in imitation agate is placed on and by pressure in the calender rolls attached to the upper side of each alternate sheet of celluloid in a series of sheets from which the "cake" is to be formed. The sheets are then cut into strips and the latter are placed on edge in a press whereby substantially equal intervals are left between the veneering in the alternate sheets as contained in the strips. When the "cake" is thus formed the finished sheets are cut or planed from its top and disclose the veneer "as fine lines, or bands, of color running across the face of the sheet." By this method the veins are either lines substantially straight and parallel to each other or curved lines substantially corresponding in curvature and direction. The irregular veins or streaks in the natural onyx, it is true, cannot be imitated by this method. By the method of the patent in suit the imitation onyx base is formed before the insertion of the coloring matter representing the veins and streaks. By the France method the coloring matter representing the veins and streaks is applied before the formation of the imitation agate base. It is not necessary, however, to rest our conclusion that the Stevens & Harrison process lacks novelty and invention upon the France method alone. The specification in letters patent No. 211,860, dated February 4, 1879, issued to John A. Mehling, for "Improvements in Artificial Stone Veneer," discloses a method of making artificial marble and other stone which in its relation to the production of imitation veins, streaks or bands, we think is substantially identical with the method of the patent in suit. The specification in the Mehling patent is in part as follows:

"My improvements have relation to the ornamentation of wood, stone, metal or other material by the application thereto of a thin coating or veneer of artificial stone; and said improvements consist in the production of a new and useful article, as will be hereinafter first fully described, and then pointed out in the claim. The desirability and utility of a veneer of artificial marble or other stone for purposes of ornamenting mantels, wainscoting, furniture, caskets, &c., are obvious from a consideration of the inexpensive nature of the material and the highly ornamental effects which may be produced by its application. * * * In accordance with my improved method the surface which is to be veneered should be prepared in some suitable way so as to hold the marble or stone. * * * I take cement or plaster (Keene's or other suitable ground cement preferred,) mix with water to about the consistency of butter, then add colors, which must vary in accordance with the stone desired to be imitated. The colors might be mingled in the dry state with the cement. The cement is next rolled out to the thickness desired and placed upon the prepared surface to be ornamented, or it may be rolled directly upon this surface, as is desirable in many cases. * * * To produce a veneer

which shall represent an inlaid surface, as in Fig. 1, I roll out the material, as before, to any thickness required, and cut out the places to be filled with a chisel or similar implement. The places thus left are filled with other material made to represent different stones. This cutting should be accomplished while the material is yet plastic; or, if done when it is hard, the body-coating must be made wet, by which it is soon softened, and the filling should immediately follow. The surface is then dressed off, and, when dry, may be polished as before. Instead of cutting through the veneer, I find it preferable in some cases—as when several pieces are to be made of the same design—to stamp the required indentations in the plastic material by use of a surface having corresponding ribs or projections; or, if the material has already hardened, the outlines of the design to be inlaid may be cut with a knife in stamp shape. This is much quicker and gives more uniform results. Into the indentations thus produced the required inlay material is placed, and the whole finished off as before. So far as the invention is concerned, it is intended to employ any of the known bases for the artificial stone, except, of course, such as will not admit of manipulation as explained."

That the Mehling method relates to cement while that in question relates to celluloid or other pyroxyline compounds is a wholly immaterial difference. The two methods cannot be distinguished from each other in their relation to the production of artificial veins, streaks or bands. In each the base is first formed. In each the base while plastic is then cut or has the required indentations stamped in it. In each the coloring matter is then inserted in the cuts or indentations, as the case may be, to produce the desired imitation. The solidification of "the whole into blocks, shapes or masses, substantially as described," after the insertion of the coloring matter in the cuts, clearly does not disclose either patentable novelty or invention. We feel constrained to hold that the presumption in favor of patent No. 546,360, has successfully been rebutted.

The Thurber & Schaefer patent, No. 542,452, relates to an "Improvement in Celluloid Articles and in the Process of Manufacturing the Same." The claims are as follows:

"1. The process of manufacturing articles of celluloid or similar material, consisting in, first, serrating, or otherwise irregularly forming, the edge of the blank, and then subjecting the said blank to the action of dies to form the flaring crinkled rim or border of the finished article, substantially as described.

2. A finished dish or plate made of celluloid, or similar material, having a body and a flaring crinkled rim or border, the edge of said rim or border being serrated or otherwise irregularly formed, and having the same edge as that of the blank from which the dish or plate was formed, substantially as described."

The defendant as early as the summer of 1893 manufactured and sold celluloid boxes, baskets and trays with flaring and crinkled or fluted rims or borders. A sheet or blank of celluloid of the proper size was placed between the parts of a die, subjected to heat and rendered soft or plastic, and then pressed in the die, with the result that such portion of the sheet as was not in contact with the die became flaring and fluted or crinkled. The material upon cooling became hard and any superfluous material in the rim or border was trimmed off by the use of a knife or saw. By the method of the patent in suit the blank is given a serrated or irregular edge before it is placed and pressed in the die. By the defendant's former method whatever ornamentation or finishing was given to the edge was imparted after the action of the die upon the blank. In view of the prior state of the art we fail to discover invention either in the product or method of production claimed in patent No. 542,-

452. Exception is taken by the complainant to the first, second and third assignments of error as being too general, vague and indefinite. The nature of the decree appealed from is such as to render greater particularity unnecessary, if not impracticable. Having reached the conclusion that the patents in suit for the reasons given cannot be sustained, no opinion is expressed on the contention by the defendant that the method described in claims 1 and 2 of patent No. 546,350, includes merely a series of mechanical manipulations and as such is not patentable.

The decree below is reversed with costs.

RICKARD et al. v. DU BON.

(Circuit Court, D. Connecticut. August 28, 1899.)

No. 972.

1. PATENTS—INFRINGEMENT—ART OF MATURING TOBACCO LEAVES.

The Rickard and Long patent, No. 604,338, for an improvement in the art of maturing tobacco leaves, which, as described, consists in spraying the leaves of the growing plant, at about the time they reach maturity, with alkali in solution, such as potash, which gives them a spotted appearance, if valid, can only be sustained on the claim that such treatment promotes the burning quality of the leaf when used as a cigar wrapper; and, although its claims are broader, it cannot be construed to cover the use for such spraying of an alkali which is not a combustion-producing agent.

2. SAME—CONSTRUCTION OF CLAIMS.

A broad claim to include an entire class as equivalents,—as all alkalies,—cannot be sustained where some members of the class do not possess the properties required to accomplish the only result which can give validity to the patent.

This was a suit in equity by Clyde A. Rickard and Edward N. Long against John A. Du Bon for infringement of a patent. On final hearing.

Pennie & Goldsborough and Francis T. Chambers, for complainants.

William E. Simonds and Arthur L. Shipman, for defendant.

TOWNSEND, District Judge. The bill and answer herein raise on final hearing the questions of validity and infringement of complainants' patent, No. 604,338, granted May 17, 1898, to Rickard and Long, for the "art of maturing tobacco leaves." It will be necessary first to review the history and explain the status of this unique case. For a cigar wrapper it is desirable to have a neutral leaf, without such a pronounced tobacco taste as to interfere with the flavor of the filler, and of a light color, which burns better. Sumatra tobacco leaf, because it possesses these qualities, is greatly in demand as a wrapper for cigars. It is more generally spotted than any other tobacco, and, when so spotted, its value is greatly enhanced. Spotted tobacco generally commands a higher price than plain tobacco. Whether this is because it is supposed to be Sumatra tobacco, or because the presence of the spot indicates a better quality, is not clear. The fact of the superior quality and higher price of spotted Sumatra having attracted the attention of Messrs. Rickard and Long, they instituted a series of experiments to pro-

duce an imitation of said tobacco, which culminated in the patented process. This process consists in spraying "the leaf, while the plant is still growing, at about the time the leaves have reached their maturity," with an alkali in solution, such as potash, which it is alleged in the specification "would greatly increase the burning quality of the leaf when used as a wrapper; and it has been found that the chemical is more thoroughly distributed throughout the body of the leaf by applying the same to the leaf in spots, and allowing the leaf to absorb and assimilate the chemical." The claims of the patent are as follows:

"(1) An improvement in the art of treating tobacco leaves, which consists in applying a combustion-promoting agent to the leaves of a growing plant, substantially as described. (2) An improvement in the art of treating tobacco leaves, which consists in applying an alkali to the leaves of a growing plant in spots, substantially as described. (3) An improvement in the art of treating tobacco leaves, which consists in applying a mixture of potash and glycerine to the leaves of a growing plant in spots, substantially as described."

The first of the various defenses to be considered is the claim that the patent is void because of lack of utility. That the prime object of the patentees was to produce a fraudulent imitation of Sumatra is conclusively established by the following statements in the original specification:

"This invention relates to the art of treating tobacco leaves which are employed as wrappers for cigars, and it has for its object to provide a process for discoloring the leaves in spots, so that the same will accurately and truly simulate the well-known spotted Sumatra wrapper or tobacco leaf. As is well known, the Sumatra wrapper, or tobacco leaf, is provided with a number of isolated, discolored spots, which appear more or less white, and which make their appearance during the growth of the plant. These spots being present in certain Sumatra tobacco leaves, the tobacconist and purchaser can always readily identify the leaf, and such spots, therefore, amount practically to a trade-mark in themselves, which at once indicates that the wrapper or leaf is a Sumatra export. The quality of a Sumatra leaf is commonly believed to be somewhat superior to an American leaf, and this fact, taken in connection with the duty levied thereon, gives the same a high marketable value. These facts are mentioned to emphasize the characteristics of a Sumatra wrapper, or tobacco leaf, and also to emphasize the great desirability of reproducing the Sumatra spots in other tobacco leaves. This invention, therefore, contemplates providing means for discoloring a tobacco leaf in spots, so that its identity cannot be distinguished from the ordinary Sumatra leaf; and to accomplish this result it is designed to employ such chemical or other means as will partially deaden the life of the leaf in isolated spots, so that such spots will become discolored, and partially or completely bleached, while at the same time remaining sufficiently soft and pliable so as not to destroy the usefulness of the leaf as a wrapper for cigars."

The examiner of the patent office rejected the application, and found, inter alia, as follows:

"The specification clearly shows that the object applicants have in view is deception. Heretofore cigar manufacturers and leaf-tobacco dealers have had to depend upon their supply of spotted tobacco only as nature produced it in or on the leaf; and as the spotted leaf is only a small percentage of the leaf grown, and as almost every smoker selects a spotted cigar in preference to one not spotted, the demand is greater than the supply for spotted cigars, and the competition among cigar manufacturers for the spotted leaf has made the price of it advance very much, leaving large quantities of the unspotted leaf on the market, almost unsalable. * * * To imitate this

spotted disease in a purely mechanical way by the application to the growing plant or the gathered leaves, and to sell domestic tobacco in competition with the imported Sumatra tobacco on the basis of the spotted character of the leaf, is a deception and a fraud."

The attorneys for the applicants thereupon amended the application so as to state as the only reason for spotting the leaves the increasing the burning qualities thereof. This application was rejected by said examiner, and on appeal by the examiners in chief, on the ground that "the main, and practically the sole, purpose of applying a chemical to the leaf in spots is to imitate the Sumatra leaf." The examiners add:

"Even if this had not been stated in the specification as originally filed, it would still be apparent that this, and this only, is the real purpose. The fact that it was originally stated to be the purpose only serves to confirm the belief that this is the real purpose."

On appeal to the commissioner of patents, however, new evidence of utility was introduced, and he reversed the decisions of the examiners, saying:

"Appellants have now disclaimed all intention of using the process fraudulently," and, as "the evidence of experts leads me to believe that the process is useful for some purpose, the appellants are entitled to a patent."

Although I am inclined to agree with the conclusion of the examiners, rather than that of the commissioner, yet because of the peculiar character of the monopoly afforded by a patent right, and of the public interest therein, it has seemed desirable to assume the correctness of the decision of the commissioner of patents that the patent is not void on the ground of fraud, and to determine the question of the utility of the patented process. The testimony on the point of utility is conflicting. Complainants' witnesses assert that tobacco artificially spotted with potash by the patented process ripens earlier, and contains a lesser amount of gum, and therefore burns better. Defendant's witnesses assert that this process seriously injures the tobacco by making holes in the leaf, by darkening it, by diminishing the available crop, and by materially injuring the burning quality of the leaf. And yet these same witnesses are confessed infringers, who, in spite of these disastrous results in the first year, have hastened again to invite disaster and tempt Providence the second year, and who have urged a speedy disposition of the case in order that they may have time this year to vie with the patentees and their licensees in deceiving the public, free from the peril of an injunction against involving themselves in ruin. In these circumstances it would, perhaps, be proper to dispose of the case on the familiar principles applied by courts of equity where the parties are in pari delicto: For the reasons already stated, the case will be disposed of on the merits. The only claim of utility, except to deceive, on which this patent can possibly be sustained, is that its process may promote the burning quality of the leaf. Defendant uses a solution of caustic soda, burnt sugar, molasses, and glycerine. It is proved that caustic soda is not a combustion-producing agent, therefore it does not infringe the first claim, and cannot be the equivalent of potash in the one feature essential to give validity to the patent, and therefore does not infringe the

third claim. If, however, as is claimed by complainants, caustic soda is the equivalent of potash, the third claim of the patent is invalid for lack of utility. The second claim is for the use of an alkali, substantially as described, thereby including any alkali such as potash. The fact that one kind of alkali, such as potash, namely, caustic soda, does not promote the burning quality of the leaf, and the lack of evidence that the patentees had ever experimented with other alkalies, show that the second claim is void either for lack of utility or because it is broader than the alleged invention. In Matheson v. Campbell, 24 C. C. A. 389, 78 Fed. 916, it was decided that a patentee "cannot speculate upon equivalents of his claims of invention, and thereby cause the public to resort to experiment in order to determine the scope of the claims of his patent." If the second claim can be sustained at all, it must be so construed as to include only such alkalies as improve the burning quality. In any event, defendant, in making spotted tobacco, has only appropriated the deceptive and fraudulent element of complainants' patent, but, as he has not improved the burning qualities of the tobacco by the use of the alkali of the second claim, or of the potash and glycerine of the third claim, he has not infringed.

These conclusions dispense with the necessity of considering the further defenses that the patent is void because it covers a method an essential element of which is the function of a plant, or because it lacks patentable novelty, or because the specification is insufficient. Let the bill be dismissed.

WESTINGHOUSE ELECTRIC & MANUFACTURING CO. v. TRIUMPH ELECTRIC CO.

(Circuit Court of Appeals, Sixth Circuit. October 3, 1899.)

No. 664.

1. DESIGN PATENTS—CONSTRUCTION OF STATUTE—PATENTABILITY.
   The purpose of congress in authorizing the granting of patents for designs is to give encouragement to the decorative arts, and in the provision of Rev. St. § 4929, which authorizes the issuance of a patent to any person who has invented and produced "any new, useful and original shape or configuration of any article of manufacture," the word "useful," which was introduced by the revision of 1870, does not require that the shape or configuration of an article, in order to be patentable, shall add some new utility to the article, but is used merely to exclude such things as might have a vicious or corrupting tendency, and a new and original design for an article may be patentable where it merely improves its appearance.
2. SAME—FRAME FOR ELECTRIC MACHINES.
   The Schmid design patent, No. 21,416, for a design of a configuration of a frame for electric machines, the only originality claimed for which is the curvature of the bases of the pillars for supporting the shaft, and of the supports to the cylinder frame for the field, does not disclose patentable invention, and is void.

Appeal from the Circuit Court of the United States for the Southern District of Ohio.

This is an appeal from a decree of the circuit court dismissing the bill of the Westinghouse Electric & Manufacturing Company against

the Triumph Electric Company, seeking to enjoin the alleged infringement of a design patent (No. 21,416) issued March 22, 1892, to Albert Schmid, and assigned by Schmid to the complainant. The patent was for a design of a new and useful configuration of a frame for electric machines. The frame is seen in Figs. 1 and 2 of the patent:

Fig. 1.

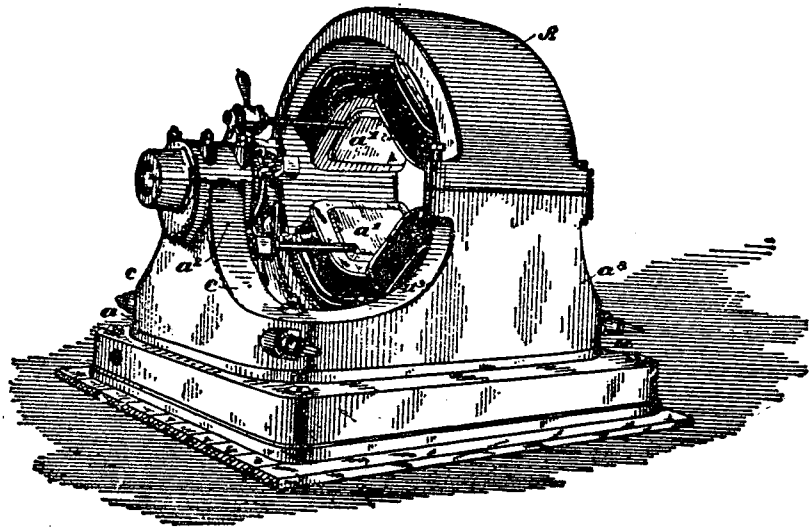
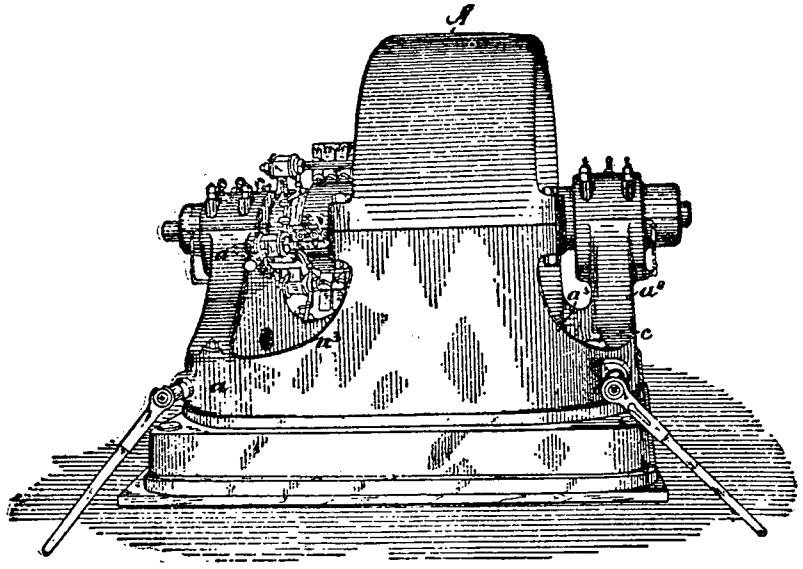


Fig. 2.



The patent says:

"The leading feature of the design is the general configuration of the frame with the extensions which constitute the supporting pillars for a shaft. A represents this frame. The bottom portion is of a somewhat rectangular shape, being rounded, however, at the corners, as indicated at a. The central portion is cylindrical in form. It is located nearer to one end of the base than the other, and its sides, resting upon the base, are curved, as indicated at a^3. The pillars, a^2, rise from the bottom portion or base at opposite ends. The sides of these pillars are of curved contour, as shown at c, gradually sinking to the base, and joining or nearly joining the curves of the adjacent edges of the cylindrical portion, thus giving a pleasing appearance to the structure. Owing to the greater distance of the cylindrical portion from one end of the base than the other, the curves will unite less acutely at one end than at the other. What I claim as my invention is the design for the frame of a machine substantially as herein shown and described."

Wesley G. Carr, for appellant.

L. M. Hosea, for appellee.

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

TAFT, Circuit Judge (after stating the facts). Section 4929 of the Revised Statutes provides that:

"Any person who by his own industry, genius, efforts and expense, has invented and produced (1) any new and original design for a manufacture, bust, statue, alto-relievo or bas relief; (2) any new and original design for the printing of woolen, silk, cotton or other fabrics; (3) any new and original impression, ornament, pattern, print or picture to be printed, painted, cast or otherwise placed on or worked into any article of manufacture; (4) or any new, useful and original shape or configuration of any article of manufacture, the same not having been known or used by others before his invention or production thereof, or patented or described in any printed publication, may, upon payment of the fee prescribed and other due proceedings had, the same as in cases of invention or discoveries, obtain a patent therefor."

Of this statute the supreme court says, speaking by the chief justice, in the case of Smith v. Saddle Co., 148 U. S. 674–678, 13 Sup. Ct. 768, 769:

"The first three of these classes plainly refer to ornament or to ornament and utility, and the last to new shapes or forms of manufactured articles; and it is under the latter clause that this patent was granted."

The same is true of the patent in suit, and the question is whether that which is here claimed to be a patented configuration is new, useful, and original, and is the shape or configuration of an article of manufacture. The court below held that the term "useful," which was introduced into the statute by the amendment of 1870, required that the shape or configuration should embrace some new utility, and that, as the patent in suit was conceded not to involve any utility different from that presented in other and previous machine frames, the patent was void. We should think it very doubtful whether the word "useful," introduced by revision of the patent laws into the statute, is to have the same meaning as it has in the section providing for patents for useful inventions. The whole purpose of congress, as pointed out by Mr. Justice Strong, speaking for the supreme court, in the case of Gorham Co. v. White, 14 Wall. 511, was to give encouragement to the decorative arts. It contemplated not so much utility as appearance. "The law manifestly contemplates

that giving certain new and original appearances to a manufactured article may enhance its salable value, may enlarge the demand for it, and may be a meritorious service to the public. * * * It is the appearance itself which attracts attention and calls out favor or dislike. It is the appearance itself, therefore, no matter by what agency caused, that constitutes mainly, if not entirely, the contribution to the public which the law deems worthy of recompense." This decision was rendered at a time when the statute of 1861 was in force. By that statute a design patent was provided for "any new and original shape or configuration of any article of manufacture." The word "useful" did not appear in this phrase. It did, however, appear in another part of the same section, to wit, "any new and useful pattern, or print, to be either worked into or worked on, or printed, or painted, or cast, or otherwise fixed on any article of manufacture." By the act of 1870, which was a revision as well as amendment of the patent laws, the word "useful" was transferred from the office of qualifying patterns and prints to that of qualifying shapes or configurations of matter. 12 Stat. 246. We cannot infer from the transfer of a single word from one phrase to another, where both are in pari materia, that thereby, as to one of the classes of designs protected by the statute, the whole purpose of congress, as pointed out by the supreme court, was changed. We must infer that the term "useful" was inserted merely, out of abundant caution, to indicate that things which were vicious and had a tendency to corrupt, and in this sense were not useful, were not to be covered by the statute. As already said, the statute is a revision, and the presumption of the legislative intention to change the meaning by a change of language is by no means so strong as when the sole object of the statute is to amend. We concur in the opinion of Mr. Commissioner Hall in Ex parte Schulze-Berge, 42 O. G. 293, in which he says:

"There can be no doubt that an invention, to be the subject of a mechanical patent, must possess utility or usefulness; but it is a usefulness which relates to mechanics,—the modification or control of physical forces. On the other hand, the subject of a design patent may also be useful in an entirely different sense or direction, and I think the word 'useful,' in the statute (section 4929, Rev. St.), is employed in a different sense. The subject of invention, so far as form or shape or configuration is concerned, must be useful in the sense that it tends to promote pleasure, refinement, comfort, depending upon the sense of the beautiful. It must be useful in the sense that it must not be mischievous, obscene, or tending to produce evil or wicked reflections. Invention in this field of art relates to the intangible, and its power consists in its ability to awaken pleasant and agreeable sensations, conceptions, and thoughts, and the usefulness involved is that which brings about these results."

See, also, Ex parte Norton, 22 O. G. 1205; Kraus v. Fitzpatrick, 34 Fed. 39.

It is further objected by the appellee that the frame of the electric machine is not an article of manufacture, within the meaning of the statute above quoted, and that a design patent cannot be granted for the configuration of what is part of a machine, rather than an article of manufacture, within the meaning of the law. The question is not free from difficulty, and we do not find it necessary to consider it. Assuming that a frame for an electric machine might be made the subject of a design patent, we are clearly of opinion that

the frame here patented was not new or original, in view of the existing state of the art.

It is conceded on behalf of the appellant that the physical and mechanical necessities of the electric machine, of which the subject-matter of this patent was to form the frame, required a cylindrical frame in which should be the field of the multipolar dynamo, and in which the armature must revolve, and that there must be pillars at each side of this cylinder to support the axis or shaft of the armature. It is also conceded that it was a necessary mechanical arrangement that the field and revolving armature should be nearer to one of the supports than the other. Many forms of the frame of the electric machine have been introduced in evidence by model and drawing, and in each we find the pillars and cylindrical frame between; and the only distinction which counsel for complainant has been able to point out between the patented design and previous forms is in the curvature of the base of the pillars, and of the bases of the supports to the cylinder frame for the field. In the patented design the bases of the pillars and of the cylinder are curved so as to make them almost continuous from the cylinder to the pillar. In the Elwell Parker machine frame we find the curve at the base of the pillars, but with only a very slight curve, if any, at the base of the cylindrical frame. In the Alioth machine we find curved bases to the pillars, with a curved web connecting one pillar with the cylinder, while the other pillar, though curved to the base, is not directly connected with the cylinder. As pointed out by counsel for the defendant, and as admitted by the witnesses for the complainant, the insertion of a small curved fillet at the base of the cylinder on each side would destroy all material difference in appearance between the patented design and the Elwell Parker frame. It is further shown by the evidence that curves like this at the base of a standard or pillar are of the commonest use, and are at once suggested to the practical builder of such a machine, by the fact that they render the casting of them much easier and more certain of success. In general appearance the Alioth and the Elwell Parker machine are very like the patented design. The difference in the curve at the bottom is one which would suggest itself to any workman, and does not involve that exercise of the inventive genius which is as necessary to support a design patent as a mechanical patent. Smith v. Saddle Co., 148 U. S. 674–679, 13 Sup. Ct. 768; Northrup v. Adams, 2 Ban. & A. 567, Fed. Cas. No. 10,328; Foster v. Crossin, 44 Fed. 62. For this reason, and without considering the other interesting questions presented in full in the briefs of counsel, we affirm the decree of the circuit court, at the costs of the appellant.

CHANDLER ADJUSTABLE CHAIR & DESK CO. v. TOWN OF WINDHAM.

(Circuit Court, D. Connecticut. October 11, 1899.)

PATENTS—INFRINGEMENT—ADJUSTABLE SUPPORTS FOR SCHOOL FURNITURE.

The Roulstone patent, No. 508,557, for adjustable supports for school furniture, in view of the prior state of the art, is a very narrow one; the essential features of the claims being confined to mere details of construction.

This was a suit in equity by the Chandler Adjustable Chair & Desk Company against the town of Windham for infringement of a patent. On final hearing.

Richard P. Elliott and Edward S. Beach, for complainant.
Perkins & Perkins and Frederick L. Emery, for defendant.

TOWNSEND, District Judge. Final hearing on bill and answer raising the questions of validity and infringement of complainant's patent, No. 508,557, granted November 14, 1893, to Thomas R. Roulstone for adjustable supports for school furniture. Complainant originally brought a suit under this patent and a Feely patent, hereafter referred to, against the makers of the infringing device. Some testimony was taken, but the suit was not pressed, and this suit was brought, and thereafter it was agreed that the former suit should await the determination of this suit. The defendant herein is a mere purchaser and user, and the action is defended by the successors of the corporation which sold these desks to the defendant, which successors are located in the First circuit, and still make these infringing chairs. No sufficient reason is shown why the complainant has asked for an injunction and accounting against this purchaser, who, so far as appears, has no intention of committing further infringement, instead of against the real defendant.

The patent relates to adjustable supports for desks and chairs, and has for its object to regulate and adjust the height of school furniture according to the size of the pupil for whom it is to be used. The three claims, all of which are alleged to be infringed, are as follows:

"(1) An adjustable support for school furniture, consisting of a base portion, C, having vertical guides, C', and a notch, C'', at its upper end, a shank, B, having a vertical slot, b, guide ribs, B', and vertical lips or ledges, B^2, a clamping bolt, D, detachably fitting within the notched upper end of the base portion, and extending through the vertical slot in the shank, a washer, E, bearing against the vertical lips or ledges of the shank, and a nut, d, engaging the bolt and bearing against the washer, substantially as described. (2) An adjustable support for school furniture, consisting of a base portion, C, having vertically tapering guides, C', and a notch, C'', at its upper end, a shank, B, having a vertical slot, b, and tapering guide ribs, B', fitting the tapering guides of the base portion, a clamping bolt, D, engaging the notched upper end of the base portion and extending through the vertical slot in the shank, a washer, E, bearing against the shank, and a nut, d, engaging the bolt and bearing against the washer, substantially as described. (3) An adjustable support for school furniture, consisting of a base portion, C, having vertical tapering guides, C', a shank, B, having a vertical slot and tapering guide ribs, B', fitting the tapering guides of the base portion, and a clamping bolt engaging the base portion and extending through the vertical slot in the shank, substantially as described."

The adjustable support consists of a base, and a shank with vertical ribs tapered to correspond with guide grooves in the base so as to protect the stand against downward pressure. The shank and base are held together by a screw-threaded bolt, which passes through a horizontal slot in the shank and is secured by a nut and washer. It is claimed that the patent covers the use of tapering slides so adapted to each other as to secure the benefit of a wedge action. The complainant contends that this is a pioneer patent, which has solved the problem of adjustable school furniture. The evidence,

however, shows that the patent is a step backward; that the complainant itself has abandoned the construction described therein, and has ceased paying the agreed royalties to the Roulstone representatives; that it is no longer making school furniture under the Roulstone patent, but is making it under the Feely patent; and that the Roulstone patent is so defective that, to use the language of the treasurer of the complainant company concerning the Roulstone standards in his affidavit in support of the application for the Feely patent:

"I consider them efficient for their intended purpose, when applied singly to chairs; but when they are applied in pairs to desks they are open to the objection that the screws whereby they are secured to the desk and floor are soon wrenched loose, owing to the fact that the faces on the upper and lower portions of the standards, on which the said portions slide, are slanted, and hence separate slightly when the desk is raised, and have to be drawn together again laterally in order to clamp the desk in its adjusted position. The defect just stated has been known to me and to the company generally ever since the Roulstone standards were put upon the market, by reason of numerous complaints from the purchasers thereof; but, although the company would at all times have been glad to discover a practical means of obviating the said defect, yet no one in its employ, so far as I am aware, has ever been able to propose any way of doing so."

Prior patents showed every element of the patented combination in this art. The patent to Thompson granted December 3, 1872 (No. 133,551), shows every element of the first claim, except the notch, which the defendant does not use. The only material difference between this claim and the second and third claims is in the addition of a wedge device which is shown in the Fisher and Alliger patents. This construction is used by the defendant. All that the complainant did was to shift the wedge of the Fisher patent so that there should be double-wedged surfaces bearing against each other, instead of a single-wedged surface as shown therein, without securing any new function or result. The complainant is therefore in this dilemma, on either horn of which he must be impaled: Either the change of location of the two slanting wedges from Fisher or Alliger does not involve invention, for the foregoing reason, or, if it does involve invention, then it does not embrace the Alliger and Fisher construction used by the defendant. Furthermore the file wrappers of the Roulstone and Feely patents show that the patent in any case is a very narrow one; that the claims are very limited, and that the patentee, as a condition of securing said claims, admitted that the essential features thereof were mere details of construction. Defendant further shows that the first claim is limited to a notch, which it does not use. For the purpose of supporting the patent, complainant's counsel have insisted upon a protection against lateral motion by reason of certain transverse wedging afforded by the action of the bolt and washer upon the sides of the slotted shank. This characteristic of the patent is not referred to in the specification or claims, except as it may be inferred from the use of the word "spanning." That it was not thought of or claimed in the patent in suit is evident from the fact that it is specifically claimed in the fourth claim of the Feely patent taken out by complainant as assignee, and from the statement of its counsel in the Feely application that the

Roulstone patent does not cover this transverse-wedging construction. In view of the necessarily limited construction to be given to the patent by reason of the foregoing facts, it must be held that the defendant does not infringe any of said claims, and a decree may therefore be entered dismissing the bill.

YALE & TOWNE MFG. CO. v. SARGENT & CO.

(Circuit Court, D. Connecticut. September 5, 1899.)

PATENTS—INVENTION—IMPROVEMENT IN LOCKS.

The Taylor patent, No. 373,107, for an improved lock, the improvement consisting in the use, in an ordinary mortise door lock, of a guard plate, or extra face plate, to cover the head of a set screw for greater security, does not disclose patentable invention, and is void.

This was a suit in equity by the Yale & Towne Manufacturing Company against Sargent & Co. for infringement of a patent. On final hearing.

Wetmore & Jenner, for complainant.
John Kimberly Beach and Samuel H. Fisher, for defendant.

TOWNSEND, District Judge. At final hearing herein defendant contests the validity, and denies its infringement, of complainant's patent No. 373,107, granted November 15, 1887, to Warren H. Taylor, for an improved lock. The improvement relates to the old ordinary mortise door lock where the cylindrical tumbler case or escutcheon is screwed into the bolt case. Such escutcheons are generally grooved on the side, and a set screw, screwed through the face plate, fits with the groove, and prevents the escutcheon from being turned. When the door was unlocked, it was possible to turn this set screw far enough back to disengage it from the escutcheon, and, when the door was again locked, to unscrew the escutcheon, and thus get access to the bolt, and unlock the door. The patentee herein proposed to provide greater security against such tampering with the lock by screwing to the regular face plate of the lock an extra face plate, which he called a "guard plate," and which covered the head of said set screw. The claim is as follows:

"In a lock, the combination, with an escutcheon-securing set screw, of a guard plate covering the head of the set screw, and secured to the face plate of the lock, substantially as set forth."

It is difficult to conceive on what theory a patent could be granted for such a mere cover, or aggregation of two duplicate face plates. It is conceded that the construction involved nothing more than mere mechanical skill. The prior art in various patents showed face plates, set screws, and guard plates covering the heads of set screws and secured to the face plates, substantially identical in construction with that of the patent in suit.

The position of counsel for complainant is as follows:

"The matter, therefore, comes to this: That invention may be involved in the claim if the conception is novel, and the practical embodiment of it is useful, notwithstanding that the mere execution of it may involve merely me-

chanical skill. The question, then, is, was there inventive genius in Taylor's conception as embodied in the claim? And * * * the defendant's argument * * * is that invention was not involved in transferring from the lock of the Pitt, * * * Biggs, or Hart patent the supplemental plates shown in those constructions, in view of the fact that plates of various forms had been used in articles of household hardware to cover up screws; and it is asserted that the guard plate of the Taylor lock performs its function of covering up the set screw in the same manner that these older plates performed their respective functions. When we consider that Taylor's invention involved the projection of the inventive faculty much further into the unknown, and that he gave birth to an idea which involved the retention, without impairment of all the advantages of the existing lock, and giving to it, in addition, greatly increased security, then we see that the proposition that the peculiar means employed by him did its work in the same way that prior plates did their work is irrelevant. The important matter is that the work which the Taylor guard plate does is not the same work which the prior plates did, and this difference in work proves a difference in function. The manner of doing the work is nothing; the work done is everything."

It is established by various decisions that a novel conception of the application of old means to produce a new and unusual or unexpected result is not a double use, and may be patented. The question in such cases is whether the conception involves invention. In Newark Watch-Case Material Co. v. Wilmot & Hobbs Mfg. Co., 60 Fed. 614, the patent was for an external removable sheet-iron watch protector to prevent it from being affected by magnetic currents. The prior art showed similar boxes, designed for protection against robbery. The circuit court of appeals (13 C. C. A. 27, 65 Fed. 507) held, affirming the decision of the court below, that, although no anticipatory watch protector was shown, yet the question was one of patentability, and that, as the idea was a natural and obvious one, it was not patentable. So, in the case at bar, the use of such duplicate face plate being old, the mere idea that it might here be used as an additional protection, but in exactly the same form, is so obvious as not to be patentable. In Watson v. Railway Co., 132 U. S. 161, 10 Sup. Ct. 45, the patentee claimed that he was the first person who conceived the idea of combining in one freight car an inside flexible and outside rigid door, and that various advantages were the result of such combination. The supreme court cited, approved, and affirmed the opinion of the circuit court that such a construction was a mere aggregation, and did not involve invention. The reasoning in said case is directly applicable to the case at bar. As was said by Mr. Justice Matthews in Heald v. Rice, 104 U. S. 754: "It is only the occasion which is new; the use itself is merely analogous." Let the bill be dismissed.

CITY OF CHICAGO v. WISCONSIN S. S. CO.

(Circuit Court of Appeals, Seventh Circuit. October 3, 1899.)

No. 550.

1. NAVIGABLE WATERS—BRIDGES—NEGLIGENCE IN CONSTRUCTION OF DRAW.
Where the draw of a bridge maintained by a city over a navigable stream is provided with a lock at one end, sufficient to hold it in position when open, under ordinary circumstances, the city is not chargeable with negligence because such lock is not sufficiently strong to withstand the

impact of a vessel striking against the side of the draw at the opposite end, or because the draw is not locked at both ends.

2. SAME—SUIT FOR INJURY OF VESSEL—BURDEN OF PROOF.

In a suit against a city to recover for an injury caused by the draw of a bridge swinging out and striking a passing vessel, where there was evident fault on the part of the vessel or the bridge tender, but it is not satisfactorily located by the evidence, the libel will be dismissed.

Appeal from the District Court of the United States for the Northern District of Illinois.

This was a libel in personam by the Wisconsin Steamship Company against the city of Chicago to recover damages for injuries to libelant's steamer, the Thomas Davidson, then in tow of the tug William Dickinson, by collision with the Indiana Street Bridge, which occurred May 13, 1895, through the alleged negligence of the bridge tender.

The undisputed facts of the case were as follows: The bridge crosses the north branch of the Chicago river from east to west, and rests upon a turntable built upon piles in the middle of the river. The bridge swings north and south, and, when open, is supported upon what is known as the "center protection," which extends the whole length of the draw up and down the river, north and south. It is constructed upon piles driven into the bottom of the river, bound together and planked over with a stringer around it, and forms a sort of a platform upon which the bridge, when open, rests. The bridge was 32½ feet in width; the platform 35½ feet, projecting beyond the bridge a distance of nearly 2 feet upon either side. The bridge proper hung about 9 feet above the water. The main channel of the river was on the west or starboard side of descending vessels. The draw of the bridge was swung upon the center, but was locked at the north end only. This lock was formed by the dropping of a bar attached to the bridge into a socket standing up from the protection.

The steamer was 312 feet long, 42 feet beam, and, had she been kept in the center of the channel, would have had 2½ feet clear upon either side.

The collision occurred a little while after dark, as the steamer came down the north branch of the river, and passed through the westerly channel of the draw. As she was passing through, from some cause, the north end of the bridge swung into the channel, and over the port quarter of the steamer, carrying away some of her upper works, including her after-cabin. The allegation of the libel in this connection is that "the steamer had almost got through the draw of said bridge, when the bridge tender carelessly and negligently swung said bridge in and over the side of said vessel near the stern and at her quarter, and caught the forward end of said steamer's boiler house, crushing it in, and knocking down her smokestack, breaking her steam pipes, and blowing off the steam," etc.; and further, "that the said bridge tender caused said bridge to swing so unexpectedly and suddenly that there was nothing the master of said steamer could do to avoid the accident, and that said accident occurred solely through the negligence and unskillfulness of said bridge tender in causing said bridge to run foul of and against said steamer as aforesaid."

This allegation of fault was practically abandoned upon the hearing, and the cause tried upon the theory, not that the bridge tender negligently swung the bridge as the steamer was passing through, but that the bridge had not been swung over in line with the center protection and locked, as it should have been, but was left so far out of line that the bow of the propeller struck it at the southerly end, and thereby caused the north end to swing over the propeller.

Upon a full hearing upon pleadings and proofs, the district court was of opinion that the collision occurred either by reason of the fact that the bridge was not exactly parallel with the protection, and that the south end projected into the river, or because the bridge was not locked at both ends, as, in its judgment, it should have been. A decree was accordingly awarded against the city for $3,006.87, from which respondent appealed to this court.

Charles E. Kremer, for appellant.

Robert Rae, for appellee.

Before BROWN, Circuit Justice, and WOODS and JENKINS, Circuit Judges.

BROWN, Circuit Justice (after stating the facts as above). The material question in this case is whether the bridge, as the tow approached the draw, was in line with the center protection or pier, and was properly locked at its north end. If it were not exactly in line, then the south end probably projected into the draw, and, as there was only a margin of 2½ feet on each side of the steamer, a blow against the south end of the bridge would thrust it to the eastward, with a corresponding movement of the north end to the westward, which would carry it directly over the port quarter of the steamer. Upon the other hand, if the bridge were directly in line with the center protection, and properly locked, it is difficult to see why the whole duty of the city to the steamer was not discharged, as the protection projected beyond the bridge on either side a distance of 1½ to 2 feet, and the steamer would encounter and be warded off by the protection before it touched the bridge.

The presumption and the probabilities are that the bridge tender performed his whole duty in this particular. The direct testimony is all to the same effect. Not only does the tender swear that the bridge was locked, but the master of the steamer, who was standing on the pilot house, in full view of the bridge, says there was nothing in the situation to apprise him of any danger of collision, and that the bridge seemed to be perfectly parallel with the abutment, so that it could not have projected over any; and that, after he had passed the lower end of the center protection, he suddenly heard a crash, which he at first thought was an explosion. There is no testimony to contradict this.

The only allegation of negligence in the libel is that "the bridge tender carelessly and negligently swung the bridge over the vessel." There is absolutely no testimony to support this theory, and it may well be doubted whether such evidence as there is of negligence is not a material departure from the allegations of the libel, though it is probably too late to raise a question of variance in the appellate court. The bridge tender, in this connection, swears that, as the vessel passed, he was standing against the lever by which the bridge is swung, and that as he was standing there, watching, he received a sharp blow in the back, which knocked him over, and rendered him nearly unconscious. When he got up, the lever had gone around three or four times, and the bridge was over the boat. If this testimony be true,—and it seems by no means improbable,—it indicates almost conclusively that some great force was suddenly brought to bear upon the south end of the bridge, which caused an abrupt and violent motion of the bridge lever.

The negligence now relied upon is that the bridge tender failed to lock the bridge, by reason whereof the south end was struck by the steamer, and the north end driven over her port side. As already observed, there is no direct testimony to this effect, and the fact that the center protection projected beyond the bridge indicates that the steamer would come in contact with the protection before it could touch the bridge.

The fact that the steamer must in some way or other have hit the bridge is accounted for by the respondent by an elm fender hanging over the port bow of the steamer—a stick of timber about 22 feet long, 12 inches wide, and 7 thick—coming in contact with the bridge. This fender was hanging over the side of the vessel at a point forward of where the vessel is widest, or where it begins to taper towards the bow. At this point the steamer was wider on deck than at her water line, tapering gradually from the deck to the keel. Her draft at this point was between 5 and 6 feet. The theory is that, as the steamer came up against the center protection, the bottom of the fender would be shoved in against her side, while the rail at the deck line, or near it, would press against the middle of the fender, and, the upper portion being held firmly by a strap to her side, the deck would make of the fender a bent bow, and as the bow was being bent by the shape of the vessel and her weight against the center protection, the fender could not withstand so great a strain, and broke at a point about 3 feet from the upper end; that, as it broke, it violently shot out and struck the bridge (this blow being followed by a continuous pressure), and started it, notwithstanding the fact that it was locked at the north end. In corroboration of this, libelant's testimony tended to show that immediately after the collision the lower end of the fender was taken out of the water where it had fallen, while the other end remained on the bow of the boat; that there was also paint upon the fender of the color of the bridge, and that certain slivers from the fender were also taken from the damaged portion of the bridge. Libelant's explanation of this is that the fender was not broken that night, but that two days thereafter, in coming down from the Union Elevator, the propeller got athwart the draw of another bridge, and required the assistance of tugs to pull her off; and in some way the fender got broken against the chains that went around a clump of piles at the protection. This directly contradicted the testimony of the respondent, which indicated that the lower end of the fender was picked up immediately after the collision, and laid upon the abutment of the bridge.

However improbable it may seem that a stick of timber of the size of this fender could have been broken in the manner indicated, the testimony upon both sides tends to show that it was broken substantially in this way, either that night, by coming in contact with the bridge, or within a day or two thereafter, by coming in contact with another bridge at Sixteenth street.

We think the city cannot be charged with negligence in failing to have a lock at both ends of the bridge, though that probably would have lent additional safety. The object of the lock is merely to hold the bridge in position over the center protection, and not to resist the impact of a moving vessel. The lock is simply a revolving iron pulley of five or six inches in diameter that falls into a groove or notch of the size of the pulley at the end of the latch, and half its diameter in depth, so that it would not be difficult, with a strain on the bridge, to have the latch roll out of the notch or groove into which it falls. While such additional lock might have increased its resisting power, it is merely a matter of conjecture whether it would

have been sufficient to prevent a collision. There is no allegation in the libel upon the subject. The duty of the city in that regard was not to supply every possible protection, but only such as experience shows to be necessary in the usual use of the bridge. We think the city was not bound to go further, and provide appliances which would enable the bridge to resist the impact of a heavy steamer.

We do not think the mere fact that the north end of the bridge inflicted the injury shifts upon the city the burden of accounting for it and exonerating itself. This injury was so obviously the effect of a sudden thrust at the south end that it belongs to the steamer to establish the fault of the city there.

Upon the whole case we are of opinion that, while the actual facts are by no means free from doubt, libelant has not made out its case by a preponderance of testimony. If there be any such preponderance, one way or the other, it is rather in favor of the respondent. Where fault is evident, but cannot be satisfactorily located, the libel should be dismissed. The Worthington and Davis, 19 Fed. 836.

The decree of the court below must therefore be reversed, and the case remanded, with directions to dismiss the libel.

THE CARRIER DOVE.

RICH v. WILLIAMS et al.

(Circuit Court of Appeals, First Circuit. October 27, 1899.)

No. 306.

1. SEAMEN—LIEN OF FISHERMEN—VOYAGE ON LAYS.
   Fishermen are seamen, and, except as modified by their peculiar contracts, express or implied, are protected by the law as other seamen are, and for their wages may look to the vessel, her master, and ordinarily her owners.
2. SAME.
   The fact that the master, who is part owner of a fishing vessel, charters it from his co-owners for a voyage on the "quarter clear lay," and afterwards engages a crew, agreeing to give them the same share of the catch as though they had together chartered the vessel, does not render the members of the crew co-charterers; but they have all the rights of seamen, including the right to a lien on the vessel, as for wages, for the value of their share of the catch.

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

Eugene P. Carver (Edward E. Blodgett, on the brief), for appellant.
John W. Keith and Robert Homans, for appellees.

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

WEBB, District Judge. The appellant appears to misapprehend the relations of the libelants to the vessel and her owners. The evidence in the district court is not reported. Instead of it, the parties present to this court what is denominated an "agreement as to evidence." This agreement is not full enough, in respect to many ques-

tions which arise, to show clearly the details of the contract of the appellants with Manuel Silva, the captain, and that of the captain with the members of the crew. We are left to discover those matters, as best we can, from what this agreement contains; and, examining it carefully, we do not find anything to support the appellant's statement of the relation of the crew to the vessel or to the master. We are satisfied that the claimants, together with Manuel Silva, were owners of the schooner Carrier Dove, and that, being so co-owners, Silva contracted with the appellants to take the schooner and employ her in the fishing business on what is called the "quarter clear share." At that time no crew had been engaged, and, so far as can be perceived, neither Silva nor the other owners had any knowledge of the libelants. By his contract with his co-owners, Silva was only to pay for the use of the vessel one quarter share of the gross catch. As to the fishermen whom he should engage, he was free to pay wages in money, or, in lieu thereof, to give to each such a share of the catch as he might agree upon with each. Of the vessel's quarter, he would be entitled to his share, proportionate to his ownership of the vessel. In fact, he gave the members of the crew the same shares of the profits of the business that they would have, according to custom, if he and they together, and as contracting parties, had chartered the schooner on the "quarter clear lay." But this did not make the crew co-charterers with Silva. It was only a way of determining their compensation, substituting the uncertain returns of the business for a fixed rate of wages. Had they been co-charterers, they would be liable to the claimants for the proportion of the catch due the vessel.

To the erroneous theory of the claimants, of a charter by the crew, all the difficulty and doubt about the rights of the parties may readily be attributed. Engaging to become members of the crew, under the circumstances of this case, did not give to the libelants all the rights and powers, nor did it subject them to the duties and responsibilities, attaching under the usages and customs of the "quarter clear lay," that they would have and be subject to if they had themselves been parties to the contract for the use and employment of the vessel. They had not a full right and power to select their own agent for the sale of the catch, for the simple reason that they were not partners. They were hired fishermen, whose wages were dependent on the success of the fishing in which they engaged. Fishermen are seamen, having uses and customs peculiar to their business, but are at the same time, except as modified by their peculiar contracts, express or implied, protected by the law as other seamen are. For their wages they can look to the vessel, her master, and ordinarily her owners. But when the master by his contract has become owner pro hac vice, as was the fact in this instance, and well known to them, they cannot look to the owners personally. The decree of the district court is affirmed, with interest, and one bill of costs of appeal is awarded to the appellees.

HICKMAN et al. v. MISSOURI, K. & T. RY. CO.

(Circuit Court, W. D. Missouri, C. D. October 17, 1899.)

1. JURISDICTION OF FEDERAL COURTS—SUIT BY STATE RAILROAD COMMISSIONERS —REMOVAL.
   A suit brought by the railroad commissioners of Missouri, under the statutes of the state, against a railroad company, to enforce obedience to an order of the commission fixing rates, is not one in effect on behalf of the state, or in which the state is the real party in interest, so as to prevent its removal from a state to a federal court by the defendant, where the statutory grounds for removal exist. The real parties in interest in such a suit are the carrier and its patrons, and the state is interested only in a governmental sense.
2. SAME.
   Neither the fact that a state appropriates money in aid of suits brought by its railroad commissioners, to be paid out, on their requisition, in payment of expenses and costs audited by the state auditor and approved by the governor, nor a statute authorizing the imposition of fines and penalties by a court upon railroad companies refusing to conform to rates fixed by the commission, which fines and penalties are paid into the school fund, makes the state a party, within the meaning of the eleventh constitutional amendment, to a suit by the commissioners against a railroad company, in which the only issue is the validity of rates fixed by them.
3. REMOVAL OF CAUSES—WAIVER OF RIGHT.
   Where a state court denies a petition for removal, and the defendant thereupon causes a transcript of the record to be filed and docketed in the federal court, and such petition and record disclose good grounds for removal, the state court is without jurisdiction to proceed further, and the defendant does not, by further appearing and contesting the case therein, waive his right to proceed in the federal court.

On Motion to Remand to State Court.

Edward C. Crow, Atty. Gen., for complainants.
George P. B. Jackson, for defendant.

PHILIPS, District Judge. The motion to remand this cause was submitted at the last term of court. The essential facts of record are as follows: On the 21st day of October, 1895, plaintiffs filed their petition in the state circuit court of Cooper county, Mo., against the defendant railroad company, a citizen of the state of Kansas, which, in substance, recited that the defendant company was controlling and operating a railroad bridge over the Missouri river at Boonville, Mo., as a part of, or in the use of, its line of railroad; that complaints having been made to plaintiffs, as the board of railroad and warehouse commissioners, that arbitrary, illegal, and improper charges had been made by defendant for carrying passengers and freight over said bridge, the commissioners had, after notice, examined into the reasonableness of such charges, and, becoming satisfied that the complaints were reasonable, had issued an order establishing a reduced rate of charges; and that the defendant company was nevertheless proceeding, in disregard of the action of the commissioners, to exact a higher rate. They prayed for an injunction, or such other process, mandatory or otherwise, as might be necessary in the premises to restrain the defendant from further continuing to violate the findings of the plaintiffs. The defendant, being duly summoned, appeared in said court on the 21st day of October, 1895, and filed its

petition for removal of the cause into the United States circuit court for this district. The petition was in due form, alleging that the defendant was at the times aforesaid, and then was, a nonresident, —a citizen of the state of Kansas,—and that plaintiffs were resident citizens of this district, and that the amount of the subject-matter in dispute in the suit, exclusive of interest and costs, exceeded the sum and value of $2,000, and presented therewith the required bond. This petition for removal the court overruled on the 30th day of October, 1895. Thereupon the defendant had made out a transcript of the record and proceedings, and filed the same in this court on the 4th day of March, 1896, before the first day of the next term of court. By leave and under order of the court the defendant afterwards, to wit, on the 23d day of April, 1898, filed its answer herein, which tendered the general issue as to the averments respecting its dereliction of duty, and pleaded specifically that the action taken by the railroad commissioners in the regulation and establishment of tariff rates over said bridge was irregular, and not in conformity to the statute of the state under which the commissioners claimed to have acted. It further pleaded that said railroad bridge was and is an independent corporation from the defendant company, authorized to be built under an act of congress, and that the bridge company had the authority and power to collect tolls for freight and passengers passing over said bridge; that in order to raise the money to construct said bridge the bridge company issued its bonds for a large amount, to wit, the sum of $1,000,000, bearing interest at the rate of 7 per cent. per annum; that thereafter the defendant, in order to obtain the use of said bridge for crossing its trains, passengers, and freight thereover, entered into a contract with the bridge company by which it undertook to guaranty the payment of the interest upon the bonds of said bridge company in consideration of the privilege of the use of the bridge; and that as a part of said agreement it was stipulated that all tolls arising from the passing of freight and passengers over said bridge should be appropriated to the payment of said interest, and to create a sinking fund for the payment of the principal of said bonds; that accordingly under said agreement the defendant collected the stipulated tolls from passengers and freights passing over said bridge, and deposited the same as a fund (1) to meet each accruing interest payment, and (2) the surplus of tolls so collected in each year were set apart in a proper depository to take up the principal of said bonds, defendant agreeing in said contract that the tolls should amount in each year to the sum of $70,000, being the total interest charge which the defendant was required to pay; that the defendant was operating said bridge under and in pursuance of said agreement and arrangement, and was collecting tolls from all persons and on all freight passing over said bridge, and appropriating and setting aside the proceeds therefrom as by said contract required; that said tolls are not charged for the transportation or hauling of passengers or freight, but are purely tolls for passing and crossing over said bridge; that, while they are collected immediately by the defendant, they are collected by it as the agent and representative of said bridge company, whose property said tolls become as

soon as collected, and that therefore said tolls charged have no connection with the rates or fares charged the passengers traveling upon the defendant's railroad, nor with the rates of freight charged for freight hauled over said railroad; that such tolls so charged and collected by the defendant are authorized by the act of congress authorizing bridge companies, and by the incorporation of said bridge company under the laws of the state of Missouri; and that therefore the action of the complainants is in violation of the contractual rights of the defendant. On June 6, 1898, the plaintiffs filed their reply to the answer, which pleads, in substance, that after said petition for removal from the state court had been overruled by the court the defendant appeared therein and filed motion for a continuance of the cause, by which act, the reply claims, the defendant abandoned its said motion to transfer the cause to the United States court, and waived the objection to the jurisdiction of the state circuit court, and that afterwards the state court took up the cause and entered a decree therein in favor of the complainants; that thereafter the defendant filed a motion for new trial and in arrest of said judgment, whereby, the reply claims, the defendant abandoned its action theretofore taken for the removal of the cause, and waived its objection to the jurisdiction of the state circuit court, which motion the state circuit court overruled, and the defendant took an appeal therefrom to the supreme court of the state, by which action, it is alleged, it again abandoned its objection to the jurisdiction of the state court. The reply further tendered the general issue as to the new matter pleaded in the answer. And on the same day, to wit, June 6, 1898, the complainants filed herein a motion to remand this cause to the state court for the reason (1) that this court has no jurisdiction to try and determine the same; (2) because the petition for removal of the cause was properly overruled; (3) because the defendant by its action subsequently taken in the state court waived its objection to the jurisdiction of that court; (4) because the judgment of the state circuit court is final.

When this motion to remand was taken up and submitted at the last term of this court, the only ground suggested by the attorney general of the state in its support was that the action was in fact and law one in behalf of the state, and the state was and is the real party in interest, and therefore the cause was not removable into this court. This is the only question presenting any reasonable ground for debate.

From the statement of facts, it appears that, after the transcript of record from the state court was filed and the cause docketed in this court, the plaintiffs, without raising the objection to the jurisdiction of this court on the ground that the state is a party, entered their appearance herein, and, inter alia, by their replication took issue on the merits of the case with the defendant. As between individual suitors, this would have been such an appearance as to amount to a waiver of any question of jurisdiction over the person of the parties. It might therefore be an interesting question, if the plaintiffs, as contended for in the motion to remand, represent the state, whether the state had not thus given its consent to try this controversy in the

United States court. If the exemption of the state against being brought into the federal court is a personal privilege, it is one that may be waived; but whether or not it would require legislative action to signify such waiver need not be considered in this case, as I prefer to place the decision of this question upon the broader ground established by the decisions of the supreme court of the United States.

The state is not named as a party. The court, however, may look through the record and ascertain whether or not, although not named as such, the state is in fact a real party. If the state is a real party in interest, in the absence of a controlling question arising under some federal law or the constitution, the suit is not removable from the state to the United States circuit court. Ames v. Kansas, 111 U. S. 449, 4 Sup. Ct. 437; Stone v. South Carolina, 117 U. S. 431, 6 Sup. Ct. 799. I had supposed, however, that the question as to whether, in a suit like this, between state railroad commissioners by name and a nonresident citizen of the state, the state is a party, was settled by adjudications of the supreme court of the United States. Mr. Justice Lamar, in Pennoyer v. McConnaughy, 140 U. S. 1, 11 Sup. Ct. 699, reviewed the decisions of that court bearing more or less directly upon the question here involved. In that case the bill was lodged against the land commissioners of the state of Oregon et al., to restrain the state officers from doing acts alleged to be a violation of complainant's contractual rights with the state. The jurisdiction of the federal court was challenged, as in this case, on the ground that, although the state was not named as a party, yet it was against the land commissioners, who were officers of the state, acting under its authority, and therefore the state was, in effect, a party to the suit. This contention was answered in the negative, and the jurisdiction of the federal court was maintained on two grounds: (1) That the state was not in fact a party; and (2) because the act of the defendants complained of was in contravention of section 10, art. 1, of the constitution of the United States. The answer filed in this case prior to the motion to remand makes allegations tending to show that the plaintiffs' contention and demand is violative of defendant's contractual rights, which the constitution will protect. But the removal here was not predicated of this defense. Since that decision the precise question, in legal effect, raised by this motion to remand, came before the supreme court in Reagan v. Trust Co., 154 U. S. 362, 14 Sup. Ct. 1047. Reagan, McLean, and Foster were railroad commissioners of the state of Texas, and Culberson was the attorney general of the state. Under a statute similar to that of Missouri the commissioners made certain classifications of freights, and established certain rates for the government of railroads in the state, which regulations the commissioners and the attorney general were threatening to enforce. The complainant, representing the mortgagees of the road, brought its bill in equity against the commissioners and the attorney general to prevent them from putting into operation and enforcing the tariff rates. Objection was raised to the jurisdiction of the federal court on the ground that the suit was, in effect, against the state of Texas. This contention was overruled by the supreme court, and in language so explicit as to leave

no doubt as to the meaning of the court touching this vexed question. Mr. Justice Brewer, who delivered the unanimous opinion of the court, said:

"We are unable to yield our assent to this argument. So far from the state being the only real party in interest, and upon whom alone the judgment effectively operates, it has, in a pecuniary sense, no interest at all. Going back of all matters of form, the only parties pecuniarily affected are the shippers and the carriers, and the only direct pecuniary interest which the state can have arises when it abandons its governmental character, and, as an individual, employs the railroad company to carry its property. There is a sense, doubtless, in which it may be said that the state is interested in the question, but only a governmental sense. It is interested in the well-being of its citizens, in the just and equal enforcement of all its laws; but such governmental interest is not the pecuniary interest which causes it to bear the burden of an adverse judgment. Not a dollar will be taken from the treasury of the state, no pecuniary obligation of it will be enforced, none of its property affected, by any decree which may be rendered. It is not nearly so much affected by the decree in this case as it would be by an injunction against officers staying the collection of taxes, and yet a frequent and unquestioned exercise of jurisdiction of courts, state and federal, is in restraining the collection of taxes illegal in whole or in part."

Further on the court said:

"Nor can it be said in such a case that relief is obtainable only in the courts of the state; for it may be laid down as a general proposition that, whenever a citizen of a state can go into the courts of a state to defend his property against the illegal acts of its officers, a citizen of another state may invoke the jurisdiction of the federal courts to maintain a like defense. A state cannot tie up a citizen of another state, having property rights within its territory invaded by unauthorized acts of its own officers, to suits for redress in its own courts. Given a case where a suit can be maintained in the court of the state to protect property rights, a citizen of another state may invoke the jurisdiction of the federal courts."

The petition in the case at bar discloses on its face that the commissioners are seeking by this action to protect the interests of individual patrons of the defendant road. It states, as the instigating cause of the action taken by the commissioners, "that informal complaints have heretofore been made to plaintiffs * * * that arbitrary, illegal, and improper charges have been made by said defendant for carrying passengers and freight over that portion of the defendant's road which passes over said bridge." The state statute (section 2653, Rev. St. Mo. 1889) under which the railroad commissioners assume to act opens with this language: "Where the complaint involves a private or public question, as aforesaid," the commissioners may take action. This statute likewise authorizes private citizens having grievances touching undue exactions by any railroad to institute proceedings before the commissioners, or the commissioners, upon complaint, may proceed in their behalf, as the matter involved is in a certain sense a public question. But the commissioners determine for themselves whether or not the complaint is worthy of their attention and investigation; and, as is well known, the commissioners, in making such investigations, call before them the aggrieved citizens, and hear their complaints, as well as the suggestions of the defendant company, and then decide what action in the premises shall be taken. But whether they initiate the investigation and rearrange the traffic rates at the instance of complaining private

patrons of the road, or sua sponte, it is nevertheless in a certain sense a public question, as the state, in the language of Mr. Justice Brewer, is "interested in the question, but only in a governmental sense. It is interested in the well-being of its citizens, in the just and equal enforcement of all its laws; but such government interest is not the pecuniary interest which causes it to bear the burden of an adverse judgment." It would not be seriously contended, I take it, that if, after the commissioners had established a given tariff schedule, a private citizen were to bring an action to enforce compliance with the regulations, a nonresident defendant railroad company could not remove such action from the state into the United States court, if the requisite jurisdictional amount were involved in the controversy. What difference, therefore, in principle, can it make that the commissioners of their own motion institute the proceedings? In either case the real party in immediate interest is the patron or patrons affected by the exactions imposed by the road. Mr. Justice Brewer again effectually disposes of this question by saying:

"Going back of all matters of form, the only parties pecuniarily affected are shippers and carriers, and the only direct pecuniary interest which the state can have arises when it abandons its governmental character, and as an individual employs the railroad company to carry its property."

It is suggested, however, that this case is to be differentiated from the Texas case, in that there is a provision in the Texas statute which authorizes any railroad company or other party in interest dissatisfied with the decision of any rate, regulation, etc., adopted by the commissioners, to file a petition for relief "in Travis county, Texas, against said commission as defendant," from which the conclusion is sought to be drawn that the state having thereby, in effect, consented that its commissioners might be sued, constituted the basis of the ruling of the supreme court. It is true that Mr. Justice Brewer, arguendo, adverted to said provision of the statute, but he most distinctly announced that such fact did not control the ruling of the court. After suggesting that the reservation contained in the eleventh amendment to the federal constitution could be waived by the state, and that possibly it had done so by said statute, as if apprehensive that the court might be understood as placing its decision as to jurisdiction upon that ground, he distinctly said:

"However, it is unnecessary to go so far as that, for this cannot, for the reasons heretofore indicated, in any fair sense be considered a suit against the state."

Again, it is suggested that inasmuch as the state appropriates money to aid in the prosecution of such suits by the commissioners, in paying expenses and costs, it has a direct interest in such litigation. The statute relied upon directs that such expenses and costs may be paid upon the requisition of the commissioners, after auditing by the state auditor, subject to the approval by the governor, and payable out of any moneys in the treasury "not otherwise appropriated." There are several conclusive answers to this suggestion. In the first place, should the commissioners fail in any such action, the judgment for costs would not be against the state of Missouri,

but solely against the plaintiffs. It could not be executed if given against the state, for the palpable reason that the state has made no provision therefor and has not consented thereto. The payment of such costs would be entirely optional with the state. The legislative branch might not make any appropriation therefor, and the governor might not approve the account. The defendant would have no remedy either to compel the legislature or the chief executive of the state to act. The state therefore can in no legal sense be said to have any direct pecuniary interest in this suit, which must be understood to mean an interest in the fruits of pending litigation which are to inure directly to its benefit. It cannot by any refinement of argument be made to depend upon the question of the remote possibility of one party or the other voluntarily assuming the payment of costs of the litigation. The state might, pro bono publico, consent to pay the costs which any private citizen should incur in the prosecution of an action to enforce the provisions of the regulations made by the commissioners to compel their observance by the railroad. Could it be maintained that, because of such assumed undertaking by the state, it thereby became so far a party to the suit as to deny the jurisdiction of the federal court when a nonresident defendant sought to remove such controversy into the United States court? The defendant would be remediless to enforce against the state any such provisions without its express consent. The legislatures of all the states having like statutes provide funds for the use of the commissioners in performing the duties of their office, but it never occurred to the supreme court of the United States, or any of the very learned lawyers engaged in such litigation as this, that such fact could affect the question of jurisdiction.

The final contention in support of this motion is that inasmuch as the statute provides that after the commissioners have established a schedule of rates, if the railroads refuse to comply therewith, the commissioners may proceed by injunction or mandamus against the nonconforming roads to compel obedience, and the courts may impose certain fines and penalties upon the roads, which fines shall inure to the benefit of the school fund, therefore the state has such pecuniary interest in this suit as to constitute it a party, within the meaning of the eleventh amendment. This suggestion cannot command my assent. Such subsequent proceedings, from which such penalties could result, do not inhere in the pending action at bar. They would be essentially contingent and separate. The subsequent action might never arise, as the defendant company might conform. It would also be entirely optional with the railroad commissioners, and any individual interested who is equally authorized to institute such proceedings, whether or not they would ask the court to proceed summarily against the offending roads. Independent of any statutory provision, the state court, in the exercise of its inherent power, could impose a fine for the violation of such injunction, in a contempt proceeding; and such fine, under the general law of the state, would go to the state. And, if this fact suffices to constitute the state a party in the original injunction suit, then by the same logic might it be maintained that the state, in legal contemplation, is a party to

every civil suit of injunction. The sole issue tendered by the pleadings in this case is to have determined the validity of the rates imposed by the commissioners, in which the state has no direct pecuniary interest, as held by the supreme court in the Texas case. The statute of the state of Texas contains a similar provision, subjecting the offending road to a forfeiture of money, to go to the state of Texas. This provision of the Texas statute is incorporated in the statement of facts in the Reagan Case, 154 U. S. 365, 366, 14 Sup. Ct. 1047, and was therefore before the eyes of the court in deciding that case. Neither the attorney general of the state nor the court considered that fact as affecting or bearing upon the jurisdictional question involved. This question again came before the supreme court in the Nebraska case (Smyth v. Ames, 169 U. S. 466, 18 Sup. Ct. 418), which brought the railroad transportation commissioners, the state officers, into the United States court to test the validity of the rates established by the commissioners of that state. The question was again raised that the state, in effect, was a party. But the able lawyers concerned in the cause did not express faith enough in the proposition to present it in other than the most perfunctory way, and the court disposed of it as a question that had passed in rem judicatam. The court predicated jurisdiction on the ground of diverse citizenship, as well as the fact of a federal constitutional question being involved. Page 518, 169 U. S., and page 423, 18 Sup. Ct. The Nebraska statute, present before the court, as shown by the statement of facts (pages 475, 476, 169 U. S., and page 420, 18 Sup. Ct.), contains a similar provision for heavy fines, to the use of the state, for violation of the regulations established by the commissioners.

The question here involved is essentially a federal question (Oakley v. Goodnow, 118 U. S. 43, 6 Sup. Ct. 944), on which the decisions of the supreme court of the United States are controlling, and this court must follow them. When the petition for removal, with the record in the case, disclosed the facts which showed the right of removal, and the proper bond was filed in the state court, the cause stood practically removed, and the jurisdiction of the state court ceased at once. Railroad Co. v. Koontz, 104 U. S. 5. No order of the state court was necessary to effectuate the removal. Kern v. Huidekoper, 103 U. S. 485. After the state court refused to remove the cause, the defendant was authorized by the act of congress to obtain a certified copy of the record of the state court and docket the case in this court; and his subsequent appearance in the state court and in the supreme court in the action taken by him therein constituted no waiver of the act of removal, nor prejudiced his right to proceed in this court. Insurance Co. v. Dunn, 19 Wall. 214; Removal Cases, 100 U. S. 457; Kern v. Huidekoper, supra. Therefore all the proceedings taken by plaintiffs in the state court after the removal was effected were coram non judice and absolutely void, for the obvious and conclusive reason that the "controversy" between the parties was then removed into the United States court, there to remain until finally determined. Railroad Co. v. Fulton (Ohio Sup.) 53 N. E. 265; Cox v. Railroad Co., 68 Ga. 448. When a petition for

removal is filed in the state court, the only question left for that court to determine is one of law,—whether, admitting the facts stated in the petition to be true, it appears on the face of the record, including the petition, the pleadings, and proceedings to that date, that the petitioner is entitled to removal, "and, if an issue of fact is made upon the petition, that issue must be tried in the United States circuit court." Railway Co. v. Dunn, 122 U. S. 513, 7 Sup. Ct. 1262. It results that the motion to remand is overruled.

LAZARUS v. McDONALD et al.

(Circuit Court, W. D. Missouri, St. Joseph Division. June 22, 1899.)

ATTORNEY AND CLIENT—AGREEMENT FOR LEGAL SERVICES.

Defendants' intestate was largely interested in certain corporations which became insolvent, and both he and the corporations made assignments for the benefit of their creditors. In this condition of affairs, the decedent made a written proposition to complainant, a lawyer, which was accepted, to secure his services in effecting a settlement and composition with creditors. Such proposition or contract embraced two essential features—First, decedent was to be relieved from personal liability on all the debts, individual and corporate; and, second, the exclusive right to any surplus of the assets then in the hands of the assignees "not needed in satisfaction of the claims against those assets should inure" to decedent. It further provided that, "upon a settlement with the creditors * * * as above set forth, you are to receive a fee equal to twenty per cent. of the value of the estates * * * inuring to me as above." *Held*, that the formation of a corporation to which, with the assent of all the creditors, the assets in the hands of the assignees were transferred, and the acceptance by such creditors of notes of the corporation for their claims, on the basis of an agreed composition, with a further arrangement that on payment of all such notes the entire stock of the corporation should be transferred to decedent, did not entitle complainant to recover his fee, on the basis of the nominal excess of the assets of the corporation, as shown by its books, over its liabilities, at the time it was formed, but that the contract contemplated that both parties should share the risk of actually saving assets from the wreck, and complainant could not enforce his demand until the debts assumed had been actually paid, and then on the basis of the value of the assets remaining, and which "inured" to the decedent or his estate.

This was a suit in equity to establish the amount and to enforce collection of a contingent fee for legal services rendered under a written contract. Heard on exceptions to the report of a master.

Frank Haggerman, Oliver M. Spencer, and Hall & Woodson, for complainant.

Brown & Dolman, for defendants.

ADAMS, District Judge. This is a suit to establish a demand against the estate of Dudley M. Steele, deceased, and to discover assets for application to its payment. After the issues were made up in this case, the same was referred to Alexander Martin, Esq., as special master, to hear the evidence and report his conclusions of law and fact to the court. The hearing having been fully had before the master, the case is now before this court on exceptions to the report of the master filed herein. It appears that on June 4,

1894, the mercantile firm of Steele & Walker (composed of Dudley M. Steele and ——— Walker); and a corporation by the name of "Midland Coffee & Spice Company," in which Steele owned all the stock and for which he had incurred some obligations as indorser of its commercial paper; and Dudley M. Steele himself, who had a considerable estate, consisting of capital stock in a mercantile corporation known as "Steele-Smith Grocery Company," located at Omaha, Neb., some real estate, consisting of about 5,700 acres of lands in the state of Kansas, the building occupied by Steele & Walker, in St. Joseph, Mo., and some other unimportant pieces of land,—made their several general assignments, under the laws of the state of Missouri, for the benefit of their creditors. The cause of action sued on in this case arose out of an employment of complainant, who is a practicing lawyer in New Orleans, La., by Dudley M. Steele, in his lifetime, to perform certain legal services for him in the way of making a settlement with his creditors and extricating him from his financial difficulties. The contract of employment is found in a certain letter written by Steele to the complainant in the form of a proposition by Steele. It is as follows:

"Henry L. Lazarus, Attorney, New Orleans, La.—Dear Sir: After mature consideration, I have concluded to ask your services in an attempt to extricate the financial affairs of Steele & Walker and myself from their present condition. Whatever plan may be pursued, I shall and do require that I shall be relieved from my personal liability upon the debts of Dudley M. Steele and of Steele & Walker, including the indorsement by Steele & Walker and D. M. Steele for the Midland Coffee & Spice Co.; and, further, that the exclusive right to any surplus of the estates of Steele & Walker and D. M. Steele now in the hands of assignees, not needed in satisfaction of the claims against those estates, shall inure to me. If my services are desired after the composition is effected with the creditors of Steele & Walker and myself, I will, at a salary equal to any other business offer, give the business incident to the complete payment of the deferred portion of the indebtedness to be created my exclusive attention, and, pending negotiations for this settlement, I and my local counsel will render all necessary and appropriate assistance. I will, in any event, refund to you my proportion of all necessary traveling and contingent expenses incident to your coming to St. Joseph from New Orleans and the visiting of the various creditors. Upon a settlement with the creditors of D. M. Steele and Steele & Walker, as above set forth, you are to receive a fee equal to twenty per cent. of the value of the surplus of the estates of Steele & Walker and D. M. Steele inuring to me as above. If we do not readily agree upon the value of said surplus, it may be appraised by two appraisers, one chosen by each of us, and, in case of disagreement between the two we may select, they to select a third, and the three thus chosen, or a majority of them, to appraise said surplus, said appraisers to be all of St. Joseph and disinterested. One-quarter of the expenses and this compensation I shall expect you to take in the obligations of J. W. and S. A. Walker, in such form as you and they may agree upon, or in the sole obligations of J. W. Walker if S. A. Walker refuses to unite with him, and the remainder of this compensation I will provide for by allowing a reasonable time after this composition is effected and the remaining assets placed under my control. If you are unsuccessful in this attempt, my obligation under this proposition is limited to repayment to you of one-half your traveling and contingent expenses in attempting to effect the settlement.

"Very respectfully, D. M. Steele."

On receipt of this letter, complainant duly accepted employment thereunder, and proceeded to performance.

The plan advised by complainant, pursuant to the suggestions found in said proposition, is expressed in a communication pre-

pared by complainant, and addressed to D. M. Steele, Esq., to be signed by the creditors. This communication is as follows:

"St. Joseph, Mo., August 8th, 1894.

"Dudley M. Steele, Esq., St. Joseph, Mo.—Dear Sir: As creditors of the firm of Steele & Walker, D. M. Steele, and of the Midland Coffee Company, we submit for your consideration the following propositions, with a view to the adjustment of the indebtedness due by said parties: If a corporation shall be formed and organized with power to carry on the business of grocers and commission merchants, and with authority to acquire real estate and to dispose of the same, with a board of directors to consist of D. M. Steele, Milton Tootle, Jr., B. Weakley, Wm. B. Craig, and Chas. E. Jessopp, and said corporation organized at once, with D. M. Steele to be chosen as president, Milton Tootle, Jr., vice president, Wm. B. Craig, general manager, and Chas. E. Jessopp, treasurer and secretary, to serve for one year, or until successors or persons in substitution for them shall be selected. And if the corporation shall pass by-laws operating as a contract until the payment of the adjusted indebtedness, providing as follows: That the salaries of the officers shall be, president $5,000, general manager $3,000, secretary and treasurer $1,500, and not subject to change, except by alteration of the by-laws; and shall also pass by-laws providing that special meetings of the shareholders will be held at the place of business of the corporation in St. Joseph, Mo., and can be called at any time, on not less than twenty-four hours' notice, to be given by publication in a daily paper in St. Joseph, Mo., said notice naming the time for such meeting, signed by the holders of a majority of the stock of the corporation, and must be called by the secretary of the corporation by a like publication of a notice of not less than twenty-four hours, whenever he shall be directed so to do by letter or telegram addressed to him by the holders of a majority of the stock, or by the committee of creditors of said corporation hereinafter to be mentioned; and that the secretary shall give the notice for the time designated in such letter or telegram, provided the notice to be published be for not less than twenty-four hours; and, further provided, that at all meetings of shareholders each shareholder shall be entitled to one vote; that shareholders may vote by proxy, and that at all shareholders' meetings all votes shall be by shares only; and that at any such meetings the holder of a majority of the stock of the corporation may remove summarily any director or directors, officer or officers, employé or employés, of the company, and substitute other persons for them, and that the salaries of the removed parties shall instantly cease upon their removal; and that said by-laws, when adopted, shall only be subject to repeal or alteration by the vote of a majority of the stock of the corporation. And if the corporation shall, after its organization, execute and deliver into the hands of John S. Lemon, S. C. Woodson, and R. L. McDonald, a committee hereinafter mentioned, the promissory notes of said corporation, to the order of each of the creditors of Steele & Walker, D. M. Steele, and the Midland Coffee Company, referred to in the schedule hereto annexed as a part hereof, and any other claims of the parties mentioned in the schedule, or of others which the committee shall ascertain to be justly payable, upon the following basis of percentage of the debt of said creditors: On the paper of Steele & Walker, without other indorsement or security, fifty cents on the dollar; on the paper of Steele & Walker, with the indorsement of Dudley M. Steele, 70 cents on the dollar; on the merchandise accounts of Steele & Walker, thirty-seven and one-half cents on the dollar; on the obligations of the Midland Coffee Company indorsed by Steele & Walker, sixty-two and one-half cents on the dollar; on the obligations of the Midland Coffee Company indorsed by Steele & Walker and Dudley M. Steele, seventy-five cents on the dolllar; on the merchandise accounts of the Midland Coffee Company, thirty cents on the dollar,—the said obligations of the corporation to be made payable to the creditors, respectively, divided into equal amounts, payable at six, twelve, and eighteen months, with interest at 5 per cent. per annum, and dated on the day of delivery. And if the corporation shall, at the same time, place in the hands of said committee a contract duly executed, for the benefit of all the said creditors who shall accept said notes and make the assignment to the corporation as hereinabove

stated, respectively, constituting a committee in behalf of said creditors of said corporation to supervise, direct, and control the corporate acts as hereinafter mentioned, and providing that said committee shall have authority to deliver said notes to each of said creditors upon the assignment to the corporation by said creditors or the committee herein provided for, respectively, of their claims against Steele & Walker, D. M. Steele, and the Midland Coffee & Spice Company, provided such assignment shall be made within ninety days after the delivery of the notes of said corporation; and if the assignments, respectively, are not made within said period, the notes that shall be applicable to said assignment shall be returned by the committee to said corporation to be canceled, it being distinctly understood that there is to be no assumption of interest or liability of said corporation for any of the debts or obligations of Steele & Walker, Dudley M. Steele, or the Midland Coffee Company. The necessary expenses of the committee shall be paid by the corporation. And said contract shall also provide that at least once every week the said corporation shall make a report to said committee, in form to be required by the committee, of all its receipts and disbursements, and of such other facts and accounts as the committee may desire. And that said committee shall approve orders for all goods purchased to replenish stock on the application of the president or general manager, and they may, at all times, apply all surplus funds of said corporation not necessary for the proper conduct of said business to the prepayment of said notes which shall have been accepted by the creditors, indorsing, or causing to be indorsed, such payments, with the time of the making thereof, on the back of the note on which the payments have been applied. And said contract shall further provide that said committee may, at any time, require that the president, or any officer or employé, shall be discharged, and any person or persons named by them substituted, and the board of directors shall be required to obey such direction given in writing within twenty-four hours after the same, and the salaries of such persons then shall cease; and that in like manner the said committee may, at any time, upon notice of twenty-four hours to the president of said corporation or its secretary or treasurer, require the business to be brought to an end, and thereupon it shall be at once brought to an end and wound up, under the supervision of the said committee, or any attorney or agent selected by them. And that any failure upon the part of said corporation to comply with any of said stipulations of said contract, and especially of the directions of said committee, shall be a ground for the appointment of a receiver or receivers, by a court of competent jurisdiction, to close the business of said corporation, and to apply the assets to the payment of the debts, and the receiver shall be named by said committee. And said contract shall further provide that said committee shall have authority, by an instrument of writing signed by them and for a limited period, to delegate to one or more other persons, in said instrument to be named, all or any part of their powers under said contract, and shall have power, at their discretion, to appoint or remove, or to appoint or reappoint, any person who they may select to act as an assistant manager in the establishment of said corporation, who shall render such services as he can in the conduct of its business, and shall have access, at all times, to all its books and papers, and shall receive a salary not to exceed one hundred and fifty dollars per month, to be paid to him by said corporation. That two members of the committee shall constitute a quorum for the transaction of the general business of said committee, and they may do all things and exercise all powers which the full committee could do or possess, save and except the removal of officers of said corporation or directing its liquidation, and that to do either of the things last named it shall require the consent of the entire committee. And if the corporation shall deliver to the committee the notes as mentioned, and shall cause all the capital stock of the company, with the exception of one share to each of the directors, to be placed in the name of some person, to be selected by the committee, on the books of the corporation, and said certificate to be indorsed and accompanied by irrevocable transfer in blank, and so delivered to the committee, and shall also cause to be delivered to the committee with the certificate the irrevocable powers or the proxies of the holders on said books to said committee, authorizing them, and each of them, to vote the stock at all stockholders' meetings, as long as

any of said notes remain unpaid, and shall provide by said contract to be made by the corporation that the stock shall be held by the committee as collateral for the payment of the notes, and that if default be made in the payment of the notes or any of them, or of the interest thereon, the committee may sell the stock, or so much thereof as may be necessary, at public auction, in the city of St. Joseph, Missouri, first giving notice of twenty days' publication in a newspaper published in the city of St. Joseph, and apply the proceeds to the payment of the notes unpaid and interest pro rata. And said contract shall provide that the duties of said committee shall be gratuitously performed, and that no liability or responsibility shall attach to them by reason of any errors or omissions, and, in case any vacancy occurs in the committee by death, inability, refusal to act, or act further, or from any other cause, the vacancy or vacancies may be filled by the remaining members, and so on from time to time, and the committee as then constituted shall have all the powers of the committee made in this letter. And that the contract shall also provide for the continuance of the committee until all said notes shall be paid, and, when the notes have been paid, then the committee shall transfer or cause to be transferred said stock to D. M. Steele or to any other persons whom he may designate in writing addressed to said committee. That pending the organization of the corporation contemplated by the within letter we agree to assign our claims to the committee provided for herein, authorizing said committee to accept from said corporation, when organized, its obligations for the amount to which we may be, respectively, entitled, upon the basis of the adjustment herein, and payable at the times herein stated; the said committee being invested with full power and authority to use our said claims so assigned to effectually carry out the terms of adjustment proposed herein."

It took some time to secure the consent of all the creditors to this plan, but it was finally so accomplished that on December 18, 1894, complainant had succeeded in lodging the control of the claims of all the creditors in the hands of the committee provided for in said plan. A few days before that, complainant had completed the organization of a corporation contemplated by said plan, by the name of "D. M. Steele Mercantile Company." This corporation soon executed and delivered to the committee of creditors its obligations, for the benefit of the creditors of Steele and Steele & Walker, at the purchase or adjustment price of their claims. These obligations were in three sets of notes, maturing, respectively, in 6, 12, and 18 months from date, and bearing interest at the rate of 5 per cent. per annum. On the same day, to wit, December 18, 1894, all the assets, or the proceeds of such as had been reduced to money by the assignees under the state assignments, were, by appropriate orders of the court in charge of such assignment proceedings, turned over to said corporation. By this arrangement, the debts of Steele and Steele & Walker, as scaled, were assumed by the mercantile company. Steele was personally relieved therefrom, and the assets formerly belonging to the assigned estates were made subject to their payment, in accordance with the general scheme of the plan already set out.

When the mercantile company opened up its books, it stated, in appropriate debit and credit columns, its assets and liabilities. Its assets consisted of the cash turned over to it by the assignees, some undisposed of merchandise, accounts, bills receivable, real estate located in Kansas and St. Joseph, and certain other property, generally described as "cash, notes, and stocks resulting from the assignment of Dudley M. Steele," etc., aggregating the total sum of

$619,205.79. Its liabilities were stated to be the bills payable just then issued in settlement of the claims of the creditors of the assignors in said assignments, amounting (with a small item of cash) in the aggregate to $457,720.26. These figures show a balance of assets over liabilities of $161,485.53. The valuations resulting in the foregoing figures and balance were placed upon the assets by the committee of creditors, and with the knowledge and acquiescence of Steele. Mr. Lazarus, the complainant, was, at the time the foregoing entries were made, in New Orleans, his home. Mr. Jessup, the secretary of the mercantile company, on December 27, 1894, wrote complainant as follows: "I enclose a statement of the assets on hand when we took possession; also the cost of adjustment, which I trust will be satisfactory. If not so, let me know." This inclosure consisted of the figures above given, showing the balance of $161,485.53, as aforesaid. Complainant was then a director of the mercantile company, and as such presumably interested in the showing made by its books.

There is much evidence in the record relating to the value of several items of assets, and also relating to the participation of Steele in fixing the same. The complainant claims that these figures showing this balance of $161,485.53 so sent to him by the secretary of the mercantile company is a stated account, within the meaning of the law, and that, within the purview of his contract with Steele, the balance of $161,485.53 therein shown is the value of assets "inuring" to Steele, of which he, by virtue of his contract, is entitled to 20 per cent., and it is on the theory of such claim being valid that he has exhibited his bill of complaint in this case. It is fair to state that in the argument of the case counsel have not confined themselves strictly to the theory that this balance of $161,485.53 is an account stated, but have contended that it was at least such a representation and such a holding out of the situation as now estops the administrator of the estate of D. M. Steele, deceased, from denying that it is the true value of the surplus inuring to him, within the meaning of complainant's contract of employment.

I have given the evidence bearing on this phase of the case careful consideration, and have attentively considered the arguments and briefs of counsel on the question, and cannot escape the conviction that the complainant is wrong in the conclusions he deduces. The master's report on this issue is, in my opinion, fully supported by the facts. He says: "Neither do I find in the testimony sufficient evidence to support the conclusive effect of a stated account. I do not find that Mr. Steele and the complainant ever got together in an accounting which had reference to a settlement of the surplus under the contract, or that any of their admissions of value or amounts were ever made with reference to an agreement between them as to the value of the surplus, as contemplated by the contract." He also says (in which I concur) "that the valuation of December 18, 1894, was made with reference to the opening of the books of the liquidating company. It was done principally by other officers of the company or other persons. It was necessary to be done in order that a proper set of books might be opened and the business of the

corporation intelligently conducted." It appears to me clearly from all the evidence, from the situation of the parties, and the necessities of the business, the purposes to be accomplished, and all the other surrounding facts, especially from the fact that the entries were made immediately after the formation of the liquidating corporation, and before the time any efforts had been made towards disposing of any of the assets by the liquidating corporation, that the entries so made in the books, and so forwarded to complainant, could not, in the nature of the case, relate to the "surplus," within the meaning of complainant's contract of employment, but were intended for other obvious and necessary purposes, as stated by the master in his report. So far, therefore, as this action is concerned, there is no estoppel against the defendants requiring proof of the real surplus, within the true meaning of the contract between complainant and Steele. Notwithstanding the manifest general theory of the bill of complaint is to plead complainant's rights predicated upon the existence of such an account stated, or such an estoppel, the master heard all of the evidence relating to the real value of the surplus as of December 18, 1894, and allowed the complainant the full benefit of the result of such inquiry, in the same manner as he would have done if the bill of complaint had counted upon such a state of facts. It therefore becomes necessary to consider the case upon this theory also.

It is contended by complainant's counsel that, by the true interpretation of the contract of employment, complainant is entitled to a fee equal to 20 per cent. of the value of the surplus as of December 18, 1894, the date when Steele was relieved of personal liability for his debts by the act of his creditors accepting the obligations of the mercantile company therefor. It is contended, on the other hand, by the defendants' counsel, that, according to the true meaning of the contract, the complainant is entitled to nothing until the debts of Steele, even though assumed by the mercantile company, are fully satisfied out of the assets devoted to, and pledged for, their ultimate payment; and that there is no way of ascertaining the surplus inuring to Steele, 20 per cent. of the value of which was to be the measure of complainant's rights, until such debts were actually paid and satisfied.

These contentions present the crucial question of this case. The proposition of Steele to the complainant of date July 4, 1894, already set out in full, states two essential requirements to any "plan" which the complainant might adopt. These are as follows: First, Steele required that he should be relieved from personal liabilities for his own debts, and those of Steele & Walker, including his indorsements for the Midland Coffee & Spice Company; and, second, Steele required, using his own words, that the "exclusive right to any surplus of the assets of Steele & Walker and D. M. Steele, now in the hands of assignees, not needed in satisfaction of the claims against those assets, shall inure to me." He next suggested that the plan to be adopted by complainant will involve deferring the payment of a portion of the indebtedness to some future time, and offered to give the business suggested to be incident to paying such deferred

debts his exclusive attention. The plan had evidently been discussed between complainant and Steele, as will presently appear, from its general harmony with the proposition.

The clause of the contract relied on by complainant to fix his compensation is as follows: "Upon a settlement with the creditors of D. M. Steele and Steele & Walker, as above set forth, you are to receive a fee equal to twenty per cent. of the value of the surplus of the estates of Steele & Walker and D. M. Steele inuring to me as above." Inuring to me "as above"; that is to say, such surplus thereof as is not needed in satisfaction of the claims at such time as the payment of the same, or portion thereof, might be deferred. Again, in the last clause but one of the proposition, after stipulating that complainant should take one-fourth of his compensation in some obligations of J. W. and S. A. Walker, he (Steele) who was making the proposition, says: "The remainder of this compensation I will provide for by being allowed a reasonable time after this composition [here again alluding to some plan for composition obviously having been before that time talked about] is effected, and the remaining assets placed under my control." These provisions of the proposition, duly accepted by the complainant (which are the controlling ones on the question now under consideration), seem to me to clearly indicate that the parties intended to devise such a scheme or plan as would subject all the property to the payment of the debts of Steele and Steele & Walker, as they should ultimately be scaled and adjusted, and that after such debts should be paid and extinguished, and the property or some part of it should be relieved from any claim or liability therefor, the same should "inure" to Steele, and then, and not until then, should complainant be entitled, as his fee, to a sum equal to 20 per cent. of the reasonable value thereof, namely, of such as should so inure to Steele after being relieved of the obligation fixed upon it for the satisfaction of the debts.

This construction of the contract becomes more apparent, if possible, by a consideration of the "plan" contemplated to be made in the proposition, and which was soon afterwards devised and put into execution by the complainant. Without attempting to analyze in full this plan (already set out), it is sufficient for the present purpose to say that it clearly contemplates and requires the formation of a corporation with power to acquire the personal property and real estate formerly belonging to the assignors in the assignments already mentioned, and at that time in the hands of their assignees; the assumption by such corporation, with the consent of the creditors, of the payment of the debts of Steele and Steele & Walker, as the same should be scaled and adjusted and put into the form of notes, according to the scheme in said plan elaborated; the appointment of a committee of the creditors to supervise, control, and direct all corporate acts, with power in such committee to remove officers at any time, to take charge of the business, and wind it up with or without the intervention of a receiver, and, in the exact language of the plan itself, "to apply the assets to the payment of the debts." This committee was also to have an irrevocable power of attorney, or proxy, from any person in whose name the stock might stand, to

vote the stock at all stockholders' meetings, "as long as any of said notes should remain unpaid." More than this, all the capital stock was, by express provision of the plan, to be turned over to the committee, and held by the committee as collateral for the payment of said notes and accruing interest, with power in the committee to sell the same if necessary, and apply the proceeds thereof to the payment of any of said notes which might remain unpaid. The plan finally provides as follows: "For the continuation of the committee until all of said notes shall be paid, and, when the notes have been paid, then the committee shall transfer said stock to D. M. Steele, or to any other persons whom he may designate in writing addressed to said committee." This plan, it seems to me, beyond any question, contemplated at the time it was devised the actual payment and satisfaction of all notes to be given by the mercantile company in payment of the indebtedness of Steele and Steele & Walker before any of the property should inure or be turned over to Steele. Not only is this so under the general law governing the rights of creditors and stockholders in corporations, but it is so explicitly and effectually expressed by so many emphatic and otherwise unintelligible provisions of the plan, culminating in one expressly binding the committee not to deliver any part of the capital stock to Steele until the notes should be fully paid, that it is incomprehensible to me how anyone can seriously contend that any of the property, or any right thereto or control over the same, was to vest in or inure to Steele until after all the adjusted debts were not only settled (that is to say, settled so as to relieve Steele from personal liability therefor), but actually paid and satisfied, so as to entitle him to the legal right and actual possession of the remainder of the property not needed for their satisfaction. The contention of complainant's counsel that the clause of the proposition as follows: "Upon a settlement with the creditors of D. M. Steele and Steele & Walker, as above set forth, you [complainant] are to receive a fee equal to 20 per cent. of the value of the surplus," etc.,—fixes the time of the settlement so made with the creditors as to relieve Steele from liability therefor, irrespective of whether the debts were then paid or not, as the time when complainant's right to payment for his services accrued, is, in my opinion, unwarranted. It is at war with the entire theory of the proposition and plan, and with the purposes to be accomplished by Steele in and by their execution. That theory, and the manifest purpose of the parties at the time, was that all the property was first effectually dedicated to, and pledged for the payment of, the adjusted debts; and, with respect to complainant's fee, the theory clearly was that complainant was to have a fee equal to 20 per cent. of the value of such property as might be saved to Steele after the debts should be paid and first satisfied out of the property. The language relied on by complainant's counsel must be read in the light of its surroundings. The four corners of the proposition must be examined, and, if necessary, all the provisions of the plan made by the parties interested in the execution of the scheme suggested in the proposition must be considered. In the light of these recognized rules of construction, the words relied upon by complainant's counsel as follows: "Upon

a settlement with the creditors of D. M. Steele and Steele & Walker, as above set forth, you are to receive a fee equal to 20 per cent. of the value of the surplus of the estates of Steele & Walker and D. M. Steele inuring to me as above,"—have a clear and distinct meaning. The "settlement" here referred to is the one "above set forth," namely, one which, after applying the property "in satisfaction" of the claims against the assigned estates, will leave some residue to "inure" to Steele, and an amount equal to 20 per cent. of this residue so inuring to Steele, after the debts are paid, is to be the fee of the complainant. Accordingly, it is my opinion that, agreeably to the original intention of the parties, complainant was to have no fee, and no right to a fee, until a settlement and satisfaction of the creditors' demands should have been so made as to demonstrate that there was a surplus, which alone was to measure the complainant's rights.

It may be that, under the construction now given to complainant's contract, the fruition of his purpose is deferred longer than he desires; but when it is considered that he was to become, and did become, a director of the corporation, and an adviser to the committee of creditors, and thus always in a position to scrutinize the liquidation process on which his compensation depended, it seems that the postponement of his right to a fee to the end of the liquidation, under such circumstances of surveillance on his part, was not an unreasonable condition for him to consent to in his contract, and is not an unjust condition for him to abide by. That the construction put upon complainant's contract is correct appears to me also most conclusively from the conduct of the parties in connection with its performance. On December 18, 1894, the corporation having been duly organized, the property in the hands of the assignees was turned over to it, its notes executed for the adjusted demands of the creditors, and the liquidation was begun under the scheme with all its attendant safeguards. The stock which, by the terms of the plan, was to be issued provisionally to a certain party, to be selected by the creditors, and then to be indorsed and delivered to the creditors' committee, with irrevocable powers of attorney to vote and use the same to accomplish the purposes of the plan, was issued and handled somewhat differently than the plan provided, but not so as to materially disturb or affect the supervisory control of the committee of creditors over it, or the bearing which the provisions of the plan legitimately have in determining the original intent of the parties with respect to complainant's rights under the contract of employment. There is, however, one feature of the treatment of the stock which attracts attention at once.

Soon after the incorporation of the mercantile company, which was capitalized at $100,000, with 1,000 shares of stock, of the par value of $100 each, the complainant caused to be transferred to himself and to his order 200 shares thereof. He, having before that time announced that he was going to give his wife one-quarter of his fee, caused a certificate for 50 shares to be issued in her name, and the balance of 150 shares to be issued to himself directly. These certificates he took possession of and retained until this suit was instituted, when, in his bill of complaint, he tendered the same to the court for

such disposition as to the court seemed proper. There is no evidence of any kind that at or before the time of securing this stock complainant ever demanded his fee in money as a right then accrued to him. There is a conflict of evidence as to what was said by the parties at the time this stock was taken by him. Complainant claims that he required and secured the stock as collateral security for the payment of his fee. The defendants claim that he required and secured it as satisfaction for his fee, or, at least, as a conclusive evidence of his right in the property. I have given all the evidence bearing on this subject careful consideration, and, while the witnesses vary somewhat in the expression of their recollection as to what was actually said at the time, there are several uncontradicted physical facts, and necessary conclusions from them, which induce me to believe that the stock was taken at the time by complainant as a conclusive evidence of his rights under his contract of employment, and as a conclusive demonstration that the construction already placed on said contract is correct. These facts are: First. Complainant requested and received the issue of 50 shares of the stock to his wife by name. This is a circumstance tending to show that complainant was not taking the stock as collateral security for his fee or that due to his law firm for the services rendered. Second. The amount of the stock secured by him was the exact proportion of the entire issue which was to measure the amount of his fee, 200 shares being 20 per cent. of the total issue, and the amount of the stock which he caused to be issued in the name of his wife was the exact proportion of his fee which he intended to give to his wife. Third. The total issue of stock in law, as well as by many persuasive evidences of the understanding of the parties already considered, represented the exact amount and value of the property which was to inure to Steele by which the complainant's compensation was to be measured. Steele was to get all the property after the debts were satisfied; the stock represented this, and nothing more or different. It stood pledged by the plan, as well as by fixed rules of law, for the payment of all such debts before its value to the shareholders could be estimated, and of this value complainant was to have 20 per cent., and this he accurately secured when he took the stock corresponding to that portion of the value. Fourth. Self-evidently, this stock could be of no substantial value as collateral security. It had no value in itself, except one burdened with the payment of debts amounting at that time to more than the entire capital of the corporation, for the payment of which all the stock had, by specific provisions of the plan, been pledged as collateral. It had a rational utility for measuring the rights of the parties, and I prefer to impute to intelligent men such use of it, rather than the irrational, illogical, and inharmonious use, now insisted upon by complainant's counsel. Further than this, the evidence of the sayings of the parties at the time, considered in the light of all the circumstances already alluded to, in my opinion, conduce to the same result.

Another undisputed fact brings me to the same conclusion. On the same day that complainant took the 200 shares of stock, Mr. Steele, at the request of complainant, executed three promissory

notes, payable to complainant, for $4,000, $3,000, and $3,000, respectively, maturing in three, six, and nine months, respectively. These notes were delivered to complainant, who, simultaneously therewith, entered on the back of the certificate for 150 shares of stock issued to himself, the following indorsement, which was signed by him; that is to say: "The interest of H. L. Lazarus herein is to be charged with the following notes, when paid: One note, $4,000, due in three months from February 23, 1895; one note, $3,000, due six months from February 23, 1895; one note, $3,000, due nine months from February 23, 1895." These notes were discounted by complainant, and duly paid by Steele; the money, with the exception of $2,000, being paid by the mercantile company, and charged to him on its books. It is conceded by all that this money was advanced on account of complainant's fee. On the theory that the stock was given for the fee, or to represent the fee, a reasonable explanation is afforded for this indorsement on the back of the certificate. Otherwise, as it seems to me, it is without meaning. It is not usual to indorse on paper held as collateral merely the credits to which the principal obligation is entitled. On the contrary, if the paper on which it is indorsed is the evidence of the principal obligation, it affords the most appropriate place to make an entry affecting that obligation. Again, it is to be noted that complainant in making the indorsements says that his "interest" in the stock is to be charged with the amount of the notes when paid. This language could hardly have been employed had he owned no interest in the stock itself, other than that contingent kind which, in law, attends the holding of securities as collateral for the payment of some other obligation.

The rational and probable view of this transaction, in my opinion, is that complainant recognized the fact that the stock held by him represented his interest,—that is, 20 per cent. of the value of the surplus saved; and inasmuch as Steele, who was to be his debtor if there should be any salvage, had by his notes paid $10,000 on account of that obligation, it was appropriate to indorse the same on the back of the certificate, so that, when the same should be presented for participation in ultimate net profits, it should be charged, as between the complainant and Steele, with what Steele, out of a disposition to favor the complainant, had seen fit to advance him.

From the foregoing conclusions, it follows that the complainant cannot maintain a suit against the defendant, as administrator of the estate of Steele, deceased, for the recovery of money due him under his contract of employment, until the debts assumed by the mercantile company are so paid and satisfied as to discharge the property of the mercantile company from liability therefor, in order that it may be determined how much, if any, property "inured" to Steele, within the purview of the contract of employment under consideration. It may here be remarked that it is doubtful whether the complainant, in view of his having taken 20 per cent. of the capital stock of the mercantile company in the way and manner and for the purposes already stated, can have any redress now, except by a bill (if necessary) to wind up the affairs of the corporation in which he is interested. But, having treated the transaction of taking the stock

by complainant more as evidence bearing upon the construction to be placed upon the original contract of employment, I do not deem it necessary or advisable to express any further views as to its effect.

The question of fact now to be determined in settling complainant's rights, under the bill in this case (most liberally construed), is whether, at the time of the institution of this suit, any property had inured to Steele, or his personal representatives, within the meaning of the contract of employment, as hereinbefore interpreted. This question is of easy solution, in the light of the restatement of the assets and liabilities of the mercantile company made by the parties in interest on June 23, 1896, about a month before this suit was instituted. It appears from that statement, in the making of which the complainant participated, that the liabilities of the mercantile company were then $72,816.83. The liabilities consisted partly in a renewal of some of the notes of the mercantile company given for the third or final installment in settlement of the original obligations of Steele and Steele & Walker, in notes executed for money then borrowed to pay some of the original notes, and also in some of the original notes which had before that time matured and been extended. But whether these liabilities, or any of them, took on a new dress, or remained as originally evidenced, they still were, in substance and effect, the obligations of the mercantile company as originally undertaken and assumed in settlement of the debts of Steele and Steele & Walker. The assets on hand at the time of this restatement, June 23, 1896, consisted of a body of five or six thousand acres of land in Washington and Republic counties, in the state of Kansas; the business house formerly occupied by Steele & Walker; some unimproved lots in the city of St. Joseph; some defaulted notes secured by mortgages on Kansas land before then sold on credit; with some other property of small amounts, consisting of accounts, stocks, and $1,800 in cash. While the evidence concerning the actual value of these assets is conflicting, it establishes beyond question, I think, that they were not then at all available for use in settling the indebtedness for which they practically stood pledged, and that if they had been sold at public sale they would not have realized an amount equal to the indebtedness itself. In fact, most of the witnesses say that there was no sale for such assets possible at the time their testimony was taken in this case, and one witness (Mr. Wheeler), a merchant of standing and character in St. Joseph, who was one of the assignees in the prior assignments made by Steele and Steele & Walker, said, in giving his testimony, that he would not take the assets "as a gift, and pay the debts, $75,000."

Enough has already been said to show that at the institution of this suit there was a large amount of indebtedness owing by the mercantile company for the payment of which its property and assets stood charged, and that, therefore, within the true meaning of the contract of employment as hereinbefore construed, no assets had "inured to Steele," and no reasonable time had elapsed for Steele or his administrator to pay complainant, after "the remaining assets" had been placed under his (Steele's) control. The condition of things at the time this suit was instituted well illustrates the inequity of

complainant's case; for, should he now be allowed to recover a money judgment based upon any estimated value of the assets, whether as of December 18, 1894, or even as of the date of the institution of this suit, he would subject the estate of Steele to all the risk and loss incident to a forced sale of the assets, if insisted upon by creditors, or to the necessity of negotiating an extension of time for settlement in order to give the administrator an opportunity to speculate on an improved market, and in the end possibly no assets would in fact be saved, and therefore none would inure to Steele, and yet he (complainant), in direct contravention of the governing principle of his contract, would have safely secured his own fee calculated upon false premises. The plain theory of the contract of employment was that both parties should take the risk of actually, not theoretically, saving assets from the wreck. The present theory of complainant is that Steele's estate assumed all that risk.

Considering the fact that complainant, through the generosity of Steele, in making an advance payment on account of his fee, has already received $10,000, and that, too, at a time when he was not entitled thereto under the true interpretation of his contract, and to which the sequel may show he never would have been entitled, and considering the further fact that Steele, in his lifetime, fully performed his part of the contract by paying complainant all his expenses, in no small amount, it is my opinion that it is with little consideration and no equity that complainant now, before the liquidation is finished, and before it is known whether any assets are or will be saved to Steele's estate, exhibits his bill to fix his compensation, and secure a judgment therefor, which he may make out of general assets, even if nothing is ever saved from the particular assets in question, or to so fix his judgment as a lien upon all the stock of the mercantile company now held by one of the defendants for the estate of Steele that the probable result will be that, if perchance any assets are finally saved, the entire amount and value thereof will be taken to satisfy complainant's moiety of 20 per cent.

The foregoing views would dispose of the case, were it not for the fact that complainant seeks, by his bill, to establish a demand for $7,000 for legal services rendered by him to Steele other than such as were covered by the contract of employment already considered. The several items of services for which this aggregate sum is charged by complainant were fully considered by the master, and his conclusion as to each and all of them is that the same were rendered either to or for the benefit of the mercantile company or Steele under such circumstances as warranted the conviction that they were intended to be included in the services required by the contract of employment, and certainly with no intention, at the time of rendering the services, on the part of the complainant, to make any charge therefor against Steele. In this conclusion of the master with relation to the charges for extra services I fully concur, and as a result conclude that complainant has no legal or equitable right against the estate of Steele to recover for any such services.

In view of the foregoing considerations, the master's conclusion that complainant was entitled to have the surplus ascertained and ap-

praised as of the date of December 18, 1894, when Steele's debts were adjusted, is, in my opinion, erroneous.

The large amount of testimony taken; the variety of opinions as to values; the differences of witnesses as to what was and what was not assets; the maturity or extension of the payment of debts; and evidence as to what amount of assets would be required to satisfy and discharge the indebtedness,—each and all of these things presented to the master's consideration a perplexing problem, and one which, in my opinion, he properly solved, on his theory of fixing the complainant's rights according to the probable surplus estimated upon values as they existed on December 24, 1894; so that, if my construction of the contract is incorrect, and if the complainant, in view of all the facts and circumstances of this case, has any equity at all, the facts of the case, as found by the master, would justify a decree as recommended by him.

Complainant in his bill seems to stake his right of recovery solely on the allegations showing an account stated between him and Steele in his lifetime. If the parties had reached an agreement upon a surplus, within the true meaning of the contract of employment, and with reference to that contract of employment, such fact would estop the defendants from now gainsaying the conclusion so reached by the parties. Such being the showing made by the bill, the fact that a demurrer was once overruled affords no justification for the argument of counsel for complainant that the construction of the contract, as now claimed by them, has been once judicially determined.

The construction of the contract arises and becomes necessary in disposing of the case on a theory which complainant has invoked as a substitute for the disapproved theory of the bill as filed, and notwithstanding the ruling upon the demurrer, which was without doubt correct, the construction of the contract, for the purposes of the case as made by the evidence, now becomes, not only proper, but necessary. Considering the whole case; the true construction of the contract of employment; the obligations imposed upon complainant thereby; the limitations of his rights thereunder; the theory of the bill as filed being disapproved; the complainant's receipt of 20 per cent. of the capital stock of the mercantile company in the way and manner and for the purposes already stated; complainant's receipt of $10,000 on account of his compensation in the way and manner already stated,—I am of the opinion that there is no equity in the bill, and that in any event it is prematurely brought. This conclusion results in a disposition of the case without the necessity of inquiring into the issues made concerning the property alleged to have been withheld from the mercantile company by Steele, or concerning the alleged fraudulent transfer of the stock of the mercantile company to defendant Weakley.

I find, on examining the pleadings, that there is a cross bill filed by defendant McDonald, as administrator of the estate of Steele; but as counsel have not in argument pressed any consideration of this cross bill, and as it is, in the light of the result already reached, of doubtful propriety in the case, I have concluded to enter an order dismissing it, without prejudice, however, to the right of the adminis-

trator to renew his claim as there stated in any subsequent litigation, if he be so advised to do.

In accordance with the views above expressed, the second and fifth exceptions of the defendants Susan H. Weakley, Armstrong B. Weakley, and the D. M. Steele Mercantile Company to the report of the master are allowed. The other exceptions of said defendants are disallowed. All the exceptions of the complainant are disallowed. The recommendation of the master is disapproved. The cross bill of Rufus L. McDonald, administrator, is dismissed without prejudice. The temporary injunction heretofore granted herein is dissolved, and, the court being now in possession of the whole case, a decree will be entered conforming to the views herein expressed, dismissing the bill.

LEATHE et al. v. THOMAS et al.

(Circuit Court of Appeals, Seventh Circuit. November 3, 1899.)

No. 597.

1. INJUNCTION—AGAINST EXECUTION OF STATE COURT.
   An order enjoining a sheriff from proceeding with the collection of an execution lawfully issued to him in pursuance of a decree is within the prohibition of Rev. St. § 720, against an injunction by a court of the United States to stay any proceeding in a state court.[1]
2. SAME—COMITY.
   Comity prevents a federal court from enjoining enforcement of an execution of a state court.
3. APPEAL—INJUNCTION.
   Though the court of appeals can grant injunctions in aid of its jurisdiction, it cannot, on appeal from an order dissolving an injunction against enforcement of an execution, modify the order so as to permit the sheriff to collect the money, and then restrain him from paying it over to the execution plaintiff, where no such order was asked, and the right thereto was not considered in the court below.

Appeal from the Circuit Court of the United States for the Southern District of Illinois.

This is an appeal from an order dissolving a temporary injunction. The bill of complaint upon which this order of injunction was granted was brought in the court below by the appellants against the appellee for an accounting and other equitable relief. It is only necessary to state such facts disclosed in the bill as are material to the determination of the questions arising out of the order of dissolution.

Edward L. Thomas, a person of limited means, had for two years or more prior to January 24, 1893, been engaged in constructing a railroad from the city of Belleville, Ill., to a point on the Mississippi river opposite the city of St. Louis, Mo. The money used had been, up to that time, mainly furnished by William A. Adams, who died in the fore part of 1893. The railroad was being built under the name of the Belleville & St. Louis Railway Company, organized under the laws of the state of Illinois governing the incorporation of railroad companies. Said Thomas also owned some stock in a coal company operating in St. Clair county, Ill., of which, at the time of his death, William A. Adams was the principal stockholder. At this time said Thomas

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[1] Enjoining proceedings in state courts, see note to Garner v. Bank, 16 C. C. A. 90, and, supplementary thereto, note to Trust Co. v. Grantham, 27 C. C. A. 575.

was at the end of his resources, and, unless he could procure speedy and effective aid, he would lose all he had invested, and would be left burdened with a large amount of debt. The complainant Leathe was a man of large means. They were brought together by one Lucien M. Chipley, a promoter. Leathe having concluded to come to the rescue of said Thomas, they, in connection with Bart S. Adams and Lucien M. Chipley, on January 24, 1893, entered into a written agreement, the main provisions of which were that Leathe was to have 51 per cent. of the capital stock; that Leathe and Chipley were to furnish the funds to carry on the enterprise; that coal and other companies that might be formed to carry out the contemplated enterprise were to be carried on in the same proportions; that Leathe was to hold the bonds then issued by the existing company to the amount of $150,000, and to sell $500,000 of bonds to be issued; that from the proceeds of the bonds Leathe was first to be paid his investment, then Thomas and Adams were to receive the moneys advanced by them; that all sums coming to Thomas growing out of the enterprise were to be held by Leathe until all matters were fully adjusted and paid. Leathe faithfully carried out his part of the agreement. He built the railroad, the name of which was first changed to Belleville City Railway Company, then to St. Louis, Belleville & Southern Railway Company. He developed the coal enterprise, which was carried on in the name of the Crown Coal & Tow Company. In doing this he purchased large quantities of coal lands along the line of the railroad, and also steam tugs and barges for river service. Bonds were issued by the railway company to the amount of $500,000, and by the Crown Coal & Tow Company to the amount of $200,000. In November, 1895, Leathe sold his bonds, with most of the stock; Thomas at the same time transferring his stock to one Elbert H. Gary, agent for undisclosed principals, for the sum of $550,000, of which Leathe received $500,000 and Thomas $50.000, paid to them, respectively. As a part of this transaction, Leathe guarantied the purchaser against all claims that might exist against either of the companies. Under the agreement of January 24, 1893, it became the duty of Leathe to account with the parties to the contract, and it is the purpose of the bill to have such an accounting. It further appears from the bill that since the sale of the bonds many obstacles have been interposed which have prevented Leathe from making the accounting and settlement. These obstacles are chargeable to the other parties to the bill, who have involved Leathe in a multiplicity of suits, brought by single parties, in which it is impossible to settle and determine the respective rights of all the parties in interest. One of the obstacles in the way of the accounting sought by the bill is the disputed claim of Edward L. Thomas against the Crown Coal & Tow Company on which Thomas had brought suit in the St. Clair circuit court, and obtained a judgment for $6,309.89, upon which he has sued out an execution, which has been placed in the hands of the sheriff of St. Clair county, Ill.. who is now about to enforce its collection. It is alleged that said Thomas filed his bill in the circuit court of St. Clair county, Ill., in 1896, against the Crown Coal & Tow Company, and that such proceedings were had that on January 4, 1897, the court adjudged and decreed that the Crown Coal & Tow Company should pay said Thomas the sum of $6,309.89, with interest, which decree is in full force, and which the said Thomas threatens to collect by execution, which he has caused to issue from the said court, and which is now in the hands of the sheriff for collection; that complainant Leathe is, under his contract with said Gary, compelled to hold harmless the Crown Coal & Tow Company against said judgment; and, unless prevented by the order of this court, said Leathe will be compelled to pay at once to said Thomas, or the said sheriff under the said execution, the money expressed by said judgment, with interest thereon. The complainants show that said sum of money so found due said Thomas arises from and grows out of the enterprise entered into by the parties by the agreement of January 24, 1893, and that the sum so found due is in law and in equity a part of the moneys to be held and retained by said Leathe until the final adjustment of the matters growing out of said agreement. Prayer: That the state of the accounts between the several parties be ascertained and decreed, and for a temporary injunction to restrain the enforcement of the judgment of Thomas against the Crown Coal & Tow Company. On the application of the complainants a temporary injunction was granted restraining "Herman Bar-

nickol, sheriff of St. Clair county, Illinois, from further proceeding with the collection of a certain execution in his hands, issued from the office of the clerk of the circuit court of St. Clair county, Illinois, on a decree rendered at the September term, 1896, to wit, on January 4, 1897, in favor of Edward L. Thomas against the Crown Coal & Tow Company, for the sum of $6,309.89, with interest from January 4, 1897, until the further order of the court." The defendants moved for a dissolution of this temporary injunction, and, on hearing had, the same was dissolved by the order of Judge Jenkins.

G. A. Koerner, for appellants.
Charles W. Thomas, for appellees.

Before WOODS, Circuit Judge, and BAKER and SEAMAN, District Judges.

After stating the facts as above, the opinion of the court was delivered by BAKER, District Judge.

The restraining order, the dissolution of which is complained of, enjoined the sheriff from further proceeding with the collection of an execution lawfully issued to him in pursuance of a decree of the circuit court of St. Clair county, in the state of Illinois. It is suggested by counsel for appellees that under the authority of Haines v. Carpenter, 91 U. S. 254, the bill is multifarious and bad on demurrer, and that for this reason the restraining order ought to have been dissolved. We do not consider it necessary to pass upon the question suggested. The order dissolved falls directly within the prohibition of section 720, Rev. St. 1878. This section provides:

"The writ of injunction shall not be granted by any court of the United States to stay any proceeding in any court of a state except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy."

It is contended that the restraining order does not stay any proceeding in the state court, and that its only purpose is to control the action of a ministerial officer. It is conceded that no court of the United States can lawfully issue any order of injunction to arrest the progress of a suit pending in any court of a state, but it is claimed that this is not a suit pending in the court of a state, inasmuch as the matter has passed into judgment, and that the issuance of the execution by the clerk, and the act of the sheriff in executing it, are to be performed under the mandate of the statute, and form no part of the proceedings of the court. This contention cannot be maintained. The prohibition of the statute does not extend to proceedings in a court of the state up to and including final judgment only, but to the entire proceedings from the commencement of the suit until the execution issued on the judgment or decree is satisfied. The supreme court, in Wayman v. Southard, 10 Wheat. 1, say:

"The jurisdiction of a court is not exhausted by the rendition of its judgment, but continues until the judgment shall be satisfied. Many questions arise on the process subsequent to the judgment in which jurisdiction is to be exercised. It is therefore no unreasonable extension of the words of the act to suppose an execution necessary for the exercise of jurisdiction. Were it even true that jurisdiction could technically be said to terminate with the judgment, an execution would be a writ necessary for the perfection of that which was previously done, and would consequently be necessary to the beneficial exercise of jurisdiction."

Jurisdiction is the power to hear and determine the subject-matter in controversy in the suit before the court, and the rule is universal that, if the power is conferred to render the judgment or enter the decree, it also includes the power to issue proper process to enforce such judgment or decree, and that jurisdiction continues until that judgment or decree is satisfied. A writ will lie by the party aggrieved to correct errors in the proceedings, judgment, or execution in a suit in a court of record. The statute of the state authorizing the issuance and execution of final process is not in denial, but is rather in affirmance, of the existence of the jurisdiction of the court until the judgment or decree is satisfied. Diggs v. Wolcott, 4 Cranch, 179; Peck v. Jenness, 7 How. 612, 625; Watson v. Jones, 13 Wall. 679, 719; Haines v. Carpenter, 91 U. S. 254; Dial v. Reynolds, 96 U. S. 340; Sargent v. Helton, 115 U. S. 348, 6 Sup. Ct. 78; In re Sawyer, 124 U. S. 200, 220, 8 Sup. Ct. 482; U. S. v. Collins, 4 Blatchf. 142, Fed. Cas. No. 14,834; Wayman v. Southard, supra; Bank v. Halstead, 10 Wheat. 51; Riggs v. Johnson Co., 6 Wall. 166; Moran v. Sturges, 154 U. S. 256, 14 Sup. Ct. 1019; Trust Co. v. Grantham, 27 C. C. A. 570, 83 Fed. 540, and 53 U. S. App. 647. The section above cited is not the only obstacle which prevents the sustaining of the order of injunction. The principle of comity which obtains between courts of concurrent jurisdiction forms a recognized part of their duty. It requires that a subject-matter drawn and remaining within the cognizance of a court of general jurisdiction shall not be drawn into controversy or litigated in another court of concurrent jurisdiction. This principle prevails in all courts of concurrent jurisdiction deriving their powers from a common source. "A departure from this rule would lead to the utmost confusion and to endless strife between courts deriving their powers from the same source; but how much more disastrous would be the consequence of such a course in the conflict of jurisdiction between courts whose powers are derived from entirely different sources?" Buck v. Colbath, 3 Wall. 334, 341. It is firmly established that the application of this principle forbids the courts of the states from interfering by injunction or otherwise with the mesne or final process of the courts of the United States; and the same principle in like manner forbids the courts of the United States from interfering by injunction or otherwise with the mesne or final process of the courts of the states. The court, speaking through the chief justice, in Moran v. Sturges, 154 U. S. 268, 14 Sup. Ct. 1022, quotes the following from Mr. Justice Clifford, who spoke for the court in Riggs v. Johnson Co., 6 Wall. 195:

> "State courts are exempt from all interference by the federal tribunals, but they are destitute of all power to restrain either the process or proceedings of the national courts. Circuit courts and state courts act separably and independently of each other, and in their respective spheres of action the process issued by the one 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."

For these reasons, without reference to the prohibition of section 720, we should be constrained to affirm the order of dissolution.

It is, however, insisted if the court should be of opinion that the

restraining order cannot be sustained as granted, that this court should modify the order so as to permit the sheriff to collect the judgment, and then restrain him from paying it over to the execution plaintiff. It is enough to say that no such order was asked for either in the prayer for relief or in the application for a temporary injunction, nor was the right to such an order considered in the court below. This court can grant injunctions in aid of its jurisdiction, but the modification asked is tantamount to the granting of an injunction de novo in the suit pending in the court below, and is in no wise in aid of the jurisdiction of this court. Whether the court below should grant a temporary restraining order, enjoining the sheriff from paying over the money, when collected, to the execution plaintiff, and also enjoining the latter from receiving it, are questions not before us, and we express no opinion upon them. The order appealed from is affirmed at the costs of the appellants.

WEBBER v. ST. PAUL CITY RY. CO.

(Circuit Court of Appeals, Eighth Circuit. October 9, 1899.)

No. 1,122.

1. ACTION FOR PERSONAL INJURY—SURVIVAL—MINNESOTA STATUTE.
   Gen. St. Minn. 1894, § 5912, which provides that "a cause of action arising out of an injury to the person dies with the person of either party except as provided in the next section," applies to all causes of action, whether founded on contract or tort; and under it the personal representative of a person whose death was caused by an injury received while a passenger on a street railroad cannot maintain an action for breach of the contract for safe carriage, counting on the expense and loss of time caused the decedent prior to his death by the injury as the damages resulting from such breach, where the suit is not brought in accordance with the provisions of section 5913.

2. STATUTES—RULES OF CONSTRUCTION.
   When the language of a statute is unambiguous, and its meaning is clear, the legislature must be presumed to have meant what it expressed, and arguments by analogy or from history or attempted judicial construction cannot be resorted to for the purpose of placing a different construction upon it.

3. SURVIVAL OF ACTIONS—COMMON-LAW RULE.
   While, as a general proposition, in the absence of statutory provision, actions on contracts survive, and actions on torts abate, on the death of the injured party, the real test of survival is not the form, but the substance, of the cause of action; and the true rule is that if the primary cause of the damages sought to be recovered is the breach of a contract, and injuries to the person are mere incidents of the breach, the action survives; but if the proximate cause of the damages claimed is the personal injury, and the breach and the damages therefrom are merely incident to the injury, the action dies.

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

C. E. Joslin (J. F. George, on the brief), for plaintiff in error.
N. M. Thygeson (M. D. Munn, on the brief), for defendant in error.
Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

SANBORN, Circuit Judge. This was an action brought on August 12, 1898, by the executor of the last will of John E. Webber, who died on March 27, 1895, from the effects of an injury which he received on November 1, 1893, while he was riding as a passenger on one of the cars of the defendant in error, to recover the expenses of his sickness and the amount of the loss of his earnings between the time of his injury and the time of his death. The complaint counted upon the contract of transportation solely. It was that the railway company made an agreement with the deceased to carry him safely; that it did not do so, but injured his back, head, and spine, and thereby destroyed his capacity to work and caused him to die; that between the time of his injury and the day of his death his injuries caused him to expend $4,000 for care, assistance, nursing, and medical attendance, and caused him to lose his earnings, which would have been $100 per month; and that the plaintiff in error was the executor of his will, and as such was entitled to recover these amounts from the defendant in error. The contract was made, the injury was inflicted, and the action was brought in the state of Minnesota. For more than 30 years prior to the commencement of the suit the statutes of that state contained these provisions:

"Section 1. A cause of action arising out of an injury to the person dies with the person of either party, except as provided in the next section. All other causes of action by one against another, whether arising on contract or not, survive to the personal representatives of the former, and against the personal representatives of the latter.

"Sec. 2. When death is caused by the wrongful act or omission of any party, the personal representatives of the deceased may maintain an action, if he might have maintained an action, had he lived, for an injury caused by the same act or omission; but the action shall be commenced within two years after the act or omission, by which the death was caused; the damages thereon cannot exceed five thousand dollars, and the amount recovered is to be for the exclusive benefit of the widow and next of kin, to be distributed to them in the same proportions as the personal property of the deceased person." Gen. St. Minn. 1866, p. 545, c. 77; Gen. St. 1878, p. 825, c. 77.

In 1891 section 2 was amended by the addition of this clause:

"Provided that any demand for the support of the deceased and for funeral expenses, duly allowed by the probate court, shall be first deducted." Gen. St. 1894, §§ 5912, 5913.

Section 2 was again amended, in 1897, by the addition of this proviso:

"Provided, that if an action had been commenced by such deceased person during his lifetime for such injury which had not been finally determined, such action does not abate by the death of the plaintiff, but may be continued by the personal representatives of the deceased, for the benefit of the same persons and limited to the same amount of recovery as herein provided." Laws Minn. 1897, c. 261.

Under these statutes, the circuit court sustained a demurrer to the complaint, and dismissed the action, and this ruling is the only error assigned in this case.

The argument of counsel for the plaintiff in error, stated in the form of a syllogism, is: An action on a contract does not abate by the death of a party. This is an action on a contract. Therefore this action did not abate, and the executor of the will of the deceased

may recover here. In support of this position he cites Bradshaw v. Railway Co., L. R. 10 C. P. 189; Leggott v. Railway Co., 1 Q. B. Div. 599; Broom, Leg. Max. pp. 907–909; 5 Am. & Eng. Enc. Law, p. 132; and various other text-books. None of the authorities which he cites, however, construe or treat of the statutes of Minnesota, or laws identical with them; and a careful examination of these text-books and decisions has failed to convince us that the conclusion of the counsel for the plaintiff in error can be successfully sustained, in view of the positive provisions of the Minnesota statutes. The legislature of that state was not limited in its power to a declaration that actions on contracts should survive, and that actions in tort should abate, on the death of the complainant; and the statute demonstrates the fact that it was not the purpose of the legislature to make that enactment, because it expressly provided in the last clause of section 1 that all other causes of action not mentioned in the first clause, whether arising on contract or not, should survive. The legislature had the undoubted right and authority to enact that some or all actions on contracts should abate, and that some or all actions in tort should survive. It had the right to establish for itself the test of abatement and survival, and by that test all actions within the limits of the state of Minnesota, whether brought in the state or federal courts, must be tried. Henshaw v. Miller, 17 How. 212; Martin's Adm'r v. Railroad Co., 151 U. S. 673, 692, 14 Sup. Ct. 533. It exercised this power, and provided that "a cause of action arising out of an injury to the person dies with the person of either party, except as provided in the next section." We may lay aside the exception in this case, for the cause of action here in question is not of the character prescribed, nor was it brought within the time limited by the next section. The declaration then reads, "A cause of action arising out of an injury to the person dies with the person of either party." The only question remaining is, did this cause of action arise out of an injury to the person? This is answered by another question: Would it have arisen had there been no injury to the person? And the unavoidable answer to that question is that it would not. It is for loss of earnings, and for the expense of care, nursing, and medical attendance, caused by the personal injury. If the injury had not been inflicted upon the person, the loss of earnings would not have been sustained; and the expenses of the care, nursing, and medical attendance would not have been incurred even if the contract of transportation had been entirely broken,—even if the company had failed to carry the deceased an inch. It is no answer to this proposition to say that the personal injury was a breach of the contract, because the statute permits the survival of those causes of action only which did not arise out of a personal injury, whether or not the injury violated a contract. A finding that the cause of action did not arise out of the personal injury is indispensable to an escape from the provision of this section, and it cannot be truthfully said that this cause of action did not so arise. There is nothing in the statute to the effect that a cause of action ex contractu arising out of an injury to the person shall survive, while such a cause ex delicto shall abate. In order to sustain the contention of counsel for the plaintiff in error, it

is necessary to ingraft a sweeping exception upon the act of the legislature, so that it will read: "A cause of action arising out of an injury to the person dies with the person, except in cases in which the injury was the breach of a contract." It is very probable that such an exception would be much more comprehensive than the rule. However that may be, it is not the province of a court to make it. When the legislature has lawfully established a rule which limits the time or manner of maintaining a class of actions, and has made no exception to that rule, the conclusive presumption is that it intended to make none, and the courts have no power to do so. Madden v. Lancaster Co., 27 U. S. App. 528, 539, 12 C. C. A. 566, 573, and 65 Fed. 188, 195; McIver v. Hagan, 2 Wheat. 25, 29; Bank of State of Alabama v. Dalton, 9 How. 522, 528; Vance v. Vance, 108 U. S. 514, 521, 2 Sup. Ct. 854.

If doubts could arise whether or not the legislature intended what the plain words of section 1 express, when it enacted this statute, they would be dispelled by the reason of the rule, and by the subsequent legislative and judicial construction which the enactment has received. Section 1 declared that every cause of action arising out of a personal injury should die with the person, except as provided by section 2. Section 2 provided that when death was caused by the wrongful act or omission of a party the personal representatives of the deceased might maintain an action for the injury, if the deceased could have done so, and that the damages recovered should be distributed to the widow and next of kin in the same proportions as the personal property of the deceased was distributed. It is not probable that the legislature intended to provide by this statute for the survival of two actions for a personal injury which resulted in death,—one under section 1 for the diminution of the estate of the deceased between the time of his injury and his death, and another under section 2 for the pecuniary loss to his widow and next of kin. And yet this is the inevitable result of the construction for which counsel for the plaintiff in error contend. It is more reasonable, more in accord with that recognized public policy which deprecates a multiplicity of suits, and more in consonance with the express terms of the statute, to believe that it was the purpose of the legislature to provide for a single action, in which all recoverable damages resulting from the injury and the death should be assessed and adjudicated, and to abate all others, in favor of the deceased or of his legal representatives, which might arise out of the injury or the death. The subsequent legislation, and the effect given to it by the supreme court of Minnesota, lend strong support to this view. In 1891 the legislature provided that there should be deducted from the damages recovered by the widow and next of kin under section 2, before their distribution to them, any demands for the support of the deceased and funeral expenses. This was, in effect, a legislative declaration that the personal representatives could recover under section 2 the amount of the expense incurred for care, nursing, and medical attendance while the deceased was suffering from the injury which caused his death, and the supreme court of the state so interpreted the amended statute. Sykora v. Machine Co., 59 Minn. 130, 134, 60 N. W. 1008. If the

personal representatives could recover for these expenses under section 2, they surely could not also recover for them under section 1, which expressly abates all causes of action arising out of the personal injury, except as provided under section 2. They could not recover twice,—once under the rule and again under the exception. Again, in 1897, the legislature amended this statute by adding to section 2 a proviso to the effect that, if the person injured had commenced an action for the injury in his lifetime, that action should not abate on his death, but should be continued by his personal representatives for the benefit of the same persons, and should be limited to the same amount prescribed by that section. Laws Minn. 1897, c. 261. It cannot be that the lawmaking power intended by its enactments upon this subject to provide that a cause of action arising out of a personal injury causing death, not prosecuted for the benefit of the persons, nor limited to the amount provided by section 2, should survive to the personal representatives of the deceased if the injured person had not commenced an action before he died, and should abate if he had. That, however, would be the result if the contention of the counsel for the plaintiff in error was sustained. The plain reading of the statute, the subsequent amendments to it, and the judicial interpretation given to it by the supreme court of the state all point to the same conclusion, and leave no doubt that under it every cause of action in favor of the injured person or his personal representatives arising out of an injury to the person dies with the person, except those which are brought or maintained in strict accord with the provisions of section 2. Our conclusion is that under the statutes of Minnesota a cause of action in favor of the injured person or his personal representatives, which arises out of a personal injury which caused the death of the person injured, abates with his death, unless it conforms to the provisions of section 5913 of the General Statutes of Minnesota of 1894, as amended by section 2 of chapter 261 of the Laws of Minnesota of 1897.

Counsel for the respective parties to this action have presented a careful and exhaustive review of the decisions of the English and American courts upon the rule of the common law that a personal action dies with the person. But the statute of Minnesota is so plain and positive in its terms that we do not feel at liberty to disregard, evade, or explain it away, and we must decline to follow them in this discussion. It would be a futile task, however interesting and agreeable, to trace the common-law rule through the decisions of the courts of various jurisdictions, to accurately state its limitations and exceptions, and to compare it with the local law of Minnesota. Whatever the result of such an investigation, that law must still prevail, and it is too plain to be construed away. When the language of a statute is unambiguous, and its meaning is clear, arguments by analogy or from history and attempted judicial construction serve only to create doubt and to confuse the judgment. They serve to obscure far more than to elucidate the meaning of the law. There is no safer or better canon of interpretation than that, when the terms of a statute are plain and its meaning is clear, the legislature must be presumed to have meant what it expressed, and there is no room for

construction. Knox County v. Morton, 32 U. S. App. 513, 516, 15 C. C. A. 671, 673, and 68 Fed. 787, 789; U. S. v. Fisher, 2 Cranch, 358, 399; Railway Co. v. Phelps, 137 U. S. 528, 536, 11 Sup. Ct. 168; Bedsworth v. Bowman, 104 Mo. 44, 49, 15 S. W. 990; Warren v. Paving Co., 115 Mo. 572, 576, 22 S. W. 490; Davenport v. City of Hannibal, 120 Mo. 150, 25 S. W. 364. We remark, however, in closing this discussion, that the statute of Minnesota is not unique, in that it provides for the abatement of causes of action for personal injuries even when they constitute breaches of contracts. While it is true, as a general proposition, that, in the absence of statutory regulation, actions on contracts survive, and actions on torts abate, on the death of the injured party, that is by no means an accurate or complete statement of the common law upon this subject. The test of survival is not the form, but the substance, of the cause of action. An action for the breach of a promise of marriage does not survive, although it is on the contract, and the breach occasions pecuniary loss, because the chief damage, the substance of the cause of action, is disappointed hope, which is an injury to the person, and the pecuniary loss is merely incidental thereto. Stebbins v. Palmer, 1 Pick. 71; Lattimore v. Simmons, 13 Serg. & R. 183; Wade v. Kalbfleisch, 58 N. Y. 282, 286. For the same reason a cause of action against a physician or surgeon for incidental expenses caused to a patient by his want of skill and care abates with his death. Vittum v. Gilman, 48 N. H. 416; Jenkins v. French, 58 N. H. 532. In the absence of statutes, the true rule is that if the primary and moving cause of the damages sought is the breach of the agreement, and the injuries to the person are mere incidents to that breach, the action survives, but if the proximate moving cause of the damages claimed is the personal injury, and the breach of the contract and the damages therefrom are mere incidents to the injury, the cause of action dies. Jenkins v. French, 58 N. H. 532; Schreiber v. Sharpless, 110 U. S. 76, 80, 3 Sup. Ct. 423; Martin's Adm'r v. Railroad Co., 151 U. S. 673, 692, 14 Sup. Ct. 533; Smith v. Sherman, 4 Cush. 408; Boor v. Lowrey, 103 Ind. 468, 3 N. E. 151; Feary v. Hamilton (Ind. Sup.) 39 N. E. 516, 517; Payne's Appeal, 65 Conn. 397, 409, 32 Atl. 948; Wolf v. Wall, 40 Ohio St. 111; Vittum v. Gilman, 48 N. H. 419. The judgment below is affirmed.

GRATTAN TP. v. CHILTON.

(Circuit Court of Appeals, Eighth Circuit. October 9, 1899.)

No. 1,096.

1. MUNICIPAL BONDS—CONDITIONS PRECEDENT TO ISSUANCE—EFFECT OF RECITALS.

The recitals of officers who are invested with authority to determine when conditions precedent to the issue of negotiable bonds are complied with, and with power to issue them on the fulfillment of such conditions, that they have been issued "in pursuance of," or "in conformity with," or "by virtue of" the statute which authorizes their issue under the prescribed conditions, preclude inquiry, as against innocent purchasers for value of the bonds containing such recitals, as to whether or not the precedent conditions had been performed when they were issued.

2. SAME—PROPOSITION FOR ISSUANCE CONSTRUED.
A proposition adopted by the voters of a township authorizing the issuance of bonds "in aid of the construction of a line of railroad passing into the county of Holt from the east, and through the said township to the city of O'Neill, in said county, such proceeds to be given to the Nebraska & Western Railway Company when it shall complete a line of said railroad, and have cars running thereon, to the city of O'Neill," on or before a date named, the city of O'Neill being situated within said township, does not require as a condition precedent to the issuance of such bonds that the railroad shall be constructed entirely through the township, and their issuance was authorized on the completion of the road and the running of cars thereon, to the city of O'Neill within the time prescribed.

3. SAME—PRESUMPTIONS.
Acts done or contracts made by a corporation, which presuppose the existence of other acts or conditions in order to make them valid and legally operative, are presumptive proof of the latter.

4. SAME—VALIDITY—BURDEN OF PROOF.
Comp. St. Neb. 1897, p. 800, § 4023, requires a railroad company to file for record in the office of the clerk of a county in which bonds are to be voted in its aid a plat of the survey of its line of road through the county within two weeks previous to the election, and provides that no bonds shall be valid in case they are voted, unless such line is built within 40 rods of the survey as so filed. *Held*, that where bonds were voted, and were issued by the proper officers after the road was built, they, or the coupons therefrom, were prima facie evidence that the statute had been complied with, and, if the statute had not been complied with, that such fact must be pleaded and proved as an affirmative defense in an action on such bonds or coupons.

5. REVIEW ON ERROR—CASE TRIED TO COURT.
Where a case at law is tried by a circuit judge without a jury, and the resulting judgment is taken to the circuit court of appeals by writ of error, it can only be reviewed as to errors committed by the court below, and a defense not presented to nor ruled on by the trial court cannot be considered.

Caldwell, Circuit Judge, dissenting.

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

H. E. Murphy, B. T. White, and James B. Sheean, for plaintiff in error.

George W. Seevers and M. F. Harrington, for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

SANBORN, Circuit Judge. The defendant in error, Henry Percy Chilton, was the innocent purchaser, for value, of certain bonds and coupons issued by the plaintiff in error, the township of Grattan. The coupons were not paid when they became due, and he brought this action to recover upon them. The township interposed various defenses, and the case was tried by the court below upon an agreed statement of facts, and a judgment was rendered against the plaintiff in error. The opinion of the circuit court upon which this judgment rests may be found in 82 Fed. 873.

Counsel for the plaintiff in error insist that the judgment is erroneous: (1) Because the board of supervisors of the county of Holt, which issued the bonds, had no power to do so, for the reason that the Nebraska & Western Railway, to aid in the construction of which the bonds were issued, was not built through the township of Grat-

tan; and (2) because the defendant in error did not plead or prove that this railroad was built within 40 rods of the line of its route as that line was shown on the survey thereof filed by the Nebraska & Western Railway Company in the office of the clerk of the county of Holt. We will consider these contentions in their order.

1. The agreed facts on which the first position taken by counsel is based are these: Under the constitution and statutes of the state of Nebraska the board of supervisors of the county of Holt was empowered to issue the bonds of the township of Grattan to aid in the construction of a railroad upon a favorable vote of two-thirds of the electors of the township voting upon the question. Comp. St. Neb. 1897, c. 45, §§ 3518, 3519, p. 696. A proper petition for the submission of the question of the issue of the bonds to the vote of the electors was made, the proposition to issue them was submitted, and more than two-thirds of the electors voted in its favor. The petition for the election and the proposition for the issue of the bonds contained this clause:

"The proceeds of said bonds to be used in aid of the construction of a line of railroad passing into the county of Holt from the east, and through the said township to the city of O'Neill, in said county, such proceeds to be given to the Nebraska & Western Railway Company when it shall complete a line of said railroad, and have cars running thereon, to the city of O'Neill, on or before August 1, 1890."

The railway was constructed from the east into the township of Grattan, a distance of about five miles, and it was completed to the city of O'Neill, which is situated within the township, and cars were running thereon, on or before August 1, 1890, but it never was constructed to or across the western boundary of the township of Grattan. After it was completed to O'Neill, the board of county supervisors issued and delivered the bonds to the Nebraska & Western Railway Company. That company sold them on the market, and they were finally purchased for value by the defendant in error in the usual course of such commercial transactions. Each of the bonds contained this recital:

"This bond is issued for the purpose of aiding the Nebraska & Western Railway Company in the construction of a railroad through said Grattan township; said railroad to pass into the county of Holt from the east through the said Grattan township, and have cars running thereon to the city of O'Neill on or before August 1st, 1890, and is one of a series of thirty-six bonds of one thousand dollars each, and numbered from one to thirty-six, inclusive; and said bonds are issued under and by authority of the laws of the state of Nebraska found in chapter 45, on pages 540, 541, and 542, of the Compiled and Annotated Statutes of the State of Nebraska of the year 1889, and the other laws of the state of Nebraska in relation thereto."

Upon these facts it is urged that the construction of the railroad through the township of Grattan was a condition precedent to the issue of the bonds, and that, since the condition was not complied with, the board of county supervisors had no power to issue them, and they are void in the hands of all classes of purchasers. But the board certified that these bonds were issued under and by authority of the statutes. If, under any circumstances, the board would have had authority to issue them, and the bonds would have

been valid, innocent purchasers had the right to presume that those circumstances existed when they were issued, and the township was estopped to deny their existence after such purchasers had bought them in reliance upon the certificate that they were issued in compliance with the statute. There were circumstances under which the bonds might have been valid. The railroad might have been constructed through the township. The township is, therefore, estopped by the certificate in the bonds from avoiding or repudiating them on the ground that it was not constructed through the township. The state of Nebraska imposed the duty and vested the power of determining whether or not two-thirds of the voting electors of the township of Grattan had voted in favor of issuing these bonds, of determining whether or not the railroad had been constructed and put in operation to the city of O'Neill on or prior to August 1, 1890, and of determining whether or not it had been constructed through the township of Grattan, if that was a condition precedent to their issue, in the board of supervisors of the county of Holt. That board decided that all the requisite conditions precedent to their issue had been fulfilled. It sent the bonds forth, and certified on the face of each one of them that they had been issued under and by authority of the statutes of the state. The recitals of officers who are invested with authority to determine when conditions precedent to the issue of negotiable bonds are complied with, and with power to issue them upon the fulfillment of such conditions, that they have been sent forth "in pursuance of," or "in conformity with," or "by virtue of" the statute which authorizes their issue under the prescribed conditions, preclude inquiry, as against innocent purchasers for value, as to whether or not the precedent conditions had been performed when the bonds were issued. City of Huron v. Second Ward Sav. Bank, 57 U. S. App. 593, 606, 30 C. C. A. 38, 45, 86 Fed. 272, 279; National Life Ins. Co. v. Board of Education of City of Huron, 27 U. S. App. 244, 266, 268, 10 C. C. A. 637, 651, 652, and 62 Fed. 778, 792, 793, and cases there cited; West Plains Tp. v. Sage, 32 U. S. App. 725, 736, 16 C. C. A. 553, 558, and 69 Fed. 943, 948; E. H. Rollins & Sons v. Board of Com'rs of Gunnison Co., 49 U. S. App. 399, 412, 26 C. C. A. 91, 98, and 80 Fed. 692, 699; Brown's Ex'x v. Ingalls Tp., 57 U. S. App. 611, 615, 616, 30 C. C. A. 27, 29, and 86 Fed. 261, 263; City of South St. Paul v. Lamprecht Bros. Co., 60 U. S. App. 78, 85, 31 C. C. A. 585, 589, and 88 Fed. 449, 453; Rathbone v. Commissioners, 49 U. S. App. 577, 589, 27 C. C. A. 477, 483, and 83 Fed. 125, 131; Wesson v. Saline Co., 34 U. S. App. 680, 684, 20 C. C. A. 227, 229, and 73 Fed. 917, 919; City of Evansville v. Dennett, 161 U. S. 434, 439, 443, 16 Sup. Ct. 613.

There is another conclusive answer to this contention of the plaintiff in error. It is that the construction of the railroad through the township of Grattan never was a condition precedent to the issue of the bonds. It is conceded that the statutes impose no such condition. The claim is that this condition was imposed by the clause in the proposition to issue the bonds, which has been quoted above. But a fair examination of that clause, however critical, will disclose no limitation or prescription relative to the time of the issuance of the bonds. It relates exclusively to the disposition of their proceeds,

and it authorizes the board to give these to the railway company "when it shall complete a line of said railroad, and have cars running thereon, to the city of O'Neill, on or before August 1, 1890." The company did this, and thereupon the board issued and delivered the bonds. It was not material whether the commissioners sold the bonds, and paid the proceeds over to the railroad company, or delivered the bonds directly to the corporation, and permitted it to make the sale for itself. The statute and the proposition which was carried at the election alike authorized the delivery of the bonds whenever the cars were running to O'Neill, whether the railroad had then been constructed through the township or not.

2. There is a statute of the state of Nebraska which requires a railroad corporation to file for record in the office of the clerk of the county in which donations, bonds, or other valuables are to be voted in its aid a plat of the survey of its line of railroad through the county within two weeks previous to the election, and which then provides that "no bonds, and so forth, shall be valid in case they are voted, unless said railroad corporation build their line of road within forty rods of their survey as filed in the county clerk's office." Comp. St. Neb. 1897, § 4023, p. 800. It is said that the judgment below was erroneous because the defendant in error failed to plead or prove that the railroad was constructed within 40 rods of its surveyed line. But the coupons were prima facie evidence of their own validity, and required no proof aliunde to sustain them. If they were void because the railroad was not constructed in accordance with the provisions of the statute we have quoted, that was an affirmative defense, which it was incumbent on the plaintiff in error to plead and to prove if it would avail itself thereof. Contracts of a municipal or quasi municipal corporation, formally executed by the officers authorized to do so by law, and not in themselves necessarily beyond the scope of their authority, will, in the absence of proof to the contrary, be presumed to be valid, and to have been made with due authority. If acts were required to be done, or conditions were required to exist, before valid contracts could be made, the contracts themselves raise the presumption and present the evidence that such acts were performed and such conditions existed. Acts done or contracts made by a corporation which presuppose the existence of other acts or conditions in order to make them valid and legally operative are presumptive proof of the latter. City of Lincoln v. Sun Vapor Street Light Co., 19 U. S. App. 431, 438, 8 C. C. A. 253, 257, and 59 Fed. 756, 760; Barber Asphalt Pav. Co. v. City of Denver, 36 U. S. App. 499, 510, 19 C. C. A. 139, 144, and 72 Fed. 336, 341; Lincoln v. Iron Co., 103 U. S. 412, 416; President, etc., v. Dandridge, 12 Wheat. 64, 70; Omaha Bridge Cases, 10 U. S. App. 98, 189, 2 C. C. A. 174, 240, and 51 Fed. 309, 327, and cases there cited; Union Water Co. v. Murphy's Flat Fluming Co., 22 Cal. 620, 629. The record discloses no plea, proof, fact, or finding relative to this defense, and it is not here for our consideration. The agreed statement of facts as it stands is ample to support the judgment, and the questions relative to the proximity of the surveyed line to the constructed line of the railroad were not presented to or considered by the court below.

When a case is tried by a federal court without a jury, and the resulting judgment is brought by a writ of error to an appellate court for review, it is only "the rulings of the court in the progress of the trial of the case," and the sufficiency of the facts found to support the judgment, that can be reviewed. Rev. St. § 700. In such a case this is a court for the correction of the errors of the court below only. As the agreed facts in this case are sufficient to support the judgment, and as the question now presented was never brought to the attention of or ruled upon by the trial court, it certainly committed no error regarding it, and there is nothing in this point for us to review or correct. Trust Co. v. Wood, 19 U. S. App. 567, 571, 8 C. C. A. 658, 660, and 60 Fed. 346, 348; Bowden v. Burnham, 19 U. S. App. 448, 8 C. C. A. 248, and 59 Fed. 752; Norris v. Jackson, 9 Wall. 125, 127; Insurance Co. v. Folsom, 18 Wall. 237, 249; Cooper v. Omohundro, 19 Wall. 65, 69; Martinton v. Fairbanks, 112 U. S. 670, 5 Sup. Ct. 321; Lehnen v. Dickson, 148 U. S. 71, 13 Sup. Ct. 481. The judgment below is affirmed.

CALDWELL, Circuit Judge. I dissent from the language of the court as to the presumptions arising from, and the legal effect of, the issuance of municipal bonds. It states the doctrine on that subject much too broadly. Moreover, what is said on that subject is obiter, for we are all agreed that it conclusively appears from the statement of facts "that the construction of the railroad through the township of Grattan never was a condition precedent to the issue of the bonds." That being so, why should the court go out of its way to say that, if the construction of the road through the township had been made a condition precedent to the exercise of the power to issue the bonds, and the road had not been constructed at all, the mere issuance of the bonds would estop the defendant from showing that fact?

NEW DUNDERBERG MIN. CO. v. OLD et al.

(Circuit Court of Appeals, Eighth Circuit. October 9, 1899.)

No. 1,143.

1. JUDGMENT—MATTERS CONCLUDED.
   A judgment in ejectment, adjudging plaintiff entitled to possession of a vein of ore, and which necessarily determined that the apex of such vein was within the boundary of plaintiff's claim, is conclusive of such fact in a subsequent action between the same parties to recover the value of ore alleged to have been taken from such vein by defendant.
2. INTEREST—ACTION FOR CONVERSION.
   Generally, when one has wrongfully converted the money or property of another, interest at the legal rate on the money, or on the value of the property, is recoverable from the date of the conversion, and it is practically immaterial whether it is allowed as interest or as damages.
3. SAME—CONVERSION OF ORE—INTEREST.
   The decisions of the supreme court of Colorado, followed by those of the supreme court of the United States, have established the rule that in actions for mining and converting ore and in actions for the conversion of personal property the injured party may recover, under the statutes of that state, not only the value of the property converted, but also a sum

equal to legal interest thereon from the time of the conversion; and this rule applies although the damages sued for are unliquidated.

4. SAME—UNLIQUIDATED DAMAGES.
A defendant whose lessee mined and converted ore owned by plaintiff upon which defendant received royalties, the exact amount of which was shown by its books, although unknown to plaintiff, cannot avoid the payment of interest on such amount, when recovered in an action for the conversion, on the ground that the claim was unliquidated, and plaintiff claimed more than was actually due.

5. SAME—PLEADING—PRAYER FOR INTEREST.
In an action for conversion, where plaintiff's prayer for damages largely exceeded the amount recovered, he may recover interest, although not specifically demanded in the prayer.

6. TRIAL—EXCEPTIONS TO INSTRUCTIONS.
An exception to an entire charge is unavailing if the charge contains any correct and pertinent statements of fact or declarations of law, and an exception to the refusal of a series of instructions asked is equally unavailing where any of them are erroneous or inappropriate.

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

Willard Teller and R. S. Morrison (Harper M. Orahood, on the brief), for plaintiff in error.

Jacob Fillius and Edwin H. Park, for defendants in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

SANBORN, Circuit Judge. This was an action for mining and converting ore which the plaintiff in error, the New Dunderberg Mining Company, took from those portions of certain underground levels specified in the complaint which were within the side lines, extended vertically downward, of a mining claim of the defendants in error, Robert O. Old and Ellen Old. Two errors are assigned. They are that the court refused to permit the plaintiff in error to prove that the apex of the vein from which it took this ore was not found within the side lines of the claim of the defendants in error, but was situated without those lines, and within the lines of an adjoining claim, owned by the Dunderberg Company, and that the court instructed the jury that defendants in error were entitled to interest on the value of the ore converted from the time of its conversion to the time of the rendition of the verdict.

The ground of the first ruling was that the issue which the proffered testimony tendered was res adjudicata. When this ruling was made, the defendants in error had pleaded and proved that they had previously brought an action and had recovered a judgment in ejectment against the New Dunderberg Mining Company for the mine from which this ore was taken, and that this judgment had been affirmed in this court. Mining Co. v. Old, 49 U. S. App. 201, 25 C. C. A. 116, and 79 Fed. 598. In their complaint in the action of ejectment the Olds had alleged that ever since 1894 they had been the owners of, and had been entitled to, the Frostberg lode mining claim, and to every vein which had its apex within the exterior boundaries of that claim; that the New Dunderberg Company had entered into the possession of the Frostberg lode and the vein thereof, and upon a vein or lode the top or apex of which was within the exterior boundary

of survey lot No. 111, by means of underground workings from an adjoining claim, and had ousted them therefrom. The Dunderberg Company had answered that the Olds never were the owners or entitled to the possession of the Frostberg lode, that the Dunderberg Company had never unlawfully withheld the possession of it, and that the Olds were estopped from claiming the title or possession of it by reason of certain transactions between Robert O. Old and the grantee of the Dunderberg Company. The Olds had filed a replication in which they denied the estoppel. There was a trial of the issues presented by these pleadings, and the judgment was that the Olds should recover possession of the Frostberg lode mining claim survey lot No. 111, which was carefully described by metes and bounds, "and of that certain vein or lode having its top or apex in those certain shafts known and called 'McAfee Shaft,' 'Rowe Shaft,' and 'Turpin Shaft,' and all situate within the Frostberg lode mining claim survey lot No. 111, and being the same vein or lode disclosed in the Tyler level, No. 6 level, D, C, B, and A levels (except north fork of B level), wherever they intersect or penetrate into the said Frostberg lode survey No. 111, though the said vein or lode may, in its downward course, so far depart from the perpendicular as to extend outside the vertical side lines of said survey lot No. 111." In other words, the averment of the complaint was that the defendants in error owned the Frostberg claim, that the lode or vein which the Dunderberg Company worked had its apex within that claim, and that the Dunderberg Company had entered upon it underground, and had held possession of the ground where it had been found. The answer denied the ownership of the Olds, and denied that the Dunderberg Company had wrongfully entered, or wrongfully withheld the possession of, the property. These denials were surely broad enough to raise the issue, and to admit the defense that, while the places from which the ore was taken were within the vertical side lines of the Frostberg claim, it was taken from a vein whose apex was without those lines, and within the lines of the Dunderberg Company's claim; and this would have been a complete defense to the action of ejectment, because the Dunderberg Company was still in the possession of the levels when that action was commenced. The judgment in the ejectment suit demonstrates the fact that this issue was presented and that it was determined in that action. It expressly adjudges that the Frostberg vein or lode has its apex in the Frostberg claim, that it is the vein disclosed in the levels from which the ore here in controversy was taken, and that the Olds are the owners and are entitled to the possession of all those parts of the levels in question which have intersected or penetrated into the Frostberg mining claim survey No. 111. This concludes the discussion of this question between these parties. It estops the Dunderberg Company from again litigating the issue whether the apex of the vein from which it took the ore in the Frostberg claim was within or without the lines of that claim, and the trial court properly excluded the evidence upon this question. In an action between the same parties upon the same claim or demand, a judgment upon the merits is conclusive, not only as to every matter offered, but as to every admissible

matter which might have been offered to sustain or defeat the cause of action. In an action between the same parties upon a different claim or demand, the prior judgment is an estoppel as to all those matters in issue or points of controversy upon the determination of which the finding or verdict was rendered. Cromwell v. Sac Co., 94 U. S. 351, 352; Board v. Platt, 49 U. S. App. 216, 223, 25 C. C. A. 87, 91, and 79 Fed. 567, 571. Conceding that this action of conversion is based upon a different claim from that upon which the action of ejectment was founded, still the judgment in the latter action could not have been lawfully rendered without a determination of the issue, which was fairly open under the pleadings, whether or not the apex of the vein from which the ore within the Frostberg claim was taken was within its lines. The court below committed no error in its ruling upon this subject.

The damages recovered in this case consist of the royalties which the Dunderberg Company had received from ore removed from this mine by its lessees prior to February 15, 1894, when they were enjoined from taking more, and interest on the amount of these royalties from that date. It is assigned as error that the court instructed the jury that the defendants in error were entitled to this interest. It is said that this charge was erroneous, because the recovery of interest in a case of this character was unauthorized by the statutes of Colorado; because the damages sought were unliquidated, and no interest can be allowed on unliquidated damages; because the allowance of interest as damages is discretionary with the jury, and it was not the province of the court to direct its recovery; and because the complaint contained no prayer for interest. It is a general and just rule that, where interest is reserved in a contract, or is implied from the nature of the promise, it is recoverable of right; and that, when property or money has been wrongfully appropriated or converted by a defendant, interest should be given as damages to compensate the complainant for the loss of the use of the proceeds of his property or of his funds. In cases of the latter class its allowance is sometimes a matter of discretion, but generally, whenever one has wrongfully detained or misappropriated the money of another, he ought to pay and must pay interest at the legal rate from the date of the misappropriation, or from the beginning of the detention. Cooper v. Hill, 36 C. C. A. 402, 94 Fed. 582; Redfield v. Iron Co., 110 U. S. 174, 176, 3 Sup. Ct. 570; U. S. v. North Carolina, 136 U. S. 211, 218, 10 Sup. Ct. 920; Jourolmon v. Ewing, 47 U. S. App. 679, 686, 26 C. C. A. 23, 27, and 80 Fed. 604, 607; U. S. v. Pine River Logging & Improvement Co., 61 U. S. App. 69, 32 C. C. A. 406, and 89 Fed. 907; 1 Sedg. Dam. §§ 301, 303. A statute giving express authority therefor is not indispensable to the recovery of interest for the wrongful detention of money or of the value of converted property, and where no such statute exists a reasonable rate of interest conforming to the custom of the locality will be given by way of damages. Young v. Godbe, 15 Wall. 562; Beckwith v. Talbot, 2 Colo. 639, 650. When interest is recoverable as damages, the result is the same, whether it is given under the one or the other name, and hence it is error without prejudice that it is allowed as interest

when it should have been allowed as damages. McCreery v. Green, 38 Mich. 172. Repeated decisions of the highest judicial tribunal of the state of Colorado, followed by those of the supreme court of the United States, have established the proposition that in actions for mining and converting ore and in actions for the conversion of personal property the injured party may recover, under the statutes of that state, not only the value of the property converted, but also "a sum equal to legal interest on the same from the time of the conversion." Mills' Ann. St. Colo. 1891, §§ 2251, 2252; Refining Co. v. Tabor, 13 Colo. 41, 59, 21 Pac. 925; Machette v. Wanless, 2 Colo. 170; Sutton v. Dana, 15 Colo. 98, 25 Pac. 90; Perkins v. Marrs, 15 Colo. 262, 266, 25 Pac. 168; Sylvester v. Craig, 18 Colo. 44, 48, 31 Pac. 387; Cattle Co. v. Mann, 130 U. S. 69, 79, 9 Sup. Ct. 458. This is the established rule in other jurisdictions. Dows v. Bank, 91 U. S. 618, 637; Harrison v. Perea, 168 U. S. 311, 324, 18 Sup. Ct. 129; Smith v. Bolles, 132 U. S. 125, 10 Sup. Ct. 39; Coulson v. Bank, 13 U. S. App. 39, 4 C. C. A. 616, and 54 Fed. 855; Lumber Co. v. Smith, 2 C. C. A. 97, 51 Fed. 63; Bradley v. Geiselman, 22 Ill. 494, 498; Railroad Co. v. Cobb, 72 Ill. 148, 153. The case of Refining Co. v. Tabor, 13 Colo. 41, 59, 21 Pac. 925, has answered the contentions of counsel for the plaintiff in error that interest may not be allowed when the damages are unliquidated, and that it is error for the court to direct the jury to give it. That case involved two actions for $25,000 and interest for converting and selling ore which had been taken from the plaintiff's mine. The amount recovered was only $18,388.12, so that the claim, when presented, was unliquidated, and yet the judgment was reversed because the court below refused to instruct the jury to add to the amount of the value of the property a sum equal to legal interest from the time of its conversion. Moreover, while, as far as the knowledge of the Olds extended, their claim was unliquidated when they brought their suit, and they prayed for a judgment for $300,000, yet the knowledge of the plaintiff in error made the claim clear, definite, and exact. It was the amount of the royalties which it had received from the ore taken from the mine of the defendants in error, and that amount was clearly disclosed upon its books of account. It could have prevented the running of interest by remitting the amount to its owners. The fact that they claimed more than was actually due them furnished no excuse to the Dunderberg Company for its failure to pay them the amount which was due, and no defense to their claim for interest for its detention. The charge of the court upon this question was just and equitable. The plaintiff in error had broken into the mining claim of the Olds, had leased their mine to third parties, and had obtained from these lessees more than $20,000 in royalties upon ore which belonged to the defendants in error. They had obtained substantially all this money prior to February 15, 1894, when they were enjoined from further working this mine. The Olds were entitled to this money at that time. The plaintiff in error detained it. The defendants in error lost the use of it. It was right and just that they should recover interest during the time when the plaintiff in error had the benefit of it, and the statutes and decisions to which we have referred furnish ample authority for its recovery.

The objection that the prayer of the complaint contained no demand for interest is not worthy of extended consideration. The prayer of the complaint was ample to warrant the recovery. It was for $300,000 damages. The amount recovered was only $31,618.82 and costs. Since it was immaterial whether the interest was recovered as damages or as interest, it was equally immaterial whether it was demanded in the prayer of the complaint as the one or the other.

In the briefs and upon the argument it was suggested that there was error in the charge upon the measure of damages, but an examination of the record discloses the fact that no exception to the instructions of the court was taken which presents this question. Counsel for the plaintiff in error requested the court to give six instructions, some of which should have been given, while others should not, and their exception was to the refusal to give them all. They also excepted to the entire charge of the court, which properly declared the law upon many of the questions in the case. These exceptions were futile, and do not present the question of the measure of the damages. An exception to an entire charge is useless if the charge contains any correct and pertinent statements of fact or declarations of law, and an exception to a refusal of a series of instructions is unavailing if any of them were erroneous or inappropriate, because in that case it was not an error to refuse to give the entire series. Price v. Pankhurst, 10 U. S. App. 497, 3 C. C. A. 551, and 53 Fed. 312; Association v. Lyman, 18 U. S. App. 507, 9 C. C. A. 104, and 60 Fed. 498; Railway Co. v. Spencer, 36 U. S. App. 229, 18 C. C. A. 114, and 71 Fed. 93; New England Furniture & Carpet Co. v. Catholicon Co., 49 U. S. App. 78, 24 C. C. A. 595, and 79 Fed. 294. The judgment below is affirmed.

REYNOLDS v. LYON COUNTY, IOWA.

(Circuit Court, N. D. Iowa, W. D. November 1, 1899.)

1. JURISDICTION OF FEDERAL COURTS—TRANSFERRED CLAIMS—COUPONS FROM MUNICIPAL BONDS.
   The jurisdiction of a federal court to hear and determine an action brought by a citizen of another state on coupons from county bonds, payable to bearer, and which were purchased by plaintiff after they were detached, is not affected by the fact that the bonds themselves are payable to persons who are citizens of the state of which defendant is a county.

2. LIMITATIONS—STATUTE GOVERNING—ACTION ON MUNICIPAL BONDS.
   An action in a federal court on coupons from bonds issued by a municipality is governed, as to limitation, by the statute of the state, and in Iowa no recovery can be had on coupons maturing more than 10 years prior to the commencement of the action.

3. JURISDICTION OF FEDERAL COURTS—TRANSFEREE OF MUNICIPAL BONDS—INSTRUMENTS PAYABLE TO BEARER.
   Municipal bonds payable to "——, or order," are, in effect, instruments payable to bearer, within the meaning of the judiciary act of 1888 (25 Stat. 434), and a transferee who is a citizen of another state, and to whom they were transferred in the same condition by delivery, may maintain an ac-

tion thereon in a federal court, without regard to the citizenship of the original holder.

4. MUNICIPAL BONDS—VALIDITY—LIMIT OF INDEBTEDNESS.

Bonds issued by a county in exchange for outstanding warrants, and which are not a part of a series in itself exceeding in amount the limit of the county's legal indebtedness, cannot be held invalid as having been issued in excess of such limit, unless it is shown that the warrants which they replaced were also invalid for the same reason.

This was an action on negotiable bonds and coupons issued by defendant county.

A jury having been waived in the above case, the evidence was submitted to the court, from which the court finds the facts to be as follows:

(1) The plaintiff, G. M. Reynolds, was, when this suit was brought, and is now, a citizen of the state of Illinois, and the defendant, Lyon county, was, when this suit was brought, and is now, a municipal corporation created under the laws of the state of Iowa, having been duly organized as a county in the year 1872.

(2) This action is brought to recover upon thirty-five interest coupons issued by the defendant county, each for the sum of $17.50, of which number five came due June 1, 1887, five on December 1, 1887, five on June 1, 1888, five on December 1, 1888, five on June 1, 1889, five on December 1, 1889, and five on June 1, 1890; these coupons, when issued, being attached to certain bonds dated June 1, 1880, which were payable to the order of Chase & Taylor, who were then, and are now, citizens of the state of Iowa; the coupons being payable to the holder thereof, and the same being now the property of the plaintiff, he having purchased the same for value after the same had been detached from the bonds to which they were originally attached. The action is also brought upon five negotiable bonds issued by the defendant county under date of March 1, 1885, one thereof—being No. 28—being for the sum of $100, and the other four being for the sum of $500 each, payable in 10 years, with interest coupons attached; these bonds being issued to refund outstanding county warrants, and being in fact exchanged for warrants of the defendant county owned by Miller & Thompson, who were then, and are now, citizens of the state of Iowa; the bonds being made payable to ——, or order. These bonds, upon their issuance, were sold by Miller & Thompson to E. F. Drake, a citizen of Minnesota, and are now owned by the plaintiff, who bought them for value, before maturity.

(3) The value of the taxable property in Lyon county for the year 1884, as shown by the last state and county tax lists, was the sum of $1,580,735, including the amount of exemptions under the tree-culture acts of the state of Iowa; or, if the exemptions be deducted, would be the sum of $1,437,527.

(4) That on March 1, 1885, there was outstanding against the county of the bonds previously issued the following:

Of the bonds issued in 1878 and 1879.....	$ 3,700
Of the bonds issued from January, 1880, to March 1, 1885.....	37,500
	$41,200

Also the issue of $100,000, dated July 1, 1879, known as the "Shade Bonds." This issue of bonds exceeded in amount the constitutional limit, and hence were not enforceable against the county, and therefore, when the bonds in suit were issued, to wit, March 1, 1885, the valid bond indebtedness of the county was the sum of..... $41,200

At that date there were outstanding warrants to the amount of..	29,466
Total valid indebtedness.....	$70,666

(5) The proceeds realized from the sale of the Shade bonds were used to pay off $55,500 due upon judgment bonds issued by the county in 1872 and 1873, and $47,300 of funding bonds issued between October 19, 1874, and February 7, 1878. The Shade bonds were paid off from the proceeds of an issue of bonds for $120,000, dated May 1, 1885, sold by the county to different parties in the summer of 1885. After the sale of these bonds, the county repudiated liability

thereon, on the ground that the issue was in excess of the constitutional limit, and in the equity suit of Ætna Life Ins. Co. v. Lyon Co. (C. C.) 95 Fed. 325, tried before this court, it has been adjudged that the county can be held liable on this issue of bonds in the sum of $33,936.75, and no more.

J. M. Parsons, for plaintiff.

E. C. Roach, E. Y. Greenleaf, and Simon Fisher, for defendant.

SHIRAS, District Judge (after stating the facts). The first five counts in plaintiff's petition are based upon interest coupons which were issued by the defendant county in connection with bonds numbering 27 to 31, both inclusive, bearing date June 1, 1880, and payable to Chase & Taylor, or order, the coupons being in form payable to bearer. On behalf of the county it is contended that the court cannot take jurisdiction of these coupons, because the bonds from which they have been detached are payable to the order of Chase & Taylor, who are citizens of Iowa, it being urged in argument that this court ought not to hear and determine, in a suit upon the coupons, the question of the validity of the bonds, which, being payable to citizens of Iowa, or order, could not now be brought within the jurisdiction of this court. The jurisdiction of this court over an action based upon the bonds will be determined by the citizenship of Chase & Taylor when the action is brought, and this court cannot know whether they will continue to reside in Iowa or not. It may be that they may remove to another state, and thus jurisdiction in this court would exist over a suit to enforce payment of the bonds. But, aside from these considerations, even if it were true that this court might never be able to take jurisdiction of an action on the bonds, that fact does not defeat the jurisdiction over the suit to enforce payment of the coupons. The evidence shows that the coupons were detached from the bonds, and were purchased, for value, by the plaintiff; and they are as much separate claims against the county as though they had never been attached to the bonds with which they were originally issued. In order to maintain an action on the coupons, it is not necessary that the plaintiff should also be the owner of the bonds, and, being the owner of the coupons, he has the right to bring suit thereon in the federal court, because the coupons are payable to bearer, are executed by a corporation, and are owned by a citizen of a state other than Iowa.

The only other defense interposed to the coupons declared on in the first five counts of the petition is that based on the statute of limitation, and, under the ruling of the supreme court in Amy v. City of Dubuque, 98 U. S. 470, it must be held that the 10-years limitation provided for in the Code of Iowa as a bar to actions based upon written contracts is applicable to this case, and therefore no recovery can be had upon any of the coupons which matured more than 10 years before February 25, 1899, the date when the summons in this case was placed in the marshal's hands for service. In other words, the coupons maturing June 1 and December 1, 1887, and June 1 and December 1, 1888, are barred by the statute, and plaintiff is only entitled to recover on the coupons maturing June 1 and December 1, 1889, and June 1, 1890, which, with interest up to November 1, 1899, amount to the sum of $411.01.

The remaining four counts of the petition are based upon four bonds and coupons thereto attached bearing date March 1, 1885; one bond—No. 28—being for the sum of $100, and the other three—Nos. 32, 33, and 34—being for the sum of $500 each, and payable March 1, 1895. The evidence shows that these bonds were issued for the purpose of refunding outstanding warrants of the county, and were, in fact, exchanged for warrants held by the firm of Miller & Thompson. It is contended on behalf of the defendant that, as Miller & Thompson are citizens of Iowa, this court cannot entertain jurisdiction, in that the plaintiff is an assignee of the bonds holding under assignors who could not bring suit in this court. The bonds are not made payable to Miller & Thompson, but to ———, or order, and therefore, as was held by this court in Keene Five-Cent Sav. Bank v. Lyon Co. (C. C.) 90 Fed. 523, the bonds are, in effect, payable to bearer, and therefore come within the exception to the statute which confers jurisdiction over corporate obligations payable to bearer.

It is further pleaded as a defense that these bonds, when issued, were invalid and void, because the indebtedness of the county then exceeded the 5 per cent. limitation imposed by the constitution of Iowa upon the debt-creating power of the county. The evidence shows, as already stated, that these bonds were issued in exchange for outstanding warrants of the county, but the evidence does not show that the warrants were invalid; and, unless they were nonenforceable, the bonds exchanged therefor would be valid, and binding upon the county. The total issue of bonds of date of March 1, 1885, of which the four bonds in question formed part, amounted to the sum of $3,100, and these bonds are not, therefore, part of a series which in itself exceeded in amount the limitation of 5 per cent. upon the taxable property of the county; and under these circumstances the burden is upon the defendant to prove that the warrants for which the bonds were exchanged were themselves invalid and nonenforceable, because, if they were valid, the merging thereof into bonds of like amount would not increase the indebtedness of the county. The evidence adduced on behalf of the defendant county does not show that the debts evidenced by the warrants which were exchanged for the bonds sued on were invalid or nonenforceable, and hence the facts necessary to sustain this defense have not been proven. Furthermore, the evidence shows that the total valuation of the taxable property of the county at the date of the issuance of the bonds was $1,580,735, as shown by the last preceding state and county tax lists, and the county could incur an indebtedness to the amount of $79,036.75 without exceeding the constitutional limit. If the Shade bonds are excluded from computation in ascertaining the amount of the county indebtedness at the date of the issuance of the bonds in suit, the amount thereof was the sum of $70,666, and therefore the county had full authority to issue the bonds sued on without thereby reaching the limit of its debt-creating power.

In the several cases before this court based upon the bonds issued by the defendant county it has always been held that the issue of July 1, 1879, known as the "Shade Bonds," were invalid and nonenforceable, because the issue in itself was for an amount much beyond the constitutional limit, and therefore these bonds must be excluded

in computing the actual indebtedness of the county; and this view has been sustained by the court of appeals for this circuit in the case of Lyon Co. v. Ashuelot Nat. Bank, 30 C. C. A. 582, 87 Fed. 137. Under these circumstances the county had full authority to issue the bonds sued on without infringing on the constitutional restriction, and therefore, in any view that can be taken of the facts, it must be held that the defense relied on by the county has not been sustained by the evidence adduced, and the plaintiff is entitled to judgment on the bonds sued on and upon all the coupons save those which matured 10 years or more before this suit was brought, which the record shows was February 24, 1899; the total amount being the sum of $3,589.05, for which sum and costs judgment will be entered in favor of plaintiff.

KEENE FIVE-CENT SAV. BANK v. LYON COUNTY.

(Circuit Court, N. D. Iowa, W. D. November 1, 1899.)

1. MUNICIPAL BONDS—EXCEEDING LIMIT OF INDEBTEDNESS—INNOCENT PURCHASER.

   Where an issue of negotiable bonds by a county does not in itself exceed the limit of indebtedness which the county can legally contract, and the bonds recite that they are issued for the purpose of funding outstanding indebtedness of the county, and also recite the statutes under which they are issued, and which authorize their issuance for such purpose, there is nothing on the face of such bonds to charge a purchaser with notice that their issuance will increase the indebtedness of the county beyond the constitutional limit, and one purchasing such bonds in good faith from the county, for full value, is an innocent purchaser, entitled to rely on the recitals therein, and to enforce them against the county, at least to the amount for which the county could legally contract indebtedness at the time of their issuance.

2. SAME—COMPUTING OUTSTANDING INDEBTEDNESS.

   In an action against a county on its negotiable bonds issued for the purpose of funding outstanding indebtedness, where the defendant introduces evidence showing that warrants which were outstanding when the bonds were issued, and which were paid from the proceeds of such bonds, were illegal and nonenforceable against the county, the amount of such warrants cannot be considered in determining the existing indebtedness of the county when the bonds were issued.[1]

3. SAME

   Where a county issues negotiable bonds under statutory authority, for the purpose of funding its outstanding indebtedness, and sells them to an innocent purchaser for full value, it cannot impeach the validity of such bonds by showing that its officers used the proceeds in the payment of warrants which were invalid, and not enforceable.

This was an action on funding bonds issued by defendant county. A jury trial having been waived, the evidence was submitted to the court, and the facts found to be as follows:

(1) Plaintiff, the Keene Five-Cent Savings Bank, was when this action was brought, and is now, a corporation created under the laws of the state of New Hampshire; and the defendant county was when the suit was brought, and is now, a corporation created under the laws of the state of Iowa, the county being organized in January, 1872.

(2) The first state and county tax lists for the county were those for the year 1872, and the amounts of the taxable property within the defendant

[1] As to constitutional and statutory limitations upon municipal indebtedness, see note to City of Helena v. Mills, 36 C. C. A. 6, 94 Fed. 916.

county, as shown by the state and county tax lists for the various years since organization, were as follows, exclusive of amounts allowed as exemption under the tree culture acts, to wit:

For the year	1872	$ 499,099 96
" " "	1873	1,009,444 56
" " "	1874	997,822 62
" " "	1875	1,061,806 63
" " "	1876	1,081,356 09
" " "	1877	885,262 80
" " "	1878	889,757 85
" " "	1879	915,133 28
" " "	1880	1,066,707 00
" " "	1881	978,259 00
" " "	1882	989,550 00
" " "	1883	1,384,289 00
" " "	1884	1,437,527 00
" " "	1885	1,558,043 00

(3) It is further found that the exemptions under the timber culture acts of the state of Iowa, on assessments against property owners in Lyon county, as shown by the state and county tax lists for Lyon county, Iowa, were for the year 1879, and for the various years since, as follows:

For the year	1879	$ 75,218 80
" " "	1880	171,551 00
" " "	1881	171,514 00
" " "	1882	175,547 00
" " "	1883	177,182 00
" " "	1884	143,208 00
" " "	1885	160,135 00

The tax lists of said Lyon county, Iowa, for the years 1879 to 1885, inclusive, were made up as follows: First column, name of owners; second column, part of section, name of town; third column, section, lot; fourth column, township or block; fifth column, number of acres; sixth column, value of land or town lot; seventh column, value of personalty; eighth column, exemptions for trees under state law; ninth column, total value for taxation; and the property assessed for taxation was entered upon the books by entering under the proper columns the name of the owner, the description of land or lot, the value of the personalty, and under column 8 the amount of exemptions for trees under the state laws, and under the ninth column the total value for taxation as shown by columns 6 and 7, after deducting the amount entered under column 8.

(4) From the 18th day of July, 1872, to the 28th day of July, 1873, there were issued by the defendant county $55,000 of judgment bonds for the purpose of paying judgments aggregating $55,000 which had been rendered against said county, which said judgments are set out in paragraph 4 of the findings of the court in the case of Ætna Life Ins. Co. v. Lyon Co. (C. C.) 44 Fed. 329.

(5) That from July 28, 1873, up to July 1, 1879, funding bonds were issued by the defendant county, under the provisions of chapter 1 of title 4 of the Code of Iowa for 1873, as amended by chapter 9 of the Acts of the 15th General Assembly, and chapter 154 of the Acts of the 17th General Assembly, at various dates, and in amounts as follows:

October 19, 1874	$10,000
December 1, 1874	6,000
February 16, 1875	1,000
September 18, 1875	5,100
October 18, 1875	200
November 9, 1875	400
September 6, 1876	20,000
July 7, 1877	3,600
February 7, 1878	1,000
June 4, 1878	5,200
February 19, 1879	1,400
June 4, 1879	1,400
Total	$55,300

(6) July 1, 1879, the defendant county issued $100,000 of 4 per cent. refunding bonds, under the provisions of chapter 58 of the Acts of the 17th General Assembly of the State of Iowa, and upon the following resolutions of the board of supervisors of said county, of date April 3, 1878: "Whereas, in accordance with an act of the seventeenth general assembly of the state of Iowa, authorizing counties, cities, and towns to refund outstanding bonded indebtedness at a lower rate of interest, and to provide for the payment thereof, the board of supervisors of Lyon county, Iowa, in regular session assembled, deem it for the public interest to refund all indebtedness of said county, evidenced by the bonds thereof heretofore issued and outstanding at the time of the passage of this act: Therefore, be it resolved by said board of supervisors that the chairman of said board and the auditor of said county are hereby authorized and empowered to issue the coupon bonds of said county in sums not less than one hundred dollars ($100), nor more than one thousand dollars ($1,000), having not more than fifteen years to run, redeemable in lawful money of the United States of America, at the pleasure of the said county of Lyon, after five years from the date of issue, and bearing interest payable semiannually at the rate of 8 per centum (8%) per annum, which bonds shall be substantially in the forms set forth in said bill, to wit, from lines eleven to twenty-nine, inclusive, and deliver the same to J. Shade, treasurer of the said Lyon county, Iowa, who is hereby authorized to sell and dispose of said bonds so issued, in accordance of said act of the seventeenth general assembly of the state of Iowa, and for no other purpose whatever. It is further resolved by the board of supervisors of said Lyon county, Iowa, that two per centum (2%) be, and the same is hereby, appropriated, of the bonds herein authorized to be issued, to pay the cost or expenses of preparing, issuing, advertising, and disposing of the same, and that J. Shade is hereby employed as financial agent thereof, with power to employ an assistant, if he so desire, and that all matters herein set forth shall be done in strict conformity with this resolution and the provision of said act. The foregoing was approved by all the members of the board of supervisors of Lyon county, Iowa."

(7) The foregoing resolution was spread upon the records, and is upon page 337 of Book A of the records of the proceedings of the board of supervisors of said county; and the proceeds of this issue of the Shade refunding bonds, amounting to $100,000, were used to pay the principal and interest of bonds issued prior thereto, as follows: The amount of $53,500 thereof was used to pay in full all of the $55,000 of judgment bonds heretofore referred to, and which were issued in 1872 and 1873, and which were outstanding and unpaid, being in amount $53,000 of principal and $500 of interest, including the whole of $6,800 issued upon the judgment in favor of C. A. Greely, and which was reversed in the supreme court of the state of Iowa. The remainder of the proceeds arising from the sale of the Shade refunding bonds of $100,000, issued July 1, 1879, was used to pay said above-mentioned $47,300 of funding bonds not issued upon or to pay judgments, with accrued interest thereon amounting to $1,085, hereinbefore referred to as being issued between October 19, 1874, and February 7, 1878, both dates inclusive, as set forth in finding No. 5.

(8) The following additional judgments were entered against the defendant, Lyon county, at the dates and in the amounts named, to wit:

E. T. Kirk, July 24, 1873	$2,204 23
James H. Wagner, April 21, 1874	672 06
A. J. Harmon, April 21, 1874	381 42
Perkins Bros., August 22, 1874	815 05
Wilson and Van Suan & Co., May 3, 1875	3,850 34
Lyman J. Gage, October 17, 1875	4,460 56
C. H. Smith, November 15, 1876	233 00
E. T. Drake, May 14, 1878	603 00
A. H. Andrews & Co., May 14, 1878	107 45
Swan & Fawcett, May 14, 1878	603 00
T. C. Thompson, May 14, 1878	304 00
Chase & Taylor, May 14, 1878	479 10

—Which said judgments were satisfied prior to the 1st day of July, 1879, either by the issuance of the bonds set out in paragraph 5, or the proceeds of their

sale, or warrants or cash derived from other sources, and that no judgments were rendered against said county after May 14, 1878.

(9) The next bonds issued by the defendant county were issued on January 8, 1880; and that on said date, and at various dates subsequent thereto, up to and including July 1, 1885, there were issued $60,600 of funding bonds under the provisions of chapter 1, tit. 4, Code 1873; chapter 9, Acts 15th Gen. Assem.; chapter 125, Acts 16th Gen. Assem.; chapter 154, Acts 17th Gen. Assem.; chapter 183, Acts 18th Gen. Assem.; chapter 147, Acts 19th Gen. Assem.; chapter 80, Acts 20th Gen. Assem.,—at dates and in amounts as follows:

January 8, 1880	$ 600
May 12, 1880	11,600
June 1, 1880	6,800
November 12, 1880	2,400
September 6, 1881	4,000
June 13, 1882	9,000
September 1, 1884	3,100
March 1, 1885	3,100
July 1, 1885	20,000
	$60,600

(10) That the whole amount of said bonds was issued for the purpose of taking up outstanding floating warrants against said county, and on the date of the issuance of the last $3,100 there were outstanding county warrants, not funded into the issue of March 1, 1885, in the sum of $26,366.

(11) On May 1, 1885, an issue of $120,000 of refunding bonds was made by the defendant county, under the provisions of chapter 58 of the Acts of the 17th General Assembly, and chapter 175 of the Acts of the 20th General Assembly, of the State of Iowa, and under a resolution of the board of supervisors of said county of date April 11, 1884, as follows:

"Whereas, it is deemed to be for the public interest to refund the indebtedness of the county of Lyon, state of Iowa, evidenced by the bonds thereof heretofore issued and outstanding on the 1st day of January, 1884, and to issue the coupon bonds of county: It is therefore resolved, by the board of supervisors of said county in session assembled, to issue coupon bonds of this county in sums of not less than one hundred dollars, nor more than one thousand dollars, having not more than twenty years to run, redeemable in lawful money of the United States of America, at the pleasure of the county, after five years from the date thereof, and bearing interest, payable semiannually, at 6 per cent. per annum, which bonds shall be substantially in the form given in section 1, c. 58, Acts 17th Gen. Assem., and shall bear date of July 1, 1885, or on the 1st day of any month called for by Miller & Thompson; and the chairman of the board and the auditor of this board and the auditor of the county are hereby directed to issue same, in accordance with said statute and this resolution.

"In testimony whereof the said county, by its board of supervisors, has caused this bond to be signed by the chairman of the board, and attested by the auditor, with the county seal attached, this 1st day of May, 1885.

"[Seal.] J. G. Anderson, Chairman of the Board of Supervisors.

"T. C. Thompson, County Auditor."

(12) The issue of $120,000 of bonds of defendant county bearing date May 1, 1885, were of denominations of $1,000 each, and were sold at the dates, in the amounts, and of the numbers, and to the persons or corporations, as follows, to wit: June 1, 1885, Nos. 01 to 027, to G. B. Provost; June 4, 1885, Nos. 048 to 052, to C. H. Eighmey; June 6, 1885, Nos. 053 to 055, to Dubuque National Bank; August 28, 1885, Nos. 056 to 090, to Ætna Life Insurance Company; September 1, 1884, Nos. 091 to 095, to United States National Bank; September 1, 1885, Nos. 096 to 0105, to Orient Fire Insurance Company; September 2, 1885, Nos. 0106 to 0110, to Connecticut Life Insurance Company; September 8, Nos. 028 to 047, to Savings & Trust Company of Cleveland, Ohio; September 20, 1885, Nos. 0111 to 0120, to Hartford Steam-Boiler Inspection & Insurance Company.

(13) The proceeds of the $120.000 issuance of bonds of said county, dated May 1, 1885, were used to pay off and take up the $100,000 issue of bonds of July 1, 1879, and unpaid interest thereon, and the balance to take up funding bonds of said county outstanding at the date of the issue of the said $120,000 of bonds, and the commission for the placing of said $120,000 for sale, amounting to $2,438.59.

(14) No other bonds were issued by the defendant county than as set out in this finding of facts. All of the bonds issued by said county prior to the date of the issuance of the bonds in suit were outstanding and unpaid at the time of the issuance of the bonds in suit, except $20,000 of the July 1, 1879, issue, and except as shown by the facts in evidence.

(15) The $100,000 of bonds issued July 1, 1879, were in denominations of $500 and $1,000 each, and bore interest at the rate of 8 per cent., payable semi-annually, evidenced by coupons attached to said bonds, and said interest was regularly paid by the said defendant county at its maturity, from the issuance of said bonds up to the date said bonds were taken up and paid off.

(16) The defendant county for each year, from the time of its organization up to and including the year 1886, levied a tax, under the name of "Bond and Interest Fund," upon the taxable property of the said county; and from the fund derived from said taxation the said county regularly paid the interest upon all of the bonds issued by it up to the 11th day of May, 1887, except that part of the interest on bonds which was paid from the money derived from the sale of bonds, amounting to $661.41 of the $100,000 issue, and $1,585 of the bonds of said county issued prior to the $100,000 issue.

(17) Portions of the several amounts of warrants drawn and outstanding in the years 1880 to 1885, both inclusive, were paid from the funds in the county treasury derived from the taxes of these years.

(18) Of the bonds issued in 1878 and 1879 there were paid and canceled, prior to June 18, 1882, $2,400, and prior to September 1, 1884, the amount of $4,300.

(19) The resolution of the county board of April 10, 1884, reads as follows: "Whereas, the county of Lyon, in the state of Iowa, has a floating indebtedness in warrants on the different funds in said county; and whereas, the said board of supervisors deem it to the best interests of the county to bond the same: Therefore be it resolved, by the board of supervisors of Lyon county, Iowa, that the chairman, with the auditor, be authorized to issue bonds in amounts sufficient to cover said indebtedness, and deliver the same to the county treasurer, and take his receipt therefor.

(20) The said county of Lyon kept among its other books a warrant record, which record was headed, "Treasurer's Warrant Record," and upon which paid warrants were entered in columns under the following heads, "No. of Warrant," "Date of Warrant," "To Whom Drawn," "When Paid," "Original Amounts," "Interest," "Total;" and on said warrant record, on pages 274, 275, 276, 277, 279, and 280, are shown $16,637.76 of warrants paid from September 19, 1885, to October 20, 1885,—the beginning of heading on page 274 reading, in writing, as follows: "Warrants bonded from Sept. 19, 1885, to Oct. 2, 1885. John G. Watkins, Treasurer;" all of the payments upon said warrant record upon said pages 274 to 280, inclusive, being under date of September 19, 1885.

(21) That in each of the years 1879 to 1884, both inclusive, there was regularly levied and collected taxes, upon the taxable property of defendant county, six mills for county fund, three mills for bridge fund, and in the year 1884 there was also levied and collected one mill for poor fund.

(22) That the bonds in suit were sold by B. L. Richards, acting for the county treasurer of defendant county, to the plaintiff company, on the 3d day of September, 1885, and the money derived from the sale thereof was turned over by said Richards to the said county treasurer on the 21st day of September, 1885.

(23) That on the 1st day of July, 1885, and prior to the issuance of the bonds in suit, and at the date of the sale of said bonds, there were outstanding and unpaid warrants of said county to the amount of $19,765.64, of which amount $16,662.01 were paid by the county treasurer from the money realized from the sale of the bonds to the plaintiff company; it being claimed by the

defendant that the warrants thus paid were mainly issued in the year 1882, and were invalid and void, having been issued in contravention of the constitutional limitation, and the court so finds the fact to be.

(24) That, when the bonds sued on were issued and sold to the plaintiff company, the valid outstanding indebtedness of the county was as follows:

Bonds.

The bonds of July 1, 1879, known as the "Shade Bonds," had been paid off from the proceeds of the issue of $120,000, dated May 1, 1885; of the latter issue it has been judicially determined that there is valid the sum of	$33,936 75
Of the funding bonds issued up to March 1, 1885, as set forth in finding No. 9, and amounting to $40,600, there had been paid $16,900, leaving balance of	23,700 00
Of the bonds issued between June 4, 1875, and June 5, 1879, as set forth in finding 5, there remained unpaid	3,700 00
Total	$61,336 75

Warrants.

The amount of warrants outstanding was $19,765.64, of which sum $16,662.01 were invalid and nonenforceable, leaving as valid the sum of	3,103 63
Total indebtedness	$64,440 38

J. M. Parsons, for plaintiff.

E. C. Roach, E. Y. Greenleaf, and Simon Fisher, for defendant.

SHIRAS, District Judge. The evidence in this case shows that the series of bonds issued by the defendant county, under date of July 1, 1885, and amounting to the sum of $20,000, were issued for the purpose of funding the then outstanding warrants of the county, and the bonds upon their face referred to the several acts of the general assembly of the state of Iowa, which conferred upon the county full authority to issue negotiable bonds for the purpose named. As the total amount of this series of bonds did not reach the 5 per cent. limitation imposed upon the power of the county to create indebtedness, there was nothing on the face of the bonds to charge the purchaser thereof with notice of any illegality therein, but, on the contrary, every presumption was in favor of their validity.

The evidence clearly shows that the plaintiff corporation bought the bonds for full value, in good faith, and is therefore entitled to recover thereon, unless the defendant county has sustained its defense that the bonds are invalid because of the limitation found in the constitution of the state of Iowa, restricting the indebtedness of municipal corporations to 5 per cent. upon the value of the taxable property within the municipal limits, as shown by the last preceding tax lists. The total valuation of the taxable property in the county for the year 1884 was the sum of $1,580,735, and the limit of the indebtedness was therefore the sum of $79,036.75 at the time the bonds in suit were issued.

The valid outstanding bonded indebtedness of the county at that time amounted to $61,640.75. There was then outstanding county warrants to the amount of $19,765.64, of which $16,662.01 were funded in the bonds sold to the plaintiff company. On behalf of

the defendant, it is contended that the evidence by it introduced proves that the warrants thus bonded were issued in 1882, and that they were themselves void, because they were issued in violation of the constitutional limit. If defendant's position in this particular is correct, it follows that in determining the amount of the indebtedness existing against the county when the bonds in suit were sold to plaintiff this amount of void warrants cannot be estimated, and therefore the amount thereof, to wit, $16,662.01, must be deducted from the total of outstanding warrants, to wit, $19,765.64, in order to ascertain the amount of the county indebtedness represented by valid warrants, which gives the sum of $3,103.63. Adding this amount to that of the valid bonds, and we have the sum of $64,440.38 as the total of the then valid outstanding indebtedness of the county, which would fall short of the 5 per cent. limitation in the sum of $14,596.37; or, in other words, at the time the bonds in suit were issued and sold to the plaintiff company, the county could lawfully create an additional indebtedness to that amount.

It is contended, on behalf of defendant, that, as the issue of bonds sold to plaintiff exceeded this amount, being the sum of $20,000, the whole issue must be treated as invalid and void, and that the court cannot recognize and enforce the contract of the county, evidenced by the bonds, up to the limit of the indebtedness that could be lawfully created. It must be remembered that the bonds in suit did not in themselves exceed the constitutional limit, but in fact they fall far short of the limit. The recitals in the bonds clearly pointed out the acts of the state legislature upon which they were based, and justified the purchaser in believing that they were issued for the purpose of refunding the outstanding obligations of the county,—a purpose for which there existed ample legislative authority. Upon the face of the bonds, therefore, there was nothing to show that they were invalid; and herein is an essential difference between the facts of this case and those existing in Doon Tp. v. Cummins, 142 U. S. 366, 12 Sup. Ct. 220, the decision in which is the main reliance of defendant in this case. In that case, the series of bonds bought by Cummins in itself exceeded the limit of the debt-creating power of the township, and it was held that, as the purchaser was bound to know the limit fixed by the constitution and the amount of the taxable property within the township, he was charged with knowledge of the fact that the issue itself violated the constitutional provision, and he could not be held to be an innocent purchaser, and he could not rely upon any of the recitals in the bonds as evidence in his favor. In the case at bar, admitting that the plaintiff company was bound to know of the existence of the constitutional limit, and of the fact that the value of the taxable property in the county in the year 1884 amounted to $1,580,735, it follows that the plaintiff knew that the county had the legal right to create indebtedness up to the full sum of $79,036.75, and the offer to sell to it bonds, in the sum of $20,000 only, would not charge the company with knowledge that the county was approaching or exceeding the constitutional limit. The plaintiff, having bought the bonds for full value, and in good faith, is now entitled to rely upon the recitals of

the bonds; and, as the total issue was far within the limit imposed upon the county by the constitutional provision, it follows that the plaintiff, having proved the due execution of the bonds, and the payment of value therefor, has made out a full and sufficient prima facie case against the county, and is therefore entitled to recover, unless the county has made out a good defense against the plaintiff's case. The defense relied upon is not that the county did not have full authority to issue negotiable bonds for the purpose of refunding its outstanding obligations, either by direct exchange at par, or by selling the bonds and applying the proceeds in payment of its obligations; for the acts of the general assembly confer full power so to do upon the county. The defense is not that the bonds in suit were not issued for refunding purposes, or that the plaintiff company did not pay full value therefor, or that the county did not receive the money paid for the bonds; so that the defense is not based in fact upon any matter arising out of the immediate transaction between the plaintiff company and the county, nor upon any illegality appearing on the face of the bonds, but is based upon the provision of the constitution limiting the amount of indebtedness creatable by municipal corporations; and to sustain this defense the burden is upon the county of proving the amount of the valid indebtedness existing against the county at the date of the issuance of the bonds. As the defendant itself maintains that the warrants which were funded in the bonds in suit, to the amount of $16,662.01, were invalid and void, and has introduced evidence in support of its contention, the court is justified in holding that the defendant's contention in this particular is correct; and, this being the case, then it is clear that the county cannot assert that the void warrants represented an existing indebtedness that should be estimated in determining whether the county had reached the limit of indebtedness. But it may be argued that, as the evidence shows that the money realized from the sale of the bonds was in fact used in paying off the void warrants, the county in fact received no legal benefit or consideration therefor, and should not be held bound upon the bonds to any amount. Under the recitals in the bonds, the plaintiff company had the right to assume that the county would apply the proceeds realized from the bonds in the payment of valid indebtedness. If the county, after receiving the money from the plaintiff company, misapplied the same by paying off warrants which could not be enforced against the county, the plaintiff cannot be held responsible for such action on part of the county officials; nor would the payment of the void warrants, after the purchase of the bonds by the plaintiff company, give them validity at any date prior to that of the payment. Lyon Co. v. Ashuelot Nat. Bank of Keene, N. H., 30 C. C. A. 582, 82 Fed. 137. Furthermore, the very act that might be said to give them validity, to wit, payment thereof by the county, at the same moment discharged them as indebtedness against the county; for, being paid in money, that ended any liability therefor on part of the county. It thus appears that when the bonds in suit were issued the lawful indebtedness of the county amounted to the sum of $64,440.38, whereas the constitutional limit

would authorize the creation of indebtedness up to the sum of $79,036.75. The county, for a lawful purpose, issued and sold its bonds in the sum of $20,000, receiving full value therefor, and when sued thereon it defends by pleading the constitutional limit. The purpose of the limitation was not to enable municipal corporations to escape from the payment of just obligations, but solely to limit the burden of indebtedness which could be placed upon the taxable property of the municipality. The purpose of the constitutional limitation is fully met if a recovery in this class of cases is limited to the amount of indebtedness which could be lawfully created at the time of the issuance of the bonds, and no good reason exists why the plaintiff company is not entitled to recover for so much of the indebtedness as comes within the constitutional limitation. A rendition of judgment for that amount does not cause the indebtedness of the county to exceed the limit, and I see no more reason for refusing to enter judgment for the amount justly due than there would be for refusing to enter judgment in a suit upon a promissory note wherein the defense of a partial failure of consideration had been maintained.

In view of the rulings of the circuit court of appeals for this circuit in City of Huron v. Second Ward Sav. Bank, 30 C. C. A. 38, 86 Fed. 272, and of the supreme court in Board of Com'rs of Gunnison Co. v. E. H. Rollins & Sons, 173 U. S. 255, 29 Sup. Ct. 390, a plausible argument can be made to the effect that the recitals in the bonds sued on estop the county from asserting that the bonds, being issued to refund actual existing indebtedness, did in fact increase the county indebtedness, so as to come, either in whole or in part, within the constitutional inhibition; but as the bonds do not contain a positive statement that the county indebtedness, including the bonds issued, did not exceed the limit, I do not feel justified in holding that the county may not be heard to aver and prove the actual facts touching the amount of the county indebtedness; but I do hold that, as the evidence shows that when the bonds in suit were issued the county could lawfully increase its indebtedness by the sum of $14,596.37, the constitutional limitation is not infringed by holding the county liable for this amount upon the bonds sued on, and that the plaintiff company is entitled to judgment for this sum, with the interest thereon that has come due within 10 years before the bringing of this suit, the total sum being $29,242.33.

REES v. PELLOW.

(Circuit Court of Appeals, Sixth Circuit. October 23, 1899.)

No. 675.

1. BROKERS—TERMINATION OF AGENCY BY PRINCIPAL.
   A broker's agency for the sale of property having no limit as to time may be terminated at any time by the principal, subject to the ordinary requirements of good faith.

2. SAME—NOTICE OF TERMINATION.
   A letter written by a principal to a broker, terminating his agency to sell property, and addressed to his place of residence, where it was deliv-

ered at his office, took effect from the date of such delivery, although, by reason of the broker's absence, which was unknown to the principal, he did not personally receive it until his return, some weeks later, he having in the meantime taken no action in the matter of the agency.

3. SAME—CONSTRUCTION OF CONTRACT—RIGHT TO COMMISSIONS.

Defendant, who was the owner of stock in an iron-mining company, in connection with another stockholder, gave to plaintiff an option by which he agreed to sell his stock to plaintiff, or to any purchaser procured by plaintiff, at a stated price. Plaintiff did not contemplate purchasing the stock himself, but selling it at a profit. He entered into negotiations with a third party for the sale of the stock at an advance, in which he was assisted by defendant, but the terms of payment offered were not satisfactory to the sellers, and the negotiations failed. Three months after the option was given, defendant gave plaintiff notice of its withdrawal, and advanced the price of his stock beyond that asked for it by the plaintiff, and at such advanced price he and the other stockholder afterwards sold the stock to the same parties with whom plaintiff was negotiating. *Held* that, in the absence of evidence which would warrant a finding that defendant acted in bad faith in terminating the option, plaintiff was not entitled to recover commissions as for a sale made under the contract, or on a quantum meruit for services rendered.

4. SAME.

The fact that, pending the negotiations begun by plaintiff, defendant demanded and obtained a modification of the option contract, allowing him a share of the profit to be made by plaintiff in case the sale was consummated, in consideration of his assistance therein, would not operate to make him plaintiff's agent in renewing the negotiations on a different basis after the option contract was terminated.

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

This was an action brought by the defendant in error, Thomas Pellow, against William D. Rees, the plaintiff in error, to recover commissions claimed to have been earned under an option contract for bringing about the sale of 9,000 shares of stock owned by the said Rees. There was also a count upon a quantum meruit. Upon the trial of the cause the court instructed the jury to find for the defendant upon the count in contract, upon the ground that the plaintiff, Pellow, had not made the final sale of said stock, but that same had been sold by the owner, said William D. Rees. So far as the action was one to recover the reasonable value of services rendered by said Pellow in procuring a purchaser for the said shares, the court instructed the jury as follows: "But the case will be submitted to you upon the claim of the plaintiff for the value of his services. If the jury are satisfied by the evidence that the negotiations commenced by Pellow for the sale of defendant's stock to Corrigan, McKinney & Company were not broken off until the stock was finally sold by Rees to those parties in November, but were continuous throughout, and while defendant's authority to Pellow in the so-called 'option contract' continued the defendant stepped into the pending negotiations, and assumed the control of them for himself, and succeeded in conducting them to an advantageous sale, and you further find that the defendant derived advantage from Pellow's efforts in the negotiations, in that they were efficacious in bringing about the sale which was finally reached, then the plaintiff, having been interrupted in conducting the negotiations he had begun, and prevented from earning the commission that he might have earned but for the intervention of the defendant, is entitled to recover what his services were reasonably worth to the defendant." There was a verdict and judgment in favor of the defendant in error for the sum of $2,430, and a writ of error has been sued out by the plaintiff in error.

The undisputed evidence established:

First. That William D. Rees and Samuel Mitchell were owners of a large majority of the shares of the capital stock of the Blue Iron Mining Company, an iron-mining corporation of the state of Michigan, whose mines were situated

at Negaunee, Mich., and that Pellow was the owner of a small number of shares. Mitchell, who was the uncle of Pellow, was the president of the corporation, and Pellow its secretary and treasurer. Rees was a director in the company. Mitchell and Pellow resided at Negaunee, and Rees at Cleveland, Ohio. The corporation was organized for the purpose of operating an iron mine under a lease, by the terms of which a royalty was paid upon the ore mined. Active operations had ceased some time prior to the transactions out of which this suit arose on account of the inability of the company to profitably carry on mining operations under the terms of the lease. Fruitless efforts had theretofore been made to secure a reduction in the royalty, that operations might be resumed. In this condition of affairs there arose a strong desire to make a sale of the property through a sale of all or a majority of the shares. Under these circumstances Pellow sought to obtain from both Rees and Mitchell authority to sell their holdings of stock for the sake of the commissions. Mitchell readily agreed to sell his stock to Pellow, or through him, at two dollars per share, and Rees orally agreed to place his stock in his hands to be sold with that of Mitchell on the same terms. The agreement with Rees was confirmed by a letter dated August 5, 1896, in the following words:

"Mr. Thomas Pellow, Negaunee, Mich.—Dear Sir: I shall be glad to hear from you whenever you have anything of interest to say with regard to your prospects of disposing of the stock of the Blue mine. Confirming my verbal agreement, I will join Capt. Mitchell in selling to you, or through you, my stock in the Blue mine at $2.00 per share, and if, during your negotiations, Capt. Mitchell should be willing to take less than that for his stock, I will agree to the same reductions on my shares.

"Yours, truly, W. D. Rees."

Pellow had, in a prior stage of the negotiations with Rees, applied by letter for an option for the definite term of 60 days. This Rees declined, but gave the option above set out, in which no time is fixed.

Second. No sale of the stock having been consummated, Rees, on November 6, 1896, revoked his option by a letter in the following words:

"Mr. Thomas Pellow, Negaunee, Mich.—Dear Sir: Three or four months ago I joined Capt. Mitchell in an option to you on my stock in the Blue Iron Ming. Co., about which we have had some correspondence. I extended the option from time to time, but it has now been running so long that I feel justified in withdrawing it entirely. That the trade has not gone through has been through no fault of mine, for I have done all I could to further it; in fact, have done more to promote the trade than any one else. You will therefore please consider the option canceled.

"Yours, truly, W. D. Rees."

Third. On November 24, 1896, Rees sold both his own stock and that of Mitchell to the firm of Corrigan, McKinney & Co. for three dollars per share. The terms of sale were: Cash, $10,000; $30,000 in four months, with security; balance payable in installments, for which the notes of the firm were taken, secured by the stock as collateral. The purchasers also agreed to take the stock of all others at the same rate if offered within 30 days. Pellow put his own stock into this sale, as did all other stockholders. The proceeds of sale as they came in, the payment of deferred notes having been anticipated by the buyers, were distributed by Pellow among the stockholders in his character as secretary and treasurer. When the last of the purchase money had been distributed, Pellow for the first time presented a claim for the commissions alleged to be due him as for bringing about this sale. This claim was for 75 cents per share for the sale of Rees' 9,000 shares. This reduction from a commission of one dollar on each share was in consequence of a modification of the original option contract of August 5, 1896, averred to have been made about September 24, 1896, and came about, as the evidence tended to show, as follows: Immediately upon securing the option, Pellow opened negotiations for the sale of the stock of the company to Corrigan, McKinney & Co., the same firm who ultimately bought through Rees. That firm owned and operated an iron mine adjoining that of the Blue Iron Mining Company, having a lease on the property from the same persons owning the fee in the mines worked by the latter-mentioned company. Each mine produced the same character of

ore, and they were competitors in business. All the members of the firm of Corrigan, McKinney & Co. lived at Cleveland, the residence of Rees. Pellow's negotiations were opened with and conducted through the manager of the Corrigan, McKinney & Co. mines, who resided at Negaunee, the residence, also, of Pellow and Mitchell. Pellow offered the stock at $2.50 per share. This price was apparently satisfactory, though the purchasers were unwilling to pay cash, but expressed a willingness to pay a small sum in money as an evidence of good faith, and give the firm's notes secured by the stock for deferred payments. Pellow advised Rees of the attitude of Corrigan, McKinney & Co., the price at which he had offered the stock, the willingness of the purchasers to pay part cash, and asked Rees as to the solvency of the firm, and as to his willingness to sell upon the credit proposed. Rees, under date of August 19th, expressed confidence in the financial ability of Corrigan, McKinney & Co. and his willingness to accept their paper, but deferred the matter to Mitchell. This letter was mailed to Mitchell, to be delivered to Rees if Mitchell approved the sale on the credit desired. Rees further expressed the notion that the sale should reserve to the stockholders certain money in the treasury of the company, which he thought should be distributed as a dividend to the shareholders before the sale. To this Pellow demurred, saying that he had stated to the purchasers that this money would be an asset acquired by them. He also stated, in reply to Rees, that he had required the buyers to pay one dollar cash on each share, and the balance upon a credit, and that this proposition had been forwarded by Mr. Cole, the local manager for Corrigan, McKinney & Co., to the firm at Cleveland, and that he was in daily anticipation of a favorable reply. Under dates of September 20th and 21st, Pellow wired and wrote Rees that Corrigan, McKinney & Co. wanted to discuss the deal with him (Rees) at Cleveland, and gave him to understand that they wished to obtain from him some collateral promises in reference to outside matters, and to arrange amount of cash payment and time to be given on deferred payments. He urged Rees to stand firmly by $2.50 as the price for the stock, as he was sure they would pay that price, and wanted the property. He also notified Rees that he had asked Mitchell to go to Cleveland to consult with him (Rees) as to the sale, and to represent him (Pellow) in concluding the transaction. According to an understanding with Rees, Mitchell did go to Cleveland, and several interviews took place there between Rees and Corrigan, representing Corrigan, McKinney & Co., and between Rees and Mitchell. During these negotiations at Cleveland, Rees wrote Mitchell, under date of September 24, 1896, as follows:

"Since I saw you last night, I have been thinking over the 'Blue' matter. It must be apparent to you, as well as to Pellow, that I am doing more than half the work to place this property, if it is placed at all. Corrigan, McKinney & Co. would not touch it without certain promises and encouragement from me, and Pellow's effort to place the stock is a failure without my help, and concessions on my part as to the terms of payment. I am quite willing that Pellow should be compensated for his share of the work, but I feel that on my stock that I should have a share of the margin there is in it. 25 cents per share will certainly fully compensate Pellow for any work he has done towards placing my stock, and, under the circumstances, I do not think he ought to have any more. In your case, you may, through your relations to Pellow, be willing to overlook the matter, but in my case it is simply business."

This letter was inclosed by Mitchell in one written by himself to Pellow as follows:

"Cleveland, Ohio, Sept. 24, 1896.

"Dear Nephew: Your letter and message in answer to mine rec'd. Those people are very hard people to make a deal with. They talk as if they do not want the property, & also that Mr. Cole said that he thought it could be got for 2.20 or 2.25 per share. I told them that if he said that he must of meant (clear) of the money in the treasury & etc.'s. After talking all the afternoon yesterday, Corrigan thought that it might be possible that Judge Burke would consider it, if we were willing to take 12 equal payments, commencing Oct. 1/97, as per my telegram to you. In order to consider this, they want Rees to agree to work for their interest in getting the royalty fixed up & also promise

them the Lucky Star property, or his influence to get it. Now, Mr. Rees thinks that, as long as he has to work to help the matter through, he ought to be entitled to a division of the margin that you would make, viz. 25 cents, or half the profits. He has just left here, and after a long talk, in which I told him, he gave the option which he admitted, but said it was on different terms,—that he never expected to be asked to take notes, or to make promises about properties, etc.'s, and that he is willing to take the 2.00 per share, etc., now (in cash), or even half cash & half notes, which they say they cannot pay. They say there is no use talking cash, because they have not got it, & cannot get it. But that the notes will be paid when due, with 6 per cent. interest. Now, Mr. Rees wanted me to send you the letter he sent me at the hotel this a. m., and ask you to telegraph as soon as received, whether you were willing to concede the 25 cents per share. I do not know what to say in this matter. I worked with Corrigan to see if I could get 50 cents per share cash, including what is in the treas., & he could not. Now we are letting it go on speculation & taking notes for say, 2 yrs., or an average of 1½ yrs. In the meantime, if McKinley should be elected, we might be able to sell for cash & get more, long before those payments would commence. You have the situation exactly & can wire me, or Rees, as you please, what you think about it."

Under date of September 26, 1896, Pellow wired Mitchell as follows:

"Am willing to concede Rees twenty-five cents on his own stock, but you do as you please with the deal. We should not turn over what cash we have, but keep it on account."

This negotiation at Cleveland came to nothing owing to an inability of the parties to agree upon the terms of sale in respect to the cash to be paid and the credit to be given, and Mitchell, with the approval of Rees, went to Chicago to see their lessors, and obtain, if possible, such reduction in royalty as would justify them in the resumption of active mining operations. Pellow, about the 1st of October, went to Canada, partly for pleasure and partly on private business. There he remained until November 28th, when he returned to Negaunee, and found on his office table Rees' letter, revoking the option of August 5th. During his absence, Pellow took no step whatever in furtherance of any sale, and seems to have been altogether ignorant of the further history of the matter until informed of the sale, which had been made during his absence in Canada. After the breaking off of the Cleveland conferences between Rees and Corrigan and the resumption of efforts to obtain such concessions from the lessors as would enable the company to continue business, there occurred other conferences between Rees and Corrigan in reference to a sale, and much correspondence passed between Rees and Mitchell on this subject, as well as touching a resumption of mining operations. The whole of this correspondence was in evidence. From it, together with the oral evidence of both Rees and Mitchell, it was contended for Pellow that there had been a continuous negotiation, and that, when Rees wrote his letter of November 6th, the original negotiation was still on, with an increasing promise of fruitful results, and that any services rendered by Rees in concluding the negotiations were compensated by the modification of the option contract heretofore mentioned. It was also contended that the rescission of the option was in bad faith, and done for the purpose of getting the benefit of the services of Pellow in bringing about the original negotiation with the ultimate purchasers, without compensating him according to the terms of the option. The circuit judge, as before stated, instructed the jury that they must find for the defendant in so far as the suit was for commissions as for making the sale, but that, if they found that the negotiations begun by Pellow were continuously carried on by Rees, although the terms were changed, they might find for Pellow the reasonable value of his services to Rees, so far as they had been "efficacious in bringing about the sale which was finally reached."

James H. Hoyt, for plaintiff in error.

C. R. Brown, for defendant in error.

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

LURTON, Circuit Judge, having made the foregoing statement of facts, delivered the opinion of the court.

The agreement between Rees and Pellow, evidenced by the letter of August 5, 1896, has a double aspect, and must be construed accordingly: First, it was an option to join Mitchell, and sell to Pellow at a fixed price; second, this option was coupled with an agency to sell, in conjunction with Mitchell, to others at the same price.

So far as it was an option to Pellow himself, it was revocable at any time before acceptance. Stitt v. Huidekopers, 17 Wall. 384–394. There is no pretense that Pellow ever accepted the offer, or even had any purpose to do so. This aspect of the case may, therefore, be dismissed.

We come to the proposition as one of agency. There was no consideration for this agency, and no limit upon its duration. It was, therefore, subject to be terminated in good faith at the will of the principal; otherwise, there would be no means of relieving the principal from an authority exercised under it at any length of time after it was made, no matter what the change of circumstances. Stitt v. Huidekopers, supra; Story, Ag. § 463; Hale v. Kumler, 54 U. S. App. 685–695, 29 C. C. A. 67, and 85 Fed. 161. In Sibbald v. Iron Co., 83 N. Y. 378–384, the rule as to revocation is very admirably stated as follows:

"Where no time for the continuance of the contract is fixed by its terms, either party is at liberty to terminate it at will, subject only to the ordinary requirements of good faith. Usually the broker is entitled to a fair and reasonable opportunity to perform his obligation, subject, of course, to the right of the seller to sell independently. But, that having been granted him, the right of the principal to terminate his authority is absolute and unrestricted, except only that he may not do it in bad faith, and as a mere device to escape the payment of the broker's commissions."

So far as this option was coupled with an agency, it was terminated by Rees' letter of November 6, 1896, expressly revoking it. That revocation, as between principal and agent, took effect from the time when it was delivered in due course of mail at the usual place of business and address of the agent. The letter was addressed to Negaunee, the residence of Pellow, and was duly received at his office, where it lay unopened until his return, November 28, 1896, from a trip to Canada. Rees was unadvised of any change in his address, or of his absence from his residence, and in good faith addressed and mailed his letter of revocation to his only known and usual address. If Pellow neglected to notify Rees of his absence and changed address, or to make any arrangement to have his mail forwarded, he cannot escape the consequences of his own fault. Undoubtedly, the general rule is that a revocation only takes effect, as between principal and agent, when it is made known to him. But we are of opinion that, under the facts of this case, he received constructive notice that his agency had terminated. The case is not embarrassed by any acts or conduct of Pellow done in furtherance of his agency between the date when he ought to have received this letter in due course of mail and his actual knowledge of revocation, November 28, 1896. In that interval he did nothing under his authority, and no third person acquired any rights in ignorance of the revocation. The sale subse-

quently made was made by Rees alone, though made to Corrigan, McKinney & Co., with whom Pellow had commenced negotiations immediately upon his employment as agent. Inasmuch as Pellow did not consummate a sale before his authority was revoked, it is clear that he cannot recover upon the theory that he had made a sale of the property, unless that revocation was in bad faith, and the sale subsequently consummated one which was effected through his agency as the procuring cause. The contract between Rees and Pellow was a peculiar one. Pellow's compensation depended entirely upon his being able to make a sale at a price in excess of two dollars per share. If he sold at that price, he would receive no compensation, no matter how valuable his services, nor how large his expenditures. He was to be compensated by receiving for his services all he should receive over the fixed price at which Rees obligated himself to sell the stock through or to Pellow. It is clear, therefore, that unless Pellow was prevented from consummating a negotiation, which was evidently approaching success, by a revocation made for the purpose of defeating his commissions, and taking advantage of his services without compensation, there can be no recovery. Did Rees capriciously defeat a sale about to be made by Pellow for the purpose of availing himself of his services, and avoiding the payment of the agreed compensation? The evidence establishes the fact that Pellow began negotiations for a sale to Corrigan, McKinney & Co., and that he diligently prosecuted his efforts to bring the minds of seller and buyer together down to the conclusion of the conference between Rees and Corrigan at Cleveland in September. The evidence is also satisfactory that in the Cleveland conferences Pellow, though not personally present and assisting, was represented by his kinsman, Mitchell. Pellow had offered the stock at $2.50 per share, a price which would have secured to him a profit of 50 cents on each share if a sale could have then been consummated, subject to a deduction of 25 cents per share under the modification made in favor of Rees. The minds of the parties were not brought together at Cleveland. The option contract contemplated a sale for cash. A purchaser ready and willing to buy upon a credit, not satisfactory to his principal, was not a fulfillment of his obligation. Rees was willing to make some concessions in respect to the terms of payment, but held firmly to the determination to act with Mitchell, and make no sale to which Mitchell, as a large shareholder, should not agree. Mitchell was not willing to make as full a concession as Rees seems to have been. The proposed purchasers were either unwilling or unable to make such cash payment, or otherwise secure deferred payments, as was satisfactory to either Mitchell or Rees. The Cleveland conferences, therefore, ended without any meeting of minds. From that time Pellow ceased to be a factor in the matter. He went off to Canada, and remained until late in November, and apparently abandoned all further efforts to make a sale. After that Mitchell acted only for himself, and there is not the slightest evidence that he at any other time or occasion, save during the Cleveland conferences, acted for or represented Pellow as the agent for Rees in making a sale of the property. Efforts were at once resumed to obtain a con-

cession from the lessors of the Blue Iron Mining Company in respect to royalty upon ore taken from the company's mines. Efforts were also made to secure a supply of coal before winter set in, by which active mining might be resumed. The correspondence between Rees and Mitchell which followed the conclusion of the Cleveland conferences tends to show that Rees was reluctant to abandon the idea of a sale to Corrigan, McKinney & Co., and that he, from time to time, resumed his negotiations with them, and endeavored to obtain some agreement from Mitchell in respect to a cash payment which would enable him to press that firm up to the point of buying by meeting their wishes in respect to terms of payment. Mitchell, on the other hand, was much more disposed to hold firmly for a considerable cash payment, and as the prospect of obtaining a concession in the matter of royalty increased he stiffened in his ideas of the value of the stock. So, also, as the prospect of the elevation of William McKinley to the presidency of the United States increased, both Mitchell and Rees deemed the prospect of an advance in iron to improve, until finally Mitchell, upon his confidence in the improved business conditions of the country, raised his price to three dollars per share, and wired Rees to hold firmly for that advance. On November 6, 1896, the circumstances affecting the value of the subject-matter of this agency had so changed as that neither Mitchell nor Rees was longer willing to part with stock at less than three dollars per share. In this changed condition of things, Rees revoked his option to Pellow. That at that time Corrigan, McKinney & Co. had not accepted the terms upon which Pellow had offered them this stock is not disputed. Those terms were two and one-half dollars per share; one dollar per share to be paid in cash, and the remainder on time, secured by the stock as a collateral. The price had been satisfactory, but the parties could not agree upon the terms of payment, and this was the situation down to the middle of November. Being at liberty to advance the price, Rees did so by demanding three dollars per share. The terms of payment being also made acceptable, a bargain was struck, and a sale made November 24, 1896.

The duty which a broker employed to make a sale assumes is that of bringing the minds of the buyer and the seller together for a sale. This includes the price and the terms of sale. When this has been done he has earned his commission, for his contract has been performed. McGavock v. Woodlief, 20 How. 221; Kock v. Emmerling, 22 How. 69. There is no possible doubt, upon the evidence in this case, that Pellow never did bring the buyers and sellers to an agreement. They were utterly unable to agree upon the terms of the sale, though not differing as to the price. This was the indisputable condition of the matter when the Cleveland conferences ended, and this was the equally indisputable situation on the 6th day of November, when his authority was revoked, although negotiations had been resumed by Rees between those dates. The efforts of Pellow had been unsuccessful. He had been unable to procure a purchaser upon terms acceptable to himself and to both the buyer and seller. Down to the date of the revocation the seller was at liberty to advance the price upon Corrigan, McKinney & Co., for the latter had not accepted.

the terms which Pellow had been authorized to offer. At that date the circumstances affecting the value of the stock had changed. Rees was not under any moral or legal obligation to abide longer by his proposition to Pellow, and was at full liberty to revoke his option. There was no sufficient evidence of want of good faith in then revoking his agency to justify the submission of this question to the jury.

For much the same considerations we think it was error to submit the question to the jury as to the reasonable value of Pellow's services. The agreement of August 5, 1896, was not the ordinary brokerage contract between principal and agent. It was an option for a sale, in conjunction with Mitchell, to Pellow himself, or to one designated by him, at a fixed price. Pellow's compensation depended upon his making a sale at something in excess of the fixed price stipulated in the option. No matter how valuable his services, he expressly stipulated that his compensation should depend entirely upon a sale, while the option was in force, for a price in excess of two dollars per share. He made no such sale before the revocation, and there was no evidence, as we have already seen, of a sufficiently substantial character to require that the court should submit to the jury the question as to whether Rees acted in good faith in revoking his authority on the 6th of November. Unless there was evidence which would have reasonably justified a jury in finding that, when the authority was revoked, a negotiation instituted by Pellow was plainly and obviously approaching success, and that Rees, with a knowledge of this, revoked his authority for the purpose of concluding the sale without his assistance, and of avoiding the payment to him of the price obtained in excess of the price fixed in the option agreement, there was no case for the jury at all. If the revocation was in bad faith, it might well be said that the due performance of his obligation was prevented for the purpose of concluding the sale himself, and saving the stipulated compensation. In this event the principal would not be permitted to rely upon the defense that the broker had not performed his contract, in order to defeat a recovery of the stipulated commissions. But if, on the other hand, Rees acted in good faith, not intending to escape the payment of commissions, but moved only by the changed circumstances, and in his own interest, and while the negotiations were unsuccessful or inconclusive, he had the absolute right to terminate the option. After such a revocation he was at perfect liberty to resume or continue efforts to sell to a customer who had been unsuccessfully approached by Pellow, even though he, to some extent, availed himself of the former unsuccessful labors of Pellow. The case of Sibbald v. Iron Co., 83 N. Y. 378–384, and the case of Wylie v. Bank, 61 N. Y. 415, are well-considered cases supporting the view we have expressed, and meet our approval. The case of Stitt v. Huidekopers, 17 Wall. 384, is also much in point in its facts, and lends support to the conclusion we reach as to the right of revocation in good faith of an option much like that here considered. It is true that that case did not involve the question presented here by the count upon a quantum meruit, and turned alone upon the count for commissions under the contract. But our view is that,

under an option such as that here involved there can be no recovery for services unless the authority was revoked in bad faith, and that in that event the recovery would be under the contract for the full stipulated compensation, the principal not being suffered to rely upon a nonperformance, due to his own wrongful interference for the purpose of making the sale himself and avoiding the agreed commission. Pellow had had from August 5th to November 6th to consummate a sale. From October 1st to the latter date he was out of the country, and engaged in no effort whatever. Mitchell, who was his kinsman and friend, and who had acted for him at Cleveland conferences, did not act for or represent him thereafter, but, upon the contrary, says he felt entirely free to act for himself, and in his own interest. Neither can we construe the modification secured by Rees in respect to Pellow's compensation as operating to make Rees his continued agent and representative in further efforts to bring about a sale after the failure of the anticipated sale at Cleveland. That modification was intended to apply to the then anticipated sale,—a sale which, if made, would be due, as Rees then claimed, to certain outside concessions and promises made by him. It did not operate to make Rees Pellow's agent for the subsequent sale of his own stock for Pellow's benefit. Our conclusion is that the sole and only ground upon which defendant in error could recover compensation was upon the ground that his agency to sell had been revoked in bad faith, and as a mere device to defeat Pellow's interest in a sale about to be made. That failing, there should have been a direction to find for the plaintiff in error.

The court erred in submitting to the jury the question of the reasonable value of the services of the defendant, and in the terms of the charge heretofore set out, and in refusing to charge, as requested, that there could be no recovery, upon the facts of the case, under the quantum meruit count of the declaration. The judgment must be reversed, and a new trial awarded.

KELLY et al. v. FAHRNEY.

(Circuit Court of Appeals, Eighth Circuit. October 16, 1899.)

No. 1,203.

1. CONTRACT—PARTIES—RIGHT TO ENFORCE.
   A contract to lend money to a corporation, made with stockholders who furnished the consideration, *held* to be a contract with them individually, for the breach of which they were entitled to sue.

2. APPEAL—REVERSAL—RIGHT TO NOMINAL DAMAGES.
   When no substantial right is involved, a judgment against a plaintiff will not be reversed when it appears from the statement of his cause of action that, at most, he is only entitled to recover nominal damages.

3. DAMAGES—BREACH OF CONTRACT TO LOAN MONEY.
   No substantial damages are recoverable for the breach of an executory agreement to loan money, where no definite time for the continuance of the loan is agreed on, since the law implies an agreement to repay it on demand.

4. SAME—REMOTENESS.

To render losses sustained by one party to a contract as a result of its breach by the other recoverable as damages for the breach, where they were not its direct and natural consequences, by reason of special circumstances known to both parties when the contract was made, they must be such as, in view of such circumstances, could have been foreseen and estimated with reasonable certainty; and a party who failed to comply with a contract with stockholders to lend money to a corporation cannot be held to have contemplated that such stockholders would give stock owned by them individually to another person as a bonus to procure the loan, or held liable for the value of stock so given as damages for the breach of his contract.

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

This case was tried below on demurrer to an amended complaint, the action being a suit at law upon a contract. The demurrer was sustained; whereupon the plaintiffs declined to plead further, and a final judgment was rendered in favor of the defendant.

The complaint recited, in substance, that the White Cliffs Portland Cement & Chalk Company was an Arkansas corporation, with a capital stock of $1,000,000; that William J. Kelly and John Kelly, the plaintiffs below and the plaintiffs in error here, were, respectively, the president and secretary of said company, the active managers of its affairs, and the owners of a controlling interest in its capital stock; that Ezra C. Fahrney, the defendant below and the defendant in error here, was also a large stockholder in said company; that on or about December 10, 1896, said company was in great need of money to complete its plant and run its business successfully; that prior to said date said company had issued bonds secured by a mortgage on its property to the amount of $120,000, and had sold 80 bonds, of the denomination of $1,000 each, and had hypothecated 25 bonds, amounting to $25,000, to secure a loan in the sum of $20,000, and that it held the remainder of said bonds, amounting to $20,000, subject to such future disposition thereof as it might see fit to make. It was then averred as follows: "That thereupon, on the said day, in the city of Chicago, in the state of Illinois, the plaintiffs and the defendant entered into an agreement and contract whereby it was agreed that the plaintiffs should give and assign to the defendant $25,000, at its face value, of that part of the capital stock of said corporation then owned and held by the said plaintiffs, in consideration of which defendant then and there agreed and undertook to and with the plaintiffs that he would take and pay for the said $20,000 of said bonds remaining of said corporation, and as soon thereafter as the said corporation should give out of money, and require more, that he, the said defendant, would loan and pay into the company on its note the sum of $75,000 for its purposes, and it was further agreed, as a part of said contract, that, when the money should be so needed by said corporation, the said William J. Kelly, then president of said corporation, should come to the city of Chicago, and carry out the terms of said contract; that thereupon, in pursuance of said agreement, the plaintiffs then and there assigned and gave to the defendant the said $25,000, at its face value, of said capital stock of said corporation, and said defendant took and paid for the said $20,000 of said company's bonds; that said corporation having in all things authorized the said William J. Kelly, the president thereof, to negotiate said loan for and in behalf of said corporation, and the said William J. Kelly being then fully authorized and empowered by a resolution of the board of directors of said corporation as in said agreement provided, and after said agreement had been made, to wit, on the 1st day of March, 1897, the said corporation did then give out of money, and required more to conduct its business and finish its plant, as aforesaid, and said William J. Kelly went to the city of Chicago, as agreed, for the purpose of carrying out said agreement, and offered to carry out the agreement, and was by the said defendant then and there informed that he, the said defendant, would not carry out or keep his contract as agreed in that regard, but would refuse to do so." It was next averred, in substance, that because the aforesaid company was involved in debt, and owed certain debts

for labor which were liens upon its property, it could not borrow more money except by assigning a part of its stock to some person as a bonus to induce a loan, which fact had been discussed by the plaintiffs and the defendant, and was well known to the latter; that a greater part of the corporate indebtedness was due to the defendant and his father, which consisted of bonds secured by the aforesaid mortgage, the whole of which mortgage indebtedness could be declared due if the interest thereon was not promptly paid; that the defendant and his father, immediately after the former had declined to make the aforesaid loan, as he had agreed to do, began pressing for payment of the indebtedness which they then held, and that, to prevent a foreclosure of the aforesaid mortgage on the company's property, the plaintiffs were compelled to and did negotiate a loan to the company in the sum of $50,000, and in doing so were forced to give up and assign $300,000 worth of their stock in said company to the creditor to induce the loan. It was next averred that the stock so assigned as a bonus was worth $300,000, and that by the breach of the aforesaid contract the plaintiffs were damaged to that amount. The complaint contained a second count, which was substantially the same as the first, except that it charged that the defendant resorted to various artifices to prevent the plaintiffs from obtaining a loan elsewhere after the defendant had refused to advance $75,000 according to his agreement, and that this was done to compel the plaintiffs to give up more of their stock than they had originally agreed to do, and to thereby enable the defendant to secure a controlling interest in the corporation.

Ernest Dale Owen (Oscar D. Scott and Paul Jones, on the brief), for plaintiffs in error.

U. M. Rose (W. E. Hemingway and G. B. Rose, on the brief), for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

THAYER, Circuit Judge, after stating the case as above, delivered the opinion of the court.

It is contended in behalf of the defendant below, the defendant in error here, that the demurrer to the complaint was properly sustained because the contract declared upon was a contract between the defendant and the White Cliffs Portland Cement & Chalk Company, hereafter termed the "White Cliffs Company," and that no such privity exists between the plaintiffs and said company as will enable them to sue on an agreement made by it. This contention, however, cannot be sustained. A fair construction of the complaint leads inevitably to the conclusion that the agreement described in the complaint was one between the defendant and the plaintiffs, the latter acting individually, and not merely as officers of the corporation. The consideration for the alleged promise by the defendant to take the bonds of the corporation to the amount of $20,000, and to pay for the same, and also to loan to the White Cliffs Company on its note $75,000 when its funds should give out, moved entirely from the plaintiffs, acting in an individual capacity, and consisted of an assignment to the defendant of stock in said company to the amount of $25,000, which they then owned. The fact that the consideration for the promise moved from the plaintiffs, and that the promise was made to them, compels us to regard the agreement as one that was made with the plaintiffs in an individual capacity, for the breach of which they are entitled to sue.

It is next insisted that the damages claimed are too remote and speculative to be recovered, and that, even if nominal damages might

have been allowed, nevertheless the judgment below ought not to be reversed for that reason. The rule seems to be well established in the state of Arkansas, from whence this case comes, that a judgment will not be reversed by an appellate tribunal, and a new trial granted, when it appears from the statement of his cause of action that the appellant, or the plaintiff in error, is only entitled to nominal damages. Trippe v. Duval, 33 Ark. 811; Buckner v. Railway, 53 Ark. 16, 18, 13 S. W. 332. The same rule obtains in many other states, and rests, as we think, upon sound reasons, since the time of the courts ought not to be consumed in the trial of cases in which no substantial right is involved, and where the recovery must, in any event, be limited to a merely nominal sum. Frivolous litigation of that character should be discouraged by all lawful methods, and appellate courts may well decline to reverse judgments rendered at nisi prius when it appears that the only error committed was in refusing to allow the plaintiff to recover an insignificant sum. Harris v. Kerr, 37 Minn. 537, 35 N. W. 379; Faulkner v. Closter, 79 Iowa, 15, 17, 44 N. W. 208; McAllister v. Clement, 75 Cal. 182, 16 Pac. 775; Bustamente v. Stewart, 55 Cal. 115; McConihe v. New York & E. R. Co., 20 N. Y. 495, 498. See, also, 1 Sedg. Dam. § 109, and cases there cited.

We accordingly turn to consider the question whether the damages laid in the complaint are too speculative and remote to be recovered. If such be the case, the judgment below should be affirmed. It will be observed from the foregoing statement that the plaintiffs do not claim any other damage than the loss of the stock which they were compelled to give as a bonus to procure a loan to the corporation in the sum of $50,000, after the defendant had declined to keep his engagement. It is also noticeable that, as the contract is described in the complaint, the defendant did not promise to loan the White Cliffs Company the sum of $75,000 for any specified period, or at any prescribed rate of interest. In view of these facts, it is manifest that the complaint does not disclose a breach of contract which could occasion any substantial loss or damage to the plaintiffs, unless they are entitled to recover the value of their stock which they transferred to secure a loan from another source. Since no agreement appears to have been made by the defendant to make a loan to the White Cliffs Company for any definite period, the law implies that the borrower was under an obligation to return it on demand (Thompson v. Ketchum, 8 Johns. 190; Purdy v. Philips, 11 N. Y. 406); and no substantial damage was occasioned by a refusal to loan money which the corporation was legally bound to repay forthwith (Bradford, E. & C. R. Co. v. New York, L. E. & W. R. Co., 123 N. Y. 316, 327, 25 N. E. 499).

Counsel for the plaintiffs insist, however, and have argued at considerable length, that because the agreement in suit was made and was not fulfilled by the defendant, the plaintiffs had the right to procure the money from some other source, and to charge the expense of obtaining it to the defendant; also that the value of their stock, which is said to have been worth $300,000, is in this instance a proper item of damage, because the defendant was aware when he made the

agreement that if he did not keep his promise the plaintiffs would be compelled to part with a part of their stock, as a bonus, to obtain a loan elsewhere. It will be seen, therefore, that the plaintiffs invoke an application of the doctrine first announced in Hadley v. Baxendale, 9 Exch. 341, 354, 356; the claim being, in substance, that the contract in suit was made in view of special facts and circumstances, that were known to both of the contracting parties, which render the value of the lost stock recoverable, although, under ordinary circumstances, it would not be a legitimate item of damage, because it was not a loss which, in the usual course of events, would result from a breach of the agreement. Attempts have been made repeatedly, of which the case in hand is an example, to push the doctrine of Hadley v. Baxendale to an unreasonable limit, but such attempts have usually failed. In a recent case (Trust Co. v. Clark, 34 C. C. A. 354, 92 Fed. 293) this court had occasion to consider under what circumstances damages for the breach of a contract, other than the customary damage, might be allowed, because of the special circumstances of the case, and because they were within the contemplation of the parties when the contract was made. The conclusion announced in that case was, in substance, that anticipated damages, different from those which would ordinarily be sustained, are not always recoverable, but will only be awarded when, in view of special circumstances, they may be regarded as the natural and direct result of the breach, and were not problematical, but were capable of being foreseen, and of being estimated with reasonable accuracy.

Now, conceding it to be true, as stated in the complaint, that the White Cliffs Company had no means of borrowing money when the contract in suit was executed, except by assigning to the lender some of its stock as a bonus, and that this fact was well known to the defendant, and was even discussed by the parties to the agreement, still we do not perceive that by reason of these facts the defendant was bound to foresee that if he did not keep his promise the plaintiffs would part with a great amount of their own stock to secure a loan to the corporation. The complaint does not show that all the stock of the corporation had been issued when the contract was signed, and that the company had no stock of its own to sell or hypothecate, and, even if that fact did appear, we would be unable to hold that the defendant was bound to anticipate that the plaintiffs would sacrifice a large part of their own holdings to secure a loan to the corporation if he did not comply with his agreement. The action of the plaintiffs in giving away some of their own stock to secure the loan was voluntary, and the defendant might as well have anticipated that, if the plaintiffs elected to use their own credit to obtain money for the corporation, they would raise it by the sale or hypothecation of some other kind of property, which was more marketable, and would not involve any considerable sacrifice. It certainly cannot be inferred, from any allegations found in the complaint, that the defendant, when he entered into the agreement in suit, had any reason to anticipate that, if he did not keep his engagement, the plaintiffs would sacrifice property of the value of $300,000 to obtain a loan in the sum of $50,000. The damages sued for cannot be recovered, therefore,

because they are not the natural and direct result of the breach of contract complained of, neither are they made such by any special facts or circumstances alleged in the complaint showing that the loss of plaintiffs' stock was an anticipated result of the breach, or that it ought to have been anticipated. In accordance with these views, the judgment below is affirmed.

WARREN-SCHARF ASPHALT PAV. CO. v. COMMERCIAL NAT. BANK OF DETROIT, MICH.

(Circuit Court of Appeals, Sixth Circuit. October 23, 1899.)

No. 671.

1. PRINCIPAL AND AGENT—INDORSEMENT OF FORGED CHECK BY AGENT—LIABILITY OF PRINCIPAL.
   An agent of a corporation, duly authorized to indorse checks in its behalf for deposit, may bind it by such an indorsement to the payment of a check purporting to have been drawn by the corporation to its own order, although such check was in fact forged by the agent himself.

2. BILLS AND NOTES—INDORSEMENT OF FORGED CHECK.
   The liability of a payee who by himself or an authorized agent indorses and deposits in a bank for credit a forged check is not the usual contingent liability of an indorser, but that of a warrantor of the genuineness of the paper; and it is absolute, requiring neither demand nor notice.

3. BANKING—DEPOSITS—RECEIVING FORGED CHECKS.
   A paving company having its principal place of business in New York opened an account with a bank in Detroit, and transmitted to the bank a power of attorney authorizing the company's local agent in Detroit to indorse and sign checks and deposit money in its name and for its use. From time to time the agent indorsed and deposited checks drawn by the company to its own order on its New York bank, which were credited to its account as cash. The agent forged such a check, indorsed and deposited it in the usual manner, checked out the proceeds, and absconded. *Held*, that the bank was not bound to know the company's New York signature, and that, in the absence of circumstances amounting to notice that the signature was a forgery, the company was liable to it on the indorsement for the amount of the check.

4. SAME—CREDITING CHECKS IN ADVANCE OF COLLECTION.
   The bank was not guilty of negligence, or a violation of the usual rules and customs of banking, in receiving and crediting the check as cash; and the paying out of such deposit prior to the collection of the check did not constitute an overdraft, as between the parties, but on such payment the bank became a bona fide holder of the check for value.

5. PRINCIPAL AND AGENT—POWER OF ATTORNEY—CONSTRUCTION.
   Where a power of attorney given by a corporation, authorizing an agent to indorse and sign checks, provided that all checks drawn should be "in the name of this company," a check drawn on a blank furnished by the company to the agent, having the name of the company printed at its head, and signed only in the name of the agent, as "attorney and cashier," which was in the form of all previous checks drawn by the agent, cannot be repudiated by the company as not within the terms of the power.

6. SAME—RIGHTS OF THIRD PARTIES DEALING WITH AGENT.
   A power of attorney given by a corporation, authorizing an agent to draw checks on a bank "for the use of" the company, does not impose on the bank the responsibility of seeing that the money drawn on such checks is devoted to the use of the company; and it is protected in the payment of

such a check, drawn payable to "cash," to the agent himself, where made in good faith, and where money had usually been drawn by the agent in that manner.

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

This was an action by the Commercial National Bank of Detroit, Mich., against the Warren-Scharf Asphalt Paving Company, a corporation of the state of New York, but having an office and agency at Detroit. The action was brought for the purpose of recovering $10,000, with interest, alleged to have been advanced or paid out on account of the said Warren-Scharf Asphalt Paving Company under the following circumstances:

First. On the 10th of July, 1897, one C. R. England, being at that time the local agent and representative of the paving company in Detroit, opened a banking account in the name of the said Warren-Scharf Asphalt Paving Company with the said bank, presenting as authority a letter bearing date July 8, 1897, in the following words:

"To Commercial National Bank, Detroit, Michigan—Gentlemen: We beg to advise you that we have to-day issued to our Mr. C. R. England our banking power of attorney, No. 243, which he will present to you. We desire to reopen our account with you."

Inclosed in this letter was the power of attorney referred to, which was in the words and figures here following:

"Office of Warren-Scharf Asphalt Paving Company, 81 Fulton Street.

"New York, July 8, 1897. No. 243.

"To the Commercial National Bank, of the City of Detroit, State of Michigan: This certifies that C. R. England is officially authorized to indorse and sign checks and deposit moneys and make drafts on this company in the name and for the use of this company, in and through the Commercial National Bank, of the city of Detroit, state of Michigan, until this power of attorney shall have been officially canceled, but not longer than during the year 1897. The said C. R. England will be specially authorized by official letter or telegram in the personal name of the president or vice president or other duly-authorized official of the company to make drafts for specified amounts. The said bank account to be kept in the name of this company, and all checks drawn against or indorsed for deposit to said account by the said C. R. England to be in the name of this company.

"Warren-Scharf Asphalt Paving Company,
"By F. W. White, Treasurer.
"W. R. Warren, President. [L. S.]"

From time to time between the opening of that account and August 7th, following, England deposited to the credit of the paving company checks drawn in New York by the paving company against the National City Bank of New York, and payable to its own order; the checks being indorsed in Detroit by the paving company through England as its "attorney and cashier." These checks, according to the usual course of business, were entered upon the company's pass book and on its account as cash. Against this account England from time to time drew checks payable to "cash," and obtained the money himself. These checks were usually accompanied by a slip called a "pay-roll order," showing the denomination in which the money was desired, though sometimes such a memorandum was placed on the back of the check itself. At close of business August 6, 1897, there was a balance to the credit of the paving company of something over $1,400, of which $1,200 consisted in one of the company's New York checks which had been deposited as cash on the 4th of August. On the morning of August 7th this balance was increased by the deposit of a check for $10,000 purporting to be drawn by the paving company in New York against the National City Bank of New York to its own order. This check was indorsed in Detroit by the paving company through England, and at his request passed to the credit of the company as cash, following in this respect the course of business previously pursued. This check and its indorsement were in these words and figures:

"New York, Aug. 5, 1897.

"No. H2,985. Warren-Scharf Asphalt Paving Company.

"Pay to the order of Warren-Scharf Asphalt Paving Company ten thousand & $^{00}/_{100}$ dollars ($10,000.00).

"Jas. D. Lawrence, Attorney & Cashier.

"To the National City Bank, New York."

Indorsement: "Pay to order of Commercial National Bank, Detroit, Michigan. Warren-Scharf Asphalt Paving Company,

"By C. R. England, Atty. & Cashier."

Just before making this deposit, England, upon one of the paving company's checks, drawn by himself, had drawn out $1,132.28, ostensibly for the purpose of paying the company's employés; the check being accompanied by a pay-roll slip containing a memorandum of the denominations of money in which the check was to be paid. That check was in the usual form in which England had been accustomed to draw checks against the company's account. As typical of the manner in which the account had been checked against, we here set out this check, which is as follows:

"No. 14,608C. Detroit, Mich., Aug. 7, 1897.

"Warren-Scharf Asphalt Paving Company.

"Pay to the order of cash eleven hundred and thirty-two and $^{28}/_{100}$ dollars ($1,132.28). C. R. England, Atty. and Cashier.

"To the Commercial National Bank, Detroit, Mich."

Shortly after making the $10,000 deposit before mentioned, England presented another check for $10,000, which at his request was paid to him in large bills. That check was in these words and figures:

"No. 14,609C. Detroit, Mich., Aug. 7, 1897.

"Warren-Scharf Asphalt Paving Company.

"Pay to the order of cash ten thousand & no-100 dollars ($10,000.00).

"C. R. England, Attorney & Cashier.

"To the Commercial National Bank, Detroit, Mich."

With this money England absconded, and has not been since heard from. The check deposited by him on same day, which had made the company's account good, when duly presented on August 9th to the National City Bank of New York for payment, was refused, the signature of the drawer being a forgery. The evidence established that no such person as James D. Lawrence was known to the paving company, and that the signature of James D. Lawrence had been written by England. When England presented the check for $1,132.28, he told the paying teller that in about an hour he would return, and would want $10,000. This sum he said he would want in cash; that he was going to Toledo in the afternoon about a transaction in which nothing but money could be used; that the banks would be closed, so that he could not take the money in a certified check. He intimated, also, that the transaction at Toledo was one of which no record should be made, and that therefore nothing but money would do him. Before England returned, the paying teller examined England's power of attorney, for the purpose, as he states, of seeing whether there was any limitation upon the amount he might check out. He also asked the bookkeeper whether any deposit had been made to the company's credit that morning, to which the reply was, "Not yet." This interview with England occurred about 10 o'clock in the morning. In the course of the following hour the deposit heretofore mentioned was made with the receiving teller, and at once passed to the credit of the company's account by the bookkeeper. Shortly after that England presented for payment the check for $10,000 above set out. The paying teller made the usual inquiry as to the then state of the account, and was informed by the bookkeeper of the deposit shortly before made, and that the account was good for $10,000. When the teller handed the money to England, he jocosely remarked, "You want to be careful of this, and don't skip or anything." To which England replied, "I should say not."

Upon the conclusion of all the evidence, the court instructed the jury to find for the defendant in error in the sum of $10,000, with interest from August 7, 1897.

Fred W. Whiting, for plaintiff in error.
A. E. Angell, 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.

The authority expressly conferred upon England included the power to "indorse and sign checks." The evidence shows that remittances were several times made to him from the New York office of the company by checks payable to its own order. To utilize them, an indorsement was essential. An indorsement of a check purporting to be payable to the order of the paving company, for the purpose of either collection or deposit, implied a contract that the instrument itself and all antecedent indorsements were genuine. Story, Prom. Notes, §§ 135–380, 387; 4 Am. & Eng. Enc. Law (2d Ed.) 447; Harris v. Bradley, 7 Yerg. 310; Turnbull v. Bowyer, 40 N. Y. 456–460; Onondaga County Sav. Bank v. U. S., 26 U. S. App. 377, 12 C. C. A. 407, and 64 Fed. 703. In the absence of circumstances amounting to notice that the signature of the paving company was a forgery, the defendant in error had a right to rely upon the indorsement made by England as a representation and guaranty by the payee that the check itself, as well as the signature of the drawer, was genuine. Although the defendant in error was bound at its peril to know the signature of a check drawn by England under the power of attorney to him, yet it was not the payee of this forged check; and it was not bound to know the New York signature of the paving company, or the genuineness of the filling up of a check purporting to have been drawn at the principal office of the corporation upon its New York bank of deposit. Unless, therefore, it acted in bad faith, or the forgery was so obvious that it should have been detected by bare inspection, it was not negligent in accepting the check as a cash deposit in reliance upon the representation of the known local agent of the apparent drawer, and upon the contract implied from the indorsement placed thereon by England under his known authority. National Bank of Commerce v. National Mechanics' Banking Ass'n, 55 N. Y. 211–215. Neither in the form or signature of the check, nor in any circumstance occurring when the check was indorsed and deposited, do we find any fact which would justify a jury in holding the defendant in error guilty of any negligence in taking this forged check and crediting it as a cash deposit. The instrument turned out to have been unauthorized by the apparent drawer, and the signature a forgery. If the drawer and payee were not legally identical with the indorsee, the fact that the instrument was not genuine, and the drawer's signature a forgery, would operate to fix the liability of the indorser as absolute, without either demand or notice. In such a case the indorsee would become entitled to recover the amount of the check from the indorser upon the implied warranty that the in-

strument and the antecedent signatures were genuine. Liability would be fixed before and without any presentation of such a forged check. Turnbull v. Bowyer, 40 N. Y. 456–460. The fact that the drawer, payee, and indorser were legally the same person does not change the principle. The indorsement of this check by the paving company, or by one authorized to indorse in its name, was equally effective as a warranty of the genuineness of both the instrument itself and all antecedent signatures. The liability of the paving company growing out of its relation to the instrument as an indorser was, by reason of the fact that the instrument was a forgery, not the usual contingent liability of an indorser, but one of fixed responsibility as a warrantor of the genuineness of the paper indorsed.

But it is said that the authority to England did not authorize him to overcheck, and that, until the check deposited had been actually collected, there was no authority to pay the $10,000 check presented on the same day. The forged check was the apparent check of a responsible customer upon another bank. According to the well-recognized course of banking business, this check was accepted as a cash deposit. Morse, Banks, §§ 569, 570. The receiving teller testifies that in the acceptance of this check, and crediting it at once to the account of the paving company, there was nothing out of the ordinary course of banking business. This evidence is not contradicted or questioned. The bank was under no obligation to credit a check thus deposited as cash, but it was clearly guilty of no negligent or unusual conduct in doing so. When received and credited as cash, the account was subject to check, and the bank had no right to refuse to pay checks against the account thus swollen. Armstrong v. Bank, 133 U. S. 433–466, 10 Sup. Ct. 450. The check subsequently paid was in no true sense an overdraft, and the bank became the bona fide holder of the forged check for value so soon as checks were drawn and paid by reason of the credit thus obtained.

It is next urged that the check drawn by and paid to England on August 7th was not a check drawn in the name of the paving company. The authority of England was to "indorse and sign checks"; "all checks drawn against or indorsed for deposit to said account by the said England to be in the name of this company." It is said that the $10,000 check paid to England was signed only in the name of "C. R. England, Atty. & Cashier." This is a misreading of the instrument. The name of the "Warren-Scharf Asphalt Paving Company" appears on the face of the check above the signature of England. It is true that the name of the company appears above the words "Pay to the order of cash." This check was in the form of all previous checks drawn against this account. The name of the paving company is engraved or printed on the check, and was taken from the check book furnished England by the company. It is likewise the form in which the company's name was signed upon checks drawn at its principal office against its New York account. The objection is not well taken.

It is next said that England's authority was limited to signing checks "for the use of" the company, and that this check was drawn payable to "cash," and was presented for payment by England him-

self, and that a check thus drawn and paid was equivalent to a check payable to the order of England, and was therefore not prima facie a check drawn for the "use of" the company. The authority to sign checks for the use of the company imposed no affirmative duty upon the bank to inquire into the purposes of the check, or the use to which the money was to be put. If the bank paid this check in good faith, having no notice of England's fraudulent purposes, and not acting in collusion with him, it should be protected. England was acting within the apparent scope of his agency, and the bank was not bound to inquire into the use he intended to make of the proceeds of the check, it being drawn in usual form and in ordinary course of business. All or nearly all of the checks theretofore drawn against this account had been payable to "cash," and had been presented by and paid to England. It is true that most of them had been accompanied by a slip indicating the kind of money needed, which would possibly imply that the check was drawn for money needed to pay off employés. But there was no other indication than this memorandum made by England himself that the check had been drawn for the use of his company. In the absence of circumstances calculated to arouse suspicion that the check had been drawn for some fraudulent purpose, the bank was under no obligation to know that the drawer's own agent was going to misappropriate the proceeds. The mere fact that this accredited agent of the paving company had drawn this check payable to "cash," and that he presented it for payment himself, was not enough to put the bank upon inquiry as to the honesty of his purposes in the subsequent use of the money. The explanation given by England, that the money would be needed for use in a neighboring city after bank hours, and for a transaction in which money alone would answer, was calculated to lead the bank to the conclusion that the check had been drawn, and that the proceeds were to be used, for the purposes of the paving company. The intimation that the transaction in which it was to be used was one of which no record was wanted carried no intimation that it was not a transaction for the benefit of the company, and justified no inquiry into its character. The inquiries made by the paying teller as to the terms of the letter of authority and as to the then state of the paving company's account were all proper precautions for the security of the bank. There was nothing in the colloquy between England and the bank's teller indicative that suspicion as to the honest purposes of England had been aroused, or upon which the bank should be charged with negligence or as exceeding its authority in respect to paying checks drawn by England. There was no evidence from which a jury might rightfully infer that the bank had notice that England was exceeding his authority or intended a misappropriation. The plaintiff in error intrusted England with the authority to indorse and sign checks in its name, and any loss arising from his dishonesty, when apparently acting within the scope of his known powers, should be borne by those who enabled him to perpetrate the fraud, rather than by one who has innocently suffered. There was no error in instructing the jury to find for the defendant in error, as there was no such conflict of evidence as would properly make an issue for the jury. The judgment is accordingly affirmed.

In re SHEPARD.

(District Court, S. D. New York. June 28, 1899.)

BANKRUPTCY—DISCHARGE—ALIMONY.

Alimony awarded to a divorced wife by the judgment of a court of competent jurisdiction, to be paid in fixed weekly installments, and overdue at the time the husband files his petition in bankruptcy, is not such a debt as will be released by his discharge; and therefore the wife will not be stayed, pending the bankruptcy proceedings, from pursuing appropriate remedies for its collection.

In Bankruptcy.

George Shepard was made defendant in an action for absolute divorce, brought by his wife in a state court having jurisdiction in the premises. In this suit alimony was awarded to the plaintiff, to be paid by the defendant at the rate of $20 per week, together with counsel fees. Pending a motion in the state court to commit him for contempt of court in failing to pay the alimony due to the plaintiff,—which had accumulated, and was then in arrear to the extent of about $1,300.—Shepard filed his voluntary petition in bankruptcy, and was duly adjudged bankrupt. The indebtedness to his wife was included in his list of debts and creditors filed in the bankruptcy proceedings. The court of bankruptcy, on motion, granted an order temporarily staying all action on the part of the wife looking to the enforcement of her remedies against the bankrupt for the collection of this debt; and the case is now before the court on an order to show cause why the stay should not be made permanent until the determination of the bankrupt's application for discharge, under section 11 of the bankruptcy act of 1898, which provides that a suit pending against a bankrupt at the time of his adjudication, if "founded upon a claim from which a discharge would be a release, * * * may be stayed until twelve months after the date of such adjudication, or if, within that time, such person applies for a discharge, then until the question of such discharge is determined."

Benjamin D. Levy, for bankrupt.

BROWN, District Judge. My opinion is that a discharge in bankruptcy would not release the obligation to pay alimony, and, therefore, the stay, under section 11, should be denied.

In re KUFFLER.

(District Court, S. D. New York. October 20, 1899.)

BANKRUPTCY—TRUSTEE—APPOINTMENT BY REFEREE.

Where the creditors of a bankrupt are unable to elect a trustee, no sufficient majority agreeing upon any candidate, after two sessions held at the office of the referee for that purpose on successive days, and there appears to be immediate need of a trustee, it is within the authority of the referee to make the appointment; and an appointment so made will not be vacated by the judge if the person chosen is competent, impartial, and otherwise suitable.

In Bankruptcy. On motion of certain creditors of the bankrupt to vacate an appointment of a trustee of his estate made by the referee in bankruptcy.

Benj. Tuska and Horwitz & Samuels, for petitioning creditors.
G. W. Wingate, for trustee.

BROWN, District Judge. I am not inclined to interfere with the appointment made by the referee of Mr. Hodgskin as trustee in the above case. It is not claimed that he is not a perfectly competent and impartial person, able to administer properly the affairs of the estate. The creditors object that he was not their choice. But before his appointment the creditors could not agree, and different groups were maneuvering and wrangling to secure the election of their respective favorites. The first session at the referee's office, from 10:30 to 4:30, was without result, and on the adjourned day when called on to proceed with the election, they were not agreed and were still divided. There was apparent need of a trustee at once. The judge had directed several days before that the referee should appoint a trustee unless a suitable trustee were elected by the creditors. I think abundant opportunity was furnished the creditors to proceed with the election. I shall not countenance or support any abridgment of the right given by the act to creditors to elect a trustee, though by the act this trustee must be a suitable person who can be approved by the referee or by the judge. But the creditors have no right to use the office of the referee or his time in protracted maneuvers in behalf of their special favorites. Such work should be done elsewhere. Nor can the court regard with any complacency the efforts of creditors to secure a particular trustee for merely personal objects.

The motion is denied.

In re ADAMS.

(District Court, E. D. Michigan, S. D. September 15, 1899.)

BANKRUPTCY—LIENS—UNRECORDED MORTGAGE.

A mortgage made more than four months before the filing of a petition in bankruptcy against the mortgagor is not annulled by his adjudication thereon, although it was not recorded until within a month of the bankruptcy proceedings. But where the law of the state provides that such a mortgage shall not be valid as against any persons who became creditors of the mortgagor during the time between the execution and the recording of the mortgage, either by a new credit or the extension of a pre-existing indebtedness, the same rule will be applied in the bankruptcy proceedings.

In Bankruptcy. On certificate of Harlow P. Davock, referee.

The following is the opinion and finding of the referee certified for review on the trustee's petition:

Petition by the trustee in bankruptcy of Yates A. Adams for an order declaring a certain chattel mortgage to be null and void, as against himself and the creditors of the estate whom he represented. It appeared that Adams, the bankrupt, gave a chattel mortgage, on December 17, 1897, to the National Bank of Battle Creek, to secure an existing indebtedness and also future advances to be made to said Adams. The mortgage was not recorded until November 23, 1898. In December, 1898, proceedings in involuntary bankruptcy were instituted against Adams by certain of his creditors, and he was adjudged bankrupt, January 11, 1899. His trustee, when appointed, resisted the claims of the bank under the chattel mortgage, and asked for an order adjudging it void by reason of the delay in recording it. It was admitted by the bank that, under the laws of the state (How. Ann. St. Mich. §§ 6190, 6191, 6193), the mortgage would be invalid as against any persons who became creditors of

the mortgagor during the time which elapsed between the execution of the mortgage and the filing of the same for record. Upon a hearing before the referee in bankruptcy, it was ruled that the petition of the trustee must be denied, and that the mortgage was invalid only as against those creditors of the bankrupt who became such between December 17, 1897, and November 23, 1898, either by the creation of a new credit or by the extension of an old indebtedness which existed on or before December 17, 1897. In the opinion delivered by the referee it was said: "The petitioners contend that the matter of recording is the main question in this case, and cite the cases of Harvey v. Crane, Fed. Cas. No. 6,178; In re Corn Exchange Bank, Fed. Cas. No. 3,242; In re Dyke, Fed. Cas. No. 4,227. Under sections 23a and 23b of the bankruptcy act of 1898, where it is provided that the United States circuit courts shall have jurisdiction only of certain cases, providing that suits by a trustee in bankruptcy shall be brought or prosecuted only in those courts where the bankrupt might have brought or prosecuted them if proceedings in bankruptcy had not been instituted, it has been decided in the case of Burnett v. Mercantile Co. (D. C.) 91 Fed. 365, that the court of bankruptcy has no jurisdiction of an action by such trustee to set aside an alleged fraudulent conveyance made by the bankrupt to a defendant who is a citizen of the same state with the bankrupt and the trustee. On the other hand, it has been decided that the United States courts are not devested of this jurisdiction in suit brought by the trustee to set aside fraudulent transfers of the bankrupt; citing Carter v. Hobbs, 1 Nat. Bankr. News, 191, 92 Fed. 594 (Baker, J.); In re Sievers, 1 Nat. Bankr. News, 68, 91 Fed. 366 (Adams, J.). Under the bankruptcy law of 1867, it has been decided that a mortgage executed more than four months before bankruptcy proceedings, given to secure advances already made, as well as advances to be made, is valid against the assignee of the bankrupt mortgagor. Schulze v. Bolting, Fed. Cas. No. 12,489; Douglass v. Vogeler, 6 Fed. 53; Potter v. Coggeshall, Fed. Cas. No. 11,322. A mortgage given long before the commencement of bankruptcy proceedings, but not recorded until less than two months prior thereto, was held not to be fraudulent on account of failure to be recorded. Curry v. McCauley (C. C.) 20 Fed. 583. Under the state law, the mortgage was and is void against the creditors who became such between the making and filing, or extended credit on old indebtedness during that time. Warner v. Littlefield, 89 Mich. 329, 50 N. W. 721; Baker v. Parkhurst (Mich.) 78 N. W. 643; Brown v. Brabb, 67 Mich. 17, 34 N. W. 403. As to the trustee being a purchaser in good faith: This is covered by Brown v. Brabb, supra; Gibson v. Warden, 14 Wall. 244; Stewart v. Platt, 101 U. S. 731. In the recent decision in Re Brown (D. C.) 91 Fed. 358, it has been decided that, under Bankr. Act 1898, §§ 67–70, since a petition in involuntary bankruptcy could not be filed until the expiration of four months from the passage of the act, transfers and liens affected by an adjudication in bankruptcy are such only as were made or obtained four months prior to the filing of the petition. No transfer of property, lien, or incumbrance is avoided by an adjudication in involuntary bankruptcy, unless made or created subsequent to the passage of the act. I therefore find that the petition of the trustee should be denied, and the mortgage held void, only as to the creditors of the bankrupt who became such intermediate between December 17, 1897, and November 23, 1898, by a new credit, or by extension of old indebtedness which existed on or prior to December 17, 1897. As to the points raised by the petitioning trustee as to determining the standing of the various creditors, this is a matter of bookkeeping and mathematics, which can be adjusted by the trustee with the facts as presented to him.

Andrew W. Lockton, for trustee in bankruptcy.
Hulbert & Mechem, for mortgage creditor.

SWAN, District Judge. The question of jurisdiction having been practically waived by the submission of the cause upon the merits and without objection by the defendant, and the facts being undisputed, the only inquiry which remains is as to ruling of the referee holding valid the chattel mortgage to the National Bank of Battle

Creek as against creditors of the bankrupt who neither gave nor extended credit while that mortgage was withheld from record. The finding of the referee is approved, and the petition of the trustee is denied.

In re SKINNER.

(District Court, N. D. Iowa, W. D. October 30, 1899.)

1. BANKRUPTCY—OPPOSITION TO DISCHARGE—CONCEALMENT OF ASSETS.
   Where a debtor, within four months prior to filing his petition in bankruptcy, transfers real and personal property to his wife, without consideration, and with intent to defraud his creditors, and then states in his schedule that he has no property of any kind, he is guilty of knowingly and fraudulently concealing from his trustee property belonging to his estate in bankruptcy, and is not entitled to be discharged.
2. SAME—EVIDENCE—JUDGMENT OF STATE COURT
   A judgment rendered by a state court in a suit to which the bankrupt, his wife, and the trustee, as the representative of creditors, were all parties, finding that a conveyance of property by the bankrupt to his wife was fraudulent as to creditors, and should be set aside, and the property transferred to the trustee, is conclusive evidence of the points decided, on the bankrupt's subsequent application for discharge, opposed by creditors on the ground of such fraudulent conveyance as a concealment of assets.

In Bankruptcy. Submitted on bankrupt's petition for discharge and the objections filed thereto on behalf of creditors.

Lewis & Beardsley, for bankrupt.

R. H. Brown, Wm. Milchrist, J. H. Quick, and John R. Carter, for creditors.

SHIRAS, District Judge. From the record in this case it appears that on the 1st day of March, 1899, Dwight H. Skinner was, on his own petition, adjudged a bankrupt by the referee of Woodbury county, and P. A. Sawyer was appointed trustee of his estate. In due season a petition for discharge was filed by the bankrupt, to which objections on behalf of several of his creditors were interposed, alleging, in substance, that within four months preceding the filing of the petition for an adjudication the bankrupt, with intent to defraud his creditors, and for the purpose of fraudulently concealing his property, had conveyed, and had caused to be conveyed, through the agency of third parties, a large amount of property, consisting of real estate and of shares of the capital stock of the Interstate Investment Company, to his wife, and had purposely omitted to set forth his interest in and ownership of this property in the schedules by him filed as part of his petition in bankruptcy. It further appears in evidence that the trustee, P. A. Sawyer, intervened in a suit in equity pending in the district court of Woodbury county, Iowa, entitled "J. G. Shumaker vs. W. N. Davidson et al.," to which suit Dwight H. Skinner, the bankrupt, was a party, and in this suit the trustee set up the alleged fraudulent transfers of property made by the bankrupt, and upon the hearing of this suit it was adjudged by the court that in January, 1899, the bankrupt, in fraud of his creditors, and without consideration, had caused to be conveyed to his

wife 200 shares of the capital stock of the investment company, and that this conveyance should be set aside, and the shares should be conveyed to the trustee as part of the estate of the bankrupt. It was also adjudged that the trustee was entitled to the sum of $3,200, a balance due from J. G. Shumaker upon a purchase made by him of certain realty belonging to the bankrupt, it being held that Shumaker was a purchaser in good faith, and therefore entitled to hold the realty as against the trustee; but that the amount remaining unpaid of the purchase price belonged to the estate of the bankrupt, and must be paid to the trustee. In these proceedings the bankrupt, his wife, and the trustee, representing the creditors, were parties, and the decree must be held binding upon them, and to be conclusive upon the vital question litigated, to wit, whether the transfer to the wife of the property of the bankrupt were or were not fraudulent as to his creditors. Thus, in Southern Pac. R. Co. v. U. S., 168 U. S. 1–48, 18 Sup. Ct. 27, it is said that:

"The general principle announced in numerous cases is that a right, question, or fact distinctly put in issue, and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies; and, even if the second suit is for a different cause of action, the right, question, or fact once so determined must, as between the same parties or their privies, be taken as conclusively established, so long as the judgment in first suit remains unmodified."

It having, therefore, been conclusively determined in a suit between the bankrupt and his creditors, represented by the trustee, that the bankrupt had conveyed to his wife, without consideration, and with intent to defraud his creditors, property to a large amount, and it appearing from the record in this case that when the bankrupt filed his petition and schedules he stated that he had no property of any kind, except a possible equity of redemption in 1,440 head of sheep mortgaged to a named creditor, the court is justified in finding that the bankrupt has knowingly and fraudulently concealed from his trustee property to a large amount, which in fact forms part of his estate, and therefore, under the provisions of sections 14 and 29 of the bankrupt act, the petitioner is not entitled to a discharge. Judgment accordingly.

In re BLANKFEIN et al.

(District Court, S. D. New York. October 28, 1899.)

BANKRUPTCY—CREDITORS—REPRESENTATION BY ATTORNEY.

An attorney at law, retained generally to represent a creditor in bankruptcy proceedings, cannot cast the vote of such creditor in the election of a trustee at a creditors' meeting, without showing an express authorization thereto as attorney in fact.

In Bankruptcy.

Epstein Bros. and Stillman F. Kneeland, for the motion.
Myers, Goldsmith & Bronner and Max J. Kohler, opposed.

BROWN, District Judge. The question has been submitted whether a vote for a trustee at a creditors' meeting, offered in behalf of

Butterfield & Co. by a clerk employed by the law firm of Black, Olcott, Gruber & Bonynge who appeared in the proceedings as the proctors for Butterfield & Co., should be received. The vote was objected to by other creditors on the ground that no express authority from Butterfield & Co. to vote for trustee was shown, and that a mere retainer, as attorney at law, was insufficient.

The presumption in favor of the authority of an attorney to appear and act for the client whom he assumes to represent, has been chiefly asserted in ordinary suits. It extends to all the usual incidents of litigation arising in the conduct of the cause, because a party is usually obliged to employ an attorney, and presumably intends him to perform all acts incidental to his function and germane to it. This authority, however, is subject to numerous limitations, which will be found in 3 Am. & Eng. Enc. Law (2d Ed.) p. 345 et seq., and page 375. It would not be claimed, however, that an attorney might make oath to a bankrupt's schedules without special authorization by law; and voting for a trustee in bankruptcy is an act so essentially different in its nature and character from an attorney's ordinary duties in the conduct of litigation, and the business considerations that enter into the choice of a trustee are so foreign to a lawyer's ordinary functions or presumed special knowledge and skill, that the right to vote cannot be deemed to be a part of his implied authority, nor presumed to be conferred upon a lawyer from his mere retainer in a bankruptcy proceeding.

In bankruptcy, this question can hardly be treated as a new one. Under similar provisions of the act of 1867 the practice was definitely settled, that an attorney could not vote for an assignee merely by virtue of his general authority as attorney at law. He must prove his authority by letter of attorney, or by the oath of some one, showing him to be a duly-constituted attorney, i. e. an attorney in fact, for that purpose. See Bump, Bankr. (10th Ed.) 667 note; In re Purvis, 1 N. B. R. 163, Fed. Cas. No. 11,476; In re Knoepfel, 1 N. B. R. 23, 1 Ben. 330, Fed. Cas. No. 7,891; Id., 1 N. B. R. 70, Fed. Cas. No. 7,892. The latter case was decided in this district by Mr. Justice Blatchford, wherein Mr. Seixas, though he was the attorney and proctor for the parties, and showed a special authority from one Kutter, the attorney in fact of the foreign creditors, was held to have no right to vote for an assignee in their behalf, his special authority to vote being defective. In the case of Martin v. Walker, 1 Abb. Adm. 579, 16 Fed. Cas. 911, Betts, J., held that under a retainer as attorney at law, the proctor could not claim to be attorney in fact.

"One cannot, by virtue of his retainer as attorney at law, assume to act in the cause in the character of attorney in fact." Id., 1 Abb. Adm. 584, 16 Fed. Cas. 913.

I find no sufficient reason for any different rule under the present act. See Loveland, Bankr. 206, § 105. As I have said, there is no substantial difference on this point in the language of the two acts. The act of 1867 (Rev. St. § 5095) provided:

"Any creditor may act at all meetings by his duly constituted attorney the same as though personally present,"

and this was held to mean an attorney in fact, as above stated.

In the present act, sections 56 and 44 authorize creditors to appoint a trustee by vote; and section 1, subd. 9, provides:

"'Creditor' * * * may include his duly authorized agent, attorney or proxy."

The words "duly authorized" here apply to "attorney" and "proxy" as well as to "agent." This phrase in effect is, "his duly authorized attorney," and this requires the production and exhibition or proof of the authority. Such phraseology would not be used where an attorney at law is intended, since his authority is legally presumed, and is not ordinarily required to be shown. The connection with the word "proxy" is also some indication that an attorney in fact is meant, who must be "duly authorized" and in due form; that is, as in case of a proxy, unless proved by oath, as an agent's authority may be proved, to be legally substantiated by some writing that is self proving or can be proved by oath, and filed with the referee.

As the present act uses substantially the same language as the act of 1867, the practice and rulings under that act, in the absence of any contrary indication, ought I think to be deemed controlling, as intended to be continued under the present law. The reasons for the rule are the same as under the former act.

Such seems also to be the intent of the supreme court rule 21, subd. 5 (18 Sup. Ct. vii.), in providing for a representation of the creditor through a letter of attorney. This clause provides:

"The execution of any letter of attorney to represent a creditor may be proved," etc.

Voting for a trustee, is "representing" the creditor in a very special sense; and not being a right belonging to an attorney at law as such, the intimation is strong that a letter of attorney is his proper, if not his exclusive, authority.

It is urged in favor of the attorney's claim, that general order No. 4 (18 Sup. Ct. iv.) provides that "every party may appear and conduct the proceedings by attorney," etc. But general order No. 3 (18 Sup. Ct. iv.) under the act of 1867 was in the same terms. These words have manifestly no relation to such a personal act as the creditors' choice of a trustee, any more than they refer to the affidavit to the schedules of a petitioning debtor. Form 20 (18 Sup. Ct. xxvii.) the title of which is referred to, is merely a very broad form of written authority, and confers no authority on an attorney at law.

The ordinary presumption of an attorney's authority holds, I think, in bankruptcy proceedings, as in other suits; but in my judgment it does not apply at all to acts of the special nature referred to, or to others of a kindred character, which have never been deemed incident to the right or the duties of an attorney at law, but which have always been performed by the creditors themselves, except when another person has been specifically authorized to perform them.

In the present case the vote was not offered even by either of the attorneys of record, but only by their clerk. This is but a single illustration of the loose practice that would at once arise, if the claim here made were allowed in favor of a mere attorney at law. There are other practical objections, which at least in this district should

forbid the allowance of votes for a trustee, except by creditors themselves, or by those who have been delegated to represent them in such matters, and who substantiate their right to vote in some legally recognizable form; and I am satisfied that the ends of justice will here be best subserved by an adherence to the practice under the former act. In cases of surprise and in the absence of laches, the referee may and should exercise a reasonable discretion in granting adjournments to give creditors a fair opportunity to vote, when that can be done without manifest prejudice to the estate.

The vote offered on account of Butterfield & Co. should not, therefore, be received.

In re KAMSLER.

(District Court, S. D. New York. October 25, 1899.)

1. BANKRUPTCY—OPPOSITION TO DISCHARGE—FALSE OATH.

Where a bankrupt, in his schedule, falsely states that he is not able to find the books of account which were kept in his business, and that he does not know where they are, when in fact they are in the custody of one of his creditors, where he knows them to be, and where he has access to them, he is guilty of making a "false oath in a proceeding in bankruptcy," within the meaning of Bankr. Act, § 29b, such as will forfeit his right to a discharge.

2. SAME.

A bankrupt who, on his examination before the referee, falsely accounts for a fraudulent transfer of money or property to his wife on the ground of its being the repayment of a loan, will not be entitled to receive his discharge, being guilty of a "false oath in a proceeding in bankruptcy," within the meaning of Bankr. Act, § 29b.

In Bankruptcy. On specifications in opposition to bankrupt's application for discharge.

Specifications in opposition to the application of Julius Kamsler for a discharge in bankruptcy were filed by certain of his creditors, and referred to John W. Houston, referee in bankruptcy, for hearing and report. The specifications charged the bankrupt with having concealed his books of account, and with having made various false oaths in the bankruptcy proceedings. It appeared that the bankrupt had been engaged in retail business in New York City until February 21, 1898, on which day he was closed out by the levy of an execution on his goods and stock in trade by the sheriff of the county of New York. In the schedule attached to his petition in bankruptcy, and in his testimony given before the referee, he stated that the sheriff took possession of the books of account kept in his business, on the levy above mentioned, and that he (the bankrupt) had not seen the books since the levy, and had not been able to find them, and did not know where they were. But in this he was contradicted by other witnesses, and the referee found, upon all the evidence produced before him, that the bankrupt, after the levy, had sent the books and records of his business to one of his creditors, with the explanation that he intended, if thereafter examined by creditors in supplementary proceedings, to state that he did not know where the books were; and that he had repeatedly, since that time, seen and examined the books, and looked up entries in them, at the offices of the said creditor, where the books were kept pursuant to this plan. The referee accordingly held that the bankrupt had been guilty of "making a false oath in a proceeding in bankruptcy," within the meaning of Bankr. Act, § 29b, such as to forfeit his right to a discharge. Whether the bankrupt's conduct with reference to these books constituted a concealment of them, "with fraudulent intent to conceal his true financial condition and in contemplation of bankruptcy," the referee found it unnecessary to determine;

but he suggested that, while nothing done before the passage of the bankruptcy act could be considered as done "in contemplation of bankruptcy," yet a concealment of books, unlike their destruction, might be a continuing offense, and might be committed after the passage of the act by leaving the books in the same custody, and falsely swearing that their location was unknown to the bankrupt; the principle of In re Holtz, 1 Nat. Bankr. News, 204, not being here applicable.

The bankrupt, immediately before his failure, had paid $5,000 to the joint account of his wife and his father-in-law; and he testified on his examination that it was in repayment of a bona fide loan of that amount of money from these relations. But the books of account showed no such loan, and the bankrupt, on his examination, made contradictory and inconsistent statements as to the character and source of the alleged indebtedness; and it was shown that the bankrupt, soon after his failure, was nominally in the employment of a firm consisting of his wife and another person, formed soon after the failure, and operating on capital thereafter contributed by the wife. The referee found that the bankrupt, in regard to this matter, had made a "false oath in a proceeding in bankruptcy," and, on this ground also, reported that he was not entitled to receive his discharge.

Allen H. Gangewer, for bankrupt.

Levinson, Kohler & Schattman, Rose & Putzel, and Max J. Kohler, for opposing creditors.

BROWN, District Judge. On the facts stated in the referee's report, which the testimony warrants, the discharge of Julius Kamsler should be refused.

In re HYMAN.

(District Court, S. D. New York. October 17, 1899.)

1. BANKRUPTCY—RIGHT TO DISCHARGE—MISCONDUCT OF AGENT.
   Where a business belonging to a married woman is conducted wholly by her husband, to whom she confides its entire management, and he, without her knowledge or privity, fails to keep true books of account, and conceals property, with the design of deceiving and defrauding creditors, and the wife becomes bankrupt, she is not to be deprived of her right to a discharge by reason of the husband's misconduct, being herself guiltless of any actual fraudulent intent, and her negligence in relation to the business not being equivalent to fraud, for the purposes of a penal statute.
2. SAME—CONDITIONS UPON GRANTING DISCHARGE.
   Where the bankrupt is a married woman, whose husband has had the entire conduct and management of her business, wherein, as found by the referee, he has concealed valuable property belonging to the estate, the bankrupt's discharge may be made conditional upon her using all reasonable means within her power to discover to the bankruptcy court the assets so concealed.

In Bankruptcy. On bankrupt's application for discharge, and opposition thereto by creditors.

Epstein Bros. and Mr. Kneeland, for bankrupt.

Blumenstiel & Hirsch, for creditors.

THOMAS, District Judge. The discharge of the bankrupt is opposed upon the grounds: (1) That the debtor, in contemplation of bankruptcy, failed to keep true books of account; (2) that the debtor has property which she has concealed from her trustee, to wit, assets of upwards of $15,000. The business of the bankrupt was conducted

entirely by her husband, and he either did or omitted whatever are now charged as faults against the bankrupt, but it does not appear that the bankrupt personally was involved in her husband's derelictions. The referee reports as follows:

"The bankrupt in fact kept no books of account, unless through her agent. She did not make any entries, or omit any, except through him. She did not contemplate bankruptcy when the entries were made. She knew nothing about the business, or whether it was prosperous or bankrupt, and took no pains to inquire. But the business was bankrupt at the time the false books were kept. Her agent and manager knew, or must be held to have known, it, and to have omitted the entries of his gambling account for the purpose of deceiving the creditors."

The learned referee, regarding the first specification, states:

"If the bankrupt saw fit to keep herself in ignorance of the condition of her business, and of the manner of keeping books, she should suffer the consequences. The business was hers, and the books were hers, and it was a duty which she owed to creditors to see that the books were properly kept, so that intending creditors might not be deceived; and for a failure to do this she should be held to the penalties prescribed by the act, and should not be discharged."

As to the second claim, the referee concludes:

"That the assets, to a large amount, have been concealed, but I am of the opinion that the bankrupt knows nothing regarding the matter, and has not been personally a party to such concealment,"

—And submits the question of her responsibility for the acts of her agent in this regard to the decision of the court.

It is quite obvious that the wife confided her entire business to her husband, with full confidence in his integrity and fidelity to her interests, and that the husband lost a portion of her money in speculation, and failed to indicate the same in the books kept by the concern; and it appears from the report of the learned referee that he has also concealed some of the assets. In other words, the husband has robbed the wife, and, consequently, her creditors, and it has been done without her knowledge or privity. The question is whether she should be deemed guilty of fraud by reason of this wrong which she has suffered from the person in whom she might justly repose the greatest confidence.

The present act requires that the court shall discharge the applicant unless he has "(1) committed an offense punishable by imprisonment as herein provided; or (2) 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 14b. Section 29b and section 29b, subd. 1, provide that "a person shall be punished by imprisonment for a period of not exceeding two years, upon conviction of the offense of having knowingly and fraudulently, (1) concealed while a bankrupt, or after his discharge, from his trustee, any of the property belonging to his estate in bankruptcy." It will be seen that fraudulent intent is a necessary element of either offense. But fraudulent intent is a personal quality, and, although it existed in the mind of the husband, it may not, for that reason, be imputed to the wife. Constructive fraud does not exist for the

purpose of punishment, and the statute in question is penal in its nature, as it involves the forfeiture, for misconduct, of a right of discharge. The wife confided the entire business to her husband, and, it may be assumed, not only gave affairs no personal attention, but blindly allowed him to conduct the same. She cannot be deemed either to have anticipated bankruptcy, or to have been guilty of fraud in keeping her books, for the single and only reason that her husband and agent was guilty in such direction. Negligence—at least negligence of the degree here involved—is not equivalent to fraud, within the meaning of the statute. The former statue precluded the necessity of proving fraudulent intent, as the decisions cited by the creditor in this proceeding illustrate, but the phraseology of the present statute is entirely different. The statute is plain upon its face, and in express terms makes fraud an element of the offenses which may bar a discharge. Hence there is no opportunity for construction. It is considered that the discharge should be granted in case the referee shall report that the bankrupt has used all reasonable means within her power to discover to the bankruptcy court the assets which, in the opinion of the referee, have been concealed from the trustee. Pending such report, the proceedings for the discharge should be suspended, and, if desirable, the referee may order further examination of the bankrupt upon the question now left for his decision.

In re LANGE.

(District Court, S. D. New York. October 30, 1899.)

1. BANKRUPTCY—CONTESTED PETITION—PROOF OF INSOLVENCY.
   On the trial of a petition in involuntary bankruptcy, on the issue of solvency, evidence of a letter written by the respondent, stating that he was unable to pay his debts, and calling a meeting of his creditors, for the purpose of inducing them to accept 30 per cent. of their claims, is prima facie proof of his insolvency, and sufficient to sustain a finding against him on that issue, unless overcome by countervailing proof.

2. SAME—PREFERENCE—PAYMENT OF RENT.
   Where an insolvent debtor, having a leasehold interest in a bakery where he carries on his business, pays the rent due on the same, as a means of enabling himself to continue the business, but with the purpose of defrauding his creditors, by hoarding and secreting the proceeds of the business so continued, and incurring new business debts without paying any old ones, the payment of the rent should be considered as a fraudulent payment and preference under the bankruptcy law.

3. SAME—PETITION—AMENDMENT.
   Where a petition in bankruptcy alleges the payment of a certain debt by the respondent as a preference and an act of bankruptcy, it may be amended, on application duly made, by inserting allegations of other preferential payments made by the respondent before the filing of the petition, and in discharge of debts of like general character with that first mentioned; or such an amendment may be deemed to have been made, and to warrant an adjudication against the respondent, when his own testimony upon the trial of the petition discloses the essential facts as to such other payments of debts.

In Bankruptcy. On petition for adjudication in involuntary bankruptcy.

Myers, Goldsmith & Bronner, for petitioning creditors.
Wagner & Cady, for bankrupt.

BROWN, District Judge. The petition avers insolvency, and a preference intended by the payment of rent on the leasehold of a bakery, used in the defendant's business. The answer is a general denial. The defendant's letter of July 25th, stating his inability to pay his debts and calling a meeting of his creditors for the purpose of inducing them to take 30 cents on a dollar in unsecured notes, is sufficient prima facie evidence of his insolvency, which the different estimates of the value of his lease, good will and fixtures, are not, in my judgment, sufficient to overcome. I find the defendant therefore insolvent.

Payment of rent by an insolvent is not necessarily a preference. But when it is done as a means and for the purpose of carrying on a business in fraud of creditors it should be so regarded. The subsequent conduct of the debtor in this case in the manner of prosecuting his business, with clearly a considerable profit, but without the payment of a dollar on his former debts, and actually incurring new business debts which he does not pay, and thus largely increasing the hoarding of the proceeds which he collected and secreted from the receiver, gives such color to his previous acts, and to the payment of the rent for the presumed purpose of doing this very thing, that I think the payment should be regarded as part of a scheme to defraud; and hence a fraudulent payment and preference under the bankrupt law. The evidence given to bring out these facts also discloses a number of other payments made prior to filing the petition, upon debts previously contracted, though subsequent to paying the rent. These payments were not for a present consideration, and hence were fraudulent preferences of business debts under the act. Though these were not set out in the petition, yet being of like general character as the one debt stated, though not for rent, they would have been allowed to be inserted in the petition by amendment, if applied for before the trial; and as the defendant cannot claim surprise, all the evidence being derived from his own testimony to his own book entries, the amendment should be deemed made; and upon both grounds a decree of adjudication allowed.

In re HEINSFURTER.

(District Court, S. D. Iowa, E. D. August 19, 1899.)

No. 725.

1. BANKRUPTCY—PROOF OF DEBT—ESTOPPEL.

Where the vendor of goods brought an action of replevin in a state court, claiming a rescission of the sale on the ground of fraudulent representations by the vendee as to his solvency, and under the writ of replevin secured possession of part of the goods sold, and the vendee was adjudged bankrupt, and the vendor thereupon filed proofs of debt in the bankruptcy proceedings, claiming from the estate the difference between the original purchase price of the goods and the value of those recovered in replevin, but without abandoning or dismissing the proceedings in the state court,

which remained pending and undetermined, *held*, that such creditor could not prove his claim, either in whole or in part, without first surrendering to the trustee in bankruptcy the goods returned under the writ of replevin, or the value thereof.

2. SAME—UNLIQUIDATED DEMANDS.
Under Bankruptcy Act 1898, § 63b, there can be no proof and allowance of an unliquidated claim against the estate of a bankrupt until its amount has been made certain, pursuant to an application to the court of bankruptcy, and in such manner as that court shall direct.

In Bankruptcy. On review of decision of referee in bankruptcy disallowing a claim offered for proof against the estate of the bankrupt by the Guthman, Carpenter & Telling Company, a creditor.

Ira R. Tabor, for claimant.
Isaac Petersberger, for defendant.

WOOLSON, District Judge. The evidence introduced before the referee in the proceeding to prove up the contested claim accompanies the certificate of the referee. The facts in the case, so far as the same relate to the actual transactions of the parties, are not in dispute. In brief, these are as follows: Heinsfurter, the bankrupt, was in the year 1898 engaged as a merchant, with principal store at Davenport, Iowa, but with a branch store at Erie, Ill. On September 9th of that year, at the solicitation of the traveling salesman of the claimant, the Guthman, Carpenter & Telling Company, Heinsfurter gave claimant an order for goods for his Erie house. Heinsfurter was not asked for, nor did he give, any statement to the said salesman as to his financial condition at that time. Shortly after giving this order, the agent or representative at Davenport of the Wilber Mercantile Agency called upon Heinsfurter for a statement as to his financial condition, stating that he wanted it for such agency. Heinsfurter states that he told the representative that he could make him no statement, but could only give him a statement made to Dun and Bradstreet last January, and that this representative could look that up, and that he then gave him a copy of such statement. Heinsfurter testifies that this statement was, at the time it was made to Dun and Bradstreet, a truthful statement of his financial standing, as obtained from his books. The evidence shows that, at the date of purchase of the goods ordered through said salesman, Heinsfurter was in fact insolvent (accepting for such term the definition given in the bankruptcy statute), but that from time to time, as necessity therefor existed, his relatives had come to his assistance and "tided over" his immediate financial difficulties, and that, if such assistance had been given in the fall of 1898, he might, at least for the time, have continued his business. Instead of this assistance, his sister, who was a large creditor, demanded a chattel mortgage on all his goods, as security for the indebtedness to her; and thereupon he moved the Erie stock to Davenport, and on November 17, 1898, he gave his sister the chattel mortgage demanded. Subsequently the stock went into the hands of a receiver. The Guthman, Carpenter & Telling Company instituted in the state court a suit in replevin for the goods sold by them to Heinsfurter, and de-

clared the contract of sale to him to be rescinded, on the alleged fact that, at the time of his purchase of said goods from them, Heinsfurter was insolvent, and fraudulently bought said goods with the intention, then held by him, not to pay for the same, etc. Under the writ of replevin issued in such suit, there were taken and returned to said replevying plaintiffs 186 pairs of shoes, identified by said plaintiffs as part of the goods by them sold and delivered to Heinsfurter. This replevin suit has not been prosecuted to judgment. The referee finds the value of said goods so returned to said plaintiffs under said replevin writ to be $200, while said claimant avers the same to be but $184.55. Upon February 24, 1899, said Guthman, Carpenter & Telling Company filed its verified proof of debt with Referee Helmick, wherein it claims that the goods by it sold to Heinsfurter which were not taken under said writ of replevin had been sold by Heinsfurter or the said receiver, and that there is due to claimant from the estate of said bankrupt the difference between the aggregate amount which Heinsfurter, under his order and purchase, was to pay (said aggregate is conceded to be $350.45) and the value of the goods returned under said writ, which difference claimant alleged to be $165.90. Perhaps the most direct method of presenting the situation as asserted by said claimant is to copy a portion of its proof of debt as filed with the referee. After averring the sale and delivery of the goods, and the fraudulent intent, etc., of said Heinsfurter with reference thereto, it says:

> Claimant further states that, as soon as it heard of the fraudulent intention of said Heinsfurter, it immediately caused to be rescinded, and did rescind, the said contract of sale to said Heinsfurter; that it so elected to rescind the same as soon as it was informed of the fraudulent conduct and intention on the part of Heinsfurter, of the giving of the chattel mortgage above referred to, and of transferring above-described property from Erie, Ill., to Davenport, Iowa, without the knowledge or consent of claimant, with intention of defrauding this claimant.

After reciting the institution, as above stated, of said action in replevin, and that goods to the value of $184.55 were returned thereunder to said claimant, and that the value of the goods not returned as commanded in the writ was $165.90, and that such goods not returned had been sold by Heinsfurter and the receiver, the claim herein is stated as follows:

> Claimant alleges, and so charges the fact to be, that prior to the contract of sale by it to said Heinsfurter, and as an inducement thereto, the said Heinsfurter made false and fraudulent representations as to his assets and liabilities, with reference to his financial standing, which was done for the purpose and with the intent to procure the said merchandise from claimant, in fraud of its rights, and with the intention not to pay for the same; that the said Heinsfurter took, appropriated, and converted to his own use the goods, wares, and merchandise described in claimant's petition in replevin in the district court of Scott county, Iowa, which petition is here referred to, and made a part of this record in this matter.

The petition is not attached or exhibited by copy, or otherwise referred to than in the above extract. But the briefs of the counsel are on the basis, justified by the language of this proof of debt, that the replevin action described and included the entire goods originally bought from claimant by Heinsfurter.

Claimant further alleges that it rescinded the contract of sale of said merchandise, and asks that its claim be allowed by the referee in the sum of $165.90, for the wrongful and fraudulent conversion and detention of said property.

The objections filed against this claim are, in substance: (1) That claimant, having elected to proceed in the state court in replevin of said property, is estopped from proving any claim here, since, having replevied, it cannot prove its claim in whole or in part in bankruptcy; (2) if this is a claim in tort, it has not been reduced to judgment or liquidation, and no order has ever been made by the court allowing or directing its liquidation as a debt; (3) the claim as presented is not a provable debt, under the statute.

The referee held that said replevin action did not estop claimant from proving up its claim in bankruptcy; that for goods converted the claim may be proven without having the same first liquidated by judgment; that said bankrupt bought said goods in good faith, in the ordinary course of business, and that the title thereto rested in him; that the goods replevied by claimant constituted a payment on the claim, and a preference by claimant received, and that until said preference, to wit, the value of the goods replevied, found to be $200, and costs herein, $16.20, are by claimant paid to the trustee of the bankrupt estate, allowance of claim presented must be denied.

Originally claimant held a claim, under contract with Heinsfurter, for goods sold and delivered at an agreed price. Here, then, was a debt clearly provable under section 63a, subd. 4, as upon contract. Had payment been made by Heinsfurter, or part of goods by him be returned, unquestionably the remainder of the contract aggregate would have been a provable debt. (I am not here considering the matter of preference.) But the claimant instituted a replevin suit for the identical goods whose purchase was the contract just referred to. The cause of action was based on the rescission by claimant of the contract. The right to rescind was based on alleged fraud on the part of the purchaser, in that, being then insolvent, and knowing such insolvency, he falsely and fraudulently represented himself as solvent; that at the time of such purchase he did not intend to pay for said goods; that claimant, in reliance on such representation, and believing the purchaser intended to pay for the goods, sold and delivered them, etc. This rescission by claimant of such contract is expressly stated in the extracts above given from proof of debt filed herein. It is not necessary to consider here whether the claimant could have rescinded the contract of sale as to a part of the goods, viz. those returned under the writ, leaving the remainder, to wit, those not so returned, standing under contract of sale; for by the extracts above given it plainly appears that the claimant rescinded, if any portion, the entire contract of sale, in bringing said replevin action. What is the scope of said action,—the result that may be reached therein,—under the Iowa statutes? Section 4175, Code Iowa 1897, directs that the jury must assess the value of the property, and the damages for the taking or detention thereof, and, if so asked by either party, shall find the value of each article, etc. Section 4176 provides:

The judgment shall determine which party is entitled to the possession of the property, and shall designate his right therein, and if such party have not the possession thereof, shall also determine the value of the right of such party, which right shall be absolute as to an adverse party, and shall also award such damages to either party as he may be entitled to for the illegal detention thereof.

Section 4178 confers on the party found to be entitled to (but not already in) possession of the property the right to have execution for the value thereof, or, if a part only of the articles are found, he may have them, and execution for value of remainder. Assuming, then, that claimant shall, in said replevin action, prove the basis (false representations, etc., as to solvency, and willful intent not to pay) of its right to rescind, it will then be entitled to the property it has received under the replevin writ, and, not the contract price for the remainder, but the value of the remainder of such goods as the jury, on evidence before them, shall assess same; also, to judgment for any damages for detention or taking the goods to which the jury may find it entitled. We may here notice that in this replevin action the claimant is given all the relief, so far as the judgment is concerned, which it can have,—the goods returned, the value of any not returned, and damages for taking and detention of property. Having the action now pending in the state court, wherein is claimant's right to proceed here? The suggestion is not without force that the claimant, by proceedings herein, is splitting up its cause of action. It is single in the state court, though the remedy or relief may run in different directions. As the matter now stands, claimant, having received nearly 60 per cent. of its entire claim, in the return to it of the goods taken under the writ of replevin, is seeking here to prove up as a debt against the estate the remainder (about 40 per cent.) of that for which its action is still pending in the state court. May claimant thus proceed? It assumes to be at liberty, and, with its action in the state court pending, we are authorized to assume that it intends, to proceed with such action to the full extent authorized under the state statutes. If it shall in that action, by proof therein presented, sustain its right to rescind, claimant will therein obtain judgment for the goods already returned, for the value of those not returned, and any damages to which it may be found entitled. If claimant shall not furnish proof sufficient to sustain its attempted rescission of contract, judgment will be entered against it for return of goods, or their value, and for any damages properly assessable for the taking, etc. Thus far nothing appears indicating an intent to abandon the action in the state court, so far as the same relates to goods not taken under the writ and for damages. While the claim presented herein to the referee states that the amount involved in that (state) action is $184.55, the claim, as a whole, disproves this statement, and shows that the entire amount of goods sold and delivered to Heinsfurter is involved therein, and is still not disposed of by any order or judgment of court, or pleading filed by parties to such action. If claimant is successful in said action as to the goods returned, and would be permitted to withdraw all claim for further proceedings therein, the result would be that it would

have received, in goods returned, $200, and, if claim is herein allowed, would receive an additional amount in dividends. This would give claimant a decided benefit or advantage over other creditors of the estate.

Where is to be determined whether a basis for the attempted rescission actually occurred? Unless such basis actually did exist, claimant could not so rescind, as against its vendee or his resisting estate. Before claimant can be adjudged entitled to the goods returned to it, the state court must find, from the evidence therein submitted, that such basis is proven. Certainly as to that contest, begun in the state court, and pending therein when claim was herein filed, and not yet disposed of, this court cannot assume jurisdiction. But claimant recognizes that this court can do nothing as to the claim herein filed—no judgment on the merits having been had in the state court, and therefore no plea of res judicata can be herein filed—without this court first passing on the merits as to the basis for such rescission, and it has therefore submitted proof on that point. The state court may find differently on this question, from the finding that might be here reached. What then? Assume the state court, by its finding under the proof before it, sustains such rescission, and that this court, under proof here submitted, affirms the conclusion reached by the referee, and finds no basis existed for such rescission; what then results? Yet these contradictory findings are possible, as the matter now stands, even if claimant proceeds no further in the state court than to attempt to prove its right to the goods returned to it under the writ of replevin. These suggestions present the difficulties here encountered. The claimant has elected to present its proofs of debt herein as being "for the wrongful and fraudulent conversion and detention of property," and has thereby disclaimed any action on the original contract of purchase.

Precedents are not wanting in which the owner of property converted by another to his own use has been permitted to waive the tort and sue as upon an implied contract that the party so converting the property is impliedly held as thereby promising to pay the value thereof. But no case has been cited by counsel for claimant, nor have I found any case in the limited time at my disposal for the search, wherein a party rescinding or attempting to rescind a contract of purchase for fraud on the part of the purchaser has been permitted to retain part of the property obtained by him under his attempted rescission, and then elect to sue for the remainder of the property as upon an implied contract to pay therefor, because of the vendee's having converted it to his own use. If the contract of purchase in this case was, as the referee has found it, a legal, binding contract, the title to the property passed to the vendee. Such was the intent of the parties in this contract of purchase when it was made, according to the uncontradicted evidence. Then, the title to the property being in the vendee, he had a right to dispose of it,—could rightfully and lawfully sell it; and, whatever may have been his liability therefor, he was not liable for converting it to his own use or for selling it. Under the evidence as herein presented, I must affirm, so far as the pleadings herein permit, the finding of the referee

that Heinsfurter purchased said goods in good faith, and in the ordinary course of his business. This follows from the finding that he was not guilty of fraud towards claimant in his said purchase. The burden of proof is on claimant to sustain its allegation of such fraud. This finding of necessity compels the rejection of the claim as presented against the estate, for "wrongful and fraudulent conversion and detention of such property."

If the positions taken by the bankrupt and opposing creditors be accepted, viz. that the claim herein presented is an unliquidated claim, within the terms of section 63b of the bankruptcy statute, the same result must be reached, and the claim rejected, since there has been no application to the court for its liquidation, which, under said section, must be liquidated before the claim can be proved and allowed against said estate. So, if it be not an unliquidated claim, and if the claim for conversion of property can be directly proven up, there must be proof of the value of the property converted. This proof is wanting here. Had the claim been properly shown to have been based on contract of purchase, and so presented herein, the evidence herein would have been sufficient.

It may not be necessary to attempt consideration of that part of the referee's findings wherein he finds the receipt of $200 of property returned to claimant under said writ of replevin constituted a preference received by claimant. My time is so occupied with pressing official duties that I will not attempt to state my reasons for not accepting this finding, since, under the conclusions reached herein, such finding becomes immaterial. But I heartily accept the equitable conclusions reached thereunder, that, unless the claimant shall pay to the trustee the value of the goods so taken by claimant, it ought not to be permitted to prove up its claim herein. If the claim had been filed as on the original contract of purchase, the goods would have constituted a part of the assets of the estate, and claimant would have proved up its entire claim. Claimant has by force, albeit the force of the law, taken a part of these purchased goods, which, under the evidence here submitted, it is not entitled to so have taken. If it desires that its claim for all or a part of the goods be proved up, it must undo the wrong which, under the evidence, it has committed, and return the goods, or their value, before it is justly or equitably entitled to prove its claim herein. The action of the referee, rejecting the claim of the Guthman, Carpenter & Telling Company, must therefore be affirmed at the costs of said claimant. The referee will proceed with the case in bankruptcy accordingly, making such order and judgment as to said costs as may be just and proper.

An application to confirm a composition in said bankruptcy case has been presented to this court. Apparently a majority of creditors in number and amount of claims have agreed thereto. Action thereon by the court will be delayed until the 1st day of next September, to the end that the court may be advised as to what further proceedings, if any, claimant will take in the matter of its said claim. Unless action shall be taken by said date, and brought to the notice of said court, I shall feel authorized to assume that said claimant has

elected to take no further proceedings in bankruptcy, and as having withdrawn its said claim.

The referee will notify counsel of record herein of the conclusions reached by this court as above announced, and certify to counsel of record for claimant the last preceding paragraph hereof.

BOKER et al. v. UNITED STATES.

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

No. 60.

CUSTOMS DUTIES—CLASSIFICATION—NICKEL ALLOY.

Nickel alloy, in rods and sheets, which is incapable of practical use without being subjected to further manipulation and manufacture, is dutiable under paragraph 167½ of the tariff act of 1894, as an alloy "in which nickel is the component material of chief value," and not under paragraph 177, covering "manufactured articles or wares, not specifically provided for, composed wholly or in part of any metal, and whether partly or wholly manufactured"; but wire made of the same alloy, in which form it is used in the arts, and is a completed, merchantable article, is dutiable under the latter paragraph.

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

In the circuit court, TOWNSEND, District Judge, delivered the following opinion:

The merchandise in question comprises certain nickel alloy, in the form of rods, sheets, and wire. The board of general appraisers, affirming the action of the collector, assessed all the articles for duty as manufactures of metal, at 35 per cent. ad valorem, under the provisions of paragraph 177 of the act of August 27, 1894, for "manufactured articles or wares, not specifically provided for, composed wholly or in part of any metal, and whether partly or wholly manufactured." The importer protested, claiming that they were dutiable at six cents per pound, under the provisions of paragraph 167½ of said act, as "nickel or alloy of any kind in which nickel is the component material of chief value." The first question involved is whether the alloy in these forms is raw material, or a manufactured article. It seems clear that the rods and plates are not advanced from the condition of nickel alloy, and are therefore provided for under paragraph 167½. They are incapable of practical use without being subjected to further manipulation and manufacture. I think congress, by the provision for nickel alloy, itself a manufacture, must be presumed to have intended to provide for such alloy in its ordinary commercial forms as known at the passage of said act. The wire is a manufacture of metal, a complete merchantable article, imported in spools, and sold by the spool, to be used in the construction of rheostats, and dealt in commercially in various sizes, adapted to the purposes for which it is wanted. The decision of the board of general appraisers is reversed as to the rods and plates, and affirmed as to the wire.

Albert Comstock, for appellants.

H. P. Disbecker, for the United States.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

PER CURIAM. Affirmed on opinion of court below.

NASSAU BREWING CO. v. MOORE, Collector. INDIA WHARF BREWING CO. v. SAME. OCHS v. SAME. JOSEPH FALLERT BREWING CO., Limited, v. SAME.

(Circuit Court, E. D. New York. October 6, 1899.)

INTERNAL REVENUE—STAMPS FOR FERMENTED LIQUORS—EFFECT OF CHANGE IN STATUTE.

The tariff act of 1897 (30 Stat. 206), which repealed the provision of Rev. St. § 3341, that the commissioner of internal revenue should allow upon all sales of internal revenue stamps to any brewer, and by him used in his business, a deduction of 7½ per cent., did not affect the tax-paying value of stamps purchased before it went into effect, and upon which the deduction was allowed, but not used until after it went into effect.

These were suits by brewing companies against the collector of internal revenue to recover certain alleged overpayments of taxes required on fermented liquors.

Louis Marshall, for certain plaintiffs.

William C. Wells, Edward V. Slauson, and Frederick W. Rowe, for certain plaintiffs.

George H. Pettit, for the United States.

THOMAS, District Judge. The able and thorough discussion by the United States attorney clearly and forcibly presents the defendant's contention, but the court is unable to consent to the conclusion drawn from a generally accurate exposition of the system of taxation provided by the statute. The question involved is this: Section 3341, Rev. St. U. S., provides that "the commissioner of internal revenue shall allow upon all sales of such stamps [for the tax on fermented liquors] to any brewer, and by him used in his business, a deduction of seven and one-half per centum." The internal revenue collector, pursuant to the uniform practice, sold stamps to the plaintiffs, who were brewers, and upon such sales, and at the times thereof, allowed a deduction of 7½ per cent. These stamps, although purchased before for use, were not actually used in payment of taxes until after the Dingley act took effect, which act omitted and thereby repealed the previous statutory direction for the allowance of the deduction above stated. May the United States require such purchaser upon using such stamp to pay the 7½ per cent. deducted from the purchase price of the stamps upon the sale thereof? In considering this question it must be kept in mind that the purchase of the stamp is not a payment of the tax, but that the stamp is a convenient means of collecting the tax on beer "sold or removed for consumption or sale." U. S. v. American Tobacco Co., 166 U. S. 468, 17 Sup. Ct. 619. What did the former law say to the plaintiff? It gave this command: "Buy at a deduction of seven and one-half per centum a stamp of the denomination of one dollar, place it on a barrel of beer, and the tax thereon shall be paid thereby." The plaintiff paid the money as demanded, received the stamp, and placed it on the barrel. Now the claim is that the Dingley law, by retroactive influence, vitiated all previous sales of stamps at a deduction of 7½ per cent., so that stamps theretofore bought could not be received thereafter in full payment

of the tax; that is, a stamp bought before the act, and used thereafter, lost 7½ per cent. of its tax-paying power, in consequence whereof the government levied an additional tax of 7½ per cent. on the product. The Dingley act does not permit stamps to be sold, after its passage, at less than their nominal value. It does not deal with stamps theretofore sold. It does not change the tax in terms levied by the law. Of course, the result of the act is to increase the tax on beer by 7½ per cent., because, although the tax still remained at one dollar per barrel, stamps to pay the tax could no longer be bought at a discount. But the previous statute provided for a discount on the sale of stamps, and did not reduce the tax. This may be illustrated by the provision which allows a deduction on the sale of documentary stamps, while the tax on the document is unaffected thereby. This follows the rule that the purchase of the stamp is not a payment of the tax. The stamp is but a means for the future payment of the tax. A stamp sold before the Dingley act has the same tax-paying power that it had before, and when the stamp is placed on the barrel it pays the tax to the full limit of its face value. All this is clear. But the government claim amounts to this: The stamp had not been paid for, into 7½ per cent.; i. e. the collector was not permitted by the statute to allow the deduction until the stamp was used, and when the stamp was used there was no law allowing any deduction. This view makes both the sale and use of the stamp conditions precedent to be performed by the brewer before he obtains any right to a reduction. This construction is at least partially incorrect, and sufficiently so to defeat the government's conclusions founded upon it. At the outstart it may be noticed, as a matter of some, but inconclusive, weight, that the government has uniformly allowed the deduction "upon sales" at the time of sales. Indeed, it is understood that the statute or government recognizes or provides neither machinery nor regulations for allowing a rebate upon sums paid for stamps after the due use of the same. But the terms of the statute preclude the interpretation claimed by the government. The statute directs a deduction upon all sales of stamps used by a brewer in his business. The deduction is upon the sales of stamps; hence the first condition is the sale of the stamps, and, of course, such condition is precedent. But upon what stamps is it allowed? Stamps used in his business. This use must follow the sales, and therefore relates to something that must be done with the stamp after the sale. This, by all authority, involves a condition subsequent. Hence the allowable construction most favorable to the defendant is this: The title to the stamp, with an accompanying right to the deduction, vests in the purchaser at the time of sale, and the right to a reduction is defeasible, unless the stamp thereafter be used in his business. The Dingley act does not defeat this right, but, on the other hand, expressly provides (section 34) that "the repeal of existing laws, or modifications thereof, embraced in this act, shall not affect any act done, or any right accruing or accrued, * * *; but all rights and liabilities under said laws shall continue and may be enforced in the same manner," etc. Not an act done, not an accruing right, shall be affected. Accepting the defend-

ant's interpretation, can it be said that no right was accruing to these plaintiffs by reason of their purchase of the stamps; had no act been done by them from which a deduction must accrue under the mandate of the law? No; where a right is defeasible on a condition subsequent, it is deemed to have accrued. Such is common learning. And does not the Dingley act, by the most exact language, carefully protect these accruing or accrued rights? It is considered that, even under the doubtful construction of section 3341 adopted by the government, the plaintiffs had at least incipient rights, which congress protected in the enactment of the new statute. And so it should. When the government of the United States, following the practice observed by it for many years, sold at a deduction of 7½ per centum a stamp of the denomination of one dollar, and assured the purchaser that the stamp was worth a whole dollar for the purpose of paying taxes, such stamp should have a tax-paying power equal to the highest obligation issued by the government; and if, after such sale, the purchaser used the stamp in his business, he should be deemed to have fulfilled every obligation resting upon him, and to have perfected the right initiated by his purchase. The plaintiffs should have judgment in their several actions.

McKNIGHT v. UNITED STATES.

(Circuit Court of Appeals, Sixth Circuit. October 23, 1899.)

No. 648.

1. CRIMINAL LAW—TRIAL—IMPROPER ARGUMENT OF COUNSEL.
   It is prejudicial error for a court to permit counsel for the prosecution, over objection, to comment in argument to the jury upon the failure of the defendant to offer evidence of his previous good character. Such action, with the express approval of the court, in effect destroys the presumption of good character which the law raises in behalf of the defendant, and permits the jury to infer that his character is bad, because he has not produced proof to the contrary.

2. SAME—EVIDENCE.
   In the trial of a criminal case, a letter written by defendant, containing reflections upon the conduct of a witness for the prosecution, the contents of which were previously known to the witness, is not admissible in evidence for the purpose of showing that the witness is prejudiced against the defendant, where no foundation has been laid for his impeachment thereby.

3. NATIONAL BANKS—FALSE ENTRIES—INDICTMENT OF OFFICER.
   A count of an indictment, charging that defendant, as president of a national banking association, caused a false entry, which is set out, to be made in the books of the bank, purporting to show that a customer had deposited a certain sum to his general credit, when in fact, as defendant well knew, no such deposit had been made, is not insufficient, in the absence of an application for a bill of particulars, because it does not allege the manner in which defendant "caused" the entry to be made.

4. SAME—EMBEZZLEMENT BY OFFICER.
   Where the facts averred in an indictment against an officer of a national bank for embezzlement show that defendant wrongfully used the bank's money in his care and under his control for the purpose of bribing certain city officials in his own interest, it sufficiently avers an appropriation to his own use, and is not vitiated by further averments that there was an

intent to wrongfully convert the money to the use of such officials, and that it was so converted.

5. SAME—MAKING FALSE ENTRIES—INTENT.
Under an indictment based upon Rev. St. § 5209, charging an officer of a national bank with having made false entries in its books with the intent to deceive the officers and directors of the bank and any agent appointed by the comptroller to examine the affairs of the bank, and to injure and defraud the association, it is sufficient to prove the wrongful intent in either particular charged.

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

A. E. Richards and C. P. Breckinridge, for plaintiff in error.

R. D. Hill, for the United States.

Before TAFT, LURTON, and DAY, Circuit Judges.

DAY, Circuit Judge. The plaintiff in error, J. M. McKnight, having been indicted, convicted, and sentenced under section 5209 of the Revised Statutes of the United States, making penal certain acts of officers of national banks, prosecutes this writ of error to obtain a reversal of the judgment and sentence of the court below. The indictment contains numerous counts, which were disposed of by demurrer or dismissal, and the case went to trial upon thirty-five counts, upon all of which the jury rendered a verdict of not guilty, except as to three counts, being Nos. 39 and 50 of indictment No. 5,782, and No. 2 of indictment No. 5,783. Upon the trial of the case numerous exceptions were taken to the rulings of the court upon the admission and rejection of testimony, the charge given, the refusal of charges requested, objection to the indictment by demurrer, motions in arrest and for a new trial.

1. A principal ground of exception urged by the plaintiff in error arises from exception taken to the remarks of the government's special counsel in his closing address to the jury, and the court's direction to the jury in connection therewith. The comments of counsel and the rulings of the court grew out of the fact that the defendant had introduced no testimony tending to establish his previous good character. So much of the bill of exceptions as contains the history of this part of the case is as follows:

"While said special attorney was making for the government the closing argument in the case, he commented upon the fact that the defendant had not offered any evidence of good character, stating, in substance, that the defendant had the right to offer such evidence, and had not done so, and that, until he put his character in issue, the prosecution could not attack it; whereupon the counsel for the defendant interrupted the special attorney for the government, and moved the court to say to the jury that this statement was improper, that the law presumed the defendant to be a man of good character, and that the fact that he did not introduce testimony on that subject could not be commented upon; the counsel for the defendant stating that at the proper time the defendant would ask the court so to charge the jury. The court declined to say to the jury that the attorney for the government could not comment upon the fact that the defendant had not introduced testimony to prove himself to be a man of good character, but said to the jury: 'It is true, the law presumes that; but the prosecution may comment upon the absence of any evidence being presented upon that question,'—to which the defendant at the time objected and excepted, and still excepts. Under said permission from the court, and over the objection of the defendant, the special attorney

for the government proceeded to say to the jury in substance, and did say substantially, as follows, to wit: 'While the law presumes the defendant to be a man of good character, he does not have to rest upon this presumption. He can call his friends and neighbors to testify to his good character, but the prosecution could not call witnesses to attack his character until that was done. If he was a man of good character, why did he not call these friends and neighbors to prove it, and thus protect himself against these witnesses that his counsel has denounced as vultures? He did not stand like some poor mountain man,—taken away from home and friends. He is at home, and, if he could prove himself to be a man of good character, why did he not do so?' —to all of which the defendant at the time excepted, and still excepts. And on the next day, during the continuation of said closing argument, the special attorney for the government spoke of having tried men of high reputation for bad offenses, and who had speculated and lost money until the bank failed, and said that he had sympathy for such men, but that he had no sympathy for a man like the defendant, who was a 'confessed scoundrel,' a man 'without a character'; whereupon the counsel for the defense objected to these statements, which objection the court sustained, and directed the attorney for the government to withdraw the same, which he did, but proceeded to say 'that he (defendant) stands without a reputation in the community, and that he stands without such good character.' Thereupon the court interrupted the special attorney, and said, 'There is no evidence on that subject, and counsel should not say it;' whereupon the special attorney said: 'I withdraw it, then. I say that he has offered no evidence as to his character;' whereupon counsel for defendant again interrupted the special attorney, and said: 'We save an exception to that, and ask your honor to instruct the jury that it is improper.' Thereupon the court said to the jury: 'The law presumes the defendant innocent until he has been proven guilty to the exclusion of a reasonable doubt. The law presumes his character to be good; but, as the defendant might introduce evidence as to the fact of his good character, and did not, I think the district attorney can comment upon the fact that he has not.' To the last sentence in the court's statement to the jury the defendant at the time excepted, and still excepts. And thereupon, acting upon the permission of the court, and over the defendant's objection, the said special attorney again commented upon the fact that the defendant had offered no testimony as to his character, and again stated to the jury that the government could not attack the character of the defendant, as it had not been put in issue by him; to all of which the defendant objected and excepted, and still excepts."

It will thus be perceived that while the court recognized the well-established rule that, in the absence of testimony, the law presumes the accused to possess a good character, it nevertheless permitted the counsel for the government to comment upon the want of such testimony. The court refused to check the counsel in this line of argument when objections were made by counsel for the accused, and in this connection said: "It is true, the law presumes that; but the prosecution may comment upon the absence of any evidence being presented upon that question." Thereupon, under said permission, and over objections of the plaintiff in error, counsel proceeded to say: "While the law presumes the defendant to be a man of good character, he does not have to rest upon this presumption. He can call his friends and neighbors to testify to his good character, but the prosecution could not call witnesses to attack his character until that was done. If he was a man of good character, why did he not call those friends and neighbors to prove it, and thus protect himself against these witnesses that his counsel have denounced as vultures? He did not stand like some poor mountain man,—taken away from home and friends. He is at home, and, if he could prove himself to be a man of good character, why did he not do so?" The

following day, the counsel having made comments on the standing and character of the prisoner, the court sustained the objection thereto, and required the counsel to withdraw the objectionable remarks, but permitted him to repeat his observations of want of testimony as to defendant's character, and, when asked to state to the jury that said comment was improper, said: "The law presumes the defendant innocent until he has been proven guilty to the exclusion of a reasonable doubt. The law presumes his character to be good; but, as the defendant might introduce evidence of his good character, and did not, I think the district attorney can comment upon the fact that he has not." Nowhere in the subsequent proceedings or in the charge to the jury was anything said to qualify or change this ruling of the court. It amounted to an instruction to the jury that the effect of the failure of the accused to produce affirmative testimony of his previous good character might raise an inference against him as to his previous character and standing. Where the accused offers testimony in a criminal trial, seeking to show his previous good character, such testimony is substantive proof in his behalf, which the jury may consider in determining the likelihood of the commission of the alleged crime. Such testimony may of itself, or with other testimony, raise that reasonable doubt which requires acquittal. Where no testimony is offered, the accused can rest upon the legal presumption of good character. The question in this case is: May he be required to rest upon that presumption, qualified by the argument of the prosecuting attorney, made with the approval of the court, urging the jury to consider that the accused could have introduced testimony, had he been able to do so, showing his good character? To permit such course of proceeding would be to deprive the accused of the legal presumption in his favor. The suggestion of counsel, thus approved by the court, may be more detrimental to the rights of the accused than any testimony which could be adduced against him. In effect, it not only destroys the presumption in his behalf, but permits an inference that his character is bad because he has not produced proof to the contrary. While there is some confusion, and perhaps conflict, in the cases on the subject, sound principle, as well as the weight of authority, concurs in holding such comments, approved by the court, to constitute such substantial error as requires a reversal and new trial. The rule is well stated in 1 Bish. Cr. Proc. § 1119:

"It is the defendant's privilege, not his duty, to open by evidence the question of his character. The expense, the remoteness of witnesses, confidence in his case, and other considerations would often dissuade him therefrom, however certain of success therein. Hence, and because the state may not show a character bad which the defendant has not put in issue, the omission of this evidence does not justify the presumption that it is not good; and neither counsel nor the judge has the right to argue to the jury that it does, nor should they assume anything against it while deliberating on their verdict."

To the same effect: State v. Upham, 38 Me. 261; Fletcher v. State, 49 Ind. 124; Stephens v. State, 20 Tex. App. 255; State v. Dockstader, 42 Iowa, 436; Ackley v. People, 9 Barb. 610; People v. White, 24 Wend. 520; People v. Evans, 72 Mich. 367, 40 N. W. 473; Pollard v. State (Tex. Cr. App.) 26 S. W. 70.

2. It is argued that the court erred in excluding a certain letter, written by the plaintiff in error to the board of directors of the German National Bank, bearing date of September 15, 1896. For the purpose of this opinion it is not necessary to set out the letter in full. It was offered as tending to show the bias and feeling of one of the government's witnesses, R. E. Reutlinger. This witness having testified against the accused, on cross-examination (and subsequently by other witnesses) it was sought to be shown that he was present when the letter was read at the meeting of the board of directors. The letter contained references to Reutlinger's conduct, while in the bank, of a derogatory character. The argument is that this letter necessarily biased and prejudiced the witness in his feelings towards the accused. It nowhere appears that the witness had denied such bias or feeling, or that any foundation was laid for the proposed introduction of the letter as a contradiction of Reutlinger. It contained a lengthy and detailed account of the management of the bank's affairs by the accused, and its conduct in the hands of the witness and others. Its admission would have permitted the accused to prove his declarations in his own behalf not under oath. It was not a declaration of Reutlinger's, showing any bias or feeling, and did not come within the rules which permit the introduction of such declarations, either as cross-examination or direct testimony. The letter was properly excluded.

3. The fiftieth count of the indictment, omitting formal parts, is as follows:

"Fiftieth count: And the grand jurors aforesaid, upon their oaths aforesaid, do further present that J. M. McKnight, late of the district aforesaid, in the district aforesaid, on the 22d day of September, 1896,—he, the said J. M. McKnight, being then and there president of a certain banking association then and there known and designated as the German National Bank, which had been heretofore duly organized and established, and then existing and doing business in the city of Louisville, Kentucky, in the district aforesaid, all under the laws of the United States of America, in that behalf,—he, the said J. M. McKnight, president aforesaid, did then and there, in the district aforesaid, cause to be made in a certain book then and there belonging to and in use by the said association in transacting its said banking business, and then and there known and designated as 'Deposit Journal, No. 37A,' a certain entry in reference to the private account of the Germania Safety-Vault & Trust Co., which said entry was in the following words and figures, to wit:

'1318. Germania S. V. & Trust Co. $10,000.'

—And which said entry, so as aforesaid made in said book, then and there purported to show, and did in substance and effect indicate and declare, that the Germania Safety-Vault & Trust Co. had deposited, as of date aforesaid, in said bank, ten thousand dollars, subject to be checked upon by said Germania Safety-Vault & Trust Co., said entry being on left-hand page of said deposit journal, on the forty-ninth line of said page, and being the last entry on said page. And the grand jurors aforesaid, upon their oaths aforesaid, do further present that the said entry made as aforesaid was then and there false, in this: that said deposit of ten thousand dollars was not made in the said bank by the Germania Safety-Vault & Trust Co., or by any one for them in said bank, on the 22d day of September, 1896, or on any other date prior thereto, and in fact and in truth said deposit never was made to said private account of said Germania Safety-Vault & Trust Co.,—all of which J. M. McKnight, president aforesaid, then and there well knew; and that the said false entry was then and there by McKnight, president, caused to be made as aforesaid with the intent then and there on the part of him, the said J. M. McKnight, presi-

dent aforesaid, to deceive the officers and directors of said banking association and any agent appointed by the comptroller of currency to examine the affairs of said association, with the intent then and there on the part of him, the said J. M. McKnight, president aforesaid, to defraud the association, with the intent on the part of him, the said J. M. McKnight, president aforesaid, to injure the said association."

This is one of the counts upon which a verdict of guilty was returned, and is objected to because it is not sufficiently exact to charge the defendant with having "caused" the entry to be made, without setting forth the particular mode and manner by which this entry was so "caused." The indictment is not printed in the record in full. The crime of false entry, we are advised by counsel, was charged in four ways: (1) That the defendant made the entries; (2) that he made them and caused them to be made; (3) that he caused them to be made; (4) that he caused John Kerwin, special bookkeeper, to make them. He was convicted under count 50, which charges that he caused the entry to be made. The entry is incorporated in full into this count, which charges a deposit of $10,000 to the credit of the Germania Safety-Vault & Trust Company, while in fact said trust company had made no deposit in said bank; knowing which, McKnight caused the same to be made with the intent to deceive and defraud the officers and directors of the bank and any agent appointed by the comptroller to examine its affairs, with the intent to defraud and injure the said association. An indictment must sufficiently advise the accused of the nature and cause of the accusation against him, and be definite enough to enable him to plead it in bar in case he is again indicted for the same offense. It is well settled that such false entry need not be directly made by such officer of the bank. It is sufficient to procure or direct it to be made by another with the criminal intent required in the statute. Agnew v. U. S., 165 U. S. 36, 52, 17 Sup. Ct. 235. It is urged that he may be convicted by proof of some remote cause concerning which he is not advised in the indictment. This count does charge that the false entry of the deposit was caused by the defendant without any money having in fact been deposited, as he well knew; that with this knowledge, and with intent to deceive and defraud, the defendant caused the entry to be put upon the books. It is difficult to conceive of any other than a direct cause which could have been set in motion with this intent to deceive and defraud. Should the defendant be again indicted for having made, or by any means procured the entry in question to be made, the record of conviction under this count would clearly be available to him in bar. In the absence of an application for a bill of particulars, we think this count is sufficient. Such application, though addressed to the discretion of the court, should ordinarily be granted wherever the accused is liable to be surprised by evidence for which he is unprepared. Dunlop v. U. S., 165 U. S. 491, 17 Sup. Ct. 375. In Cochran v. U. S., 157 U. S. 287, 15 Sup. Ct. 628, Mr. Justice Brown, in his opinion, page 290, 157 U. S., and page 630, 15 Sup. Ct., says:

"Few indictments under the national banking law are so skillfully drawn as to be beyond the hypercriticism of astute counsel. But the true test is, not whether it might possibly have been made more certain, but whether it con-

tains every element of the offense intended to be charged, and sufficiently apprises the defendant of what he must be prepared to meet, and, in case any other proceedings are taken against him for a similar offense, whether the record shows with accuracy to what extent he may plead a former acquittal or conviction."

4. Objections in various forms were taken to count No. 2 in the indictment in case No. 5,783, which is as follows:

"Second count: And the grand jurors aforesaid, upon their oaths aforesaid, do further present that J. M. McKnight, late of the district aforesaid, on the 6th day of February, 1896, in the city of Louisville, county of Jefferson, state of Kentucky, and district aforesaid, the said J. M. McKnight being then and there president of a certain banking association then and there known and designated as the German National Bank, located in the city of Louisville, state of Kentucky, which said banking association had been heretofore organized at Louisville, Kentucky, in said district aforesaid, and organized and created under and by virtue of the laws of the United States of America, he, the said J. M. McKnight, president aforesaid, did then and there unlawfully and willfully embezzle the moneys and funds of said banking association, to wit, the sum of two thousand dollars, lawful money of the United States of America, of the value of two thousand dollars (a more full and particular description of said money is to the grand jurors unknown), with the intent then and there on the part of him, the said J. M. McKnight, president aforesaid, to defraud said banking association out of said moneys and funds, and to convert the same to the use and benefit of one F. A. Britt and John W. Reeder, the said moneys and funds aforesaid of the said banking association being then and there in the custody and care and under the control of said J. M. McKnight as president aforesaid, and the said embezzlement aforesaid of the said two thousand dollars by the said J. M. McKnight being then and there made and done by him, the said J. M. McKnight, without the knowledge or consent of the then other directors, excepting himself, of the said banking association, or the then discount and exchange committee of said banking association; that is to say, that on the 6th day of February, 1896, in the city of Louisville, county of Jefferson, state of Kentucky, and district aforesaid, did cause, persuade, procure, and induce the said F. A. Britt and John W. Reeder to sign and execute and deliver to him, J. M. McKnight, president aforesaid, a note for two thousand dollars, bearing date February 6, 1896, due one year after date, and payable to the order of themselves, negotiable and payable at the German National Bank, and indorsed on the back thereof by said F. A. Britt and John W. Reeder by each of them signing their individual names thereon; that at the time of said execution, signing, and delivery of the said note by F. A. Britt and John W. Reeder, as aforesaid, they, and each of them, were hopelessly insolvent, and had no property whatever under the laws of the state of Kentucky subject to the payment of their debts, and this was then and there well known to said J. M. McKnight, president, as aforesaid, of the said banking association, who did then and there accept and place and cause to be placed said note of F. A. Britt and John W. Reeder, signed, executed, and indorsed as aforesaid, among the assets of said banking association, and did then and there pay and cause to be paid to the said F. A. Britt and John W. Reeder the said two thousand dollars, which was then and there the money and funds of said banking association, on said note, and as the pretended proceeds thereof, without charging or collecting any discount or interest on the said note; that said payment of said two thousand dollars as aforesaid was not then and there an actual loan or discount made on said note by said J. M. McKnight, president aforesaid, in good faith, of the moneys and funds of said banking association, but said money was promised to be paid and caused to be promised to be paid, as aforesaid, by J. M. McKnight, aforesaid, to F. A. Britt and John W. Reeder as a bribe by the said McKnight of the said F. A. Britt and John W. Reeder, and each of them, and so accepted by them, and each of them, to induce them to sign an agreement to stand together with Chris. J. Jenne, John E. Leatherman, R. E. King, R. O. Breuer, and G. J. Triick (they, together with said Britt and Reeder, being members of the board of aldermen of the city of Louisville, Kentucky) on any and all propositions of legislation that might come before said body of alder-

men, and to caucus with J. M. McKnight, and to secure for the friends of said Britt, Reeder, Jenne, Leatherman, King, Breuer, and Triick an equal division of the offices and profits that might arise therefrom; and by reason of their, the said F. A. Britt and John W. Reeder, and each of them, having signed said agreement, together with said Jenne, Leatherman, King, Breuer, and Triick, agreeing with one another and binding themselves to that effect, said two thousand dollars was paid and caused to be paid to said Britt and Reeder, as aforesaid, and said note was then and there executed, signed, delivered, and accepted, as aforesaid, merely to cover up and conceal said transaction aforesaid, and not as a binding or enforceable contract against said Britt and Reeder, and so understood by all parties thereto at the time,—all of which was then and there unknown to the said other directors and committee aforesaid, as well as the acceptance of said note and the payment of said moneys and funds of said association thereon, as aforesaid; and the said J. M. McKnight, president aforesaid, did then and there, with the intent aforesaid, feloniously, unlawfully, and willfully embezzle said two thousand dollars of the moneys and funds then and there belonging to said banking association, and in his care and custody and under his control, as aforesaid, and did then and there convert same to the use and benefit of said F. A. Britt and John W. Reeder. And the grand jurors aforesaid, upon their oaths aforesaid, do further present that the said F. A. Britt, then and there well knowing that the said J. M. McKnight was then and there president of the said banking association, feloniously, unlawfully, knowingly, and willfully, with the intent to defraud the banking association of said two thousand dollars, and to convert same to the use of himself and the said Reeder, did, on the said 6th day of February, 1896, feloniously, knowingly, and willfully aid and abet said J. M. McKnight, president aforesaid, to wrongfully, unlawfully, feloniously, and willfully embezzle the moneys and funds of said banking association, as aforesaid, to said amount of two thousand dollars, as aforesaid."

The objection urged is that it is charged that the money was converted to the use of Britt and Reeder, and not to the use of the accused. An analysis of this count shows the alleged misappropriation to have been accomplished by the execution of the note by Britt and Reeder, who were insolvent, and without property, for the sum of $2,000, payable to the order of themselves, and negotiable and payable at the German National Bank; that the note was made at the instance of McKnight, who thereupon paid them $2,000 of the bank's funds; that said payment was not a loan or discount in good faith, but was by McKnight paid to Britt and Reeder as a bribe to induce them to "caucus" with said McKnight, and to "stand together" with others (also aldermen) to secure for the parties who signed the agreement an equal division of the offices and profits that might arise therefrom; and that said note was executed and delivered merely to cover up and conceal the real transaction. The statute makes it an offense to embezzle the money of a bank. The term "embezzlement" has been used in many different statutes, and, as it is a statutory offense, but little aid can be derived from the construction put upon local statutes by the courts of the various states. As used in the statutes of the United States, in the first section of the act of March 3, 1875, "to punish certain larcenies, and the receivers of stolen goods" (18 Stat. 479), which enacts "that any person who shall embezzle, steal or purloin any money, property," etc., "of the United States, shall be deemed guilty of felony," etc., the term is defined by Mr. Justice Brown to be "the fraudulent appropriation of property by a person to whom such property has been intrusted, or into whose hands it has lawfully come." Moore v. U. S., 160 U. S. 269, 16 Sup. Ct. 294. It is averred that the money of the bank, in-

trusted to McKnight as president, under his care and control, was used for the purpose stated, namely, to bribe Britt and Reeder, among other things, to "caucus" with McKnight for the purposes set forth. McKnight's acts are charged to have been with an intent to defraud the association, as is required by the statute. It does not vitiate the count to aver that there was also an intent to convert the funds to the use of Britt and Reeder, and that the same were converted to their use. Such allegations may be treated as surplusage. 1 Bish. Cr. Proc. 478. The transaction, as set out in this count, shows McKnight's wrongful act in using the bank's money in his care and under his control for wrongful purposes of his own. We think this count is not open to the objections urged against it. In view of the construction the court puts upon this count, it is unnecessary to determine whether the fraudulent appropriation required to constitute embezzlement, as the term is used in this statute, may not be made out, although such appropriation, which deprives the owner of the fund or property intrusted to the defendant's care and control, is not to the use of the accused.

5. The sixth assignment of error is:

"In overruling the defendant's motion to instruct the jury as set out in request No. 15, which is as follows: 'The jury are instructed that they cannot convict the defendant under counts 49, 50, 51, and 52, being counts relating to the charge of causing certain entries to be made concerning the deposit ticket of $10,000 in favor of the Germania Safety-Vault & Trust Co., unless they believe from the evidence, beyond a reasonable doubt, that the defendant caused the alleged entries in the said respective counts set out to be made with a fraudulent intent to deceive the officers and directors of the said bank, or any agent appointed by the comptroller of currency to examine the affairs of said bank, with the further and additional fraudulent intent on the part of the defendant at the time to defraud the said banking association, and to injure said association.' "

The theory of this request to charge is that, because the indictment charges an intent to deceive the officers and directors of the bank, or any agent appointed by the comptroller of the currency, with intent to injure and defraud the association, the intent must be proven by the government in all the particulars charged. An examination of the Revised Statutes (section 5209), under which this indictment is framed, shows that these several intents are set forth disjunctively,—"with intent to defraud a person or association," "or any agent appointed to examine the affairs of the association," or "with intent to defraud an individual," or "to defraud a corporation." It is made an offense to do the acts named with any of the intents set forth in the statute, and it is sufficient to support an indictment to prove any one thereof, so far as such element of the crime is concerned, although the several intents may be cumulatively charged in the indictment. Crain v. U. S., 162 U. S. 633, 16 Sup. Ct. 952; Whart. Cr. Pl. (9th Ed.) § 158; 1 Bish. Cr. Proc. 434, 436.

The other assignments of error are as to matters which may not be material or arise in a new trial of the case. For error in permitting the government's counsel to comment in the manner set forth on the failure of the accused to produce evidence of his good character, and the observations of the court to the jury thereon, the case must be reversed, and remanded for a new trial.

McBRIDE v. KINGMAN et al. SAME v. SICKELS et al. SAME v. RANDALL et al. SAME v. AINSWORTH et al.

(Circuit Court of Appeals, Eighth Circuit. October 9, 1899.)

Nos. 898, 1183–1185.

1. PATENTS—CONSTRUCTION OF CLAIMS—INFRINGEMENT.
A patentee, who has simply made an improvement on a device that performed the same function before as after the improvement, is protected only against those who use the very improvement that he describes and claims, or merely colorable evasions of it.

2. SAME—ENLARGING CLAIM.
The claims of a patent covering in terms only improvements in the devices or mechanism forming certain parts of a machine, cannot be enlarged to include other parts or elements not enumerated in the claims, although they may be shown by the specification and drawings, merely because they are essential parts of the machine as a whole, without which it would not be operative.

3. SAME—ESTOPPEL OF PATENTEE BY CLAIMS—SECOND PATENT.
The statute (Rev. St. § 4888) requires an inventor to particularly point out and to claim distinctly the improvement or combination which he claims as his discovery, and when he has made his claims he has thereby disclaimed and dedicated to the public all other devices, combinations, and improvements apparent from his specification and claims that are not mere evasions of those claimed as his own, and he is estopped by his patent from thereafter claiming a monopoly as to such devices, combinations, or improvements either under that or any subsequent patent.

4. SAME—RIDING ATTACHMENTS FOR PLOWS.
The McBride patent, No. 199,082, for improved riding attachments for plows, was not for a primary invention covering broadly, in combination with the other devices described and claimed, a device for carrying a plow upon wheels, or for holding it rigidly in a fixed relation to the wheels or to the axle for the purpose of regulating the depth of the furrow, but is limited, both by the prior state of the art and by the claims themselves, to the combination of the mechanism described for raising and lowering the forward end of the beam, and for canting the plow from side to side. Nor was the attempt of the patentee by his subsequent patent, No. 284,036, to add to the combination the device for rigidly attaching the plow to the axle effective, as such device was disclosed by the specification of the earlier patent, but omitted from the claims.

Appeal from the Circuit Court of the United States for the Southern District of Iowa.

Silas C. Sweet and A. B. Cummins, for appellant.

A. H. McVey and C. A. Dudley (Edmund H. McVey and N. E. Coffin, on the brief), for appellees.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

SANBORN, Circuit Judge. These are appeals from decrees which dismissed bills exhibited against the appellees for infringement of letters patent No. 199,082, issued January 8, 1878, and No. 284,036, issued August 28, 1883, to the appellant, John H. McBride, for improved riding attachments for plows. The circuit court delivered a careful and exhaustive opinion, which will be found in 72 Fed. 908, and the issues in this court have been narrowed to a single question. It is whether the appellant invented and secured by these patents

"the combination of a plow beam rigidly attached to a hinged axle, with appropriate mechanism for raising and lowering the front end of the beam, appropriate mechanism for tilting the plow from side to side, with wheels for the axle and the combining devices necessary to make the implement an operative machine," as his counsel insist, or a mere combination of old devices for raising and lowering the forward end of the beam of the plow and for tilting or canting the plow from side to side, as the court below found. It is conceded that McBride did not conceive the idea of raising and lowering the forward end of a plow beam in a wheel plow, and that he did not invent the first mechanical device to accomplish that end. It is conceded that the idea of tilting or canting the plow from side to side to determine the width of the furrow was old, and that appropriate mechanism to accomplish this purpose had been in use upon riding plows long before McBride invented his improvements. And it is conceded that the devices used by the appellees differ so widely from those described in the patents to McBride that they do not infringe upon them unless McBride first described and secured by his patents a combination not only of the devices for raising and lowering the forward end of the plow beam, and for tilting the plow from side to side, but also for rigidly attaching the plow beam to an axle borne by wheels, so that the wheels upon the axle would carry the plow, and determine the exact depth in the ground to which it might descend. In the briefs before us, counsel for McBride specify but three assignments of error upon which they rely, and these are all based on the single assertion that the court below erred because it did not hold that McBride invented and secured as a part of the combination specified in claims 1 and 3 of his patent of 1878 the first operative mechanical device by which a plow was rigidly attached to an axle borne by wheels so that it would maintain a fixed relation to the wheels and the axle as the plow was operated through the ground. They insist that the beam of every prior plow was free to move up and down, without regard to the plane upon which the wheels might be running, and that the new idea involved in the appellant's plow was in attaching the plow proper or plow beam rigidly to the axle, and thus allowing the wheels, upon which the plow rides, to determine the exact position of the bottom of the plow.

A careful examination of the patents upon which this suit is based and a survey of the state of the art when McBride made his invention, which has been illustrated by more than 50 prior patents, has failed to convince us that the position of the counsel for the appellant can be maintained. Two controlling reasons have led us to this conclusion. They are: (1) That McBride was not the first to conceive the idea or to invent and describe a mechanism for the purpose of rigidly attaching a plow to an axle so that it would maintain a fixed relation to the wheels which support it; and (2) that he did not claim any such mechanical device as a part of the combination which he described as his invention in his patent of 1878. He made his application for this patent on March 17, 1877, and it was issued on January 8, 1878. In letters patent No. 19,077, issued on January 12, 1858, to M. A. Cravath, three gang plows are shown rigidly attached to a

frame the forward end of which is borne on an axle supported by two wheels, and the rear end upon an axle borne by one wheel, so that, as the inventor says in his specification, "the weight of the plow and the downward and side pressure involved in raising and turning over the furrow slice are transferred from the sole and land side of the plow to lubricated axles, enabling the land-side plate and bar to be entirely dispensed with, and reducing the draft at least one-third." In letters patent No. 111,226, issued on January 24, 1871, to John R. McConnell, there are drawings and a description of two gang plows, the rear ends of the beams of which are rigidly attached to an axle borne by two wheels, while their forward ends are supported by the axle of a caster wheel, and are raised and lowered by the driver at will by moving a lever within his reach. These plows are carried, and the depth of their cut is limited, by the wheels which bear the axles, and they are supported in a fixed relation thereto while they are in operation. In letters patent No. 131,063, issued to William Mason on September 3, 1872, a drawing and description of a sulky plow appear, the rear end of the beam of which is journaled on an axle borne by two wheels, while the forward end is supported by a lever which rests on a frame and tongue carried by three wheels. The lever is used to raise and lower the forward end of the beam, and is provided with a perforated bar and pin to secure it in any desired position when the plow is at work. The specification and drawing of this patent show a plow which is rigidly attached, when it is in operation, to axles borne by three wheels, so that the wheels carry the plow and maintain all its parts in a fixed relation to them and to the axles upon which they turn. There are other patents in this record which disclose mechanical devices which were conceived prior to 1877, and by which plows were rigidly attached to axles, so that they maintained a fixed relation to them and to the wheels which supported them while they were in operation. It would be a work of supererogation to describe and review them, for it cannot be held, in view of those to which we have already referred, that McBride was either the first to conceive the idea of holding the plow and the wheels in this fixed relation, or that he was the first to invent a mechanism by which this result was accomplished. He certainly was not a pioneer here, and his invention in this regard, if he made any, was by no means a primary one. If he invented or secured anything in the device by which he connected his plow with his wheels, it was not more than the particular mechanism by which he secured this fixed relation and mere colorable evasions of it, and the mechanical means used by the appellees differed too radically from his device to constitute any infringement upon it.

A patent to the original inventor of a machine which first performs a useful function protects him against all mechanisms that perform the same function by equivalent mechanical devices, but a patent to one who has simply made a slight improvement on a device that performed the same function before as after the improvement is protected only against those who use the very improvement that he describes and claims, or mere colorable evasions of it. Stirrat v. Manu-

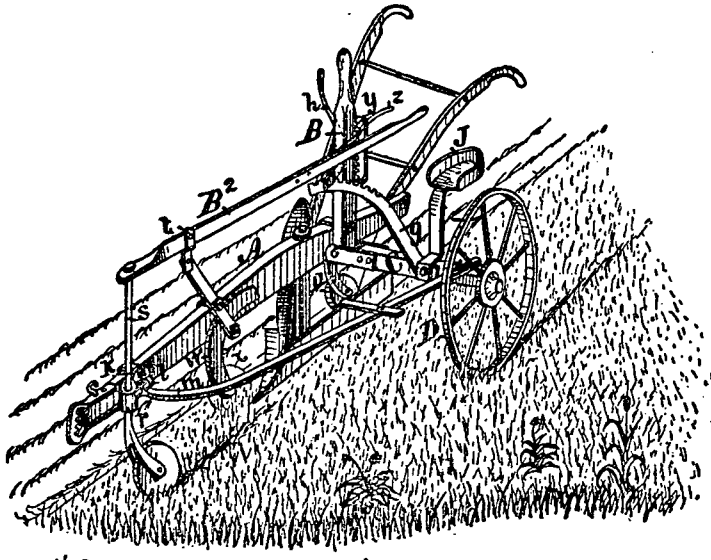
facturing Co., 27 U. S. App. 30, 42, 10 C. C. A. 216, 217, and 61 Fed. 980, 981; P. H. Murphy Mfg. Co. v. Excelsior Car-Roof Co., 40 U. S. App. 200, 215, 22 C. C. A. 65S, 665, and 76 Fed. 965, 972; Adams Electric Ry. Co. v. Lindell Ry. Co., 40 U. S. App. 482, 499, 23 C. C. A. 223, 231, and 77 Fed. 432, 440. Moreover, the appellant did not claim as a part of his invention, when he procured his patent, any mechanism or device whereby the plow was carried by and held rigidly in a fixed relation to the axle or to the wheels. These are the claims upon which his counsel rely for this device:

(1) "In combination with the plow beam and hinged axle, the lever, B, having the combined rack and fender, y, and lever, B^2, provided with a spring latch, z, substantially as and for the purposes shown and described." (3) "The vertical lever, B, having the combined rack and fender, y, and the gravitating latch, h, the hinged axle, C, carrying the wheel, D, and rack, g, the jointed fulcrum, t, clamping the colter, wx, the horizontal lever, B^2, having a spring latch at its rear end, and carrying a caster wheel at its front end, and the hinged and adjustable brace, m; when arranged and combined to operate substantially as and for the purposes shown and described."

This is a copy of the drawing, which illustrates these claims:

J. McBRIDE.
Plow-Attachment.

No. 199,082. Patented Jan. 8, 1878.



Witnesses:
M. E. Ormig.
Arthur Stimson.

Inventor:
John McBride,
By Thomas G. Ormig,
Attorney.

The specification defines and describes the various parts mentioned in the claims in this way:

"A represents the beam of a common right or left hand plow. B is a vertical lever, rigidly clamped to the rear portion of the plow beam by means of bolts, or in any suitable way. C is a horizontal axle, hinged at right angles to the lower end of the vertical lever, B. D is a traction wheel, mounted upon the free end of the hinged axle, C. g is a rack, of segmental form, rigidly fixed to the outer portion of the axle, C, to connect with the vertical lever, B, and serve as a means of bracing the axle and adjusting it, as required, to govern the width of the furrow cut by the advancing plow. h is the handle of a gravitating latch pivoted to the vertical lever, B, to engage and lock the rack, g, and axle, C, rigidly to the lever, B. J is the plowman's seat, carried by the axle, C, and its supporting wheel, D. k is a combined brace hinge and caster-shaft bearing, rigidly fixed to the front end of the plow beam in any suitable way. m is the curved front end of an axle brace, connected with the hinge, k, in such a manner that the rear end of the brace can have vertical play. The rear end of the brace, m, is connected with the axle, C, in such a manner that it can be readily lengthened and shortened to regulate the gather of the wheel, D, and thereby aid in governing the width of furrow. r is a caster-shaft bearing, formed integral with the hinge plate, k, clamped to the front end of the plow beam. s is the vertical shaft of a caster wheel, passed through the bearing, r, and connected at its top end with an adjustable and horizontal lever, B^2. t is my adjustable and jointed fulcrum, carrying the lever, B^2, and also clamping the colter, wx, rigidly to the plow beam. * * * y is my combined rack and fender, rigidly fixed to the vertical lever, B, to combine, adjust, and lock the two levers, B and B^2, rigidly together. z is a spring latch, carried by the lever, B^2, to engage the rack y, and thereby lock the lever in a fixed position, as required, to retain the caster wheel carried at its front end at such various elevations relative to the plow beam as may be necessary to govern the depth of the plow and the thickness of the furrow slice cut loose and turned by the plow as it advances. a is an anti-friction roller or caster wheel, carried by a bearer that is rigidly clamped to the beam in such position relative to the heel of the land side that it will relieve the land side from much friction, and thereby lessen the draft power required to operate the plow."

The question is whether or not the appellant has claimed as a part of his invention any mechanism which carries the plow in a fixed relation to wheels which gauge the depth to which it may sink into the earth while it is in operation. It is plain that the only wheels described in the drawing and specification which might accomplish this purpose are the supporting wheel, D, which is journaled on the hinged axle, C, and the anti-friction roller or caster wheel, a, the bearer of which is "clamped to the beam in such position relative to the heel of the land side that it will relieve the land side from much friction." But this anti-friction roller clamped to the beam is nowhere claimed as a part of the invention, and without it the plow could not be carried in a fixed relation to the wheels, nor could the depth of its plowing be gauged by them. It is strenuously argued that this anti-friction roller was essential to an operative riding plow, and that it must, therefore, be implied without specific mention. Let it be conceded that this argument is well founded if McBride's invention was a plowing machine, or a combination of a device for carrying the plow on wheels, a device for raising and depressing the forward end of its beam, and a device for canting or tilting it. But the very question

at issue is whether or not it was a combination of these three devices, or of the last two only. The argument, therefore, begs the very question in dispute, and has no cogency. It assumes that the invention was a combination of the three devices, and then insists that one of them, which is not mentioned in the claims, was a part of that combination, because without it the invention would be a combination of only two devices.

It is next contended that the word "axle" necessarily means an axle carried by two wheels, and hence that the term "hinged axle" in the claims of the patent describes not only the hinged axle, C, but also the lower end of the vertical lever, B, the plow beam, and the bearer which carries the anti-friction roller, a, and which is clamped to the beam; so that the claim of the "hinged axle" includes all these elements as a part of the combination. This position, however, is refuted by the specification itself. The patentee has there defined the term "hinged axle" as he has used it in this patent, and has clearly limited its meaning to the bearer which is supported by the wheel, D, at one end and by the lower end of the vertical lever, B, at the other. He says: "C is a horizontal axle, hinged at right angles to the lower end of the vertical lever, B. D is a traction wheel, mounted upon the free end of the hinged axle, C. * * * J is the plowman's seat, carried by the axle, C, and its supporting wheel, D." The "hinged axle," then, had but one free end. The other end was hinged to the lower end of the vertical lever, B, and it did not extend from that lever through the plow beam and through the bearer into the roller, a. It had but one supporting wheel, "its supporting wheel, D," and it did not extend into another supporting wheel, the anti-friction roller, a. There seems to be nothing in the specification or in the claims of this patent to indicate that McBride ever thought that he had invented, or had brought into his combination, or that he ever intended to secure as a part of it, any mechanical device for carrying his plow upon wheels, or for holding it rigidly in a fixed relation to the wheels or to the axle. On the other hand, the claims themselves, the specification, and the history of the application, which is disclosed by the file wrapper and its contents, point with unerring certainty to the conclusion that this patentee secured nothing here but the means of combining a device for canting the plow with a mechanism for raising and lowering the forward end of its beam. He gave notice of no other invention, of no broader combination, in his claim. He described nothing more in his specification. Speaking there of the scope of his invention, he said:

"It consists in a combined rack and fender fixed to a vertical lever, and an adjustable jointed fulcrum, adapted to carry a horizontal lever and to clamp a colter to the plow beam, being used as an improved means for advantageously combining a horizontal hinged axle, carrying a wheel and a segmental rack to govern the width of the furrow cut by the plow, and a horizontal lever carrying a caster wheel at its front end to govern the depth of the plow, all as hereinafter fully set forth."

In other words, he declared that it was an improved means for combining a device to cant the plow with a device to raise and lower

its forward end, and that it was that only. The history of his application confirms this view. It was rejected three times, because the claims which it contained were anticipated by prior patents, and McBride amended it, and limited these claims four times, before his patent was finally issued. In his original application he said: "I am aware that wheel plows and riding attachments for plows have been used, but I claim that my manner of arranging and combining the various parts so as to bring the adjusting levers together at the side of the operator's seat so that the plowman can govern the width and depth of a furrow without inclining his body to reach and operate the levers, and without changing his center of gravity to unbalance the plow, is a new and valuable improvement"; and he nowhere declared, and never claimed, either in his original application or in any of his amendments, that he had conceived the idea, or invented, or combined with his levers, the mechanical means of holding the plow in a fixed relation to the wheels and axle which carried it.

The statute requires the inventor to particularly point out and to claim distinctly the improvement or combination which he claims as his discovery. Rev. St. § 4888. When, under this statute, the inventor has made his claims, he has thereby disclaimed and dedicated to the public all other combinations and improvements apparent from his specification and claims that are not mere evasions of the device, combination, or improvement which he claims as his own. While the patent is notice of the claims which it contains and allows, it constitutes an estoppel of the patentee from claiming under that or any subsequent patent any combination or improvement there shown which he has not clearly pointed out and distinctly claimed as his discovery or invention when he received his patent. It is a complete and a legal notice to every one—notice on which every one has a right to rely—that he may freely use such improvements and combinations without claim or molestation from the patentee. It would constitute rank injustice to permit an inventor, after a combination or device that he did not distinctly claim in his patent had gone into general use, and years after his patent had been granted, to read that combination or device into one of the claims of his patent, and to recover for its infringement of every one who had used it upon the faith of his solemn declaration that he did not claim it. This would be the effect of a reversal of the decree below. This patent was issued more than 21 years ago. No mechanical device for rigidly attaching and securely holding the plow in a fixed relation to the axle and the wheels which carried it was pointed out or claimed in it as a part of the combination which it secured. During all these years manufacturers of wheel plows have rigidly attached them and held them in fixed relations to the axles and wheels which carried them by various mechanical devices without notice from this patent that the appellant had ever claimed or secured a monopoly of their use, and the claims of his patent are utterly insufficient to sustain such a monopoly. Building Co. v. Eustis, 27 U. S. App. 693, 709, 13 C. C. A. 143, 145, and 65 Fed. 804, 807; Stirrat v. Manufacturing Co., 27 U. S. App.

13, 47, 10 C. C. A. 216, 220, and 61 Fed. 980, 984; Adams Electric Ry. Co. v. Lindell Ry. Co., 40 U. S. App. 482, 514, 23 C. C. A. 223, 241, and 77 Fed. 432, 451.

The claim by the appellant in his letters patent of August 28, 1883, —No. 284,036,—of the combination of his device for rigidly attaching the plow to the axle with the two devices the combination of which was secured by the patent of 1878, was futile. The combination claimed in 1883 was shown in the drawing and specification of the earlier patent, but it was not claimed, and it was thereby irrevocably dedicated to the public by the appellant. A description of a device or combination which is not claimed in the drawings or specification of a patent estops the patentee from securing a monopoly of its use by a subsequent patent as well as by any other means. James v. Campbell, 104 U. S. 356, 382; Adams v. Stamping Co. (C. C.) 28 Fed. 360, 365. The decrees below are affirmed.

HART & HEGEMAN MFG. CO. v. ANCHOR ELECTRIC CO. et al.

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

No. 238.

Petition for rehearing denied.

For former opinion, see 34 C. C. A. 606, 92 Fed. 657.

MALCOMSON v. WAPPO MILLS et al.

(Circuit Court, D. South Carolina. November 7, 1899.)

CREDITORS' SUIT—RIGHT TO COSTS.

Where a person is made party to a creditors' bill, filed to administer an insolvent estate, who has no interest in the estate, and can derive no benefit from its administration, and who promptly disclaims interest therein, he is entitled to his costs.

In Equity.

J. E. Burke and Drayton F. Hastie, for the motion.
Mitchell & Smith and Smythe, Lee & Frost, opposed.

SIMONTON, Circuit Judge. This case now comes up on a taxation of costs. This is a creditors' bill to settle the affairs of C. C. Pinckney, Jr., and to administer his insolvent estate. Creditors claiming liens were made parties. The estate has been administered. Among others, E. R. Memminger and Allard Memminger, executors, were made parties defendants, it being alleged that they held a lien on a part of the property of C. C. Pinckney, Jr. They came in and disclaimed all claim and interest whatsoever as executors. The bill necessarily is dismissed as to them. Their solicitor claims as fees a docket fee of $20, and for filing the answer and disclaimer $3. Edward R. Memminger was also made a party defendant, alleged to be the holder of a lien on property of C. C. Pinckney, Jr. He denied these allegations. His attorney now claims a similar docket fee for him and costs of his answer. R. B. Cuthbert was also a defendant, claiming a lien. He has established this claim, and has been paid. He claims similar costs. The costs in federal courts are governed entirely by the act of congress relating thereto, now section 824, Rev. St. U. S. This is obligatory in all law cases. Costs in equity are within the discretion of the court. When allowed, they must conform to the statute. The docket fee is $20, and is allowed only after a final hearing in equity. When a creditors' bill is filed to administer and settle an insolvent estate, the action is in the interest of all parties who hold claims or liens. The purpose of the proceedings is to secure the rights of all creditors, all legal rights and equities being preserved. Every claimant is benefited, and each should bear the burden. For this reason the universal practice of this court in such cases has been to allow no docket fee to any solicitor except the solicitor of the complainant. Where, however, a person is made a party who has no interest whatever in the estate, and can derive no benefit from its administration, the case is different. He stands on another footing. If he promptly disclaims in the record, he should get his costs. The Memminger executors are in this plight. They should get their docket fee under the statute, and the three dollars costs for their disclaimer under equity rule 25. E. R. Memminger did have a claim on the estate, although not the lien which it was supposed that he had. The administration has been a profit to him. Mr. Cuthbert's lien and claim were established and secured in these proceedings. He comes within the general rule, as also does E. R. Memminger. Their docket fee and costs of answer cannot be allowed.

NEW YORK SECURITY & TRUST CO. v. LOUISVILLE, E. & ST. L. CONSOL. R. CO. et al.

(Circuit Court, D. Indiana. November 2, 1899.)

No. 9,125.

1. RAILROADS—CONSOLIDATION AGREEMENT—RIGHTS OF BONDHOLDERS TO ENFORCE EXCHANGE OF BONDS.

   Certain railroad companies united, forming a consolidated company, the agreement providing that such company should issue its bonds, secured by mortgage on its entire property, for the purpose of taking up bonds of the constituent companies, which bore a higher rate of interest, but the consolidated company did not assume the payment of their indebtedness. Such bonds were made and deposited with a trustee; the officers being authorized to effect an exchange, and, if not effected, to make such arrangements as they deemed for the best interests of the company. *Held*, that such action was not for the benefit of the holders of the outstanding bonds, and gave individual holders of bonds of one of the constituent companies no right to compel the delivery to them severally of bonds of the consolidated company in exchange for their holdings, especially where they did not assert any such claim until nine years after the consolidation, and until all the companies had become insolvent, and the property had been placed in the hands of receivers, during most of which time they received interest at the higher rate, which they made no offer to return.

2. SAME.

   The offer of an exchange of bonds contemplated by the action of the railroad companies could not be accepted by the holders of outstanding bonds until it was communicated to them for acceptance by some act of the companies.

3. SAME—EQUITY—LACHES.

   Even had the right of the holders of outstanding bonds to exchange them for the new bonds existed, it must have been asserted by them within a reasonable time; and a delay of nine years, without averment and proof that they could not have known of the offer sooner by the exercise of reasonable diligence, constituted such laches as would bar them of the right to enforce the exchange after the circumstances of the parties had so changed as to render it inequitable.

This was a hearing on exceptions to the master's report on the amended intervening petition of Otis Kimball and 29 others, holders of the bonds of the Huntingburg, Tell City & Cannelton Railroad Company, to compel the delivery to them, in exchange for their bonds, of bonds of the defendant the Louisville, Evansville & St. Louis Consolidated Railroad Company. The principal suit is one for the foreclosure of mortgages against the defendant company.

Floyd A. Woods, for interveners.

Hornblower, Byrne, Taylor & Miller, Thomas G. Shearman, and C. W. Fairbanks, for respondents.

BAKER, District Judge. The petitioners have filed their petition, on behalf of themselves and of all others similarly situated, to compel the New York Security & Trust Company and George T. Jarvis, receiver of the Louisville, Evansville & St. Louis Consolidated Railroad Company, and also receiver of its constituent companies, to deliver to them certain bonds executed by the consolidated com-

pany, bearing date July 1, 1889, in exchange for bonds, held by them, issued by the Huntingburg, Tell City & Cannelton Railroad Company. The material facts are these:

October 1, 1887, the Huntingburg, Tell City & Cannelton Railroad Company (hereinafter called the Huntingburg Road or Company) issued its 300 first mortgage bonds, of $1,000 each, to the American Loan & Trust Company of Massachusetts and Noble C. Butler of Indiana, payable on October 1, 1927, in gold coin of the United States, with interest at the rate of 6 per cent. per annum, payable semiannually on the presentation and surrender of the interest coupons thereto attached. To secure the payment of these bonds a first mortgage of the railroad property, equipment, and franchises of the Huntingburg Company was executed to the American Loan & Trust Company and Noble C. Butler, as trustees. The petitioners are the owners and holders of 270 of these bonds. On May 21, 1889, the Huntingburg Company entered into an agreement with the Louisville, Evansville & St. Louis Railroad Company, the Illinois & St. Louis Railroad & Coal Company, the Belleville, Centralia & Eastern Railroad Company, and the Venice & Carondelet Railway Company, corporations organized under the laws of the states of Illinois and Indiana, whereby the above-named railroad companies lawfully consolidated and merged themselves into one corporation, under the corporate name of the Louisville, Evansville & St. Louis Consolidated Railroad Company. By the agreement of consolidation it was stipulated that all the stock and property, real, personal, and mixed, of the constituent companies, should become consolidated under the name of the Louisville, Evansville & St. Louis Consolidated Railroad Company, upon the terms and provisions of the consolidation set forth in the agreement. By the plan of consolidation the several corporations, among other things, agreed that the mortgages then existing upon the property of the parties of the first, second, fourth, and fifth parts (the Huntingburg Company being the party of the fifth part) should be taken up and canceled. It was further agreed that the consolidated company should issue 8,000 consolidated, first mortgage, 5 per cent., 50-year, gold, coupon bonds, of $1,000 each, bearing date July 1, 1889, interest payable semiannually, and secured by a mortgage or deed of trust on the entire property, owned or controlled, or thereafter to be owned or controlled, by it. All of the stock and bonds of the consolidated company provided for in the agreement of consolidation were to be placed in some safe place of deposit by its board of directors, and thereafter held in trust for the purpose of exchange according to the terms of the consolidation agreement, except as to 925 bonds therein otherwise provided for; and, in case any owner or holder of any of the bonds or stock of the constituent companies should neglect or refuse to exchange any of such bonds or stock for the consolidated bonds as therein provided, the board of directors of the consolidated company was empowered to make such arrangements in regard thereto as in their opinion the interest of the consolidated company might require, consistent with the provisions of the agreement of consolidation. It was further provided that the board of directors of the consoli-

dated company should have the power, and it was directed, without any formal vote of the stockholders, to make, execute, and deliver all such instruments, contracts, deeds of trust, mortgages, bonds, scrip, and certificates of stock, and other instruments of whatever kind or nature, which were contemplated or might be required to effectuate the true intent and meaning of any provision of the agreement of consolidation. It was further provided, among other things, that, when the bonds were prepared and ready for issue, they should be distributed as follows:

"* * * (d) To be used in taking up and in satisfaction of the first mortgage bonds of the Huntingburg, Tell City and Cannelton Railroad, and in redemption thereof, three hundred of said bonds."

It was thereafter resolved, on May 21, 1889, by the stockholders of the consolidated company, that said company, by its president and secretary, should have the power, and they were authorized and directed, to prepare, print, execute, and deliver $8,000,000 of first consolidated, 5 per cent., gold, coupon, mortgage bonds, running 50 years, interest payable semiannually, and a mortgage or deed of trust on all the property and franchises of the consolidated company, to the New York Security & Trust Company and Josephus Collett, as trustees, to secure the payment of said consolidated bonds as provided in the agreement of consolidation. Pursuant to such authority the president and secretary of the consolidated company executed and delivered the bonds and mortgage to the trustees in trust for the uses and purposes set forth in the consolidation agreement.

Some of the petitioners remained in ignorance of said agreement of consolidation, and of their right to exchange the Huntingburg Company's bonds owned by them for consolidated bonds, until April 28, 1897, others until December 8, 1897, and others until March 19, 1898, at which times they offered to surrender their bonds, and demanded a like amount of consolidated bonds in exchange, which demands were refused by the defendants. It is shown, however, that some of the petitioners participated in the consolidation agreement, and must have known of their rights under it at that time. Of the first consolidated mortgage bonds, there have been issued, and are now outstanding in the hands of bona fide holders, $3,797,500, and the balance of said bonds is still in the custody and possession of the defendants. The petitioners were paid after May 21, 1889, and before January 1, 1894, 10 semiannual installments of interest on the Huntingburg bonds at the rate of 6 per cent. per annum. They do not offer to repay or account for the difference between the interest received by them on the Huntingburg bonds and the interest which they would have received on the consolidated bonds. On March 1, 1893, the consolidated company prepared and issued $15,000,000 of 4 per cent., gold-bearing, coupon, mortgage bonds, running 50 years, and executed to the New York Security & Trust Company a general mortgage on all its property and franchises to secure the payment of the same. Upwards of $2,000,000 of the general mortgage bonds secured by the mortgage of March 1, 1893, were issued, and outstanding in the hands of bona fide holders for value on January 1, 1894. It is not shown that the

purchasers of the $2,000,000 of general mortgage bonds had any notice or knowledge that the petitioners had any such right as they now assert.

The consolidated company has been insolvent since January 1, 1894, when its railroad and other property were placed in the hands of receivers by this court, and by the United States circuit court for the Southern district of Illinois; and said receivers and their successor have at all times since that date been in possession of its railroad, and all other property belonging to it. On September 6, 1894, the New York Security & Trust Company filed its bill in this court against the consolidated company and others to foreclose the mortgage known as the "First Consolidated Mortgage," and on September 13, 1894, said trust company filed a similar bill for the same purpose in the circuit court of the United States for the Southern district of Illinois. The receivers previously appointed were continued as receivers under these bills. Cross bills were filed in each of the above suits to foreclose the general mortgage of March 1, 1893, for the benefit of the holders and owners of the $2,000,000 of outstanding bonds secured by it. These suits are still pending and undetermined. In March, 1896, suits were begun by the American Loan & Trust Company of Massachusetts and Noble C. Butler of Indiana, as complainants, in this court, and also in the circuit court of the United States for the Southern district of Illinois, to foreclose two mortgages executed on or about October 20, 1886, by the Louisville, Evansville & St. Louis Railroad Company, one of the parties to the consolidation agreement, and receivers were appointed for said property in said suits. Said foreclosure suits are still pending and undetermined. On March 9, 1896, the American Loan & Trust Company and Noble C. Butler, as trustees, began suit in this court to foreclose the mortgage executed by the Huntingburg Company on October 1, 1887, to secure 300 bonds, of $1,000 each. In this suit on April 24, 1896, George T. Jarvis was duly appointed receiver of the railroad and property of the Huntingburg Company. At this time Jarvis became sole receiver in all the cases then pending in this court and in the circuit court of the United States for the Southern district of Illinois. On February 18, 1896, the following request to begin the last above named suit was presented to the American Loan & Trust Company:

"We, the undersigned, a committee of a majority of the bondholders in amount of the first mortgage bonds of the Huntingburg, Tell City and Cannelton Railroad Company, hereby request the American Loan and Trust Company, trustee under the mortgage securing said bonds dated October 1, 1887, to proceed at once to have a receiver appointed of the property securing said bonds, and to foreclose said mortgage. William T. Hart,
"John M. Graham,
"John Stites,
"Committee."

At that time the committee represented the following holders of the bonds of the Huntingburg Company, to wit: Nathaniel W. Bumstead, $10,000; John Goldthwait, $10,000; William T. Hart, $27,000; Eleazer D. Chamberlain, $10,000; Albert H. Rhodes and Enid L. Ripley, $18,000; Arioch Wentworth, $100,000; Sarah E. Carey, admin-

istratrix, $15,000; and Rachel Lee, $6,000,—in all, $196,000. On November 28, 1896, a petition was filed by the New York Security & Trust Company, in the pending foreclosure suits brought by it and the American Loan & Trust Company and Noble C. Butler, for an order directing the receiver to discontinue the operation of the Huntingburg Road, or for the delivery of the same to the trustees under the mortgage of October 1, 1887, covering said property. This motion was opposed on behalf of some of the bondholders and the trustees at the time of the hearing on said petition. Said trustees could have had said mortgage of October 1, 1887, foreclosed, and a sale made thereunder, long before, and at any time since, said petition was filed.

On these facts the petitioners insist that they are entitled to a decree of the court compelling the New York Security & Trust Company and George T. Jarvis, receiver, to deliver to them, severally, in exchange for the bonds held by them against the Huntingburg Company, a like amount of the consolidated first mortgage bonds bearing date July 1, 1889. The theory of the petitioners is that by the agreement of consolidation the trust company and the receiver are trustees for the benefit of the bondholders of the constituent companies, and that the bondholders of the Huntingburg Company have thereby acquired a vested right in and to 300 bonds issued under that agreement, which may be enforced against the trustee and the receiver. These 300 bonds were to be used by the board of directors of the consolidated company in taking up, and in satisfaction of, the bonds of the Huntingburg Company, and in the redemption thereof. It would not seem that this conferred any absolute right on the bondholders of the Huntingburg Company to insist on the delivery in specie to each of them severally of as many of the consolidated bonds as should be equal to the number of the Huntingburg Company's bonds held by each of them, respectively. If the consolidated bonds could have been sold for a sum in excess of the amount necessary to take up, satisfy, and redeem the Huntingburg Company's bonds, no reason is perceived why the directors were not at liberty to make such sale. It would seem that the agreement of consolidation ought not to be construed to secure an absolute right of exchange to each bondholder of the Huntingburg Company's bonds, because, if this were so, it would probably defeat the purpose intended to be accomplished. The object to be attained was to procure an exchange of 300 bonds, of $1,000 each, bearing 6 per cent. interest, for a like number of bonds, each of the like amount, bearing 5 per cent. interest only. The former bonds constitute the first lien on the Huntingburg Road, and if less than the whole amount were to be taken up, satisfied, and redeemed, leaving the residue as the paramount lien on the road, it would seem hardly reasonable to suppose that the holders of such residue would be willing to surrender a better security for a poorer one.

It is true that the consolidated company, by taking the property, franchises, and effects of the constituent companies, became bound for the indebtedness of each, to the extent of the property received by it from each, but to no greater extent. In order to facilitate the

refunding and consolidating of the debt of the constituent companies, and for their own advantage, they mutually agreed that new bonds should be issued, bearing a lower rate of interest, and a new mortgage executed by the consolidated company upon the several properties acquired by it, to secure the payment of such bonds. For this purpose the bonds were issued, and the mortgage executed and deposited with the trust company. In the agreement of consolidation there is no undertaking by the consolidated company to assume or pay the outstanding bonded indebtedness of the constituent companies. Nor is there any express stipulation binding the consolidated company to make the exchange of bonds, but, on the contrary, the agreement contemplates that they may not be exchanged. It is provided that, in case the bondholders shall neglect or refuse to make the exchange, the directors may make such arrangements as to them may seem best adapted to secure the interests of the consolidated company. It received no property from the constituent companies which it undertook to account for or deliver to, or for the benefit of, the bondholders. The agreement of consolidation was solely with, and primarily for the benefit of, the constituent companies, and not with, or for the benefit of, the present petitioners. The exchange of bonds provided for might prove advantageous or detrimental to the bondholders. They alone were to determine that question. It suffices to say that their interests were not considered, nor were they consulted. Whether any exchange would be made was left for future determination by the bondholders themselves. Until an agreement for exchange had been made, no new contract between them and the consolidated company could exist In any event, the agreement of consolidation contemplated a new contract before any actual exchange. No party to that agreement had the right, nor did it assume to have authority, to bind the directors of the consolidated company or the bondholders of the constituent companies. If it were conceded (and it is not) that the constituent companies may have had originally the right to insist that the trustees should carry out the agreement for exchange, it is certain that, since 1894, when they passed into the hands of a receiver, they cannot assert any such right. The petitioners must stand upon their own rights, and their rights were not considered, except, possibly, incidentally, in the agreement of consolidation. They cannot avail themselves of the agreement, except by the consent of the contracting parties; and the agreement of the contracting parties may be abrogated or varied to suit themselves, without consulting the bondholders, at any time before an agreement for exchange has been made. The right of the petitioners, in its most favorable aspect, is simply a right of exchange, within a reasonable time, on the terms provided for. To assume that the petitioners acquired a present interest in or title to the 300 consolidated bonds, or any of them, by virtue of the consolidation agreement, is to confound settled legal principles. When the owner of property subject to a mortgage conveys the same by a deed containing no assumption or agreement to pay the incumbrance, the mortgagee's rights and remedies remain unaffected. In case the purchaser assumes and agrees

to pay the incumbrance, the contract of assumption is made for the benefit of the mortgagee and the protection of the mortgagor, and, as between purchaser and seller, the former becomes the principal, and the latter the surety, in respect to the incumbrance the payment of which has been assumed. A suit in equity is maintainable by the mortgagee on the contract of assumption for the purpose of avoiding circuity of action. The equity upon which the mortgagee depends for relief is the right of the mortgagor against his vendee, to which he is permitted to succeed by substituting himself in place of the mortgagor. It is settled that such mortgagee has no greater right than the mortgagor has against the vendee. Keller v. Ashford, 133 U. S. 610, 623, 624, 10 Sup. Ct. 494. Though the assumption of the mortgage debt by the subsequent purchaser is absolute and unqualified in the deed of conveyance, it will be controlled by a collateral contract made between him and his grantor which is not embodied in the deed. The right of the mortgagee to enforce payment of the mortgage debt, either in whole or in part, against the grantee of the mortgagor, does not rest upon any contract of the grantee with him, or with the grantor for his benefit. Recovery in such a case against the subsequent purchaser is adjudged in a court of equity to a mortgagee not in virtue of any original equity residing in him, but by a mere rule of procedure he is allowed to go directly as a creditor against the person ultimately liable, in order to avoid circuity of action, and to save the mortgagor, as the intermediate party, from being harassed for the payment of the debt, and then driven to seek relief over against the person who has indemnified him, and upon whom the liability will ultimately fall. The consolidated company did not assume or agree to pay the debt of the petitioners. Their rights and remedies on their bonds remained unaffected by the terms of the consolidation agreement, which gave them no right to or equity in the consolidated bonds. But, if originally this were otherwise, in the long lapse of time the situation of the parties to the agreement of consolidation has so changed that it would be inequitable, as between them, specifically to enforce the contract; and, unless the contract ought to be now enforced between the parties to that agreement, it cannot be enforced in favor of the petitioners.

Besides, a stranger to a contract, who did not know of or assent to it at the time it was made, and has not done or omitted any act on the faith of it, cannot maintain an action upon it. Willard v. Wood, 135 U. S. 309, 314, 10 Sup. Ct. 831. The petitioners allege that no notice was ever issued by any railroad company offering the first consolidated mortgage bonds of the consolidated company to the holders of the Huntingburg bonds in exchange for their bonds. This being so, it brings their case within the principle that an instrument which in express terms contains an offer of a contract cannot be accepted by the person for whom the offer is apparently intended before such offer is communicated to him by some act of the alleged offerer. James v. Bottle Co., 69 Mo. App. 207; Shaw v. Stone, 1 Cush. 228, 244; Dunham v. City of Boston, 12 Allen, 375; Sears v. Railway Co., 152 Mass. 151, 25 N. E. 98. If there ever

was any offer, it was made on May 21, 1889, to exchange bonds bearing 5 per cent. interest for Huntingburg bonds bearing 6 per cent. interest. The holders of the latter bonds have received 10 semiannual installments of interest since the offer was made, and, while retaining the excess of interest, after the lapse of nine years they severally insist on their right to enforce an exchange; and that, too, while the constituent and consolidated companies have passed into the hands of a receiver. They have slept upon their rights for nine years, during which time their acts have been entirely inconsistent with the right now asserted. The circumstances have so changed that it would be inequitable to creditors having inferior liens that the right of exchange should be decreed; and their long delay, accompanied with inconsistent acts, would be fatal to their case in a court of equity, even if there were no intervening rights of other creditors. The delay of nine years, unexplained and unexcused as it is, would of itself bar the petitioners from the relief demanded. Hoyt v. Sprague, 103 U. S. 613; Randolph's Ex'r v. Quidnick Co., 135 U. S. 457, 10 Sup. Ct. 655; Sullivan v. Railroad Co., 94 U. S. 806; Catlin v. Green, 120 N. Y. 441, 24 N. E. 941; Finch v. Parker, 49 N. Y. 1. There is neither averment nor proof that the petitioners could not, by the exercise of ordinary diligence, have learned of the existence and terms of the agreement of consolidation within a reasonable time after it was executed. It is difficult to avoid the conclusion that they were inexcusably negligent in failing to learn of the agreement of consolidation until nine years had elapsed. When the fact of a long lapse of time is admitted or established, the burden is devolved upon those who have allowed this time to pass to show that they made diligent inquiry, or were in some way, by the fault of the adverse party, induced to refrain from inquiry, if they would avoid the imputation of laches. As was said in Marsh v. Whitmore, 21 Wall. 178, 185, the party against whom by long lapse of time a presumption of laches arises "should set forth in his bill specifically what were the impediments to an earlier prosecution of the claim," and, if he does not do so, he can have no relief in a court of equity. Godden v. Kimmell, 99 U. S. 201; Mackall v. Casilear, 137 U. S. 556, 566, 11 Sup. Ct. 178; Hanner v. Moulton, 138 U. S. 486, 492, 11 Sup. Ct. 408; Sullivan v. Railroad Co., supra. In Hanner v. Moulton, supra, it was held that it was sufficient to establish laches that the plaintiffs "had the means of knowing." The court cited with approval Rowe v. Horton, 65 Tex. 89, and Parish v. Alston, Id. 194, where it was held that the action was barred by laches, because the plaintiff might by reasonable diligence have sooner discovered the mistake which was the alleged ground of relief, although it was not in fact discovered until within a few months before the suit was brought. In Woolensak v. Reiher, 115 U. S. 96, 5 Sup. Ct. 1137, the court held that a party who would avoid the imputation of laches must show that he made inquiry and examination with that reasonable degree of care which is habitual to, and expected of, men in the management of their own interests in the ordinary affairs of life, and that the law would impute knowledge when oppor-

tunity and interest, combined with reasonable care, would necessarily impart it. In Godden v. Kimmell, supra, it is said:

"The rule is that a cestui que trust should set forth in the bill specifically what were the impediments to an earlier prosecution of the claim, and how he or she came to be so long ignorant of their alleged rights, and the means used by the respondent to keep him or her in ignorance, and how he or she first came to the knowledge of their rights."

To the same effect is Badger v. Badger, 2 Wall. 87, 95. The petitioners have wholly failed to make out a case within the foregoing rule.

Other reasons are urged in bar of the petitioners' right to the relief sought by them, which the court does not deem it necessary to consider. For the foregoing reasons the exceptions to the master's report must be overruled, and his report approved. A decree may be entered accordingly.

DAVENPORT v. BUFFINGTON et al.

(Circuit Court of Appeals, Eighth Circuit. October 16, 1899.)

No. 1,177.

1. MUNICIPAL CORPORATIONS—PUBLIC PARKS—RIGHTS OF TAXPAYER IN.
   A resident and taxpayer of a city or town may maintain a suit in equity to prevent the diversion to private use by the original proprietor of the town site of land which, when the town was laid out and platted, was dedicated as a public park, and has since been maintained as such.
2. DEDICATION—STATE AS DEDICATOR—POWER OF REVOCATION.
   A nation, state, or municipality, which dedicates land within a town site, of which it is owner, to public use for park purposes, is as conclusively estopped as a private proprietor from revoking such dedication, from selling the park, and from appropriating the land which it occupies to other purposes, after lots have been sold, the town settled, and after the park has been improved with money raised by taxation of its residents and taxpayers in reliance upon the grant and covenant which the dedication evidences.

Appeal from the United States Court of Appeals in the Indian Territory.

This is an appeal from a decree of the United States court of appeals in the Indian Territory, which affirmed a decree of the trial court overruling a demurrer to the complaint, and granting a perpetual injunction against the appropriation of the public parks of Vinita, in the Indian Territory, to private use. This was the case which the appellees presented by their bill: The Cherokee Nation, by a legislative enactment passed on December 14, 1871, reserved a tract of land one mile square at every railroad station upon its lands, and authorized its principal chief to appoint commissioners to locate, survey, and sell the same as sites for towns. These commissioners located, surveyed, and platted a tract of land one mile square as the town of Downingville, where Vinita now stands. By their plat they divided this land into lots, blocks, parks, streets, alleys, and right of way of the railroad company. Then they advertised for sale, and on October 13, 1871, sold, the lots and blocks according to this plat. After completing this sale they filed their plat and their report of the sale, and this plat and sale were duly approved by the national council of the Cherokee Nation. After all this had been done, and in the year 1873, the national council created the mayor and town council of Downingville a municipal corporation, and that corporation took, and has

ever since retained, the possession, care, and control of the streets, alleys, and public parks of Downingville under this act of incorporation. It has taxed the property of the residents of that town to raise money to improve these parks, and it has expended money upon them for that purpose. After the mayor and town council of Downingville had held possession and control of these parks for 23 years, and had expended some money upon them in improvements, and on December 4, 1896, the national council of the Cherokee Nation passed a legislative act which authorized the town commissioners of that nation to survey and plat these parks into lots, and to sell them. The judge of the circuit court of Cooweescoowee district enjoined T. A. Chandler, town commissioner, from surveying and selling these parks under this act, but this commissioner proceeded to sell the lots in the park, as though no injunction had been issued against him, in contempt of the circuit court of Cooweescoowee district. The appellant, James S. Davenport, bought one of these lots, and fenced it for the purpose of building a residence upon it. None of the money realized from the sale of these lots in the parks has been paid to, and none of it inures to the benefit of, the mayor and town council of Downingville, under the act authorizing their sale. The appellee T. M. Buffington is the mayor of Downingville. The appellees J. C. Gray and T. F. Thompson are citizens of the Cherokee Nation, who own lots fronting the park in which the lot purchased by Davenport is situated, and they bought their lots before the national council passed the act of December 4, 1896. The appellee W. H. Tarrant is a resident and taxpayer of the corporate town of Downingville, and a citizen of the United States. These appellees averred that the sale of this park by the town commissioners was illegal, that the appellant thereby obtained no legal right or title to the lot which he purchased and fenced, that the sale and the act of the appellant in fencing this lot constituted a violation of the dedication of the parks to public use and of the rights of the appellees, and entailed much damage upon each of them, and they prayed for and obtained an injunction which prohibited the appellant from constructing a residence on the lot in the park which he had bought, and commanded him to remove the fence which he had built upon it. The grounds of the demurrer to the complaint which stated these facts were that there was a defect of parties plaintiff, and that the facts stated in the complaint constituted no cause of action. The courts below overruled this demurrer, and issued a perpetual injunction.

G. B. Denison and William T. Hutchings, for appellant.

Preston S. Davis, for appellees.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

SANBORN, Circuit Judge (after stating the facts as above). When this suit was commenced the tribal courts of the Cherokee Nation had exclusive jurisdiction of all cases arising in the Cherokee country in which members of that tribe by nativity or adoption were the only parties, while the United States court in the Indian Territory had jurisdiction of every civil case arising between a citizen of the United States and any citizen or person residing in the Indian Territory. 25 Stat. 784, c. 333, § 6; 26 Stat. 94, 96, c. 182, §§ 29, 31; Raymond v. Raymond, 28 C. C. A. 38, 83 Fed. 721, 723. All the parties to this suit except Tarrant were members of the Cherokee Nation. If Tarrant had no cause of action against the appellant, then he was not a proper party to this suit, and the United States court was without jurisdiction of it. The defect of parties plaintiff which the appellant urges upon our consideration is that Tarrant was a mere general taxpayer and resident of Downingville, that he had no interest in the preservation of its parks different from or other than that possessed by every other resident taxpayer, and that this was insuffi-

cient to enable him to maintain a suit for this injunction. If, however, these parks were dedicated to the public by the Cherokee Nation, as this taxpayer claims, that dedication was made more than 25 years ago, and the town of Downingville has been settled, the lots in it have been sold, and its inhabitants have established their homes there, and have become the taxpayers of the town in reliance upon that dedication. After all this has been done, the nation sells the parks, and its vendee enters upon a portion of one of them, and is about to appropriate it to his private use, and to make it the site for his residence. Has a resident and taxpayer of the municipality no remedy for such a wrong? May the parks which he and his fellow citizens have paid to improve be sold and appropriated to the use of the nation, or of strangers, while he stands by remediless? Has he no interest in the right of the public to the free use of these commons sufficient to enable him to maintain a suit in equity to prevent the destruction of his right to use them, the spoliation of the parks, and their appropriation to private use? Let us see. The title to the land in these parks, subject to the right of the inhabitants and taxpayers of the town to use it forever for park purposes, is without value. It is nothing but a naked legal title held in trust for the people who use, or have the right to use, the parks. The real value of the land in the parks is the value of the right to use it, and when the nation sells the parks it derives its purchase price, in fact, not from the sale of the title to the land, but from the sale or the destruction of the right of the people to use that land for park purposes. Thus, by the sale of the parks, the resident taxpayer, Tarrant, is deprived of his share in the valuable right to use them. This is not the only injury entailed upon him by this sale. Parks are, if not necessary, at least customary, possessions of towns and cities; and, if the parks of Downingville are sold and appropriated to private use, the strong probability is that the town will purchase more land, establish other parks upon it in lieu of those destroyed, and thus increase the burden of the appellee's taxation. Again, Tarrant alleges that he has a wife and four children, and that he expects to make Downingville his home, and to raise and educate his children there. If these parks are appropriated to private use, he and his family will be deprived of their use to promote their health, recreation, and amusement. In short, the sale of the parks, and their use by the vendees for their private purposes, will deprive the appellee Tarrant of his share in the valuable right of the people to use them for park purposes, will deprive him and his family of a source of health, recreation, and amusement, and will be very likely to increase the burden of his taxation by compelling him to pay a part of the purchase price of other parks bought to replace those destroyed. Now, the enforcement of trusts is one of the great heads of equity jurisdiction. The land in these parks, if it was really dedicated to the use of the public for park purposes, is held in trust for that use, and courts of equity always interfere at the suit of a cestui que trust or a cestui que use to prohibit a violation of the trust, or a destruction of the right of user. The appellee Tarrant is one of the cestuis que use for whom these parks are held in trust, and the inevitable conclusion is that his

interest in them is ample to enable him to maintain a suit in equity to prevent their diversion to private uses. Thus, in Scofield v. School Dist., 27 Conn. 499, it was held that a resident and taxpayer of the district had sufficient interest to enable him to maintain an injunction to prevent the use of the school house for religious services. The court very pertinently said that the value of the right of the district and its inhabitants to the exclusive use of the school house for school purposes was not to be measured by the mere pecuniary injury resulting from an infringement of the right. To the same effect is the decision of the supreme court of Kansas in Spencer v. School Dist., 15 Kan. 259, in which the opinion was delivered by Judge Brewer. Indeed, under the modern decisions, the general rule is that a resident taxpayer of a municipality has sufficient interest, and has the right to maintain a bill to prevent the unlawful disposition of the money or property of his town or city, to forbid the illegal creation of a debt or liability of his municipality, and to restrain the diversion of money or property in his town or city from any public use in which he shares to which it has been dedicated. Crampton v. Zabriskie, 101 U. S. 601, 609; Mayor, etc., v. Gill, 31 Md. 375, 395; Spencer v. School Dist., 15 Kan. 259; Scofield v. School Dist., 27 Conn. 499; Christopher v. Mayor, etc., 13 Barb. 567, 571; Stuyvesant v. Pearsall, 15 Barb. 244; De Baun v. Mayor, etc., 16 Barb. 392; Sharpless v. Mayor, etc., 21 Pa. St. 147, 158; Moers v. City of Reading, Id. 188; City of New London v. Brainard, 22 Conn. 552; Merrill v. Plainfield, 45 N. H. 126.

The suggestion is made in the brief of the appellant that the only citizens of the United States who could lawfully reside in the Cherokee Nation were school teachers, army officers, and licensed traders, and that, consequently, the appellee Tarrant could not have been a lawful resident and taxpayer of Downingville. But there is no presumption that Tarrant was not a school teacher, or an army officer, or a trader, and the demurrer admits that he was a resident and taxpayer of the town. This was an admission that he was a lawful resident, and the payer of a legal tax, and the suggestion in this regard is unworthy of consideration.

The second proposition of counsel for the appellant is that the complaint states no cause of action, because the Cherokee Nation had the right to revoke in 1896 the dedication which it made in 1871, and to sell the land dedicated to public parks free from the trust with which it was impressed. The designation of this land as parks or commons on the plat of the town of Downingville, which was accepted and approved by the nation in 1871, was, in legal effect, a grant of the land for the exclusive use of the public for park purposes, and a warranty on the part of the nation, which owned it, that it would never claim or use it for any other purpose. The purchase of lots in accordance with this plat by the inhabitants and taxpayers of Downingville, and their imposition upon themselves and their expenditure of taxes to care for and improve the parks was an acceptance of this grant and covenant. Bell v. Railroad Co., 63 Fed. 417, 419, 11 C. C. A. 271, 272, and 27 U. S. App. 305, 308; Beatty v. Kurtz, 2 Pet. 565, 583; City of Jacksonville v. Jacksonville Ry. Co.,

67 Ill. 540, 542; Le Clerq v. Trustees of Gallipolis, 7 Ohio, 218, 221, pt. 1; Village of Princeville v. Auten, 77 Ill. 325, 330; Brown v. Manning, 6 Ohio, 298. After the mayor and town council of the town of Downingville was incorporated by the Cherokee Nation, and after it took possession and control of these parks, this grant and acceptance became a threefold contract. It was an agreement between the nation and the public,—the people for whose use the title of the parks was held,—an agreement between the mayor and the town council of the town of Downingville and these people, and an agreement between the nation and the municipality; and all parties to this agreement were equally bound to hold and keep the land embraced within these parks sacred to the exclusive use of the public for park purposes. It is not claimed that a private proprietor, who had platted and dedicated land for a park in this way, could lawfully revoke that dedication, and sell the park for private use, after lots had been bought, and the park had been improved in reliance upon the plat. The contention is that the Cherokee Nation was a trustee for and represented the public, and that its sale of the parks was a lawful release of the right of the public to use them as such by their legal trustee and representative. In support of this view counsel for the appellant cites Clarke v. City of Providence (R. I.) 15 Atl. 765, 766, and Commissioners v. Armstrong, 45 N. Y. 234. In these cases, however, the state simply authorized the municipalities to appropriate the parks within their limits to other uses. The state did not assume in either case to appropriate a park to its own use, or to sell it for its own benefit, as the Cherokee Nation does in the case at bar; so that these decisions do not rule this case. Moreover, the nation, in the case in hand, is the grantor and covenantor, and upon indisputable principles it cannot be at the same time the grantee and the covenantee, or the agent of such grantee and covenantee, to release to itself the grant and covenant which it has made. McKinley v. Williams, 74 Fed. 94, 95, 20 C. C. A. 312, 313, and 36 U. S. App. 749, 752, and cases there cited. Besides, we are unwilling to concede that a nation or a state which becomes the proprietor of a town site, plats it, and dedicates its streets and parks to public use, has any greater or better right to revoke or avoid its grant or covenant than a private proprietor would have. It may be that either, before any rights have accrued, can revoke the dedication, but, after lots have been sold, after streets have been graded, after parks have been cared for and improved according to the plat,—in other words, after rights have vested in reliance upon the dedication,—we deny the right of nation or of individual to revoke it, or to release or destroy the right of the public to the exclusive use of the parks and streets for the purposes for which they were granted. Nations, states, and municipalities have and exercise two classes of powers,—one governmental, by which they rule their people; the other proprietary or business, by which they carry on their business affairs as legal personalities. The same fundamental principles of justice, of law, and of equity govern them in the exercise of their powers of the latter class which control the acts of private individuals. Illinois Trust & Savings Bank v. City of Arkansas City, 76 Fed. 271, 282, 22 C. C. A. 171, 182,

and 40 U. S. App. 257, 277 and cases there cited; U. S. v. Northern Pac. R. Co. (C. C. A.) 95 Fed. 864, 880. When the Cherokee Nation platted the town of Downingville, and when it undertook to revoke the dedication which that plat evidenced, it was not exercising its governmental, but its proprietary or business, powers, and it was subject to the same principles of law and of equity, and to the same rules of estoppel, that would have governed a private proprietor under like circumstances. A nation, state, or municipality which dedicates land that it owns in the site of a town to public use for the purpose of a park is as conclusively estopped as a private proprietor from revoking that dedication, from selling the park, and from appropriating the land which it occupies to other purposes after lots have been sold, after the town has been settled, and after the park has been improved with moneys raised by the taxation of its residents and taxpayers in reliance upon the grant and covenant which the dedication evidences. Monongahela Nav. Co. v. U. S., 148 U. S. 312, 341, 13 Sup. Ct. 622; Rutherford v. Taylor, 38 Mo. 315, 319; Warren v. Mayor, etc., 22 Iowa, 351; Ransom v. Boal, 29 Iowa, 69; Price v. Thompson, 48 Mo. 361, 365; Commissioners v. Lathrop, 9 Kan. 453, 463; McCollough v. Board, 51 Cal. 418; Harris Co. v. Taylor, 58 Tex. 690, 695. As the Cherokee Nation had no right to take possession of or to occupy the parks in the town of Downingville for the construction of residences in the year 1896, the appellant, Davenport, acquired no such right by his purchase from that nation, and the injunction was rightfully granted. The decrees of the United States court of appeals in the Indian Territory and of the United States court for the Northern district of the Indian Territory are affirmed.

CENTRAL TRUST CO. OF NEW YORK et al. v. DENVER & R. G. R. CO.

(Circuit Court of Appeals, Eighth Circuit. October 23, 1899.)

No. 1,216.

1. RAILROADS—USE OF TRACK IN COMMON—MUTUAL DUTIES AND LIABILITIES.
Where a railroad company leased to another company the right to use a portion of its track, and thereafter each company ran its trains over such track, in charge of its own employés, although they united in employing a joint superintendent and train dispatchers, the use by each was in common with the other, and not a joint use, and each was bound to the use of due care to avoid injury to the trains of the other, and liable to the other for such an injury resulting from the negligence of its servants. Such duty and liability also rested upon a receiver operating the trains of one of the companies under a continuation of the agreement.

2. SAME—LIABILITY FOR TORTS OF LESSEE.
A railroad company, which has leased to another company the right to use, in common with itself, a portion of its track, is liable to its own passengers and shippers for injuries received by reason of the negligence of the servants of its lessee in the operation of trains upon such track.

3. SAME—CLAIMS AGAINST RECEIVER—MODE OF ESTABLISHING.
Where a collision occurred between a railroad train being operated by a receiver and a train of another company, through the negligence of the receiver's servants, and the damages sustained by the other company are readily ascertainable by the court, it is proper to adjudicate and allow

its claim therefor on a petition of intervention filed in the suit in which the receiver was appointed, without requiring it to be litigated and established in an action at law.

4. SAME—EFFECT OF SALE OF ROAD.
In such case, the fact that before the hearing of such claim the road in the hands of the receiver has been sold does not affect the right of the court to determine and allow the claim in the matter of the receivership, where the sale was made subject to the right of the court to charge the purchaser with all liabilities incurred by the receiver before delivering possession of the property; the purchaser being made a party, and permitted to make any defense which the receiver might have urged.

5. SAME—EVIDENCE—MODE OF MAKING PROOF.
In passing upon items of damage claimed in such proceeding, it being a matter relating to the administration of the receiver, it is proper for the court to recognize the methods of proof commonly accepted as satisfactory by railroad companies in cases of such losses.

6. SAME—ALLOWANCE OF INTEREST.
The allowance of interest on the claims allowed from the date when the decision was filed on which the decree was afterwards entered was within the discretion of the court.

7. SAME—CONDITIONS OF DECREE.
A provision of the decree requiring the purchaser of the road, who had assumed liability for all claims against the receiver, on notice from the intervener of any future claim made against it on account of such collision to compromise and settle such claim or defend against it, paying any judgment rendered thereon against the intervener, was proper.

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

On and prior to December 24, 1889, the Denver & Rio Grande Railroad Company (herein called the "Denver Company") owned and operated a line of railroad from Denver through Pueblo, Leadville, and Newcastle to Rifle Creek, in Colorado; and the Colorado Midland Railway Company (called herein the "Midland Company") owned and operated a line of railroad from Colorado Springs to Newcastle. The said railroad companies, being desirous of extending their respective railroads to a connection with the Rio Grande Western Railway at Grand Junction, Colo., on that day entered into a written agreement whereby the Denver Company leased to the Midland Company, for the term of 50 years, an undivided moiety of the railroad of the Denver Company between Newcastle and Rifle Creek, a distance of about 13 miles; and on the same day the same two companies entered into a written agreement with the Rio Grande Junction Railway Company, which was then building a section of railroad from Rifle Creek to Grand Junction, to lease such section of railroad for 50 years. The said Denver Company and Midland Company thenceforth operated the division of railroad between Newcastle and Grand Junction in common, each running its own passenger and freight trains thereon, with its own employés, and neither having any share or interest in the business of the other. For convenience and safety, they united in employing a joint superintendent, who had the charge and direction of the movements of all trains and engines on that division of railroad, and employed train dispatchers, and also had charge of repairs, replacements, and improvements thereon, as directed by said two companies. About December, 1893, the Midland Company was merged into the Colorado Midland Railroad Company, and later this suit was begun to foreclose a mortgage upon all the properties of said last-named company, and in its progress the appellant George W. Ristine was appointed sole receiver of such railroad company, and directed by the court to operate said division of said railroad under said lease and agreement; and the operation thereof was continued in all things as theretofore. Pursuant to decree of foreclosure in this suit, the entire railroad property covered by said mortgage was, on September 8, 1897, duly sold to Frederic P. Olcott, subject to the payment, satisfaction, and discharge by the purchaser of all liabilities incurred by said receiver before the delivery to the purchaser of the

possession of said mortgaged property, and reserving to the court the power to retake such property in case the purchaser, his successors or assigns, should fail to comply with any order of the court in respect to the payment and discharge of such liability, and providing also for the transfer of such obligation to any new corporation to which the railroad property might be transferred. The said sale was duly ratified and confirmed by order of the court in this suit on the 11th day of September, 1897, and on October 30, 1897, said Frederic P. Olcott conveyed and transferred said railroad property, subject to said condition of sale, to the Colorado Midland Railway Company, a new corporation, which assumed said obligation (and is called herein the "New Midland Company"); and on the 1st day of November, 1897, all of said railroad property was by said receiver delivered to said New Midland Company, under the terms of said sale. On the morning of September 10, 1897, at about 14 minutes after midnight, the passenger train No. 1 of the Denver Company, going west, consisting of an engine and eight cars, was, when moving at a high rate of speed, between one and two miles west of Newcastle, on the railroad of said Denver Company between Newcastle and Rifle Creek, met at a curve on said railroad by a freight train of said receiver, George W. Ristine, going eastward on the same single track, causing a violent collision, in which the engine and most of the cars of said passenger train were wrecked, and the gas pipes on such cars broken, so that the gas escaped, ignited, and exploded, causing further wreckage, and, by setting said passenger cars on fire, destroyed much property on the said passenger train, as well as the engine and many of the cars. Several of the employés and passengers on the same train were killed, and many others wounded and injured. The said passenger train was running on its proper time, as directed by said joint superintendent, and the persons in charge of that train were free from fault, and the said collision, wreckage of engine and cars, loss of life, and injury to persons, and destruction of property, were wholly chargeable to the gross negligence and misconduct of the conductor and engineer of said freight train of said receiver, which was run contrary to the directions of said joint superintendent and his train dispatchers. The Denver Company filed its petition in intervention in this foreclosure suit to recover the damages it had sustained through said collision; and for which the receiver, as such, was alleged to be liable, and the receiver and the said New Midland Company were made parties to such intervention, and appeared therein, and contested the claims of the intervener. After issue, and reference to a special master, upon his report and the evidence taken by him the circuit court made the decree in favor of the intervener which is appealed from.

Henry T. Rogers (Lucius M. Cuthbert, Daniel B. Ellis, George C. Preston, and Pierpont Fuller, on the briefs), for appellants.

Henry F. May (Edward O. Wolcott and Joel F. Vaile, on the brief), for appellee.

Before SANBORN and THAYER, Circuit Judges, and LOCHREN, District Judge.

LOCHREN, District Judge, after stating the case as above, delivered the opinion of the court.

The section of railroad between Newcastle and Rifle Creek upon which the collision occurred was the railroad of the intervener, the Denver Company, and in its possession and use at the time of the collision. The so-called "lease," as interpreted and acted upon by the parties to it, gave to the Midland Company trackage rights for its trains over this section of railroad, upon the terms agreed upon. The appointment of a joint superintendent to control the movement of trains and engines over that section and the adjoining section to Grand Junction, also used in common by the two railroad companies, with authority to employ subordinate train dispatchers,

was a proper provision to insure the care necessary to prevent collisions, while obtaining the fullest use of the single track by both companies; and it was matter of convenience to intrust supervision over the condition, repairs, and improvements of that division of railroad to such superintendent. As each company operated its own trains by its own servants in the prosecution of its own separate business, in which the other company had no interest, the use by each company was in common with the other company, and not a joint use; and each company, in the operation of its trains, was bound to use reasonable care, under the circumstances, to avoid injury to the trains of the other company. The findings of the special master as to the practice in the settlements for live stock killed on the line between Newcastle and Grand Junction were not immaterial, as they tended to show the practical interpretation of the so-called "lease" by the parties, and the character of the actual possession and use of that section of railroad.

The receiver had taken the place and assumed the rights and obligations of the Midland Company in respect to that section of railroad, and was, as receiver, responsible to the Denver Company for all the damages sustained by that company from the said collision and the explosion of gas and conflagration which immediately resulted therefrom; such collision being caused wholly by the negligence of the servants of said receiver in the management of the said freight train. As the Denver Company then owned, possessed, and operated with its own trains the railroad between Newcastle and Rifle Creek, on which this collision occurred, it was liable to its own passengers, and to the owners of property carried by it on its passenger train, for injuries and losses from the collision, explosion, and fire, though caused wholly, as aforesaid, by the negligence of the receiver's servants while running his freight train upon that section of railroad with the permission of the Denver Company. Railroad Co. v. Barron, 5 Wall. 91, 104. See, also, Heron v. Railway Co., 68 Minn. 542, 71 N. W. 706. The damages sustained by the Denver Company were, therefore, not only the loss of its own property destroyed or injured, but included also the amounts it had to pay for the immediate care of its injured passengers, and of the remains of such as were killed, and the amounts it was required to pay its passengers, and owners of property on its passenger train, in satisfaction for their injuries and losses from the collision. This disposes of all assignments of error which question the right of the intervener to have any relief.

On reviewing the action of the circuit court as to the specific items of damage allowed to the intervener, it should be borne in mind that the court was not simply engaged in the adjudication of issues between ordinary litigants. In this foreclosure suit it had taken possession of the railroad property, and was operating the railroad by its receiver, and was thus exercising administrative functions, temporarily, in connection with and in aid of the foreclosure suit. The damages claimed in this intervention against the receiver because of the torts of his employés in the movement of one of his trains would, if allowed, be classed as operating expenses

of the railroad under the receiver. 20 Am. & Eng. Enc. Law, 385. The court, in considering these claims, was supervising the action of its own receiver in the administration of the business of the railroad, and, for the purpose of directing his action, could properly ascertain his liabilities according to the business methods customarily adopted by careful and prudent railroad corporations under like circumstances, avoiding needless delays and vexatious and expensive litigation, where the right of the matter was obvious to the court, and where it could see that no real dispute as to facts existed. The fact that before the hearing a sale of the railroad property had been made upon the condition referred to did not change the nature of the proceeding further than to make it necessary that the New Midland Company, because of its assumption of ultimate responsibility, be made a party to the intervention, with the right to present any objections or defenses against the claims which the receiver might have urged. The intervention was still a proceeding in the matter of the receivership in the foreclosure suit, as much as if the railroad, at the time of the hearing, was still in the hands of the receiver; and the court, if clearly satisfied that the receiver was liable, and that the showing fixed the amount of a claim beyond doubt or serious contention, would properly allow it, without the delay and expense of formal litigation. If a claim were for unliquidated damages,—as for personal injuries from a moving train of the receiver, the amount being in dispute, as well as allegations of negligence and of contributory negligence,—it would, from its nature, have to be determined by a jury in an action at law, as was done in Thompson v. Railway Co., 35 C. C. A. 357, 93 Fed. 384, although any judgment obtained by the claimant could only be satisfied in the intervention in the foreclosure suit. The same course would have to be taken, as to the trial of such a claim, if the receivership were still active. But it would have been an abuse of the power of the court in this case, where the right of recovery was clear, had it required or permitted extended and expensive litigation as to claims, the amounts of which were readily ascertainable upon the showings at the hearing, satisfactory to the court, and unquestioned as to accuracy.

The errors assigned upon the allowance of particular items are generally but repetitions or amplifications of the general objections going to the right of the intervener to recover any damages. As to the claim for damages to rolling stock, $27,771.31, it was, on the hearing before the special master, agreed and admitted that petitioner's Exhibit No. 7, which specified such damages aggregating that sum, was a true statement of the damages to rolling stock of the intervener as the result of the collision, explosion, and fire, and that the intervener was responsible to the Pullman Company and the Rio Grande Western Company for their coaches named in that statement. This admission left no issue as to the amount of that claim. And the same is true in respect to the item of $205.43, paid by the intervener to the United States on account of registered mail matter and equipment destroyed by the collision and fire, it having been admitted at the same hearing that the amount was rea-

sonable, and the proof of payment by the intervener sufficient. As to the claim for $1,240.75 paid by the intervener to its passengers, named in its petition, in settlement of their respective claims for personal injuries and loss of baggage, the receiver, in his answer, admits that at the time of the making of such settlement he conceded that the amounts were reasonable for the passengers to receive on account of such losses and injuries. And so in respect to the other items making up the aggregate of $31,863 allowed by the special master, and also by the court, it is enough to say, without going further into details, that the evidence sufficiently showed that they consisted of settlements for damages to property carried on intervener's train, and in payments of expenditures made necessary by and resulting from the collision; all of which were actually and properly paid by the intervener. Neither the fact of payment by the intervener nor the reasonableness of the amount was questioned. The general holding that the receiver was liable to the intervener disposed of all contention as to these items. The item of $999.11, for moneys to that amount paid by the intervener to owners of express matter carried on intervener's passenger train, and destroyed in the collision and fire, was properly allowed by the court. It was not questioned that the intervener had paid that amount, upon proofs which, though ex parte, were such as are customarily accepted as satisfactory by railroad companies in cases of such losses. No suspicion as to the accuracy and correctness of such proofs was suggested. The liability of the receiver being clear, and the losses and their amounts appearing by customary proofs, not contested or questioned as to accuracy, on which the payments by the intervener had been made, there was no real issue in respect to the item to require or justify any litigation, delay, or expense. In supervising the administration of the receiver in respect to this item, the court rightfully recognized and acted upon the methods in use in the common course of carrying on the business of such railroads, and the proofs, which might and should have been accepted as satisfactory by the receiver, on which to recommend to the court the allowance of the item, had he still continued in the active operation of the railroad. Upon the hearing in this intervention it was as much within the discretion of the court to accept such uncontroverted customary proofs, when satisfied of the correctness of the same, and thus avoid needless expense and delay, as if the railroad were then still under the management of its receiver.

The allowance of interest from July 14, 1898, the day when the decision of the court was filed on which the decree was afterwards entered, was made by the judges who rendered the decision and also signed the decree, and was within the discretion of the court. Frazer v. Carpet Co., 141 Mass. 126, 4 N. E. 620.

The provision in the decree requiring the Colorado Midland Railway Company, upon notice from the intervener of any claim made against it on account of said collision, wreck, explosion, or conflagration, to compromise and settle such claim or defend against the same, paying any judgment rendered thereon against the interven-

er, with interest, costs, and reasonable counsel fees, is a proper provision for the satisfaction of the liabilities of the receiver in conformity with the condition of the foreclosure sale above referred to.

The decree of the circuit court is affirmed, with costs.

THOMAS v. CINCINNATI, N. O. & T. P. RY. CO.

(Circuit Court, D. Kentucky. April 13, 1899.)

1. MASTER AND SERVANT—RAILROADS—RELATION OF YARD MASTER—FELLOW SERVANTS.
   A yardmaster of a railroad, who is made responsible for the condition of the yards at the terminus of a division, directs the incoming and the starting of trains, and is authorized to employ and discharge men, but who is subject to the orders of the superintendent and train master, is a fellow servant of the foreman of a switching gang employed in the yard under him.[1]
2. SAME—COMPETENCY TO RUN ENGINE.
   Evidence that a yard master had occasionally run engines, and could handle them with perfect safety, is sufficient to establish his competency to run a switch engine in the switching yard, though he may never have passed the examination for engineers.
3. SAME.
   That one handling a switching engine was reckless in a particular instance does not prove incompetency.
4. SAME—DERAILMENT—FAILURE OF YARD MASTER TO GIVE PROPER INSTRUCTIONS.
   In an action for death by the derailment of a train, it appeared that there had been placed in the track an automatic switch, intended to be ordinarily set by hand, and depended upon as automatic only in emergency. The yard master in charge of the track informed the employés using the switch that it would work automatically at all times, and a train attempted to be run across the switch when not set was derailed, causing the death of an employé. *Held*, that the yard master's failure to communicate the proper use of the switch to the employés using it was a breach of duty for which the railroad company was liable.

Intervening Petition of Mary R. Gray, Administratrix of Fletcher B. Gray, Deceased.

Mary R. Gray, administratrix of Fletcher B. Gray, deceased, has filed her intervening petition seeking to recover damages from S. M. Felton, receiver, appointed under an order of this court herein, and engaged in the operation of the railroad of the Cincinnati, New Orleans & Texas Pacific Railway Company. Fletcher B. Gray was employed as a yard conductor or foreman of the switching gang in the yards of the receiver at Somerset, Ky., which is the north terminus of the Chattanooga Division of the railroad. The second amended petition avers that on March 26, 1893, complainant's decedent, while at work as defendant's employé in the capacity of foreman of the yard crew in the yard at Somerset, Ky., was killed by the derailment of a caboose, and its consequent collision with a box car on the side track of defendant's railway, which derailment and collision occurred without fault of the complainant's decedent, but was caused by the negligence of the said defendant, his agents and employés, in causing said caboose to be operated over a defective track, over a switch of dangerous and defective construction and condition,

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[1] As to who are fellow servants, see notes to Railroad Co. v. Smith, 8 C. C. A. 668, Railway Co. v. Johnston, 9 C. C. A. 596, and Flippin v. Kimball, 31 C. C. A. 286.

and by a careless and incompetent yard master of said defendant, by whose negligence the caboose was propelled at a dangerously high rate of speed over said defective track; that the defendant knew, or could by the use of ordinary care have known, of said defective condition of the track, and of the unfitness and incompetency of said yard master, and of which complainant's decedent did not know, nor could, by the exercise of ordinary care, have known. The receiver, in his answer, denied that the track was defective, that the switch was of a dangerous construction, that the yard master was careless or incompetent, or that the accident occurred by reason either of such track, such switch, such incompetent yard master, or because of the high rate of speed at which the train was going. The issue was referred to a master, who has found the facts:

"The decedent, Fletcher B. Gray, was yard foreman in the Somerset yards. Fred Cook was the general yard master of the Somerset yards. On March 26, 1893, the yard was crowded with cars. The engineer of one of the switch engines—Stokes—had gone home to his dinner. The yard master, Cook, being anxious to expedite the work, took charge as engineer of the switch engine during the absence of Stokes, and began doing work with it in the yards. The decedent, Gray, yard foreman, was assisting him in this work. One Garrett was acting as fireman on this switch engine with Cook. George T. Moon, who was then a freight conductor, and one Melville Ramsey, who was then a switchman of the Southern, were assisting in this work. The switch engine came from the north part of the Somerset yards to a point below the yard office, backing down, pushing one caboose and pulling two. The train was going at a rate of speed variously estimated by witnesses both for plaintiff and defendant at from 15 to 25 miles per hour. While going at this rate of speed, said Moon, Fletcher B. Gray, and said Ramsey were standing on the south end of the caboose, which was being pushed south by the engine over the main track, it being the caboose of said Moon, the freight conductor. Several days before the day of the accident, which occurred Sunday, there had been put in the yard two automatic switches. These switches were called automatic, not because they were expected at all times to work automatically, without being thrown by a switchman or employé of the road, but they were useful in cases of emergency or accident, and, in the event of a car or engine accidentally running into said switch, it was expected that the switch would throw itself, and thereby prevent a derailment, or damage to the switch or track. They were not switches either new or novel in construction, although they were never before in that yard, but switches which had been in use on other roads for years past, and were known to be good standard switches. This switch, it was intended, should be handled by the switchman as other switches were. It was not a labor-saving device in the sense that it did not have to be moved by a switchman, but it was intended to prevent derailments in case the switch was misplaced. Mr. Felton, the receiver, states that they were never intended to be used automatically in regular service. It was only in case of emergency that the automatic switches were expected to be brought into play at all. While this train of which the yard master was acting as engineer was thus proceeding southwardly along the main track, this automatic switch was set so that, if it did not work automatically, or was not thrown by a switchman, the train would continue, not along the main track, but would be switched off on a side track to the left (that is, the east side of the main track), where, a few feet distant from the switch, other cars were standing. The train, without slacking speed, ran into this switch, and immediately the caboose left the track, and collided with the cars on the side track, killing Gray, and causing a wreck of the engine, of the caboose it was pushing, and of the two cabooses the engine was pulling. * * * The evidence clearly shows, as heretofore stated, that the switch was intended to act automatically only in case of emergency. Although it had not been oiled, I believe it was in such condition that there would have been no difficulty for any employé or servant of defendant to throw the switch. It is also probable that the switch might have thrown itself, provided the cars had not been running at such high rate of speed; but, going at such high rate of speed and with a caboose in front, which is many tons lighter than an engine, I believe the switch would not have thrown itself, whether oiled or not. The switch

was not intended to be run through in this manner, oiled or not oiled, and I cannot conclude from the evidence that the switch would, under the circumstances, have worked automatically, and thrown itself, even if oiled. The negligence, therefore, if any, consists not in failing to oil the switch, but in using it in a way for which it was not intended. It is contended in behalf of plaintiff that the men in the yard were informed by the yard master, Cook, that this automatic switch did not have to be thrown by the men, but that the trains or cars themselves would throw the switch, and that during the two or three days that the switch was in operation the men so believed, and acted on that belief; and from all the evidence on this point I am clearly of the opinion that Cook, the yard master, did not only believe that the switches were intended to be used without having the men themselves throw them, but that he did so use the switches, and informed the men under his charge that they were to be so used, himself setting them the example. Therefore, as I view the case, the whole question of the liability of defendant is determined by the fact of whether or not Cook, the yard master, was a fellow servant of Gray, the decedent. The evidence discloses that Somerset was what is known as a 'division terminal.' It is the half-way point between Cincinnati and Chattanooga, and it is at this point where trains are made up to go both north and south. The yards are shown by the evidence to be very large. One of the witnesses testifies that 15 or 20 miles an hour, the rate at which this train was going, was not too high rate of speed, as they were going from the north to the south end of the yard which was 'something like half a mile.' It was over these large division terminal yards that Cook was general yard master. As to the power and authority given to and exercised by him in this capacity, Mr. Felton testified: 'Q. You spoke of the yard master as one of the officers of the company, classing him with the superintendent, and I forget what other officer. Over what employés has he authority as an officer of the company? A. The yard master has charge of the yard and the yard crews and the train crews, while in the yard limits. He has entire charge of the operating of the yard.' The rules of the company in force at the time of the accident relating to the yard master's duties were as follows: By rule 134, as yard master, Cook had charge of the yards where the trains are made up, the movements of trains therein, and the force employed. By rule 135 the yard masters are responsible for the prompt transportation of cars, and the prompt movement of all cars within the limits of their yards. They must be familiar with the rules of the freight service, and with the duties of every employé connected with freight trains, and will require the prompt and efficient discharge of those duties in the yards. By rule 139 they must not permit a train to start with an engineman, conductor, or brakeman who is under the influence of liquor, or unfit for duty. By rule 142 they must see that their cars are kept in good order, that cars are properly inspected, and that those requiring repairs are sent to the shop. One of the defendant's witnesses (Moon) tersely states the duties of the yard master as follows: 'All in the yard is subject to his orders.' Considerable testimony was taken on the question as to whether or not Yard Master Cook, while acting as engineer, ought to obey signals such as decedent, Gray, might have given him while running the train. All this, however, I think is immaterial. Of course, such signals as to go ahead, or to back up, or to go slow, and the like, would have to be given by the foreman, brakeman, or any other person on the train to the engineer operating the train; but this does not mean that the yard master is in any respect whatever deprived of that power and authority which he possesses as yard master. He is none the less yard master, with all the powers and duties of the office, whatever work he may temporarily assist in doing. * * * Believing, therefore, it is clear that Yard Master Cook is a vice principal of the company, and that he did not to any extent whatever lose that character while acting as engineer, it becomes necessary to ascertain whether Gray met his death through either the negligence, incompetency, or unskillfulness of said Cook, and, if he did, the defendant company should be held liable. In the first place, Cook should not have taken charge of the engine. While there is some conflict in the testimony as to his capacity to run an engine, the statement of Mr. Griggs, the superintendent, is that he has never passed the examination which was required for an engineer; that he

(Mr. Griggs) had seen him move engines occasionally; and that he thought he might handle an engine in the yards, but that the yard master had no authority to handle an engine. The present yard master, Jones, witness for defendant, testified that Cook could handle an engine with perfect safety; but Whitely, for plaintiff, testified that he had known Cook intimately for 16 years, and had never known him to run an engine. Moon (defendant's witness) had known Cook since 1886, and during all that time he had not, to Moon's knowledge, had any experience as an engineer. Vickey, plaintiff's witness, testified that he had known Cook intimately for 13 years; that, if he had any experience as an engineer, he did not know of it, but that he had seen him use an engine a few times, when the engineer was absent, without an accident. Cook, whose testimony was taken in Mexico by defendant, no one being present for plaintiff, testified that he had become familiar with the operation of locomotives from his twenty-two years of railroad experience, and had handled them quite often. He did not state that he was a skilled or competent engineer, or that he had ever passed an examination as engineer, or that he had ever regularly run an engine. Upon such state of fact, Cook had no right whatever to take charge of and run the switch engine, either during the absence of the regular engineer at dinner, or at any time whatever. The fact that the yards were crowded, and time was pressing, affords no reason why an incompetent person should run the engine. There can be no question but that, had Cook, by reason of his authority as yard master, employed a man to run this switch engine, who had never taken the course which engineers take, and had never passed the necessary examination, the defendant would be liable for any damage occasioned by such person's negligence or incompetency. Such being the case, the defendant is liable, if Cook, having such authority and power to employ an engineer, himself took charge of the engine. Further, Cook's conduct was in direct violation of rule 342 of defendant, in force at that time, which is as follows: 'It is the duty of the engineman to handle his own engine at all times, but the fireman may do so at the station, in the immediate presence of the engineman, or when, by necessity, the engineman is temporarily absent: provided, the master mechanic has declared him competent.' Further, as heretofore stated, it was made the duty of the yard master, under rule 345, to be familiar with the duties of every employé connected with the freight trains, and it was his duty to enforce obedience to these rules. Although the testimony of Mr. Felton, Mr. Griggs, and others leaves no question as to the manner in which these automatic switches were to be used, it is clearly evident that Cook did not use this switch properly during the several days it was put in, but that he informed the men in the yards that it was to be used in a manner never intended, giving them to understand that it did not have to be thrown by a switchman or employé, but that the cars themselves would throw it, it being intended to work automatically; and there is no doubt that several times the switch had worked without any one throwing it. * * * Gray's statement to Moon shows that he had been so informed, and, further, he acted on that information, and so lost his life, though he endeavored to slow up the train because of its high rate of speed. It is further clear beyond all doubt that Cook at the time of the accident did attempt to run through the switch at a high rate of speed, knowing it was set wrong. George T. Moon, also on the platform, one of defendant's witnesses, stated that he did not see Gray give any signal, but when he (Moon) told Gray that the switch was open, he answered, 'That's all right,' leaving the impression on his mind, as he stated, that the switch was safe, and would throw itself. * * * It was certainly gross carelessness and incompetency to run at such rate of speed knowing the switch was wrongly set. It seems from other testimony that the switch had set itself on several other occasions, and I have no doubt but that Cook believed it would do so when he ran over it. * * * If Cook, with his power and authority, and the duty he owed defendant's servants, was ignorant of the manner in which the switch should be used, it is an ignorance for which the company should be held liable. The entire operation of the yards was in the charge of Cook. Instructions and orders to the men employed in the yards came from him. If, therefore, he put in appliances, and wrongfully informed the employés of the defendant as to the manner in which they should be used,

and these employés, using such appliances as directed, are injured, the defendant is certainly liable. In this case the yard master himself, by his ignorance of the proper use of the switch, or his negligence, caused Gray's death, and, in either event, defendant is liable."

C. M. Cist, for plaintiff.

Harmon, Colston, Goldsmith & Hoadley, for defendant.

TAFT, Circuit Judge (after stating the facts as above). The charges of negligence contained in the second amended petition are: First, that the receiver permitted the operation of the caboose over a defective track, and, secondly, over a switch in a dangerous and defective construction; third, that the accident occurred through the negligence of the yard master of the defendant in the operation of the locomotive, the yard master being a vice principal, and representing the receiver; fourth, that the yard master, even if a fellow servant, was incompetent, and unfit, that the receiver was aware of his unfitness and incompetence, and that this caused the accident. There is no evidence to show that the track was defective. There is no evidence to show that the switch was of a dangerous construction and condition. There is evidence to show that the switch was not sufficiently oiled, but the master finds, and the evidence supports him in the view, that, even if the switch had been oiled, the accident would have happened. From this it follows, of course, that the injury was not caused by the failure to oil. Third, it is said that the accident was caused by the negligence of the yard master, and that he was a vice principal, and represented the defendant in what he did. The master found that the yard master was a vice principal. I cannot agree in this conclusion. It is true that the evidence shows that the yard master had complete control of the yard; he was made responsible for its condition; that he was authorized to employ and discharge men, and that he directed the incoming and starting of trains. I do not think, however, that under the principles laid down in the Baugh Case, 13 Sup. Ct. 914, this would put him at the head of one of the departments of the railroad. The nature of his duties was not at all unlike that of a station agent, only that he had more men under him. He was subject to the orders of the superintendent, whose office was at the station in Somerset. He was subordinate to the train master. It would serve no good purpose to discuss at length or restate the grounds of the rule which must control the federal courts in determining the question whether an employé is a fellow servant or not. They have been laid down with elaboration in the Baugh Case, already referred to, and have been reaffirmed from time to time by the supreme court in numerous cases. Railroad Co. v. Keegan, 160 U. S. 259, 16 Sup. Ct. 269; Railroad Co. v. Peterson, 162 U. S. 346, 16 Sup. Ct. 843; Oakes v. Mase, 165 U. S. 363, 17 Sup. Ct. 345; Railroad Co. v. Poirier, 167 U. S. 48, 17 Sup. Ct. 741; Mining Co. v. Whelan, 168 U. S. 86, 18 Sup. Ct. 40. In Grady v. Railway Co., 34 C. C. A. 494, 92 Fed. 491, decided by the court of appeals of this circuit March 7, 1899, it was held that the foreman in charge of the freight-car repair shops, the immediate subordinate of the

master car builder, who had control of the work of car repairs,—a branch of the mechanical department of the road, at the head of which was the master mechanic,—was a fellow servant of the workman who, it was charged, was injured through his negligence. In that case the court said:

"The Baugh Case has set such limits to the vice-principal doctrine that it is exceedingly difficult to suggest a position outside of those of the superintendents or acting superintendents of the various great departments of the road, the incumbent of which is not to be regarded as a fellow servant of all the other employés. The Ross Case, 112 U. S. 377, 5 Sup. Ct. 184, it is said, has never been expressly overruled. This is true, but it has been so limited to its peculiar facts as to make it of no force as authority in any case where those facts are not exactly presented."

The exception to the finding of the master that Cook was not a fellow servant of Gray is sustained.

The next charge of negligence is based on the employment of Cook as a yard master when he was known to be incompetent. There is not the slightest evidence that Cook was not a good yard master. But it is said that he was an incompetent engineer. It is sufficient answer to say that he was not employed as engineer, and, if he discharged duties not assigned to him, the company is not responsible for this breach of duty unless he was a vice principal, —as he was not. But the argument is, and it is supported by the conclusion of the master, that Cook had authority to employ engineers, and in doing so he was discharging a personal duty of the receiver, owing to Gray, to use due care in the selection of such engineer; that when he assumed to act as engineer he was employing himself; that he knew he was incompetent, and, as he represented the company in the act of employing, the company was responsible for the result of such employment. The first objection to this position is that there is no allegation in the petition under which it can be maintained, and the second is that the evidence does not sustain the conclusion that Cook was not competent to run an engine in the yards. I have read the evidence on the question of the competency of the yard master both as a yard master and as an engineer, and I do not think that it established that he did not have sufficient knowledge to run a switch engine in the switching yard. He was undoubtedly reckless in the case before us, but a single instance of recklessness does not prove incompetency. The evidence to prove his incompetency is of a negative character, and most unsatisfactory, and it does not, it seems to me, contradict in any material way the direct and affirmative evidence that he did not know enough about an engine to run it in the yards. The exceptions to the finding of the master on these charges of negligence are sustained.

I think, however, that there is another ground of negligence clearly established by the evidence, which the court, in order to do justice, ought not to ignore, and ought to give the petitioner an opportunity to introduce into her petition by amendment. The evidence and the findings of the master make it clear that the real reason for this accident is to be found in an attempt of the yard master,

and the acquiescence of the other employés who were with him in that attempt, to run through an open switch on the supposition that the switch was intended to work automatically at all times, and to save the necessity of turning it by hand. It is further clearly shown by the evidence for the receiver that the switch had not such purpose. The switch was placed where it was with the hope that in cases of accident when cars ran through an open switch the breaking of the switch points would be avoided by automatic action in the switch itself. It was not intended that employés should deliberately run through an open switch, relying on the operation of the automatic device. It was not a labor-saving machine. It was only to be used in an emergency. It was like an emergency brake in an elevator, or a device for breaking the fall of the cab at the bottom of the elevator in case the cable breaks. Such devices are not intended for constant use, and a servant who puts them to such use cannot complain if they do not always operate. They are safety appliances to be used in case of accident, and cannot be relied on in the regular course. It was a personal duty of the company to plaintiff's decedent, as one of its employés, to communicate to him and to all other employés using the switch the proper limitation upon its use. This was not done. Had the yard master been informed that the automatic device in the switch was only to be depended upon when it could not be helped, but that in all ordinary circumstances it was to be used as an ordinary hand switch, and had he communicated these rules for the use of the switch to his subordinates, it is clear that this accident would not have happened. Gray, standing upon the front platform of the caboose, seeing the open switch, would undoubtedly have signaled to Cook, who was running the engine, to stop until the switch could be turned. Cook would have stopped, and in that case there would have been no collision. It is a personal duty owing by the master to the servant in a dangerous and complicated business to prescribe rules sufficient for its orderly and safe management, and to keep his servants informed of those rules, so far as they may be needful for their guidance. Railroad Co. v. Camp, 31 U. S. App. 213, 13 C. C. A. 233, and 65 Fed. 952; Slater v. Jewett, 85 N. Y. 61; Shear. & R. Neg. (5th Ed.) § 202. It is further the personal duty of the master to avoid exposing his servants to unusual risks by giving warning to them of the perils to which they may be exposed in the use of machinery, where the servant has not the same opportunity to know the dangers of the machinery that the master has. In the present case this switch had been put in place but a few days before, and the scope for its use had certainly not been properly explained to its employés. They had been given to understand by the yard master that it was a labor-saving device, instead of which it was only an emergency switch. To this failure on the part of the receiver or his superintendent the accident is directly due. It would properly have been the yard master's duty to communicate to the employés the proper use to which the automatic part of this switch could be devoted. If he failed in that duty, he failed in a personal duty directly owing from the receiver to petitioner's decedent, for

which the receiver can be held liable. It is not that the switch was defective, but only that its mode of use, resulting from a failure of the receiver or his agents properly to regulate it, was negligent. In Smith v. Baker [1891] App. Cas. 325, the plaintiff was employed to drill holes in a rock near a crane worked by men in another department of his employer's work. The crane was used for lifting stones which were sometimes swung over plaintiff's head without warning. During the work a stone so swung fell on the plaintiff, and injured him. This was held by the house of lords to be a defective system of work, rendering the employer liable in the event of injury caused thereby. "I think," said Lord Halsbury (page 339), "the cases cited at your lordships' bar of Sword v. Cameron, 1 Sc. Sess. Cas. (2d Ser.) 493, and Coal Co. v. McGuire, 3 Macq. 300, established conclusively the point for which they were cited,—that a negligent system or a negligent mode of using perfectly sound machinery may make the employer liable."

The remaining exceptions to the report are overruled. The petitioner is given leave to file an amendment to her amended petition in accordance with the suggestion herein, and upon the filing of such amendment a decree will be entered finding in favor of the petitioner in the amount reported by the master, to wit, $8,000.

TOMLINSON v. CHICAGO, B. & Q. R. CO.

(Circuit Court of Appeals, Eighth Circuit. October 23, 1899.)

No. 1,179.

MASTER AND SERVANT—INJURY OF RAILROAD EMPLOYE—FELLOW SERVANTS.

A bridge builder and repairer employed by a railroad company, and furnished with cars in which he and his assistants and tools are transported to places along the line of the road where his services are required, the usual custom being to attach his cars to some regular train, is a fellow servant with the employés in charge of such trains, not only while he is engaged in the work of building or repairing bridges, but also while being so moved in his cars from place to place in the discharge of his regular duties, and he cannot recover from the company for injuries received through their negligence while being so transported in the usual manner.[1]

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

S. C. Hinsdale and J. B. Ross, for plaintiff in error.

Henry F. May (Edward O. Wolcott and Joel F. Vaile, on the brief), for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

THAYER, Circuit Judge. John Tomlinson, the plaintiff below and the plaintiff in error here, was in the employ of the Chicago, Burlington & Quincy Railroad Company, the defendant in error,

[1] As to who are fellow servants, see notes to Railroad Co. v. Smith, 8 C. C. A. 668, Railway Co. v. Johnston, 9 C. C. A. 596, and Flippin v. Kimball, 31 C. C. A. 286.

hereafter termed the "defendant," as a bridge builder and a repairer of bridges on the line of its road. To enable him to discharge his duties promptly, conveniently, and efficiently, two cars had been assigned to him for his use, which belonged to the railroad company, and in these cars the plaintiff was in the habit of traveling with his tools and materials from place to place where his services happened to be required. When the plaintiff had orders to repair a bridge at any particular point on the line of the defendant's road, the two cars that had been assigned to him were usually placed in one of the defendant's regular freight trains for transportation to the place where the work was to be done, and the plaintiff, with his assistants, was in the habit of riding in said cars to the place of destination. On arriving at the place of destination, said cars would be set out on a side track as near as possible to the place where a bridge was to be erected or repaired, or where other work in his line was to be done. On December 5, 1892, the plaintiff was ordered to proceed with his two cars from Barr station, on the line of the defendant's road, to Akron station, and there build a snow fence. Pursuant to said order, his cars were taken up by one of the defendant's regular freight trains, known as train "No. 150," which consisted at the time of about 35 cars, including the plaintiff's cars. The 2 latter were placed nearly in the middle of the freight train, there being about 10 cars between them and the engine, and 23 cars in the rear thereof. When said train reached a point about seven miles west of a place called "Corona Station," on the line of the defendant's road, the train parted in two places, one break being between the plaintiff's cars and the engine and the other break being between the plaintiff's cars and the rear end of the train. The break was not discovered at the time, and the train continued eastward to Corona station, on a down grade. When the engine and the cars attached to it stopped at said station, the detached cars at the rear end of the train, which were then a short distance behind, crashed into the forward cars, from which they had been detached, and in this way the two work cars, in one of which the plaintiff was riding, were broken up and wrecked, and the plaintiff thereby sustained serious injuries. It was charged in the complaint which was filed by the plaintiff against the defendant company that the employés of the railroad company who were in charge of said freight train at the time were guilty of gross negligence, both in permitting the break to occur, and in not discovering that the train had been broken up into three sections before it reached Corona station. At the conclusion of all the testimony, the learned judge of the trial court directed a verdict for the defendant upon the sole ground that the evidence disclosed conclusively that such negligence as was proven was the negligence of the trainmen who were in charge of the freight train, and that the latter must be regarded as the fellow servants of the plaintiff. Whether this view of the case was correct or erroneous is the sole question presented for decision.

In Railroad Co. v. Hambly, 154 U. S. 349, 14 Sup. Ct. 983, it was decided that a common day-laborer, who was at work with a gang

of sectionmen on a line of railroad, and was injured by the negligence of a conductor and engineer of a passenger train which was moving over the road, could not recover against his employer for the injury so sustained, because he and the conductor and engineer of the passenger train were engaged in the same common employment, and were, therefore, fellow servants. The doctrine announced in that case was reiterated in Railroad Co. v. Charless, 162 U. S. 359, 16 Sup. Ct. 848; also in Railroad Co. v. Peterson, 162 U. S. 346, 356, 16 Sup. Ct. 843, and in Oakes v. Mase, 165 U. S. 363, 17 Sup. Ct. 345, and in Martin v. Railroad Co., 166 U. S. 399, 403, 17 Sup. Ct. 603. It must be accepted, therefore, as the established rule in the federal courts, that sectionmen engaged in keeping a railroad track in repair and train operatives thereon are fellow servants; that the departments in which they work are not so far separate and independent as to sever that relation; and that, when an employé who is engaged in one of these departments is injured by the negligence of an employé who is at the time working in the other, the master cannot be held responsible for the injury, unless the servant through whose fault the injury was occasioned was at the time discharging some personal duty of the master, and was negligent in the performance of that duty. Railroad Co. v. Keegan, 160 U. S. 259, 264, 16 Sup. Ct. 269. It is conceded, apparently, by counsel for the plaintiff, that, if the plaintiff had been hurt while working on a bridge or trestle on the line of the defendant's road by the negligence of one of its train operatives on some passing train, he could not recover for the injury by reason of the rule enunciated in the foregoing cases, and it is clear, we think, that under the circumstances last stated he would have occupied the same relation to train operatives as a sectionman engaged in keeping the defendant's track in repair.

An effort is made to distinguish the case at bar from a case such as is last supposed because the plaintiff was injured, not while at work on the road, and engaged in keeping it in repair, but while being transported to his place of work. It seems to be contended that while being thus carried from place to place he was not a fellow servant of the trainmen engaged in operating the train in which his cars happened to be placed. We think, however, that the effort to distinguish the case in hand from those above cited, in which it was held that the sectionmen and train operatives are fellow servants, must fail for the following reasons: It was the plaintiff's duty to travel in his work cars to those places along the line of the defendant's railroad where his services were required, and it was his duty, and it had been his practice, to attach his cars to the defendant's freight trains, and go to designated points for the purpose of doing such work as he was directed to do. This was the manner in which he usually traveled to his place of work. He was not a casual passenger on the broken freight train on the day of the accident, but he was doing on that day as he usually did, and as it was contemplated that he would do when he took service with the defendant company. While traveling in the manner last indicated, he was paid for his time, and was in the same

general service as the men who operated the train on which he was carried. We can perceive no substantial reason, therefore, for holding that the relation of fellow servant between himself and the trainmen was broken while he was being transported to his place of work, and that it was re-established when he reached his destination and actually commenced work,—as we must necessarily hold if we decide that the defendant is responsible for the negligence of its trainmen on the day of the accident. It seems to us to be the more reasonable view, considering the circumstances under which his work was done, that the plaintiff was a fellow servant of the defendant's trainmen, both while he was being transported on its trains to his place of work and while he was actually engaged in repairing bridges, or doing other necessary work along the track. It results from this view of the case that the judgment below should be affirmed, and it is so ordered.

SLAVENS v. NORTHERN PAC. RY. CO. [1]

(Circuit Court of Appeals, Ninth Circuit. October 2, 1899.)

No. 506.

1. WITNESSES—CONVERSATION WITH DECEASED PERSON—PARTY IN INTEREST.
   Rev. St. U. S. § 858, provides that the law of the state in which the court is held shall determine the competency of witnesses in the courts of the United States. 2 Hill's Code Wash. § 1646, provides that, where a party sues or defends as a personal representative of a deceased person, then a party in interest or a party to the record shall not be admitted to testify in his own behalf as to any statement made to him by such deceased person. The evidence in an action against a railroad company to recover for the death of plaintiff's husband, who was killed by a landslide, showed that he was a section man on defendant's railroad, and that, with another section man, he was engaged in removing earth which had been deposited on the track, blocking the passage of a train, by a landslide from the bluff overhanging the track; that while so engaged, in answer to interrogatories of the conductor of the delayed train, he stated that there was danger of another landslide occurring at any time, that he had worked there before, and that they could expect another at any time. *Held*, that the conductor may testify to such statements, as he is not a party to the record or interested in the case.
2. CONVERSATION WITH DECEASED PERSON—RES GESTÆ.
   Such conversation constituted a part of the res gestæ, and was relevant, as tending to show that decedent was informed of the danger to which he was exposing himself.
3. MASTER AND SERVANT—RAILROADS—RULES—DUTY OF CONDUCTOR.
   In an action against a railroad company to recover for the death of plaintiff's husband, caused by his being swept off defendant's tracks into a river by a landslide, the evidence disclosed that he was one of defendant's section men; that, with another, he had been sent out to look for dangerous places in the track, liable to have been caused by the heavy rains which had fallen; that the landslide which swept him into the river occurred while he, under the direction of the conductor of a delayed train, and pursuant to a rule of the company requiring him to act under such conductor's direction, was removing a previous slide from the track. Plaintiff claimed that there was a hidden danger in the bank. *Held*, it was no part of the conductor's business to warn plaintiff of the hidden danger, merely because a rule of the company provided that section men

[1] Rehearing pending.

should, in case of accident or delay to a train, obey the orders of the conductor, especially where it was no part of the conductor's duty to know about the condition of the bluff, but the care thereof was in part intrusted to decedent.

4. SAME—NEGLIGENCE—CONDUCTOR—SECTION MAN—FELLOW SERVANT.
A section man working under the direction of a conductor of a delayed train in removing an obstruction from the track is a fellow servant with the conductor, and the company is not liable for injuries to one occasioned by the negligence of the other, though a rule of the company provides that section men shall always assist the passage of trains, and, in case of accident or delay, obey the orders of the conductor.

5. SAME.
The wife of a section man cannot recover from a railroad company for the death of her husband, who was swept from defendant's tracks into a river by a landslide, where the slide was caused by the failure of the crew, of which her husband was a member, to properly drain a bluff overhanging the track, where such duty was imposed on them by the rules of the company, as such failure is the negligence of fellow servants.

6. SAME—ASSUMPTION OF RISK.
Where section men on a railroad know that they constitute the usual force detailed for the performance of a particular duty, and during its performance they voluntarily expose themselves to a danger of which they should have known as much as any one, they are deemed to have assumed the risks incident to their situation, and cannot afterwards complain that there was not a sufficient force of men to do the work safely.

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

M. G. Munly, Jas. M. Ashton, and W. L. Sachse, for plaintiff in error.

Crowley & Grosscup, for defendant in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

ROSS, Circuit Judge. This action was brought in the court below to recover damages alleged to have been sustained by the plaintiff by the death of her husband, Charles Slavens, on December 7, 1896, by reason of the alleged negligence of the defendant company. Deceased, Slavens, was a section hand in the employ of the railway company; performing the duty, at the time of his death, of track walker and night watchman. One Antrim was the foreman of the section of the road on which the accident which caused Slavens' death occurred, and, on the evening of the accident, detailed, from the section men under his charge, Slavens and one Hughes to patrol it. Antrim had then had charge of this section for more than five years, and Slavens and Hughes had worked thereon about four years. The night watchmen were usually sent out in pairs. Hughes and Slavens had frequently been companions in the work, and had previously removed slides along different parts of the section. These men were sent out on the road by the foreman in pursuance of general rules of the company, which provide:

"Rule 455. Roadmasters are responsible for the safety of track, good condition of roadbed, fences, right of way, and grounds, and neat and tidy appearance of stations, buildings, and surroundings. They will frequently examine bridges, culverts, water stations, and other structures, and promptly report any defects or failure to superintend."

"Rule 460. Foremen and men in their employ must at all times hold themselves in readiness to aid the passage of trains, and, in case of accident or delay, will obey the orders of the conductors. (See rule 72.)

"Rule 461. Section foremen must pass over and examine their sections daily, and ascertain that the track, slopes, cuts, bridges, switches, etc., are safe, and make necessary repairs. This should be done in the morning.

"Rule 462. In case of extraordinary storms or high water, foremen must be out with their men, day and night, with proper signals, and watch those places most likely to damage, and take every precaution to prevent accident."

"Rule 472. The rounds of road watchmen or track walkers must be so arranged as to pass over their section in advance of passenger trains, when practicable. They will carefully examine the roadway, keeping a sharp lookout for broken rails, observe switches, try locks, and see that they are in proper order; see that cars clear the main track; examine buildings and other property, and protect the same from theft, fire, or other damage. Should an obstruction or anything occur that would be liable to endanger trains, the watchmen will at once, after leaving a red signal in the center of the track where obstruction occurs, proceed in the direction of the first expected train, and place torpedoes on the rail, as provided in rule 133. He will then protect the opposite direction in the same way, and then call his foreman, and send word to the nearest telegraph office."

"Rule 72. Six long blasts, repeated at intervals, is notice to trackmen and others that the train needs assistance; and all employés within hearing must repair at once to the engine or train, and render such aid as is in their power."

Slavens and Hughes were acting under these general rules at the time of the accident, which occurred in the evening of December 7, 1896, about three or four miles south of Castlerock, in the state of Washington, at which point the defendant's road is located between a high bluff and the Cowlitz river. The bank of the road at that place is from 40 to 60 feet high, with a slope of about 45 deg., and is covered with a heavy growth of brush and undergrowth. On the opposite side of the railroad track, and very near it, is the bank of the river. The river at the time of the accident was very high; it being the season of rainstorms, and it having then been raining for several days. While Slavens and Hughes were walking on the track several miles south of Castlerock, a freight train from the north overtook and passed them. Within a few minutes they heard the whistle of the engine for aid, and at once hurried forward to the assistance of the train. When they arrived they found that the train had been stopped by a slide from the high bank, consisting of soft, mushy ground, brush, and stumps. They at once began to remove the obstructions; being assisted in the work by the train crew, under the direction of the conductor. While so engaged, a second slide from the same bank occurred, which carried Slavens and Hughes into the river, resulting in the death of the former.

In her complaint, the plaintiff alleged that through its carelessness and negligence, and without the knowledge of the deceased, the defendant allowed the bank to become insecure and dangerous to its employés, including the deceased, who might be ordered or directed to work upon or adjacent to its track at the point in question; that the defendant ordered the deceased and Hughes to remove the obstructions from the railroad track with all possible speed, and carelessly and negligently failed to notify or warn the deceased or Hughes of the dangers incident to or attendant upon the removal of the obstructions; that it was very dark, and that the deceased and Hughes

were unable to see, and did not know, and could not by the exercise of ordinary diligence have known, the true condition of the bank, and were unaware of its insecure and dangerous condition; that it was the duty of the defendant to have employed a larger number of laborers to remove the obstructions, or to have watched the bank while the deceased and Hughes were removing them, and to have warned the deceased of the insecure and dangerous condition of the bank, but that the defendant wholly disregarded its duty in that behalf. The answer of the defendant denied all the allegations of negligence on its part, and, as an affirmative defense, averred that the deceased and Hughes were at the time of the accident, and for a long time prior thereto had been, in the employ of the defendant as section men and laborers, and that, as such, it was their duty to go over and along the track of the defendant at the place named in the complaint, and other places, for the purpose of inspecting and examining the road, to ascertain if any obstructions were upon the track, and to remove any found thereon; that the deceased and Hughes were fellow servants in such common employment, and that the deceased was familiar with the track and roadbed of the defendant at and near the place where the accident occurred, and for a long distance on each side of that place, and had frequently passed over and along the track in such employment; that Slavens knew of the manner in which the railroad was constructed, and the location and situation of all of its banks, and of the bluffs adjacent thereto, and that he could and did inspect the same, and that all danger of slides from the bank upon the railroad track was well known to him; that at the time of the accident there were severe storms of rain, and that Slavens knew that at such times there was danger of slides from the bank, and that he was employed to ascertain and discover such slides, in the event of their occurring, and to remove the same; that the slides in question were occasioned by the great quantity of rain which had previously fallen, and the condition of the earth, and that Slavens well knew these conditions, and, as part of his employment, voluntarily assumed the examination of the track and roadbed, and voluntarily assumed the work of removing such slides, and, in connection with his fellow servant, Hughes, did undertake to remove one of the slides mentioned; that the falling of the bank was the result of an accident, and did not occur through any fault or neglect on defendant's part in the construction of its road, or in any other way, and that all the dangers arising from the slide, or other condition of the bank or bluff, were open to the observation of Slavens, and were known to him; that he was familiar, and had been for years, with the locality, and with all the dangers which could or might arise by reason of the falling of the banks, or otherwise; and that he assumed all risk incident thereto by accepting the employment of the defendant and continuing to remain therein. The trial resulted in a verdict for the defendant, and the cause is brought here by the plaintiff by writ of error.

There was evidence to the effect that about 17 years prior to the accident a ditch was constructed on and along the bluff above the roadway, at varying distances from the rim of the slope of the bank,

for the purpose of carrying off the waters. There was evidence tending to show that at different times this ditch was cleaned out by the section men so as to admit of the passage of the waters, and that Slavens himself had sometimes been engaged in that work. There was also testimony tending to show that for some time prior to the accident it had not been cleaned out, and that it had become obstructed by leaves, logs, and trees, and that such obstruction resulted in so soaking the bank with water as to cause the slides in question. The first slide—and the one that caused the stoppage of the train, and the consequent calling, by the blasts of the engine, of the section men to its aid—was a small one, of some 10 or 12 feet in width, and a couple of feet in depth. When Slavens and Hughes came up to the train, they at once commenced shoveling the earth and débris from the track; and, finding a stump on the track, the engine was, under the direction of the conductor, hitched to it, and it was pulled off. The crew of the train had lanterns which threw what light they could, but the night was very dark. At the trial the conductor of the train was called as a witness on behalf of the defendant, and after testifying that Slavens and Hughes, upon coming up to the slide, looked it over, and then went to work cutting the brush and shoveling the dirt, while he held a lantern, that they might, by means of it and the headlight of the engine, see to work, was asked whether he had a conversation with Slavens while he was so engaged in the work, and, having answered in the affirmative, was permitted, against the objection of the plaintiff, to give this answer:

"I asked him if there was not danger of another slide coming down and putting us all into the river. He said, 'Yes,' and kind of laughed, smiled,—kind of joshing, we were. He said, 'Yes;' we would expect that at any time; that he had worked there before, and we could expect that at any time. I said, 'If that is the case, I guess I will move out of this mud, to where I can have safe footing.' "

The witness was then asked, and testified, as follows:

"Q. What did you do? A. I moved out. Q. What did he do? A. He went on working. I had hardly got out of the mud until I heard a crashing and a cracking, and started to run, and the slide passed right between back of myself and my brakeman. The brakeman was near me,—in the same vicinity. The second slide is the one that swept Mr. Slavens and Mr. Hughes into the river."

The action of the court below in permitting the conductor to testify to this conversation with Slavens constitutes the first ground relied upon by the plaintiff in error for a reversal of the judgment. The other grounds relied upon by the plaintiff in error, apart from the contention that the verdict of the jury was unsupported by and contrary to the evidence, grew out of the charge of the court to the jury. It was, in part, as follows:

"The degree of care and prudence which an employer owes his employé is that degree of ordinary care and prudence which a person of ordinary intelligence and prudence will naturally, and does usually, exercise for his own safety. It is the duty of an employer to have all the appliances for doing his work inspected, and kept in a condition fit for use, and so that they can be used with safety. And the place where an employé is set to work should be looked after, and, as far as may be, kept in a condition of safety, so that the men can work there with safety. It is not a rule which requires an employer

to do an impossible thing, or to insure the absolute safety of an employé against injury that may happen to him if he is set to work in a dangerous place. It is necessary for employers operating works in mountainous places or near rivers to employ men to do the very work that is necessary to make the places safe to the employés who engage in the service, and the employé who engages in that service assumes certain risks. Now, the risks which an employé does assume himself are of two classes: One class is that of those risks which are ordinarily incident to the employment in which he engages,—the ordinary risks which are incident to the employment the employé takes upon himself. The other class of risks are those which are known to the employé, or which are obvious, or should be known to him if he exercises due care for his own safety. If an employer has allowed his machinery or appliances to get out of repair, so that they are dangerous to handle, or sends an employé into a dangerous place, that might be safe if due care had been exercised, if that is a danger which is out of the ordinary, still the employé assumes that risk, if he voluntarily goes there with the knowledge that the danger exists, or if that danger is so obvious that in the exercise of his faculties he could know it. So that this defendant is not liable in this case for any result happening to Mr. Slavens for going to work in a dangerous place, if the evidence shows that the danger was simply the kind of danger that was necessarily incident to his employment, or if it was out of the ordinary; if it was a danger that was actually known to him, or was obvious to him,—that the risk was assumed by him,—and there is no liability of this defendant company in this case to pay damages. If, on the other hand, it appears to you from the evidence in the case that the defendant railway company was negligent, and that by reason of its negligence a danger existed, which was unknown or was not obvious to Mr. Slavens, and that, by reason of his being engaged in work exposed to that danger, the accident happened as a necessary result of the negligence of the company, so that that negligence can be considered as the proximate cause of the injury, then the defendant company is liable, and the plaintiff is entitled to a verdict at your hands for such damages as in your estimation will be reasonable compensation to her for the loss.

"The only wrongs that are charged on the part of the railway company, which can be considered by you in this case, are the particular wrongs which are mentioned in the complaint. The complaint charges that the railway company was negligent in allowing a bluff along which the track is situated, and along the bank of the Cowlitz river, to become in an unsafe and dangerous condition by reason of neglect on the part of the company, and the evidence in this case is directed to proving that the negligence—the particular negligence —consists in neglecting to keep open a ditch for drainage of the water out of the hill. That is the question which is submitted to the jury,—whether there was neglect on the part of the railway company in that particular; and, if you find that there was negligence in that particular, then you must go on and consider and determine the question whether or not that negligence was the cause of Mr. Slavens' death, and in that connection will take into consideration and account the fact that the slide—the landslide that occurred there before Mr. Slavens commenced to work at that place at removing the material from the track—was not the cause of his death. The slide that occurred before he went there is not of itself the cause of his death, and the danger created by reason of that slide was necessarily obvious to him. While he was at work, as the evidence shows, there was a further come-down of material from the bluff, and it was that which carried him out into the river. Now, the question for you to determine is whether the continuation of the sloughing of the bluff was caused directly or proximately by the failure of the railway company to keep the ditch open and free, so as to drain the water out of the hill.

"Another wrong that is charged in this complaint against the railway company is in not having a sufficient force of men at work in removing the earth and material from the track at that place, and to keep watch of coming danger to the men that were at work. Now, I instruct you, as a matter of law, in this case, the railway company is not liable for that neglect, and for this reason: Mr. Slavens necessarily had knowledge of any lack of a sufficient force of men to work, or of watchmen to give warning, at the time he went

to work, and there is no evidence that there was any such coercion exerted upon him that he was compelled to go there. He must be understood to have gone to work at that place at that time voluntarily, and with full knowledge on his part of any neglect of the company in not having a sufficient force of men there at that time, if, indeed, there was any such neglect, so that he must be understood as having assumed that risk. That is one of the risks or dangers that was known to him.

"Another charge against the company of wrong is in the failure to give Mr. Slavens warning of that danger. In the argument to the jury in this case, counsel have charged Mr. Cochran, the conductor of the freight train, with culpability in not warning Mr. Slavens that there was danger in working in that place. Now, it is clear that Mr. Slavens himself was as well informed, if not better informed, in regard to that danger, as was Mr. Cochran, the conductor who run the train. Also, the contention is made that for the time being, in the work of removing the material and earth from the track, he was the foreman of that work, and the representative of the railway company, and acting in the capacity of a vice principal. There is no more reason for supposing that he had knowledge of the condition of things on the bank above, that were out of view from the track, or that he knew of the existence of any basin or gathering of water upon the hill above, or of there being an insufficient drain, than that the trackmen who walked the track had such knowledge. That ground for charging the railway company with neglect (that is, failure on the part of Mr. Cochran to warn him of any danger) is not sufficient. The question that is submitted to you goes back of that, and it is for you to consider whether there was any neglect on the part of the railway company to have in a superintending position a man competent to keep watch of the condition of the right of way, and to give warning of any known dangerous condition by reason of a lack of proper drainage, and whether there was on the part of the defendant any failure to properly inform the men who were required to go to work, when suddenly called upon in the nighttime, of any peculiar or unusual condition of things that would be liable to result in an injury to them. If the rules of the company had made it the duty of the roadmaster or foreman of the section gang, and either one of those officers neglected that duty, you may consider that as a question to be decided in this case,—whether or not there was in that particular a failure to give warning which would amount to a breach of duty on the part of the railway company to exercise ordinary care and prudence in warning its employés against dangers that were unknown to them."

The conversation between the conductor and the deceased was objected to on two grounds: First, because of statutory incompetency; and, secondly, because of irrelevancy and immateriality.

By section 858, Rev. St., it is provided that:

"In the courts of the United States, no witness shall be excluded in any action on account of color, or in any civil action because he is a party to, or interested in the issue tried: provided, that in actions by or against executors, administrators, or guardians, in which judgment may be rendered for or against them, neither party shall be allowed to testify against the other as to any transaction with, or statement by, the testator, intestate, or ward, unless called to testify thereto by the opposite party, or required to testify thereto by the court. In all other respects the laws of the state in which the court is held shall be the rules of decision as to the competency of witnesses in the courts of the United States, in trials at common law, and in equity and admiralty."

A statute of the state of Washington provides that:

"No person offered as a witness shall be excluded from giving evidence by reason of his interest in the event of the action as a party thereto, or otherwise; but such interest may be shown to affect his credibility; provided, however, that in an action or proceeding where the adverse party sues or defends as executor, or administrator, or legal representative of any deceased person, or as deriving right or title by, through, or from any deceased person,

or as the guardian or conservator of the estate of any insane person, or of any minor under the age of fourteen years, then a party in interest, or to the record, shall not be admitted to testify in his own behalf as to any transaction had by him with, or any statement made to him by any such deceased or insane person, or by any such minor under the age of fourteen years." 2 Hill's Code, § 1646.

Even if the exception to the general rule declared in the United States statute above quoted could be extended by any act of a state,—which cannot be done (Potter v. Bank, 102 U. S. 163; King v. Worthington, 104 U. S. 44; Goodwin v. Fox, 129 U. S. 601, 630, 631, 9 Sup. Ct. 367),—still the statute of the state of Washington did not render the witness incompetent, for the simple reason that the conductor was not a party to the record, nor, in any legal sense, interested in the case. The conversation testified to by him was clearly a part of the res gestæ, and both material and relevant. "Declarations which are the natural emanations or outgrowths of the act or occurrence in litigation," said the court in the case of Railway Co. v. Buck (Ind. Sup.) 19 N. E. 453, "although not precisely concurrent in point of time, if they were yet voluntarily and spontaneously made so nearly contemporaneous as to be in the presence of the transaction which they illustrate and explain, and were made under such circumstances as necessarily to exclude the idea of design or deliberation, must, upon the clearest principles of justice, be admissible as part of the act or transaction itself." The declarations of the deceased, as testified to by the conductor, tended to show that he was apprised of the dangerous position in which he was working. But it is contended on the part of the plaintiff in error that the conductor ordered the deceased into this place of danger, and in doing so stood in the place of the railroad company, that there was a hidden danger in the bank, and that as it would have been the duty of the master to have warned the deceased of such hidden danger, if personally present, directing the work, it was equally the duty of the conductor. This contention is based on rule 460 of the defendant company, which declares, as has been seen, that "foremen, and men in their employ, must at all times hold themselves in readiness to aid the passage of trains, and, in case of accident or delay, will obey the orders of the conductor." This rule provides for emergencies. It was no part of the duty of the conductor to know anything about the ditch on the bluff, or the condition of the bank. In the nature of things, he could not know as much about their safety as the deceased, to whom, in part, their care was expressly committed by the company's rules under which he was working. By rules 455, 461, and 472, the duty of keeping in order the road, right of way, etc., was imposed upon the roadmaster and section men, each of whom was a fellow servant of the deceased, and for whose neglect the company was not answerable. At most, the conductor, in the matter in question, was a mere temporary boss; and even if it be conceded that it was his duty to have gone upon the bank and bluff, and reported their condition to the deceased, his failure to do so would likewise be the negligence of a fellow servant, for which the common employer is not responsible. Mining Co. v. Whelan, 168

U. S. 86, 18 Sup. Ct. 40; Martin v. Railroad Co., 166 U. S. 399, 17 Sup. Ct. 603, and cases there cited.

It is also contended on the part of the plaintiff in error that the court below erred in instructing the jury that the defendant company was not liable for its alleged failure to have a sufficient force of men to remove the obstruction from its track, and to keep watch of danger to the men that were at work. There was no evidence of any failure on the part of the company to furnish all the men that were needed for the proper operation and protection of the road, including the proper protection and preservation of the bank. On the contrary, the testimony of the foreman of the section on which the accident occurred was to the effect that he was given as many laborers to perform section duty as he required; that on the night of the accident he sent out the number of men he thought necessary to perform the requisite duty, which they were doing in the ordinary and customary way at the time the slide in question occurred. It was usual, according to the evidence in the case, for the foreman to send out the track walkers in pairs, which was done on that occasion. Slavens and Hughes knew that they constituted the usual force, and when they were called to the assistance of the train, and found it impeded by a slide, it was their duty to inquire into their surroundings, and they must be held to have assumed the risk of the situation in which they voluntarily placed themselves. Tuttle v. Railway Co., 122 U. S. 189, 7 Sup. Ct. 1166; Southern Pac. Co. v. Seley, 152 U. S. 145, 14 Sup. Ct. 530; Railway Co. v. Jackson, 12 C. C. A. 507, 65 Fed. 48, and cases there cited.

We would not be justified in holding the verdict contrary to the evidence, and are of the opinion that the plaintiff in error has no just ground to complain of the instructions of the court below. The judgment is affirmed.

MUTUAL LIFE INS. CO. OF NEW YORK v. HILL et al.

(Circuit Court of Appeals, Ninth Circuit. October 2, 1899.)

No. 518.

1. LIFE INSURANCE—PLACE OF CONTRACT.
   Where an insurance company in the state of New York issued a policy upon an application made at, and forwarded from, the company's office in the state of Washington, and proof of death and payment thereunder were to be made to and by the New York office, the policy is a New York contract.

2. SAME—FORFEITURE OF POLICY—NONPAYMENT OF PREMIUMS—WAIVER OF STATUTORY REQUIREMENTS.
   Laws N. Y. 1877, c. 321, § 1, providing that no insurance company shall declare a policy forfeited for nonpayment of premiums without having first given the assured 30 days' notice that the premiums were due, and that the policy would be forfeited if they were not paid, is mandatory, and cannot be waived by either or both the parties.

3. SAME—PLEADING.
   In an action on a policy of insurance on which no premiums had been paid for several years, and the policy states that it is forfeited on failure by assured to pay premiums when due, but there is a statute providing that the company shall not declare a policy so forfeited unless it has

given the assured certain notice, it is not a departure for plaintiff to plead the contract of insurance and a compliance therewith, and depend upon the statute.

4. SAME—JUDICIAL NOTICE.
The United States courts take judicial notice of the statutes of the several states.

5. SAME—ESTOPPEL.
Plaintiff is entitled to recover on a contract of insurance made in New York, on which the premiums had not been paid for several years, and the contract provided that the policy was forfeited on the failure to pay premiums when due, where the insurance company had not complied with Laws N. Y. 1877, c. 321, § 1, providing that no insurance company could declare a policy forfeited for nonpayment of premiums without giving assured certain notice; and it is immaterial that the plaintiff has not paid or offered to pay the premiums due.

6. SAME.
Since Laws N. Y. 1877, c. 321, § 1, providing that no insurance company shall declare a policy forfeited by nonpayment of premiums without having given the assured certain notice, is mandatory, and cannot be waived by either party, the beneficiaries under a policy are not estopped from claiming payment by an attempted waiver of the statute by the assured.

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

This action was brought by the children of George Dana Hill, in their own name where of age, and by their guardian where under age, to recover the amount of a policy of insurance upon the life of their deceased father. The amended complaint alleged that on April 29, 1886, in consideration of the sum of $814 paid by George Dana Hill, the insurance company (plaintiff in error herein) made and delivered to him, in the city of New York, a policy upon his life; the insurance to be paid to his wife, if living at his death, or, in case of her death before that time, to their children. This policy of insurance is set forth in the complaint, and reads as follows: "In consideration of the application for this policy, which is hereby made a part of this contract, the Mutual Life Insurance Company of New York promises to pay at its home office, in the city of New York, unto Ellen Kellogg Hill, wife of George Dana Hill, of Seattle, in the county of King, Washington territory, for her sole use, if living, in conformity with the statute, and, if not living, to such of the children of their bodies as shall be living at the death of the said wife, or to their guardian, for their use, twenty thousand dollars ($20,000), upon acceptance of satisfactory proofs at its said office of the death of the said George Dana Hill during the continuance of this policy, upon the following condition, and subject to the provisions, requirements, and benefits stated on the back of this policy, which are hereby referred to and made part hereof. The annual premium of eight hundred and fourteen dollars ($814) shall be paid in advance on the delivery of this policy, and thereafter to the company, at its home office, in the city of New York, on the twenty-ninth day of April in every year during the continuance of this contract. * * *" Upon the back of this policy are provisions to the effect that, while the payments are due and payable at the home office, they will be accepted elsewhere, when made in exchange for the company's properly signed receipt, that notice that each and every such payment is due at the date named in the policy is given and accepted by the delivery and acceptance of this policy, and that any further notice required by any statute is expressly waived. It is alleged in the complaint that the application for insurance contained the following agreement: "It is agreed that there shall be no contract of insurance until a policy shall have been delivered and issued by said company, and the first premium thereon paid, while the person proposed for insurance is in the same condition of health described in this application." It is further alleged in the complaint: "That on the 23d day of December, 1890, the defendant was notified of the death of said George Dana Hill, and requested to furnish plaintiffs necessary blanks, in

order that plaintiffs might furnish proofs of death as required by the rules and regulations of defendant company; that on the 3d day of February, 1891, said defendant, in reply thereto, informed and declared to said plaintiffs that said contract or policy of insurance above set forth had been forfeited by the nonpayment of a premium; that said defendant thereby waived the right to claim any other, or any, proofs of the death of said George Dana Hill; that said George Dana Hill during his lifetime duly performed all the conditions of said contract necessary by him to be performed; that the defendant has wholly failed to pay to plaintiffs said policy of insurance, or said sum of twenty thousand dollars ($20,000), or any part thereof."

The answer to the amended complaint admits the issuance of the policy, but denies that it was delivered in the city of New York, or any place outside of the state of Washington. It denies all allegations of performance of the conditions of the contract on the part of the insured. Three affirmative defenses are pleaded to the amended complaint. The first alleges that the insurance company was transacting its business, at the time the policy was issued, in the state of Washington, having its principal office at Seattle, in said state; that it had complied with the laws of the state relative to foreign corporations transacting business in it; that, before the time of and subsequent to the taking out of the insurance, George Dana Hill was a citizen and resident of the territory and state of Washington; that at Seattle he made his application for the insurance; that this application was transmitted to the agent of the insurance company at San Francisco, and by him to the insurance company in the city of New York; that the insurance company, pursuant to the application, made the policy mentioned in the amended complaint, and sent it to the agent at San Francisco, who afterwards transmitted it to the agent in Seattle, and that there the first premium was paid, and the policy delivered to the insured; that there became due on the policy April 29, 1887, a premium of $814, which has never been paid, but both the insured and the beneficiary refused to make payment of any part of it, and from that time forth until the death of the insured nothing whatever had been paid on account of any of the premiums; that the policy became void upon such default and refusal. The second affirmative defense alleged that at a time more than one year from the time of the issuance of the policy mentioned in the complaint, and during the lifetime of the said George Dana Hill, it was mutually agreed between the defendant and the said George Dana Hill that the said contract of insurance should be waived, abandoned, and rescinded, and the said George Dana Hill and the defendant then by mutual consent waived, abandoned, and rescinded the same accordingly, and all their mutual rights and obligations therein and thereunder. The third affirmative defense, after stating the provisions of the contract, alleged that the plaintiffs and each of them should be and are estopped from and should not be permitted to allege or prove that defendant did not mail, or cause to be mailed, or otherwise give to said George Dana Hill, a notice stating the amount of premium due on said policy on April 29, 1887, or at any other time, with the place where the same should be paid, the person to whom the same is payable, and stating that, unless the premium then due should be paid to the company or its agents within 30 days after the mailing of such notice, the policy and all payments made thereon should become forfeited, or any other notice prescribed by any statute or statutes of the state of New York, or any other notice than that hereinafter mentioned, for that shortly prior to and after and on said 29th day of April, 1887, said defendant, in writing, and also personally, notified and informed the said George Dana Hill, at said city of Seattle, that the premium of $814 necessary to be paid on said policy for the continuance of this policy of insurance was due and payable; that said defendant duly demanded payment of said premium in said sum, and at the same time and place tendered the receipt of the defendant therefor, duly signed by its president and secretary; that the said Hill, being fully so informed and advised in the premises, refused to make payment of this premium, or any part thereof, and then and there, intending and for the purpose of inducing the defendant to rely upon the same, informed the defendant that he, the said George Dana Hill, was unable to pay such premium, and did not intend to make payment thereof, or of any premium thereafter to accrue on said policy of in-

surance, but, on the contrary, he intended to allow the said policy to lapse and become forfeited for want of payment of said premium, or any future premium accruing on said policy; that the said defendant, then and there and ever since relying upon the said representation and conduct on part of the said George Dana Hill, was thereby induced to, and did, declare the said policy and contract of insurance forfeited and abandoned; and that, in good faith relying upon said conduct and representations on the part of the said George Dana Hill, defendant was induced to, and did, fail and abstain from giving or mailing any notice, whether prescribed by statute or otherwise, to the said George Dana Hill, or to any person interested in said policy, concerning the payment of any premium thereon.

A demurrer was interposed to each of these defenses on the ground that each of them failed to state facts sufficient to constitute a defense to plaintiffs' amended complaint. Upon argument, each of these demurrers was sustained, and exceptions taken by the defendant. The plaintiff in error elected to stand upon its pleadings, and declined to plead further. Thereupon the defendants in error moved the court for judgment, and the court granted the motion, against the exceptions of the plaintiff in error, and rendered a judgment against the insurance company for $24,086.61, with interest from the date of the judgment, and costs.

The statute of New York regulating the forfeitures of life insurance policies, as amended May 23, 1877, provides as follows:

"Section 1. No life insurance company doing business in the state of New York 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 such 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, or the assignee of the policy, if notice of the assignment has been given to the company, at his or her last known post office address, postage paid by the company, or by an agent of such company, or person appointed by it to collect such premium. Such notice shall further state that unless the said premium or interest then due shall be paid to the company or to a duly appointed agent or other person authorized to collect such premium within thirty days after the mailing of such notice, the said policy and all payments thereon will become forfeited and void. 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 therein contained 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. 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.

"Sec. 2. The affidavit of any one authorized by section one to mail such notice, that the same was duly addressed to the person whose life is assured by the policy, or to the assignee of the policy, if notice of the assignment has been given to the company, in pursuance of said section, shall be presumptive evidence of such notice having been given." Laws 1877, c. 321.

Edward Lyman Short, John B. Allen, and R. C. Strudwick (Struve, Allen, Hughes & McMicken and Strudwick & Peters, of counsel), for plaintiff in error.

S. Warburton (Eben Smith, of counsel), for defendants in error.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

HAWLEY, District Judge, after stating the facts as above, delivered the opinion of the court.

This action was brought upon a policy of insurance issued by the plaintiff in error, April 29, 1886, insuring the life of George Dana Hill for $20,000, upon which the first annual premium of $814 was paid when the policy was delivered. No other premiums were ever paid or tendered upon this policy. No notice was ever given by the insurance company to the insured as required by the laws of the state of New York to the effect, among other things, that unless the said premium or interest due on said policy shall be paid the company within 30 days after the mailing of such notice, "the said policy and all payments thereon will become forfeited and void." On December 4, 1890, George Dana Hill died. His surviving beneficiaries under the policy are defendants in error. Judgment was entered in their favor upon the pleadings on January 18, 1899, for $24,086.61, with interest and costs. The policy of insurance, and all the circumstances in relation thereto and in connection therewith, and all the facts concerning the action of the court in sustaining the demurrer of the defendants in error and ordering judgment, are set forth in the statement of the case. There is no controversy as to the facts. The determination of the case rests solely upon the principles of law that are to be applied to the facts. These are important, and deserving of careful, painstaking, and deliberate consideration.

It is contended by the plaintiff in error that the court erred in holding that the contract is to be governed by the statute of the state of New York. This question is not a new one in this court. It has been twice before presented, discussed, considered, and decided. Society v. Nixon, 26 C. C. A. 620, 81 Fed. 796; Same v. Trimble, 27 C. C. A. 404, 83 Fed. 85. After due deliberation upon the facts, and careful examination of the authorities, this court arrived at the conclusion that the contract there in question—which, in so far as the legal principles are involved, cannot be distinguished from the facts of this case—was a new York contract; citing in support thereof Wayman v. Southard, 10 Wheat. 48; Pritchard v. Norton, 106 U. S. 124, 136, 141, 1 Sup. Ct. 102; Bank v. Hume, 128 U. S. 195, 206, 9 Sup. Ct. 41; Coghlan v. Railroad Co., 142 U. S. 101, 109, 12 Sup. Ct. 150; Hall v. Cordell, 142 U. S. 116, 120, 12 Sup. Ct. 154.

In Society v. Nixon, as in this case, it was contended that the statement made by the insured, when requested to pay the premium due upon the policy, that he did not intend to keep the policy in force, amounted in law to a waiver on the part of both the insured and the company, of the notice required to be given by the statute of New York. Replying to this contention, the court said:

"That the statute of New York prescribes the condition upon which a policy may be forfeited for the nonpayment of a premium. The statute is mandatory, and controls the contract. Its provisions are not subject to be set aside or waived either by the company or the assured, or by both together. Society v. Clements, 140 U. S. 226, 233, 11 Sup. Ct. 822; Hicks v. Insurance Co., 9 C. C. A. 215, 60 Fed. 690; Griffith v. Insurance Co. (Cal.) 36 Pac. 117; Warner v. Association, 100 Mich. 157, 58 N. W. 667."

Entertaining no doubt of the correctness of the conclusions therein reached, we respectfully decline to further discuss the same identical questions. It is enough to say that we adhere to the views therein expressed.

It is next contended by the plaintiff in error that the judgment of the circuit court should be reversed because it is rendered, not upon the cause of action alleged in the amended complaint, but upon a cause of action entirely different, in its scope, effect, and meaning, from the one alleged in the complaint; that, in point of fact, the right of the plaintiffs in the action to recover must be determined by the allegations of their complaint; that courts should not permit them to allege one ground of recovery in their complaint, and then afterwards to rely upon another ground; that to permit such a course constitutes a departure not recognized by the law; that it is equally a departure where the plaintiffs bring an action relying upon the common or general law, and then attempt to recover by virtue of a statute; that the one is a departure from fact to fact, the other a departure from law to law. To quote from counsel's brief:

"A party who pleads a specific contract, and performance on his part of its conditions, as his right to recover, is not permitted, after performance has been controverted, to confess his noncompliance, and shift his right of recovery to an unpleaded statute of a foreign state, and assert noncompliance with its provisions on the part of defendant, and adopt the defendant's noncompliance with the unpleaded statute as his own excuse for noncompliance with the conditions of the contract alleged in his complaint. The right of action alleged and abandoned is the act of the party; that not alleged, but relied upon, is the act of the legislature of New York. With performance of the conditions alleged, the right of action is perfect, regardless of the New York statute. Without performance of the conditions alleged, there is no right of action whatever, unless it can be established through the statute of New York. If the statute of New York, instead of performance of the conditions of the contract by defendant in error, affords the ground of recovery, then pleading of the statute is indispensable."

In line with this contention, it is also argued by the plaintiff in error that the defendants in error were not entitled to judgment after the demurrer had been sustained to the affirmative answers and defenses, because issue was joined upon the allegations of performance of the conditions precedent on the part of the insured, entitling defendants in error to a recovery. Of course, the complaint should allege the actual performance of every condition precedent to the plaintiff's right of recovery. The rights of the parties must be determined upon the facts which are put in issue by the pleadings. There is always a departure when a party quits or departs from the case which he first made, and has recourse to another, and the court is not justified in rendering judgment in favor of a plaintiff not warranted by the facts set forth in his pleadings. The general principles of law contended for by counsel are undoubtedly correct. But, in so far as it is sought to apply them to the case in hand, it becomes our duty to carefully consider the allegations of the complaint, and therefrom, in connection with the affirmative defenses set up in the answer, determine whether or not the court erred in rendering judgment upon the pleadings.

In the first place, the cases cited and relied upon by the plaintiff in error are clearly distinguishable in their facts from the case at bar, in this: that the plaintiff's right of recovery therein rested solely upon another separate and distinct cause of action from the one stated in their complaint. In the present case the right of the defendants in error to recover is based exclusively upon the contract set out in their complaint, to wit, the policy of insurance The cause of action set out in the complaint was based upon the identical facts upon which the court gave judgment. There was therefore no departure in this case either from fact to fact, or from law to law, and hence the principle contended for has no application to this case. There was no necessity for the defendants in error to plead the statute of New York. The United States courts take judicial notice of all the public statutes of the several states. Moreover, the question of forfeiture was solely a matter of defense. It is not considered good pleading to anticipate matters of defense.

In the second place, the complaint did not allege that the insured had, during his lifetime, complied with each and every covenant on his part to be performed. The allegation is "that said George Dana Hill during his lifetime duly performed all the conditions of said contract necessary by him to be performed." The natural effect and legal conclusion to be drawn from this averment are that he had only done those things which he was required to do in order to keep the policy alive, of binding force and effect, and to show that it was an existing, valid contract at the time of Hill's death, and that he had not during his lifetime done any act, or failed to perform any act, that forfeited his rights under said policy, or which would in any manner deprive the beneficiaries of their rights thereunder. There is no allegation in the complaint that the insured paid any other than the first premium. The position taken by the defendants in error was that it was only necessary for them to show this fact in order to entitle them to recover. They never made any departure from this position. They never claimed that they had any right to recover upon any other ground. They recovered upon that ground alone. This was their first, last, and only contention.

The affirmative matters alleged in the answer constituted no defense to the cause of action alleged in the complaint. The contract of insurance became complete upon the payment of the first premium. It was kept alive by the provisions of the statute of New York, because the contingency of forfeiture, as therein provided for, had not happened. The contract is to be read in the light of the statute, the same as if the statute had literally been incorporated in the policy. It was not essential to the right of recovery herein that the defendants in error should have paid, or tendered payment of, the premiums due on the policy before commencing the action. When Hill died the relation of debtor and creditors existed between the insurance company and the beneficiaries named in the policy. The unpaid premiums, with legal interest from the date they became payable, constituted a claim on

behalf of the insurance company to be deducted when the company paid the amount due on the policy; thus leaving it in precisely the same situation in which it would have been if the premiums had been paid when they became due. The complaint stated a good and complete cause of action. There could not be any forfeiture of the policy unless the insurance company in its answer alleged, and, if a trial was had, proved, nonpayment of a premium due, after regular service of the notice of nonpayment as required by the statute. Carter v. Insurance Co., 110 N. Y. 16, 17 N. E. 396; Phelan v. Insurance Co., 113 N. Y. 147, 20 N. E. 827; Baxter v. Insurance Co., 119 N. Y. 450, 23 N. E. 1048; De Frece v. Insurance Co., 136 N. Y. 144, 32 N. E. 556; Griesemer v. Insurance Co., 10 Wash. 203, 38 Pac. 1031; Griffith v. Insurance Co., 101 Cal. 627, 642, 36 Pac. 113; Osborne v. Insurance Co. (Cal.) 56 Pac. 616; Hicks v. Insurance Co., 9 C. C. A. 215, 60 Fed. 690, 692; Mullen v. Insurance Co. (Tex. Sup.) 34 S. W. 605.

The plea of estoppel, as set forth in the third affirmative defense, is but another name for waiver. There is no question concerning the plea of estoppel that can be distinguished from the question as to the plea of waiver. As the parties could not waive the requirements of the statute as to the manner in which the policy could be forfeited, how could the beneficiaries, who had vested rights therein, be devested of such rights, except in the manner provided by law? They certainly could not be bound by any declarations which their father may have made in his lifetime to any agent or officer of the insurance company as to his inability to pay the premium then due upon the policy, or that he did not intend to pay that or any future premium, or that the insurance company might consider the policy forfeited without giving the notice specified in the statute. To so hold would entirely abrogate the provisions of the statute and of the policy. As was said by the court in Baxter v. Insurance Co.:

"When the provisions of this statute are adopted in a contract of insurance, for the purpose of modifying the forfeiture clause and the other strict conditions contained therein, then the clause and these conditions should be so construed as to give to the assured the full benefit contemplated, without altering any other provision of the policy, if this can be done without violating any rule of law."

The judgment of the circuit court is affirmed, with costs.

BOARD OF COM'RS OF LAKE COUNTY, COLO., v. SUTLIFF.

(Circuit Court of Appeals, Eighth Circuit. October 9, 1899.)

No. 1,135.

1. MUNICIPAL BONDS—RIGHTS OF TRANSFEREE FROM BONA FIDE PURCHASER.
A transferee from a bona fide purchaser of negotiable municipal bonds takes all the rights of the transferror, and may invoke every presumption and estoppel from their recitals to sustain their validity that such transferror might, although he takes them as a gift or advancement, after maturity, and with notice of alleged defenses.

2. SAME—ACTION ON COUPONS—EFFECT OF FORMER JUDGMENT AS ADJUDICATION.
An action on coupons from municipal bonds is not upon the same cause of action as a former action on different coupons from the same bonds, and hence the judgment in the first action renders res judicata in the second only such issues as were actually raised, litigated, and determined in the first suit.

3. APPEAL—REVIEW IN LAW ACTIONS—QUESTIONS NOT PRESENTED TO TRIAL COURT.
In an action at law, the circuit court of appeals is a court for the correction of errors of the trial court exclusively, and questions which were not presented to, or decided by, that court are not open for review.

4. SAME—QUESTIONS PRESENTED BY RECORD.
An exception to a peremptory instruction, directing a verdict for plaintiff and an assignment of error thereon, presents no question for review, where the record does not contain all the evidence.

5. MUNICIPAL BONDS—EFFECT OF RECITALS—CONSTITUTIONAL LIMITATIONS.
A certificate or recital in negotiable municipal bonds, by officers authorized to determine the question and to make the recital, that a constitutional limitation has not been exceeded or that a constitutional condition has been fulfilled, raises an estoppel in favor of a bona fide purchaser as conclusive as a recital or certificate of like effect relative to a statutory limitation or requirement.

6. SAME.
Such recitals estop the corporation, as against a bona fide holder, from defeating the bonds on the ground that the recitals are false, unless notice of the fact was given to the buyer by the face of the bonds, or by some public record which was prescribed by the constitution or by the act under which the bonds were issued as a test of the limitation or condition.

7. SAME.
When the constitution or the act under which the bonds are issued prescribes the public record which furnishes the test of compliance with the limitation, the purchaser is charged with notice of its contents, but is not required to look beyond it; and, if that record fails to show a violation of the limitation, he may rely upon the presumption that the officers faithfully discharged their duty when they issued the bonds, and upon the recitals which they contain, and the corporation will be estopped from proving other records or facts to overthrow them.

8. SAME—PUBLIC RECORD AS NOTICE—FAILURE TO COMPLY WITH STATUTE.
The Colorado act of March 24, 1877 (Laws 1877, p. 218 et seq.), authorized counties to issue negotiable bonds for certain purposes and on certain conditions, within the constitutional limitation as to indebtedness. Section 30 required the commissioners to make out, publish, and cause the clerk to record, in a book kept by him for that purpose only, and open at all times to public inspection, semiannual statements, showing "the amount of the debt owing by their county," with other material facts and details relating thereto. *Held*, that where the clerk of a county kept no such book, and no statements containing the facts required by the statute were made and recorded, a purchaser of bonds issued by the commissioners, containing recitals that they were issued in conformity to the statute, was authorized to rely on such recitals, which the county was estopped to contradict by other records, for the purpose of showing that the bonds were issued in excess of the constitutional limit of indebtedness.

9. SAME—ACTION ON COUPONS—EVIDENCE.
In an action on coupons from county bonds, the defense being that the bonds were issued in excess of the permissible indebtedness of the county, the refusal to admit in evidence the assessed valuation of the taxable property of the county next preceding the date of their issuance, and by which the limit of its indebtedness at that time was measured, was not error, where the previous evidence had made it clear that, by failing to keep a record of its indebtedness as required by statute, the county was estopped to deny the recitals in the bonds, and the valuation, therefore, became immaterial.

10. STIPULATIONS—CONSTRUCTION—EFFECT IN SUBSEQUENT SUIT.
A stipulation of facts made by attorneys on the trial of an action is not binding upon either party in a subsequent action.

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

C. S. Thomas (George R. Elder, W. H. Bryant, and H. H. Lee, on the brief), for plaintiff in error.

Edmund F. Richardson (Thomas M. Patterson and Horace N. Hawkins, on the brief), for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

SANBORN, Circuit Judge. This is an action brought by James R. Sutliff, the defendant in error, against the board of county commissioners of the county of Lake, in the state of Colorado, to recover the amount due upon coupons numbered 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, and 20, which were cut from ten road bonds that were issued by the plaintiff in error on July 1, 1881, after a favorable vote of the electors of the county, in accordance with the provisions of the act of the legislature of the state of Colorado approved March 24, 1877, entitled "An act concerning counties, county officers and county government and repealing laws on these subjects." Gen. Laws Colo. 1877, p. 218. The defenses to the coupons were that the question of their validity was rendered res adjudicata by a judgment in favor of the county which was rendered in the court below and was affirmed by the supreme court in an action which was brought by John Sutliff, the father of the defendant in error, on September 26, 1889, upon coupons numbered 1, 2, 3, 4, 5, 6, 7, and 8, cut from the same road bonds (Sutliff v. Commissioners, 147 U. S. 230, 13 Sup. Ct. 318), and that the bonds and coupons were void because they were issued when the debt of the county exceeded the constitutional limitation upon it. The case was tried to a jury. John Sutliff originally purchased the bonds and coupons without notice of any defect in, or defense to, them, and paid for them more than their par value. After some of the coupons in suit had become due, and after the defense that they were issued in violation of the constitutional limitation had been made to some of them, he gave the bonds and the coupons now in question to the defendant in error, who is his son, as an advance of a part of his share of his estate. The bonds contained this recital:

"This bond is one of a series of five thousand dollars which the board of county commissioners of said county have issued for the purpose of constructing roads and bridges, by virtue of, and in compliance with, a vote of a majority of the qualified voters of said county, at an election duly held on the 7th day of October, A. D. 1879, and under and by virtue of, and in compliance with, an act of the general assembly of the state of Colorado entitled 'An act concerning counties, county officers and county government and repealing laws on these subjects,' approved March 24th, A. D. 1877; and it is hereby certified that all the provisions of said act have been fully complied with by the proper officers in the issuing of this bond."

At the close of the trial, the court below held that the question of the validity of coupons numbered 8 was res adjudicata, because

they were sued upon by John Sutliff in his action in 1889, but that the other coupons upon which this action was founded constituted new causes of action; that, under the evidence in this case, the plaintiff in error was estopped by the recitals in the bonds from defeating these coupons on the ground that the bonds or the coupons were issued when the debt of the county was in excess of the constitutional limitation; and that the jury must return a verdict for the defendant in error upon all the coupons described in the complaint except those numbered 8. The jury was instructed accordingly, and a verdict was returned and a judgment rendered against the county.

It is assigned as error that the trial court held that the defendant in error was a bona fide purchaser of the bonds, who could rely upon the estoppel of the recitals therein. It is said that he paid nothing for them; that he received them as a gift; that some of the coupons were past due when he obtained them; and that he knew at that time that the county was defending an action upon other coupons upon the grounds relied upon in this action. Let all this be conceded. Still, the father of the defendant in error, John Sutliff, was a bona fide purchaser of these bonds and coupons, without notice of any defects in, or defenses to, them, and "a bona fide holder of commercial paper is entitled to transfer to a third party all the rights with which he is vested, and the title so acquired by his indorsee cannot be affected by proof that the indorsee was acquainted with the defenses existing against the paper." E. H. Rollins & Sons v. Board of Com'rs of Gunnison Co., 49 U. S. App. 399, 413, 26 C. C. A. 91, 99, and 80 Fed. 692, 700. The indorsee who takes from a bona fide purchaser of negotiable paper stands in the shoes of his indorser, and may invoke every presumption and estoppel which buttressed the claim of the latter, notwithstanding the fact that he received the paper as a gift, after its maturity, and with notice of alleged defenses to its collection. Commissioners v. Bolles, 94 U. S. 104, 109; Commissioners v. Clark, 94 U. S. 278, 286; Board of Com'rs of Gunnison Co. v. E. H. Rollins & Sons, 173 U. S. 255, 275, 19 Sup. Ct. 390; Rathbone v. Commissioners, 49 U. S. App. 577, 588, 27 C. C. A. 477, 482, and 83 Fed. 125, 130; Hill v. Scotland Co. (C. C.) 34 Fed. 208; Daniels, Neg. Inst. (4th Ed.) § 803. There was no error in the ruling of the court that the defendant in error could invoke the estoppel of the recitals in the bonds to the same extent as a bona fide purchaser, in support of the validity of his coupons.

The next contention of the counsel for the plaintiff in error is that the ruling of the circuit court upon the question of res adjudicata was erroneous. In the discussion of this position it will be conceded that James R. Sutliff, the defendant in error, is a privy of John Sutliff, the plaintiff in the former suit, and that the question here is the same that would have arisen if this action had been between the parties to the former judgment. There are two grounds on which an earlier judgment in an action between the same parties may constitute a conclusive estoppel respecting the issues in a subsequent suit. The first ground is that the later

suit is founded upon the same causes of action upon which the former action was based. In a case where this is the fact, the former judgment is conclusive in the subsequent litigation, not only of every issue which was raised and determined, but also of every question which might have been presented by either party and might have been determined by the court in that suit. The second ground is that the subsequent action is founded on different causes of action, but that the issues which it presents were actually raised, litigated, and determined in the earlier suit. In a case in which the second action is upon different causes of action from those involved in the first, the former judgment, though between the same parties, operates as an estoppel only as to the points and questions actually litigated and determined, and it leaves the parties free to contest and try de novo every issue and controversy which might have been, but which was not in fact, litigated and decided in the earlier action. Cromwell v. Sac Co., 94 U. S. 351, 352; Nesbit v. Riverside Independent Dist., 144 U. S. 610, 618, 12 Sup. Ct. 746; Commissioners v. Platt, 49 U. S. App. 216, 223, 25 C. C. A. 87, 91, and 79 Fed. 567, 571. It will be noticed that pleading and proof that the earlier suit was upon the same causes of action as the later is sufficient to establish the estoppel upon the first ground, but that where the second suit is upon different causes of action it is indispensable to the estoppel that it should appear that the questions in issue or points of controversy in the second action were actually raised, litigated, and determined in the first. The record in the case at bar stands in this way: The plaintiff in error pleaded in its answer that John Sutliff brought his action against the county on September 26, 1889; that in his complaint he pleaded that he was the owner of the 10 bonds from which the coupons involved in both actions were cut, and prayed for judgment for $3,000 on account of the coupons claimed to be due upon the commencement of that action; that on July 24, 1891, in that action, "being upon the recurring liability of the same cause of action as that set forth in the complaint herein," judgment was rendered in favor of the plaintiff in error, and this judgment was affirmed by the supreme court. These averments were denied by the reply of the defendant in error. At the trial so much of the record in the former action as was necessary to show that, among other things, that suit was brought to recover the amounts due on coupons numbered 8, was offered and received in evidence, for the purpose of showing that the coupons so numbered constituted certain of the causes of action in the former suit. But the record of that suit was not made a part of the bill of exceptions, and is not presented for our consideration. The counsel for the plaintiff in error preferred seven requests for instructions to the jury. One of these was that coupons numbered 8 constituted a part of the subject-matter of the former action, and that consequently no recovery could be had upon them in this action. The court so charged the jury. But no request to instruct them that any of the questions presented by the causes of action upon the other coupons pleaded in

this suit were conclusively determined by the judgment in the former action was preferred to the court below, and no error was assigned because that court did not so instruct the jury. It is now claimed that the causes of action upon these coupons were the same as those involved in the former action, and that, if they were different, the questions involved in this action were actually raised and litigated in the earlier suit. Neither position is tenable. The causes of action upon coupons numbered 9 to 20, inclusive, which are involved in this action, are not the same causes of action as those upon coupons numbered 1 to 8, which were the subject-matter of the earlier suit. Each matured coupon is a separate promise, and it gives rise to a separate and distinct cause of action. There was therefore no estoppel because the causes of action in the two suits were the same. Nesbit v. Riverside Independent Dist., 144 U. S. 610, 619, 12 Sup. Ct. 746. The causes of action in the two suits were different. Were the issues or points in controversy in this action actually raised and litigated in the former suit? This question was never presented to the trial court by plea, proof, or request for an instruction to the jury, and no exception was ever taken, and no error was ever assigned, to any ruling upon it. It is therefore not here for our consideration. In an action at law, this is a court for the correction of the errors of the court below exclusively. Questions which were not presented to, or decided by, that court are not open for review here, because the trial court cannot be guilty of error in a ruling that it has never made upon an issue to which its attention was never called. Railway Co. v. Henson, 19 U. S. App. 169, 171, 7 C. C. A. 349, 351, and 58 Fed. 530, 532; Philip Schneider Brewing Co. v. American Ice-Mach. Co., 40 U. S. App. 382, 403, 23 C. C. A. 89, 100, and 77 Fed. 138, 149; Manufacturing Co. v. Joyce, 8 U. S. App. 309, 311, 4 C. C. A. 368, 370, and 54 Fed. 332, 333. If it should be thought that the exception to the peremptory charge of the court to return a verdict for the defendant and the assignment of error upon that ruling presented this question, attention is called to the fact that this exception and assignment present nothing for review in this case, because the bill of exceptions contains only fragmentary portions of the evidence. It is impossible for an appellate court to determine whether or not the court below came to the true conclusion when it directed a verdict upon the evidence in the case, unless all the evidence before that court is presented to the reviewing court for its consideration. Taylor-Craig Corp. v. Hage, 32 U. S. App. 548, 552, 16 C. C. A. 339, 340, and 69 Fed. 581, 583. The complaint of the ruling of the court below upon the question of res adjudicata cannot be sustained.

We turn to the consideration of the defense that the indebtedness of the county exceeded the constitutional limitation when these bonds were issued. The county of Lake was organized in 1879, and the assessed valuation of its taxable property was never less than $1,000,000. The constitutional limitation of its indebtedness on July 1, 1881, after the vote of the electors in favor of the issue of these bonds, was therefore 6 per cent. of the assessed valua-

tion of its taxable property. That valuation was alleged by the plaintiff in error to have been $11,025,793 at that time, so that the constitution permitted a debt exceeding $66,000. The actual amount of the issue of road bonds from which these coupons were cut was $5,000, so that there was nothing upon the face of the bonds themselves to indicate that their issue created a debt, or that at the time of their issue a county indebtedness existed in excess of the prescribed limitation. Section 21 of the act of March 24, 1877, under which the bonds were issued, prescribed a limitation upon the indebtedness of the county which was identical with that contained in the constitution of Colorado. Section 6, art. 11, Const. Colo., as it stood prior to 1888; Gen. Laws Colo. 1877, p. 223, par. 448, § 21; Mills' Ann. St. 1891, p. 793, § 934.

Things which are equal to the same thing are equal to each other. Hence the certificate in these bonds that they were issued "under and by virtue of, and in compliance with," the act of March 24, 1877, and "that all the provisions of said act have been fully complied with by the proper officers in the issuing of these bonds," was necessarily a certificate that they had been issued in compliance with, and not in violation of, the constitutional as well as the statutory limitation. Dudley v. Board, 49 U. S. App. 336, 344, 345, 26 C. C. A. 82, 86, 87, and 80 Fed. 672, 676, 677. A certificate or recital, by officers authorized to determine the question and to make the recital, that a constitutional limitation has not been exceeded, or that a constitutional condition has been fulfilled, raises an estoppel in favor of a bona fide purchaser as conclusive as a recital or certificate of like effect relative to a statutory limitation or requirement. This rule was announced by this court, in 1894, in National Life Ins. Co. of Montpelier v. Board of Education of City of Huron, 27 U. S. App. 244, 265, 10 C. C. A. 637, 651, and 62 Fed. 778, 791; and it was affirmed by the supreme court, upon a review of the authorities, in 1898, in Board of Com'rs of Gunnison Co. v. E. H. Rollins & Sons, 173 U. S. 255, 273, 274, 19 Sup. Ct. 390. To the same effect are Buchanan v. City of Litchfield, 102 U. S. 278, 290; Pana v. Bowler, 107 U. S. 529, 539, 2 Sup. Ct. 704; Oregon v. Jennings, 119 U. S. 74, 92, 7 Sup. Ct. 124; Chaffee Co. v. Potter, 142 U. S. 355, 364, 12 Sup. Ct. 216.

Aside from the provisions of section 30 of the act of March 24, 1877, whose effect will be shortly considered, that act vested the power, and imposed the duty, of determining and certifying whether or not this limitation had been exceeded, upon the board of county commissioners which issued the bonds. After providing in section 21 that the board should not issue any bonds unless the aggregate amount of the indebtedness of the county was within the limitation contained in the statute and in the constitution, nor unless the electors of the county had approved the issue by their votes, it declared in section 22 that "the county commissioners when authorized as provided in section twenty-one of this act, shall make and issue coupon bonds of the county, not exceeding the amounts specified in the preceding section, in counties which have an assessed property valuation exceeding one million of dollars, payable at the pleasure of

the county," etc. Thus it intrusted the power and imposed the duty upon these commissioners to examine, to see and to decide whether or not the favorable vote had been taken, and whether or not the amount of the indebtedness exceeded the limitation, whenever they considered the question of issuing the bonds. They could not discharge their duty in the issuance of these bonds without a consideration and determination of these questions. The act empowered them to issue the bonds "when authorized as provided in section twenty-one of this act," and made them the judges of the fact as to when they were so authorized. The result is that, in the absence of the provisions of section 30 of the law, the recitals in the bonds would have been conclusive evidence that the constitutional and statutory limitation had not been exceeded under the rule, which is now too firmly established to admit of discussion, that recitals in the face of bonds, made by officers of municipal or quasi municipal corporations in whom the power is vested, and upon whom the duty is imposed, of determining whether or not conditions precedent to their issue have been fulfilled, or whether or not limitations have been exceeded, estop the corporation, as against a bona fide purchaser of the bonds or coupons, from defeating them on the ground that these recitals were false, unless notice of the fact was given to the buyer by the face of the bonds, or by some public record which was prescribed by the constitution or by the act under which the bonds were issued as a test of the limitation or condition. The following authorities expressly hold that such recitals as those contained in these bonds—recitals which import an issue in accordance with the terms of the law or constitution which contains the limitation—estop the municipality from defeating the bonds on the ground that its debt exceeded the prescribed limitation: Dudley v. Board, 49 U. S. App. 336, 346, 26 C. C. A. 82, 87, and 80 Fed. 672, 677; Marcy v. Oswego Tp., 92 U. S. 637, 641; Humboldt Tp. v. Long, 92 U. S. 642, 645; Sherman Co. v. Simons, 109 U. S. 735, 737, 3 Sup. Ct. 502; Dalles Co. v. McKenzie, 110 U. S. 686, 687, 4 Sup. Ct. 184; Wilson v. Salamanca Tp., 99 U. S. 499, 504; Chaffee Co. v. Potter, 142 U. S. 355, 364, 12 Sup. Ct. 216; Board of Com'rs of Gunnison Co. v. E. H. Rollins & Sons, 173 U. S. 255, 273, 274, 19 Sup. Ct. 390.

But section 30 of the act under which these bonds were issued required the county commissioners to make out semiannual statements at their regular sessions in January and July in each year, which would show the amount of the debt owing by their county; in what it consisted; what payments had been made upon the same; the rate of interest its debts were drawing; and a detailed account of the receipts and expenditures of the county for the preceding months, in which it should appear from what officer and on what fund any money had been received, and the amounts and to what individuals and from what account any money had been paid, and the amounts and the balance, showing the amount of deficit, if any, and the balance in the treasury, if any; and it required the commissioners to publish these statements, and to cause their clerk to record them in a book kept by him for that purpose only, which should be open to the inspection of the public at all times. Gen. Laws Colo. 1877,

p. 227, par. 457, § 30. If this record had been made, a purchaser, by comparing 6 per centum of the last assessed valuation of the property of the county with its debt as shown by this record, could have determined at once, at least approximately, whether or not the debt of the county was within the limitation of the statute and the constitution. In Sutliff v. Commissioners, 147 U. S. 230, 235, 13 Sup. Ct. 318, the supreme court presumed, in the absence of all evidence upon the subject, that the commissioners of Lake county had made this record, and held that the purchaser of the bonds was charged with notice of its contents, under the rule that when the constitution or the legislative act under which bonds are issued requires a public record of the amount of the indebtedness of a municipal or quasi municipal corporation, and that record has been made accordingly, so that, when it is taken in connection with the assessed valuation of the property of the county, it furnishes a practical test or gauge by which the purchaser can readily determine whether or not the constitutional or statutory limitation has been violated, he is charged with notice of the facts which that record discloses, notwithstanding the estoppel of the recitals in the bonds. Board of Com'rs of Gunnison Co. v. E. H. Rollins & Sons, 173 U. S. 255, 275, 19 Sup. Ct. 390; National Life Ins. Co. v. Board of Education of City of Huron, 27 U. S. App. 242, 262, 10 C. C. A. 637, 649, and 62 Fed. 778, 789.

It is a poor rule that will not work both ways, and the converse of this proposition is equally true, and has been repeatedly affirmed by this court. It is that, when the constitution or the act under which the bonds are issued prescribes the public record which furnishes the test of compliance with the limitation, the purchaser is not required to look beyond it; but, if that record fails to show a violation of the limitation, he may rely upon the presumption that the officers faithfully discharged their duty when they issued the bonds, and upon the recitals which they contain, and the corporation will be estopped from proving other records or facts to overthrow them. E. H. Rollins & Sons v. Board of Com'rs of Gunnison Co., 49 U. S. App. 399, 403, 26 C. C. A. 92, 96, and 80 Fed. 692, 697; Dudley v. Board, 80 Fed. 672, 677, 26 C. C. A. 82, 86, and 49 U. S. App. 336, 344. This rule disposes of the complaint of counsel for the plaintiff in error that the court below refused to receive in evidence the register of the county bonds, the register of the county warrants, and the minutes of the proceedings of the board of county commissioners, in which some reference to the indebtedness of the county appears. A buyer of municipal bonds is not required to search the proceedings of the county commissioners, and through all the books of the clerk of their board, to ascertain the indebtedness of the county, when the statute points him to a specific record for his guidance, and the officers of the county have failed to make that record, and have certified upon the face of their bonds that the limitation has not been violated. The minutes of the meetings of the commissioners and the registers of the bonds and warrants of the county constituted no notice of the county indebtedness to a bona fide purchaser of these bonds.

We come to the semiannual financial statements. As we have already remarked, the supreme court presumed, in the absence of all evidence upon the subject, in Sutliff v. Commissioners, supra, that these statements had been made, published, and recorded as required by the statute, and held that they constituted notice to the purchaser of their contents. In the case at bar, for the purpose of overcoming this presumption, the defendant in error proved that the county commissioners of Lake county had never made out at their regular sessions in January and July, or at any time, and that the clerk of their board had never recorded in a book kept by him for that purpose or in any other book, at any time prior to the issue of the bonds from which the coupons were cut, any semiannual statement which showed the amount of debt owing by the county, and the other facts which section 30 of the act of 1877 required them to spread upon the record there prescribed. For the purpose of establishing this fact, he introduced in evidence the county clerk's account book, which contained, among many accounts, some of which were an account of one county treasurer with another, an account of the state fund with the county treasurer, and an account of the county treasurer with the general school fund, certain accounts which were entitled, "Lake County in Account with County Treasurer," "Lake County in Account with County Treasurer, Expenditures Acct. Road Fund," "Lake County in Account with County Treasurer, Expenditure Account County Bond Fund," and "Lake County in Acct. with County Treasurer, Expenditure Account County Building Fund." These accounts, whose titles we have quoted, purport to be statements of the receipts and expenditures of the county treasurer from various funds of the county for periods of six months between July 1, 1879, and July 1, 1881. This is a copy of one of these accounts, which shows the general form in which they were recorded, though some of them contained general statements of the items of the expenditures:

"Lake County in Account with County Treasurer, Expenditures Acct. Road Fund.

1880.		
Jany 1.	Total expenditure on county roads in repairing, making, and bridging	4,101 84
	Interest paid on warrants	69 28
		4,171 12
1880.		
Jany 1.	By amt. of road warrants can	2,320 59
	By outstanding indebtedness of Lake county in road warrants, January 1, A. D. 1880. To balance	1,850 53
		4,171 12"

These accounts constitute the nearest approach to the records of the semiannual statements of the indebtedness of the county, required by the act of 1877, which were found among the books of the county commissioners and their clerk. They never kept any book for the sole purpose of recording such statements. After this evi-

dence had been received, the plaintiff in error, for the purpose of showing a compliance with the provisions of section 30, and for the purpose of thereby charging the defendant in error with constructive notice of the indebtedness of the county which they disclosed, offered in evidence this clerk's account book, these accounts whose titles we have quoted, and proof of the publication, by order of the county commissioners, in certain weekly papers, of some financial statements, which consist of copies of these accounts and certain other accounts of expenditures, which were certified by the chairman and clerk of the board of county commissioners in one instance, and by the clerk of that board in others, to be true and correct statements of the indebtedness of the county in outstanding county and road warrants, and of the condition of the different accounts of the county on January 1, 1880, July 1, 1880, and January 1, 1881. But these published statements had never been recorded in any book of the county, had apparently never been open to public inspection, but were found in the files of old newspapers, in the hands of the publishers or their successors. The court rejected this evidence, and this ruling is assigned as error. The assignment cannot be sustained. The main object of the enactment of section 30 of this statute was to provide for and to require the county commissioners to make a clear, plain record, in a book "kept for that purpose only," of "the amount of debt owing by the county," and of the other material facts for which it calls, so that a purchaser of the obligations of the county might know where to find out, and might at any time learn, the amount of that debt, and the validity of county obligations, by a reference to its pages. The clerk of the board of county commissioners kept no such book. The county commissioners made no such statements. The fragmentary accounts which were found in the county clerk's account book constituted no semblance of compliance with the statute, and a purchaser seeking the statutory record would never have looked there for its contents. The statute required the statements to show a detailed account of the receipts and expenditures of the county for the preceding months, from what officer and what fund any money had been received, and the amounts and to what individuals and on what account any money had been paid, and the amounts of such payments. Neither the accounts in the clerk's account book nor the published statements contain any of these things, and in nearly every respect they fail to comply with the provisions of the law. These accounts—these alleged semiannual statements from the county clerk's account book—are the same accounts which were presented to this court in Dudley v. Board; and, while the evidence of publication in this case differs from the showing in that, the proof respecting the making and recording of the semiannual statements is in effect identical, and we cannot close this discussion more aptly than by quoting the conclusion which was expressed by Judge Lochren in the opinion of this court in that case in these words:

"But in this case it is clearly shown that there never were any such semiannual statements, or record thereof, covering any of the time which could affect the legality of these bonds. As there was no such record in existence

as the act required and contemplated, there was no record which the purchaser of these bonds was bound to examine, or which would be constructive notice to him of the aggregate indebtedness of the county when the bonds were issued. Such purchaser was entitled to rely on the recitals in the bonds." Dudley v. Board, 49 U. S. App. 345, 26 C. C. A. 87, and 80 Fed. 677.

Another complaint of the plaintiff in error is that the court refused to receive in evidence the assessed valuations of the taxable property of the county in the years 1879 and 1880. The assessed valuation in 1879 was properly rejected, because, although the vote for the bonds was cast in the fall of that year, they were not issued until July, 1881, long after the assessment of 1880 had been made; and it was the assessed valuation when the bonds were issued, and not when the vote for them was cast, that measured the permissible debt. Dudley v. Board, 49 U. S. App. 336, 346, 26 C. C. A. 88, and 80 Fed. 672, 677. If the assessed valuation of 1880 had been presented at the opening of the defense, it would have been material and competent evidence, because it was by a comparison of this valuation with the public record, required by section 30 of the act of 1877, which the court might then have expected would be subsequently proved, that the test of the violation of the limitation of the county debt was required to be made by a purchaser of the bonds. But it was not offered until all the evidence to show a compliance with this section had been tendered and rejected, and it had become clear that the record required by that section had never been made. At that stage of the trial the valuation of 1880 was not material, because the fact was established that there was no record of the county debt with which a purchaser was required to compare this valuation to test a compliance with the limitation. The trial had progressed so far that the conclusion was inevitable that the county was estopped by the recitals in the bonds to show a violation of the limitation, and the valuation of 1880 was properly rejected.

In the trial of the old action of Sutliff v. Board, the attorneys for the respective parties made a written stipulation of the amount of the debts of Lake county on July 1, 1881, and of the assessed valuation of the county in the years 1879, 1880, and 1881, the first clause of which read: "It is hereby stipulated and agreed that in the trial of this case a jury is waived, and the same shall be submitted to the court upon the following agreed statement of facts." The commissioners offered this stipulation in evidence, and it is insisted that it was erroneously rejected. It is said that the stipulation was not limited to the case in which it was entitled, or to the trial to which it referred, and that it was made between the assignor of the defendant in error and the county, and that it is therefore binding upon the defendant in error in this case. The argument is unsound, because the major premise is not founded upon fact, and because the conclusion is not the logical result of the premises. The stipulation was expressly limited by its very terms to the case in which it was filed. It reads: "It is hereby stipulated and agreed that in the trial of this case a jury is waived," etc. But, if it was not so limited, it could not have the effect claimed for it by the plaintiff

in error. A stipulation made by an attorney in one action will not bind his client in another, unless the latter expressly acquiesces in it in the second suit. Much less will it estop his assignee. Nichols, Shepard & Co. v. Jones, 32 Mo. App. 657, 664; Wilkins v. Stidger, 22 Cal. 232, 239; Weisbrod v. Railway Co., 20 Wis. 441, 443. The reason for this rule is obvious. An attorney employed to conduct and try a single action has no power to bind his client or the assignee of his client in subsequent suits upon other causes of action, respecting which he has neither retainer, employment, nor authority.

All the objections to the course of the trial of this action which have been presented to this court by brief or argument have now been considered, and our conclusion is that the judgment below must be sustained. Upon the record before us, this is a just and righteous result. It is a salutary principle of law and of equity that one who, by his acts or representations, or by his silence when he ought to speak, either intentionally, or through culpable negligence, induces another to believe certain facts to exist, and the latter rightfully acts on such belief, so that he will be prejudiced if the former is permitted to deny their existence, is conclusively estopped to interpose such a denial. The father of this defendant in error bought these bonds, and paid more than their par value for them, in reliance upon the recitals made in them by the officers whom the law and the people of the county had selected and empowered to determine and certify the existence of the facts disclosed in the recitals and to issue the bonds. It is not impossible that the county received their proceeds, and that its people are now traveling upon the roads which they built. In such a case, justice and equity alike demand that the county pay the bonds and coupons, unless there is some insuperable legal objection to their enforcement. We find no such objection in this case, and the judgment below is affirmed.

SCHOFIELD v. STATE NAT. BANK OF DENVER, COLO.

(Circuit Court of Appeals, Eighth Circuit. October 9, 1899.)

No. 1,157.

1. CONTRACT — CONSTRUCTION — AGREEMENT BY BANK TO ASSUME LIABILITIES OF ANOTHER.

   Two banks entered into a contract by which one agreed to assume and pay the liabilities of the other, in consideration of which the latter transferred to the former its office furniture and cash assets, and assigned to a trustee for collection a certain amount of its bills receivable, selected by the other bank; the proceeds to be paid to such other bank until it should be reimbursed the amount it should be required to pay out. *Held* that, the evident and expressed purpose of such contract being to relieve the debtor bank from its liabilities, no implied promise on its part could arise therefrom to repay to the other bank any amount it might be required to pay out in excess of the value of the property transferred and the proceeds of the assets assigned, especially where a supplemental agreement, made some two months later, clearly showed that a contrary construction was placed upon the contract by the parties themselves.

2. ACTION FOR MONEY PAID—GROUNDS—AGREEMENT TO PAY NOT PERFORMED.
It is not enough to sustain an action for money paid out and expended for the use of defendant that plaintiff has agreed to expend it, where he has not done so, and has become insolvent.

3. NATIONAL BANKS—POWERS—VALIDITY OF CONTRACT.
A contract by a national bank to assume and pay the liabilities of another bank in consideration of the transfer to it by the other bank of its office furniture and lease and its cash and cash assets, and the further assignment to a trustee for its benefit of bills receivable and securities, is not ultra vires, but is within its powers conferred by statute to conduct a general banking business.

4. SAME—ADVERSE INTEREST OF DIRECTOR.
The fact that a director of a national bank, whose presence was necessary to constitute a quorum at a meeting where by the action of the directors, in which he participated, a contract by the bank to assume and pay the liabilities of another bank was ratified, was also a stockholder in such other bank, in the absence of any allegation of fraud in the transaction, is not sufficient to render the contract invalid.

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

William C. Cochran (Earl M. Cranston, Robert J. Pitkin, and William A. Moore, on the brief), for plaintiff in error.

Joel F. Vaile (Edward O. Wolcott, Elroy N. Clark, and Charles H. Toll, on the brief), for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

SANBORN, Circuit Judge. The writ of error in this case challenges a judgment which sustained a general demurrer to a complaint made by the plaintiff in error, John W. Schofield, as receiver of the Union National Bank of Denver, Colo., against the State National Bank of that city. Each of these banks was organized and was doing business under the national banking law in June, 1894, in the city of Denver. The complaint disclosed these facts:

On June 23, 1894, negotiations were pending between the two banks for an assumption by the Union Bank of the indebtedness of the State Bank in consideration of a transfer by the latter to the Union Bank of such a part of its live assets as would be sufficient to secure the Union Bank for paying the debts of the State Bank. On that day R. W. Woodbury, the president of the Union Bank, wrote to John L. McNeil, the president of the State Bank, that it had been impossible for him to make such a personal examination of the paper of the latter bank as would justify him in closing the transaction, but added:

"Now, if your people are disposed to secure us by your entire assets until we can be satisfied in the selection of paper, to reimburse us for the assumption of your liabilities, I will undertake to call our board together to-night at some hour, and let the transfer be announced in the morning papers."

This letter was submitted to the board of directors of the State Bank on that day, and that board passed a resolution to the effect that its president and cashier should contract to sell its office furniture, fixtures, safes, vault, and stationery to the Union Bank for $15,000, and to assign and transfer to that bank sufficient of the bills receivable, moneys, and other assets of the State Bank to se-

cure the Union Bank for its payment of the debts of the State Bank to its depositors, and for borrowed money, in consideration of an agreement by the Union Bank to pay these debts, and in consideration of its obtaining a release of the State Bank from its obligations under a certain lease to one McClintock. Thereupon the Union Bank took possession of the office, furniture, and money of the State Bank on the next day; and on June 25, 1894, the board of directors of the Union Bank approved and adopted the letter of Woodbury, and authorized the president and cashier of its bank "to carry into effect the proposed assumption of the business of the latter [the State Bank], on the general basis of paying its deposit and borrowed-money liabilities, and receiving therefor cash and exchange and good paper and furniture and fixtures sufficient to meet the same." The board of directors of the Union Bank then assumed the liabilities of the State Bank to its depositors, to other banks, to the Denver Clearing House, and to the holders of its certificates and bills payable, and proceeded to pay them as payment was demanded. The liabilities of the State Bank were $560,641.64. It had $30,987.78 in cash, and $21,815.78 in checks in transit and accounts receivable from other banks, which it immediately delivered to the Union Bank; and it had bills receivable, mortgages, and real estate of the face value of $809,446.80, but the actual value of this part of its assets was less. On July 28, 1894, the stockholders of the State Bank ratified and approved the action of its board of directors, but the stockholders of the Union Bank took no action in the premises. On July 12, 1894, three of the directors of the Union Bank resigned, and John L. McNeil, the president, and two of the directors of the State Bank, each of whom was more interested in that bank than in the Union Bank, were elected directors of the latter bank, and thereafter acted as such. In August, 1894, an agreement, which was evidenced by resolutions passed by the boards of directors of the two banks, was made in the performance of the contract of June, 1894, and it was to this effect: The Union Bank assumed the payment of $31,300, for which the State Bank was liable on certain rediscounts, and covenanted that it would not make or assert any claim or liability against the State Bank or its stockholders beyond the assigned assets. The State Bank agreed to assign to John L. McNeil, as trustee, bills receivable, to be selected by the Union Bank, to the amount of $564,000 at their face value, as security for the payments made and to be made by that bank in performance of the June agreement. The two banks agreed that the Union Bank might select the rediscounted bills as a part of this security; that it might take any of the bills receivable at their full amount in part payment of its claim; that when it paid the indebtedness of the State Bank to the Mercantile National Bank and the National Park Bank of New York, if it did so within 15 days, the trustee should turn over all the assigned securities to the Union Bank; that while he held them the trustee should collect the securities as fast as possible, and pay $500 per month out of the proceeds thereof to the president of the State Bank in satisfaction of the expenses of its liquidation; that he should pay over the balance to the Union Bank; and that if, in

the end, the property which the Union Bank received from the State Bank produced more than the former expended in payment of the debts of the latter, the surplus should be returned to the State Bank. When the resolution of the board of directors of the Union Bank which bound it to this agreement was adopted, only six members of the board were present, and McNeil was one of them, and his presence was necessary to constitute a quorum. The agreement was performed. Bills receivable which belonged to the State Bank to the amount of $564,000 at their face value were selected by the Union Bank, and assigned to McNeil as trustee, and he proceeded to collect them, and to apply the proceeds pursuant to the contract. Both the State Bank and the Union Bank became insolvent, and receivers of their property were appointed, who succeeded McNeil as trustee, and discharged his duties; and at the time of the commencement of this action the plaintiff, Schofield, as receiver of the Union Bank, had come into the possession of the uncollected balance of the assigned securities, which amounted at their face value to $279,552.95. The amount collected from these securities and paid over to the Union Bank or its receiver was $278,233.41. That bank had also received in cash, checks in transit, and in amounts due from other banks, in June, 1894, $52,803.56, and the indebtedness of the State Bank which it assumed was $560,641.64; so that, without regard to interest, it assumed an indebtedness which exceeded the amount it has realized from the property of the State Bank assigned to secure it, by the sum of $229,604.67.

Upon this state of facts, the plaintiff, as receiver of the Union Bank, offers to return the uncollected securities which he holds, and asks for a judgment against the State Bank for the difference between the amount of the debts of that bank which the Union Bank assumed and the amount which the Union Bank has realized from the assets which the State Bank delivered to it and to the trustee. The court below was unable to discover any ground for charging the State Bank with this liability, and dismissed the action.

It is not claimed that there is any express stipulation or provision in the agreement between the banks to the effect that the State Bank shall repay the money which the Union Bank has expended on account of the debts of the State Bank. But the contention is that such a contract must be implied, because that agreement provided that certain of the bills receivable of the State Bank should be assigned to the Union Bank and to the trustee to secure the reimbursement of moneys which the Union Bank expended in paying these debts. But an agreement in direct conflict with the terms of an express contract cannot be implied from such a contract. An implication may not contradict and destroy an express stipulation. The letter and the resolutions of June 23 and June 25, 1894, which constitute the original contract, strongly indicate that it was the purpose of the parties to that agreement not to charge the State Bank with any liability, but to relieve it and its stockholders of all liability for its debts. It is improbable that the State Bank insisted so strenuously upon an express agreement from the Union Bank to assume its debts, and agreed to turn over to the latter bank all

its valuable assets to secure it from loss in the performance of that contract, without a clear intention and understanding between the parties that the performance of this contract would leave the State Bank free from liability, not only to its creditors, but also to the Union Bank. This, it seems to us, is the fair construction and true meaning of the letter and resolutions of June, taken by themselves. If, however, there were any doubt that this is their true construction, it would be removed by the interpretation which the parties themselves placed upon the contract when they agreed upon the details and the manner of its performance in the following August. More than 40 days after this contract was made, and while it was in the course of performance, the two banks met, and agreed upon a method of carrying out and completing it. They put their agreement in writing, in the form of resolutions adopted by the boards of directors of the two banks. The State Bank then inserted in the resolution of its board of directors which authorized and directed the assignment of the securities to the trustee these words:

"It is further understood, and it is a condition of this resolution, that the Union National Bank, in consideration of the benefits derived by it from the arrangement between said Union Bank and said State National Bank, will not make or assert any claim or liability against or upon the part of said State National Bank of Denver, or its stockholders, beyond the said assigned assets."

And the board of directors of the Union Bank passed a resolution accepting this resolution of the State Bank, and the condition which it contains. When the language used by the parties to a contract is ambiguous or of doubtful meaning, the practical interpretation given to it by the parties themselves when engaged in the performance of the agreement, and before any controversy has arisen concerning it, is one of the best indications of its true intent. Topliff v. Topliff, 122 U. S. 121, 131, 7 Sup. Ct. 1057; Chicago v. Sheldon, 9 Wall. 50, 54. The express terms of the contracts between the banks forbid the implication that the State Bank agreed to pay to the Union Bank any part of the debts which the latter assumed.

Another position of counsel for the plaintiff in error is that the contract was ultra vires of the Union Bank, that the moneys it expended under it were paid for the use of the State Bank, and that consequently there is an implied contract by the latter bank to pay back the balance above the amount which the Union Bank has obtained from the assigned assets as money had and received by the State Bank for its own use. There are many fatal objections to this theory, but we shall notice but two. One objection is that the Union Bank does not allege in its complaint that it has ever paid out or expended any balance. It does not aver that it has paid on account of the debts of the State Bank any more than it has collected from its assets. It does allege that it has assumed and agreed to pay more, and that it has become insolvent. But it cannot recover of the State Bank for money paid out and expended for the use of the latter until it pays out and expends it. It is not enough to sustain a cause of action for money paid out and expended for the use of a defendant that the plaintiff has agreed to expend it, but has never

done so, and has become insolvent, so that he probably never can do so.

Another fatal objection to the argument of counsel here is that there was nothing in the contract beyond the powers of the Union National Bank, and therefore there is no foundation for a cause of action for the money it has expended in accordance with the terms of its contract. This agreement required the Union Bank to do nothing which national banks are not authorized to do,—nothing which they do not do in the conduct of the ordinary business of banking. That bank was empowered "to exercise by its board of directors, or duly-authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking; by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; by receiving deposits; by buying and selling exchange, coin and bullion; by loaning money on personal security; and by obtaining, issuing and circulating notes according to the provisions of this title." Rev. St. § 5136. What did the Union National Bank do here that was not within the powers conferred upon it by the national banking act? It bought the furniture and fixtures of a banking office for $15,000, assumed the lease of a building in which this office was situated, and proceeded to occupy and use it to operate its bank. But it was empowered to do this by section 5137 of the Revised Statutes. It received from the State Bank $30,987.78 in cash, and $21,815.78 in checks in transit and accounts receivable from other banks. It had express authority to receive these amounts as deposits, and by the purchase of the furniture and the receipt of these sums it became indebted to the State Bank in the sum of $67,803.56. In the absence of an express contract, it would have been bound to pay this amount to the State Bank or to its order; and, if the latter bank directed it to pay this sum to its creditors, it was legally bound to make the payment in that way. It could not have been in excess of the powers of the Union Bank for it to expressly agree to do that which it was bound to do under the law without an agreement. This, however, was not all that it did. It agreed to loan $492,838.08 (the amount above the $67,803.56 required to pay the debts of the State Bank), and to pay the debts of the State Bank with this amount; and it agreed to make this loan upon the personal security of the makers and indorsers of bills receivable of the face value of $564,000, which it selected, and which the State Bank assigned in trust to secure the repayment of the loan, and it promised to turn back to the State Bank any surplus of these securities or of their proceeds which remained after it had been reimbursed for this loan. Let us analyze this transaction for a moment, and see if there is anything here beyond the powers of a national bank. A simple illustration seems to make this matter clear. A. has a promissory note for $10,000, payable to his order, made by two responsible parties, and due in 90 days. He owes a promissory note of $9,000, due in 60 days. He takes the former note to a national bank, indorses it without recourse, discounts it, and walks off with the proceeds. No one can successfully question the power of such a bank to loan its money on the

security of such a promissory note, or its authority to discount or to buy the paper. Auten v. Bank, 19 Sup. Ct. 628, 635; Smith v. Bank, 26 Ohio St. 141, 151. But suppose A. leaves the proceeds of the note on deposit in the bank to his credit until his note for $9,000 falls due. He may then draw his check on the bank for the $9,000 payable to the creditor, and draw his check for the balance of the proceeds payable to himself, and the bank is legally liable to pay both checks; and this although the makers of the $10,000 note may have become insolvent, and their note may have become worthless, since it was discounted. Nor would there be anything ultra vires of the bank if, when A. discounts the note, the bank expressly agrees with him to do the very thing which at his request it is legally bound to do on account of its discount or purchase of the note; that is to say, to pay his note of $9,000, and to pay him the balance of the proceeds of the $10,000 note. Much less would it be beyond its powers to agree to pay the $9,000 and the surplus it should realize from the $10,000 note only. But this was all there was in the agreement which the plaintiff in error challenges. It is true that the Union Bank loaned its money on more than one promissory note, but, if it could lawfully loan it on one, it could do so on two or many. It is true that it did not place the proceeds of the bills receivable which it obtained as security to the credit of the State Bank; that it did not take possession of the bills receivable, but left them in the hands of a trustee; and that it was not bound to pay to or on account of the State Bank any more than the amount of the latter's debts, unless it realized more than that amount from the securities. But these provisions of the contract serve only to bring it further within the powers of the bank than a simple discount or purchase of the paper. Under such a discount or purchase all the proceeds of the discount of the entire purchase price are immediately payable, while under this contract only $492,838.08 was absolutely payable on account of bills receivable of the face value of $564,000, and more was payable only in case it was realized from the securities. The whole is greater than any of its parts, and includes them all; and the power which a national bank undoubtedly has to discount or purchase commercial paper, and to pay for it immediately, necessarily includes the power to agree upon the amount of the proceeds of the discount or the amount of the purchase price, to loan money upon the security of the paper, instead of discounting or purchasing it outright, and to contract to pay out the money agreed to be loaned at some future time, instead of at the time when the agreement is made. There is nothing ultra vires of the Union Bank in the contract or transaction in issue. U. S. Nat. Bank of New York v. First Nat. Bank, 49 U. S. App. 67, 73, 24 C. C. A. 597, 600, 601, 79 Fed. 296, 300; Bank v. Sharp, 6 How. 301, 322, 323; Bank v. Smith's Ex'r, 40 U. S. App. 690, 23 C. C. A. 80, 77 Fed. 129; Bank of Genesee v. Pachtin Bank, 13 N. Y. 309; Marvine v. Hymers, 12 N. Y. 223; Houghton v. Bank, 26 Wis. 663; West St. Louis Sav. Bank v. Shawnee Co. Bank, 95 U. S. 557, 559; Cooper v. Curtis, 30 Me. 488, 490; Davenport v. Stone, 104 Mich. 521, 62 N. W. 722.

The same considerations which have led to the decision that the agreement in question and its performance were within the ordinary powers of a national bank dispose of the objection that the board of directors had no authority to make the contract.

It is insisted that the agreement of August was void, because the Union Bank received no consideration for it, while it released the State Bank from liability to repay the money which the Union Bank expended in paying the debts of the State Bank, allowed the latter bank $500 per month for the expenses of its liquidation, placed the assigned securities in the hands of a trustee, and not in the possession of the Union Bank, required the Union Bank to assume an additional burden of indebtedness not covered by the original agreement (the $31,300 for which the State Bank was liable on its rediscounts), and limited the amount of the securities assigned to $564,000; and because John L. McNeil, who was the trustee, the president of, and more largely interested in the State Bank than in the Union Bank, was one of the board of directors of the latter bank, necessary to a quorum, when the resolution of that board which assented to the agreement was adopted. The agreement between the parties, however, was made in June. For more than 40 days the performance of this agreement had continued. The contract of August was then made. It was a supplemental agreement. It was made and executed in part performance of the June contract. It was nothing more than the arrangement of the details, the specification of the manner of the performance of the original agreement. Consequently it did not require a separate and independent consideration to make its stipulations binding. There was ample consideration in the mutual covenants of the original agreement for all the subsequent acts that were done and all the later contracts that were made in the course of its performance. Green v. Railway Co., 35 C. C. A. 68, 92 Fed. 873, 877. Moreover, the August agreement was satisfactory to the Union Bank when it was made, and for many years, until it was completely performed; and the presumption is that for every burden which that bank then assumed it secured what it deemed ample concessions in return, at the time it made the contract. A fair construction of the June agreement, as we have already held, left the State Bank free from liability to the Union Bank for the money it expended or agreed to expend on account of the debts of the State Bank, so that there was no release of that liability in the August agreement, because the liability never existed. The clause which the agreement of August contained on this subject was only a more positive statement of the original intention of the parties fairly expressed in the June contract. The original contract was that the State Bank should assign "sufficient of the bills receivable, moneys, credits, and other assets to secure the Union National Bank for the payments and liabilities which it shall find it necessary to pay or assume in discharging said debts and liabilities of said State National Bank." One of the main purposes of the supplemental agreement of August evidently was to fix and determine what amount of the bills receivable was sufficient to secure the Union Bank for the payment of

these liabilities. If in the later agreement it was provided that the bills receivable should be held by a trustee instead of by the bank, if he was to pay out of the proceeds $500 per month to the State Bank for the expenses of its liquidation, if the Union Bank was to assume a liability of $31,300, and if these burdens upon the Union Bank were additional to those specified in the original agreement, the presumption is that in the securities to the amount of $564,000, which the Union Bank obtained to secure its liability to pay $492,-838.08, it secured what it deemed a sufficient amount to protect it, not only against its liability for the debts of the State Bank for deposits and borrowed money specified in the June contract, but also against the additional liabilities which it assumed under the terms of the August agreement. The fact that these securities have since proved inadequate is not a vice of the contract, but a fault of the bargain. The result is that there was a valuable consideration for the covenants of the Union Bank contained in the August agreement, both in the original and in the supplemental contract, and that the latter was within the powers of the bank and of its board of directors.

Nor was the relation of McNeil to these banks and to this transaction such that his vote for the August agreement as a member of the board of directors of the Union Bank can be held to vitiate that contract. It was not an agreement with him, nor was it a contract from which he could derive any personal benefit not already secured to him by the June agreement, unless, as a stockholder of the State Bank, he was relieved from indirect liability by the assumption of the indebtedness of that bank for the $31,300 on the rediscounts, or unless he derived some profit from acting as trustee, and from disbursing the $500 per month which he received, as president of the State Bank, to pay the expenses of its liquidation. There is no averment in the complaint that there was any fraud or imposition practiced upon the Union Bank. McNeil's adverse interest, if he had any, was too remote, contingent, and uncertain to warrant any court, in the absence of fraud, in abrogating or ignoring the deliberate agreement of these corporations, made many years ago, and completely performed, without objection, long before any action was brought which challenged it.

Counsel for the plaintiff in error have presented many other objections to the contract and to the transactions of these banks, but they are all disposed of by the views already expressed. The judgment below is affirmed.

HOUSEKEEPER PUB. CO. v. SWIFT et al.

(Circuit Court of Appeals, Eighth Circuit. October 16, 1899.)

No. 1,224.

1. CONTRACTS—ABROGATION BY NEW CONTRACT.

The legal effect of a subsequent contract completely covering the same subject-matter, and made by the same parties, as an earlier agreement, but containing terms inconsistent therewith, so that the two cannot stand together, is to rescind and supersede the earlier contract, and to constitute itself the only agreement of the parties on the subject.

2. SAME—CONSTRUCTION—IMPEACHMENT OF EXECUTED AGREEMENT.
A written contract for the sale and purchase of property, which has been fully executed by the delivery of the property and the payment of the price in accordance with its terms, cannot be impeached and set aside by the seller, and an earlier contract between the parties for the sale of the same property for a greater price substituted and enforced, merely on allegations of an oral understanding between them that the second contract should be without legal effect, and that payment should be made in accordance with the first, neither fraud nor mistake being charged.

3. SAME—EVIDENCE OF NEGOTIATIONS.
Evidence to sustain such allegations would be inadmissible, under the rule that previous parol negotiations are merged in a written contract, and cannot be shown to contradict its plain terms.

4. SAME—PRACTICAL CONSTRUCTION BY PARTIES.
The consummation of a sale in accordance with the terms of a written contract therefor between the parties is a practical construction which constitutes strong evidence that such contract embodied the true agreement.

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

This is an action to recover $25,000 and interest, which is the alleged balance of the purchase price of a printing and publishing plant, and of the good will of the business of publishing a newspaper. The plaintiff in error, the Housekeeper Publishing Company, a corporation, conveyed this plant and good will to the wives of the defendants in error, Lucian Swift and William E. Haskell, and received $25,000 for them. The vendor insists that it made this conveyance in performance of a contract which it made with the defendants through Frederick Fayram, one of their number, on June 14, 1895, to sell them this property for $50,000; and the defendants contend that the conveyances were made in the performance of a contract made by the plaintiff with the defendant Haskell on July 22, 1895, to sell the property for $25,000. The facts are set forth in the complaint. The court below deemed them insufficient to constitute a cause of action, sustained a demurrer to the complaint, and dismissed the suit. These are the alleged facts:

The plaintiff owned a printing plant, and the good will of the business of publishing a newspaper, subject to a mortgage of $50,000, which secured 250 bonds, upon some of which the interest was overdue. The defendant Fayram was authorized to, and did, act for the defendants, who were negotiating to purchase this property. On June 11, 1895, the plaintiff caused the following letter, which was signed by its president, George F. Jackson, to be delivered to Fayram:

"Minneapolis, Minn., June 11, 1895.

"Frederick Fayram, St. Paul, Minn.—Sir: In accordance with the several conversations I have had with you, I hereby agree, on receipt of a written proposition from you offering to buy the plant, property, and good will of the Housekeeper Publishing Company, and to pay therefor the sum of fifty thousand dollars ($50,000), not less than twenty-five thousand dollars to be paid in cash, and the balance by notes payable in four, eight, and twelve months, with interest at six per cent. per annum, to use every personal endeavor to consummate the sale and deliver the property into your hands within as short a time as possible after receipt of aforesaid proposition.

"[Signed] George F. Jackson, Prest."

On June 14, 1895, Fayram delivered to the plaintiff a written acceptance of the proposition contained in this letter, in which he agreed to buy the property, and to pay for it $25,000 in cash, and three promissory notes of defendants, of $8,333.30 each. The plaintiff orally notified the defendants that it would accept this proposition. During the negotiation it was agreed that the title should be approved by the attorneys of the defendants. On June 17, 1895, the defendants notified the plaintiff that their attorneys required, and they

demanded, that the title to the property should be transferred to them through a foreclosure of the mortgage on the plant, and they also insisted that their written acceptance and agreement to pay $50,000 for the property should be returned and surrendered to them. They gave as a reason why they required a surrender of this acceptance that, if such a contract of purchase should come to the knowledge of the plaintiff's creditors, a charge of collusion might be made against the plaintiff and the defendants, in connection with the foreclosure of the mortgage. They assured the plaintiff that they would take the property as theretofore agreed, contract or no contract, that they intended to and would carry out their agreement, that they did not desire to cancel or modify the contract, and that the only purpose upon their part of having the custody of the written agreement was to insure against the hazard of its becoming an evidence of collusion in any attack on the foreclosure. The plaintiff believed these assurances, and surrendered the written acceptance and agreement. It then caused the mortgage upon this property to be foreclosed, and caused the title under the foreclosure to be vested in its attorney, Mr. C. W. Tankersley. While the foreclosure proceedings were pending, and after the agreement had been surrendered, the defendants again assured the plaintiff that they were willing, ready, and anxious to buy the property, and to pay for it $25,000 in cash and $25,000 in their notes. Before the foreclosure sale, which was made on July 6, 1895, they advised the plaintiff that seeming negotiations should be carried on between them after the foreclosure was completed, relative to the sale of the property; but they assured the plaintiff at all times that the only contract and transaction they desired to make was that made between the plaintiff and Fayram, and that all subsequent apparent transactions should be without meaning or validity, except as a method of transferring the title. In pursuance of this plan, simulated negotiations were conducted, and on July 22, 1895, the defendant Haskell wrote and delivered this letter:

"Minneapolis, Minn., July 22, 1895.

"Mr. George F. Jackson, Minneapolis, Minn.—Dear Sir: I will pay, or cause to be paid, the sum of $25,000 for the transfer to me, or to such person or persons or corporation as I may name, of the absolute title to the following described property, free and clear of all incumbrances, except as hereinafter specified, to wit: All the property described in the certain mortgage made on October 31st, 1891, by the Buckeye Publishing Company to L. Parker Veazey, as trustee, which mortgage was filed in the office of the city clerk of the city of Minneapolis on December 23rd, 1891, subject, however, to certain mortgages on two Huber presses. This offer is made upon the following conditions: (1) Title shall be examined by Kitchel, Cohen & Shaw, and shall not be taken unless they certify that it is satisfactory to them. (2) This offer shall hold good until 12 o'clock noon of the 23rd day of July, 1895, and no longer. Yours, truly, W. E. Haskell."

George F. Jackson, as the complaint reads, "for the purpose of performing the plaintiff's original contract, and not otherwise, pretended personally and orally, and not otherwise, to accept, in form, the offer of said Haskell; and on July 26th thereafter formal instruments of conveyance and transfer of all said properties were executed both by plaintiff and said Tankersley in part performance of the contract of June 14th, and not otherwise." Twenty-five thousand dollars was paid for these conveyances. The bonds were surrendered to the defendants. On September 1, 1895, the president of the plaintiff left the city where the transactions were had, and did not return until October 25, 1895. On this day the plaintiff was advised for the first time that the defendants repudiated and denied the contract of June 14th, and they have ever since asserted that the negotiations between Jackson and Haskell in July constituted the contract between the parties. No demand was ever made for the promissory notes until about October 25, 1895.

Francis B. Hart, for plaintiff in error.

Emanuel Cohen (Stanley R. Kitchel and Frank W. Shaw, on the brief), for defendants in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

SANBORN, Circuit Judge, after stating the facts as above, delivered the opinion of the court.

This is an action on a contract. The plaintiff has sold and delivered its property, and the defendants have paid it $25,000 for it. It seeks to recover $25,000 more, with interest, on the ground that the defendants agreed, not only to pay the $25,000 which they have paid, but also to give their promissory notes for $25,000 in addition, or, in effect, to pay $50,000 for the property. It is obvious that there can be no recovery here, and that the complaint states no cause of action unless it shows that there was an existing contract by the defendants to give these notes, and to pay $50,000 in all for the property when this action was commenced. When the complaint is read with this question in mind, its most striking feature is that it discloses an executed contract of sale between the plaintiff and the defendants of the property in question, for $25,000, which was made and performed between July 21, 1895, and August 29, 1895, and which is evidenced by the letter of the defendant Haskell of July 22, 1895, and the conveyance of the property and the surrender of the bonds which followed it, while, for the recovery it seeks, it counts on a contract between the same parties for the sale of the same property for $50,000, made between June 13 and June 17, 1895, more than a month before the second contract. It is unnecessary to determine whether or not Haskell's letter of July 22d, and the oral acceptance of Jackson, the president of the plaintiff, constituted a valid contract by the Housekeeper Company, whose specific performance could have been enforced in equity. However that may be, it is certain that this letter, its acceptance by Jackson, and the conveyances of the property, the surrender of the bonds upon it, and the payment and acceptance of the $25,000 which it fixed as the price of the property in strict accord with its terms, when taken together, made a valid contract of sale, which was completely performed by the parties, and all the terms of which were clearly expressed in the letter and the deeds. For convenience, this agreement will be called the "Contract of July 22d." Nor is it requisite to the determination of this case that we decide whether or not Jackson's letter of June 14th, in which he offered to use every personal endeavor to consummate a sale of the property for $25,000 in cash and $25,000 in promissory notes of the defendants, together with the acceptance of that proposition by the defendant Fayram, followed by the subsequent surrender on June 17th, and the destruction, of that acceptance, made or left in existence a legal contract between the parties for a sale of this property for $50,000. This question is susceptible to grave doubts. But for the purpose of this case we will concede, although we do not decide, that the letter of Jackson and the acceptance of Fayram made a lawful written contract between the plaintiff and the defendants for the sale of the property for $25,000 in cash and $25,000 in the notes of the defendants, and that this agreement was not abrogated or canceled by the surrender of Fayram's acceptance, and its subsequent destruction or suppression. For the sake of brevity, this agreement will be called.

the "Contract of June 14th." We have, then, two contracts between the same parties for the sale of the same property,—the earlier for the sale for $25,000 in cash and $25,000 in notes, and the latter for $25,000 in cash, without any notes. What was the legal effect of the subsequent contract upon its predecessor? In the absence of fraud or mutual mistake,—and the complaint contains no allegations sufficient to sustain a charge of either,—there can be no doubt concerning the answer which ought to be given to this question, under the law. The later contract covers the entire subject-matter of the earlier one. It is complete in itself. It is inconsistent with the preceding contract. The two cannot stand together. There was but one sale of this property, and this sale could not have been for $50,000 and for $25,000 at the same time. A subsequent contract completely covering the same subject-matter, and made by the same parties, as an earlier agreement, but containing terms inconsistent with the former contract, so that the two cannot stand together, rescinds, supersedes, and is substituted for the earlier contract, and becomes the only agreement of the parties on the subject. Clark, Cont. 612; Patmore v. Colburn, 1 Cromp., M. & R. 65, 71; Chrisman v. Hodges, 75 Mo. 413, 415; Renard v. Sampson, 12 N. Y. 561, 568; Stow v. Russell, 36 Ill. 18, 30; Harrison v. Polar Star Lodge, 116 Ill. 279, 287, 5 N. E. 543, 546; Howard v. Railroad Co., 1 Gill, 311, 341; Paul v. Meservey, 58 Me. 419, 421. The legal effect of the contract of July 22d, therefore, standing by itself, was to rescind the agreement of June 14th, and to constitute itself the only contract between the parties for the sale of the property.

We turn again to the complaint to ascertain in what way the plaintiff seeks to escape from this effect. The only averments to accomplish that result are that at some time before the contract of July 22d was made the defendants advised the plaintiff that it would be necessary and prudent to conduct seeming negotiations for the purchase of the property, so that the transaction might be clothed with the appearance of genuineness, and assured it that this subsequent negotiation should be meaningless and of no validity, except as a mode of transferring the property, and that the only contract and transaction they desired to make was the contract of June 14th, and that, in furtherance of this plan, the contract of July 22d was made and fulfilled in part performance of the agreement of June 14th. The averment that the contract of July 22d was performed in part fulfillment of the agreement of June 14th must stand or fall with the sufficiency of the plea, that the later contract was meaningless and invalid, because, if it was valid, the transfer of the title and the payment of the $25,000 constituted its performance, and, if it was without legal effect or meaning, the contract of June 14th was in force, and the sale and delivery of the property were necessarily a part performance of that contract. The averments under consideration do not disclose any mutual mistake in making or reducing to writing or performing the agreement of July 22d, because they do not show that the defendants did not intend to make and perform that contract. They fail to

disclose any fraud, because the promises they recite relate to the future. They do not constitute the misrepresentation of any existing fact which conditioned the trade. And fraud may not be predicated of a promise or a prophecy. Railway Co. v. Barnes' Adm'x, 64 Fed. 80, 12 C. C. A. 48, and 27 U. S. App. 421; Sawyer v. Prickett, 19 Wall. 146, 163; Insurance Co. v. McMaster, 87 Fed. 63, 67, 30 C. C. A. 532, 535, and 57 U. S. App. 638, 644; Kerr, Fraud & M. (Bump's Ann. Notes) 85, note 3. It is not perceived how a contract to sell the property for $25,000 could clothe its sale with more appearance of genuineness than an agreement to sell it for $50,000, and the complaint discloses no reason why a sham written contract for a sale at the former price should be made, if the real intention of the parties was to perform a valid contract for a sale at the latter price. There is, however, a fatal objection to the allegations which are made to avoid the contract of July 22d. Those averments are, in effect, that in the parol negotiations which preceded and resulted in that written contract the defendants represented and promised that the subsequent agreement should have consequences exactly opposite to those which its plain terms and their settled legal effect entailed. The legal effect of this written contract was to rescind and supersede the former agreement, and to make the later one the only contract between the parties. The averments of the complaint are that, in the oral negotiations which led to it, the defendants represented to and assured the plaintiff that this contract should not have that effect, but that it should itself be void while the contract of June 14th should still remain in force. Such allegations as these are futile to avoid the deliberate written contract of the parties. No evidence can be received under them, because its admission would fly in the teeth of the salutary rules that all prior negotiations are merged in the written contract which results from them, and that parol evidence cannot be received to contradict or modify its terms or its legal effect. In Chrisman v. Hodges, 75 Mo. 413, 415, this exact question was presented to the supreme court of Missouri by an attempt to show by oral testimony that it was not the intention of the parties by a subsequent inconsistent contract to substitute that agreement for an earlier one, and the court unanimously held that this would be to permit parol evidence to contradict the terms and to destroy the legal effect of the later written contract, and that such evidence could not be lawfully received. The only testimony which could establish the truth of the averments in this regard falls under the ban of the established rule so often announced and applied in this court, that "no representation, promise, or agreement made, or opinion expressed, in the previous parol negotiations as to the terms or legal effect of the resulting written agreement, can be permitted to prevail, either at law or in equity, over the plain provisions and just interpretation of the contract, in the absence of some artifice or fraud which concealed its terms and prevented the complainant from reading it." Insurance Co. v. McMaster, 87 Fed. 69–71, 30 C. C. A. 538–540; Thompson v. Insurance Co., 104 U. S. 252, 259; Insurance Co. v. Henderson, 69 Fed.

762, 766, 768, 16 C. C. A. 390, 393, 395, 32 U. S. App. 536, 543, 547; Green v. Railway Co., 35 C. C. A. 68, 92 Fed. 873, 877; Laclede Fire-Brick Mfg. Co. v. Hartford Steam-Boiler Inspection & Insurance Co., 60 Fed. 351, 353, 358, 9 C. C. A. 1, 3, 8, 19 U. S. App. 510, 513, 520; Insurance Co. v. Mowry, 96 U. S. 544, 547; Assurance Co. v. Norwood, 57 Kan. 610, 611, 613, 47 Pac. 529; Association v. Kryder, 5 Ind. App. 430, 435, 31 N. E. 851; Union Nat. Bank of Oshkosh v. German Ins. Co., 18 C. C. A. 203, 71 Fed. 473; Insurance Co. v. Teter, 136 Ind. 672, 673, 676, 679, 36 N. E. 283; Burt v. Bowles, 69 Ind. 1; Clodfelter v. Hulett, 72 Ind. 137; Hudson Canal Co. v. Pennsylvania Coal Co., 8 Wall. 276, 290; Insurance Co. v. Lyman, 15 Wall. 664; Pearson v. Carson, 69 Mo. 550; Insurance Co. v. Neiberger, 74 Mo. 167; Lewis v. Insurance Co., 39 Conn. 100. The result is that there are no averments in the complaint sufficient to avoid the legal effect of the agreement of July 22d, and the earlier contract was rescinded by that agreement, so that there is no basis for a recovery here on account of the refusal of the defendants to make and deliver their notes.

This view of the legal effect of the transactions between these parties is confirmed by the practical interpretation which they gave to them by their acts. If the earlier contract was in force when they transferred the property, and the bonds secured upon it, the plaintiff was entitled to the notes at the same time that he received the cash, and as a condition of the transfer of the property and the bonds to the defendants. If that contract was in force, and the parties were performing it, the natural and usual course of business would have been for the plaintiff to retain the title of the property and the possession of the bonds until it received the notes of the defendants, and to exchange the conveyances of the property and the notes simultaneously. On the other hand, if the former contract was rescinded and the later agreement was in force, the payment of the $25,000 was the only condition, a compliance with which the plaintiff could require. The Housekeeper Company received the $25,000, delivered the title deeds, and surrendered the bonds, without demanding or mentioning the notes. All this was done before August 29, 1895. The demand of the notes seems to have been an afterthought. It was not made until October 25, 1895, nearly two months after the property was delivered to the defendants. These acts of the parties constituted a practical construction of their transaction to the effect that the earlier contract was rescinded and the later one was in force. They are in accord with the legal effect of their written contracts, and undoubtedly indicate their intention and understanding at the time the sale was consummated. The practical interpretation given to their agreements by the parties to them, while they are engaged in their performance, and before any controversy has arisen concerning them, is one of the best indications of their true intent, and courts that follow it will rarely go far astray. Schofield v. Bank, 97 Fed. 282; Topliff v. Topliff, 122 U. S. 121, 131, 7 Sup. Ct. 1057; Chicago v. Sheldon, 9 Wall. 50, 54. The judgment below is affirmed.

FIDELITY INSURANCE, TRUST & SAFE-DEPOSIT CO. v. MECHANICS' SAV. BANK.

(Circuit Court of Appeals, Third Circuit. October 31, 1899.)

No. 27.

1. CORPORATIONS—ACTION TO ENFORCE STATUTORY LIABILITY OF STOCKHOLDERS—KANSAS STATUTE.
   Under the constitution and statutes of Kansas subjecting stockholders in corporations to an additional liability in favor of creditors to the amount of their stock, and providing (Comp. Laws Kan. 1879, c. 23, § 32) that a judgment creditor of the corporation, after an execution returned unsatisfied, "may proceed by action to charge the stockholders with the amount of his judgment," such an action is for the individual benefit of the creditor suing, and he may proceed at law against a stockholder in any court of general jurisdiction where personal service may be made on the defendant.[1]
2. SAME—EFFECT OF APPOINTMENT OF RECEIVER.
   Under such a statute, the liability of the stockholder, being directly to the creditor, cannot be enforced by a receiver appointed for the corporation, and the appointment of such receiver does not affect the right of a judgment creditor to maintain an action against a stockholder to enforce such liability.
3. SAME—LIMITATION OF ACTION—DEATH OF STOCKHOLDER.
   The contingent liability of a stockholder in a Kansas corporation under the statutes of that state upon his death continues against his personal representative, so that his death does not start the statute of limitations to running against an action to enforce such liability by a creditor whose right of action accrued subsequent to such death.
4. SAME—DEFENSES—EFFECT OF STATE DECISION.
   The supreme court of Kansas having held that a stockholder in a corporation of that state, when sued by a creditor of the corporation under its statutes to enforce the additional liability imposed thereby, which is several, and may be enforced by any judgment creditor, may plead as a defense, either in whole or pro tanto, a bona fide indebtedness from the corporation to him, existing when the plaintiff's cause of action accrued, such holding, being based upon a construction of the statute and the nature of the stockholder's liability thereunder, becomes a part of the statute law of the state, and determines the rights of the parties to an action brought thereunder in another jurisdiction.
5. SAME—EQUITABLE OR LEGAL NATURE OF DEFENSE.
   Such a defense is not an equitable one in any technical sense, but one which goes directly to the question whether the defendant, as a stockholder, is subject to any liability under the statute which the plaintiff can enforce and is cognizable in a court of law, which can only enforce the statutory liability according to its limitations as fixed by the courts of the state.

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

For opinion of circuit court, see 91 Fed. 456.

R. C. Dale, for plaintiff in error.

Russell Duane, for defendant in error.

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

[1] As to stockholders' liability to creditors of corporation, see note to Rickerson Roller-Mill Co. v. Farrell Foundry & Machine Co., 23 C. C. A. 315, and, supplementary thereto, note to Scott v. Latimer, 33 C. C. A. 23.

ACHESON, Circuit Judge. Section 2 of article 12 of the constitution of the state of Kansas reads thus:

"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 liabilities shall not apply to railroad corporations, nor corporations for religious or charitable purposes."

And a statute of that state contains the following provisions to enforce such individual liability after a creditor has obtained judgment against the corporation:

"Sec. 32. 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 upon an 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." Comp. Laws 1879, c. 23, § 32.

The Mechanics' Savings Bank having become a creditor of the Davidson Investment Company, a corporation created under and by virtue of the laws of the state of Kansas, and there located, instituted an action against that corporation in the district court of Cowley county, in the state of Kansas, and on January 24, 1895, obtained judgment therein against the said corporation in the sum of $9,022. Afterwards, on September 30, 1895, the plaintiff caused execution to be issued upon said judgment against the Davidson Investment Company, the defendant therein, which execution was returned wholly unsatisfied, it appearing that there could not be found any property whereon to levy such execution. The present action is founded upon that judgment, and was brought on July 16, 1896, by the Mechanics' Savings Bank against the personal representative of John G. Reading, deceased.

This record discloses that John G. Reading died on June 27, 1891; that on July 26, 1892, the defendant below, the Fidelity Insurance, Trust & Safe-Deposit Company, became the administrator de bonis non cum testamento annexo of his estate; and that at the time of his death John G. Reading was the owner of 150 paid shares of the capital stock of the said Davidson Investment Company, of the par value of $100 per share, the certificates for which came into the defendant's hands as administrator of said estate. This action is to enforce the additional or double liability upon said stock under the constitution and statute of the state of Kansas above recited. It is further shown by the record that the defendant below, as administrator of the estate of John G. Reading, deceased, became and has remained the holder of 15 bonds of the said Davidson Investment Company to the aggregate amount of $15,000; that default in the payment of interest thereon occurred in April, 1892, and that thereby, under the terms of the bonds, and in consequence of action taken by the

administrator, the principal became due in April, 1893. Thus it appears that at the date when the plaintiff obtained its aforesaid judgment against the Davidson Investment Company, and also at the time this action was brought, the Davidson Investment Company was indebted on said bonds to the estate of John G. Reading in an amount then due exceeding the plaintiff's claim, which indebtedness still exists. The court below directed a verdict for the plaintiff for the amount of its claim, subject to the opinion of the court upon certain reserved questions of law raised by the defendant's points. Such verdict having been rendered, the court subsequently ruled the reserved questions in favor of the plaintiff, and entered judgment against the defendant upon the verdict.

The first question which this court is called upon to consider is whether the liability of a stockholder in a Kansas corporation, under the constitution and statute of that state, to pay an additional amount equal to the par value of the stock owned by him, can be enforced in a federal court in an action at law brought by a judgment creditor against a stockholder, to which action the debtor corporation is not a party. This question the court below resolved in favor of the plaintiff. The correctness of the ruling is here earnestly and ably controverted. We are not persuaded, however, that the conclusion of the court in this regard was erroneous. The nature and extent of the liability of such stockholders are to be determined here according to the law of Kansas as declared by the supreme court of that state. Now, we think that it is firmly established by the decisions of that court that the double liability of such stockholders is several, and not joint, and that, when proceeded against by action to enforce the same, each must be sued separately; that such action can only be maintained by a judgment creditor of the corporation after execution upon his judgment against the corporation is returned unsatisfied; and that the plaintiff in such action sues for his own exclusive benefit. Howell v. Manglesdorf, 33 Kan. 194, 5 Pac. 759; Abbey v. Dry-Goods Co., 44 Kan. 415, 24 Pac. 426; Howell v. Bank, 52 Kan. 133, 34 Pac. 395; Bank v. Magnuson, 57 Kan. 573, 47 Pac. 518. These principles, it seems to us, lead irresistibly to the conclusion that under the last clause of the statute, namely, "or the plaintiff in the execution may proceed by action to charge the stockholders with the amount of his judgment," an action at law to enforce the double liability may be maintained by a judgment creditor of the corporation against a stockholder in any court of general jurisdiction where personal service may be made upon the stockholder. That this is the true construction of the statute was declared by the supreme court of Kansas in Howell v. Manglesdorf, supra. Such, also, has been the conclusion reached by courts in other jurisdictions in cases involving this Kansas statute, and where this identical question of remedy was involved. Bank v. Rindge (C. C.) 57 Fed. 279; Rhodes v. Bank, 13 C. C. A. 612, 66 Fed. 512; McVickar v. Jones (C. C.) 70 Fed. 754; Whitman v. Bank, 28 C. C. A. 404, 83 Fed. 288; Dexter v. Edmands (C. C.) 89 Fed. 467; Bank v. Ellis, 166 Mass. 414, 44 N. E. 349; Ferguson v. Sherman, 116 Cal. 169, 47 Pac. 1023.

The next question here presented is whether, by the appointment

of a receiver of the Davidson Investment Company prior to the bringing of this suit, the right of action to enforce the stockholder's double liability became vested solely in the receiver. The views we have heretofore expressed require a negative answer to this question. The liability of the stockholder is directly to the judgment creditor, and the receiver cannot enforce it. The decisions of the supreme court of Kansas above cited we think show that an action by the receiver to enforce this double liability is not maintainable. To the cases already mentioned may be added Sterne v. Atherton (Kan. App.) 51 Pac. 791. In Bank v. Ellis, supra, it was held by the supreme court of Massachusetts that the fact that the corporation was in the hands of receivers was immaterial under the construction given to the statute by the supreme court of Kansas, and which construction that court followed. A like ruling was made in Dexter v. Edmands (C. C.) 89 Fed. 473.

We are of the opinion that the questions arising upon the defendant's first and second points were correctly decided by the court below. The fact that John G. Reading died more than four years before the plaintiff's cause of action accrued by the obtaining of his judgment and return of execution unsatisfied did not prevent the maintenance of this action. The case of Richmond v. Irons, 121 U. S. 27, 7 Sup. Ct. 788, and the other cases cited in the opinion of the court below, show that the contingent liability of a stockholder in a Kansas corporation upon his death survives as against his personal representatives.

We are not prepared to say that the court below erred in declining to find that the Davidson Investment Company ceased to do business, within the meaning of the Kansas statute, prior to July 15, 1892, and therefore we conclude that the court rightly held that the action was not barred either by the statute of limitations of the state of Kansas or by the Pennsylvania act of March 28, 1867.

Thus far we are in accord with the opinion and the rulings of the circuit court. There remains, however, to be considered one other important question arising upon the defendant's fourth point, namely, whether the estate of John G. Reading, deceased, as a creditor of the Davidson Investment Company, to an amount exceeding the plaintiff's claim, upon an indebtedness which was due to the estate prior to the date when the plaintiff obtained his judgment against that corporation, was not entitled to use that indebtedness as a defense in this action. The general subject of the defense arising from counterclaims against the corporation available to a stockholder in a suit to enforce his statutory additional liability is discussed in the text-books. In 1 Cook, Stocks & S. § 225, it is said:

"It has been held that, where the statute creates a fund out of which the creditors are to be paid ratably, then the stockholder cannot set off an indebtedness of the corporation to him. He must pay in what the statute requires, and then prove his claim against the corporation like any other creditor. But where the shareholder's liability by statute is immediate, and personal, and several, and any creditor may sue any shareholder, then a shareholder may set off a debt owing to him from the corporation, when he is sued by a corporate creditor."

The same doctrine is expressed in 2 Beach, Priv. Corp. § 727, and in 2 Mor. Priv. Corp. §§ 861, 862. The rule is stated in Tayl. Priv. Corp. § 732, thus:

"When, however, a single creditor can and does sue a shareholder at law to enforce the statutory liability of the latter, it is then competent for the shareholder to set off a debt owing him from the corporation."

The doctrine thus laid down by these law writers is well sustained by their citations of adjudged cases. The rule above stated commends itself as manifestly just. Its applicability here is apparent, for under the law of Kansas the statutory double liability is not impressed with any trust for the benefit of the creditors ratably, but the liability imposed upon the stockholders is immediate, and personal, and several, and of such nature that any creditor may institute an independent action in his own right, exclusively, against any stockholder. We are not, however, here left wholly to general principles. The courts of Kansas have authoritatively spoken. In Howell v. Manglesdorf, supra, it was declared that the action to enforce the stockholder's liability does not accrue until execution upon the judgment against the corporation has been returned unsatisfied, and that the stockholder, when sued, may show in defense that he has already voluntarily paid the amount of his individual liability to other creditors of the corporation. In Abbey v. Long, 44 Kan. 688, 24 Pac. 1111, it was ruled that the stockholder cannot set off the face amount of claims against the corporation which he has bought at a discount, but only the amount he has actually paid therefor. In Musgrave v. Association, 5 Kan. App. 393, 49 Pac. 338, the court of appeals of Kansas held that the stockholder against whom proceedings were had to enforce payment of a stock liability might set up in defense debts due him from the corporation. The precise question now before us was distinctly ruled by the supreme court of Kansas (the highest court of the state) in favor of the stockholder in the recent case of Pierce v. Security Co., 55 Pac. 853,—a case which, we ought to say, was decided after the court below had ruled the question now under consideration. The substantial facts shown in that case were identical with the facts here appearing. The plaintiff, Mary H. Pierce, had obtained a judgment against a Kansas corporation, and, after return of an execution unsatisfied, she instituted a proceeding against Baker, a stockholder of the corporation, to enforce his statutory double liability. Baker, in defense, showed that he had paid the full face value of his stock, and that he had bona fide judgments and claims against the corporation which exceeded the amount of the stock owned by him, and that these claims and demands accrued when the corporation was a going concern, and prior to the bringing of the action in which Mary H. Pierce obtained her judgment. The supreme court sustained this defense. In the course of its opinion the court said:

"The claim of the stockholder is not a set-off in its technical legal sense, but it is an equitable defense, which is entitled to make. When he becomes a bona fide creditor of the corporation, he is clothed with the same equity as contract creditors."

The court, referring to the case of Abbey v. Long (which we have cited above), said:

"If a stockholder may set off voluntary payments made by him of the debts of the corporation in diminution or bar of a recovery against him, there is no good reason or authority why he may not also set off in like manner the indebtedness due from the corporation to him."

Again, the court said:

"The view taken is based largely on the nature of the liability sought to be enforced, and the character of the proceeding brought to enforce the same. Under our statute the liability imposed on stockholders is personal and several, and any creditor may institute an independent action against any stockholder for the enforcement of corporate debts."

The court further declared:

"Where the statute creates a liability against stockholders which is personal and several, and actionable by any creditor against any stockholder, it is generally held that a stockholder may, in such a proceeding, brought against himself, set off debts due to him from the company."

And in support of this last proposition the court cited the text writers to whom we have already referred.

Now, certain it is that, had an action been brought by this plaintiff against this administrator in a court of the state of Kansas to enforce the alleged liability of John G. Reading's estate, the defense here presented by the fourth point would have been effectual. Why, then, should a defense which is good in a court of Kansas be unavailing to a defendant sued in Pennsylvania? The liability sought to be enforced and the remedy by action upon the plaintiff's judgment arise under the statute of Kansas. Surely, that statute is to be construed in the same way, and the same effect given to it, in both jurisdictions. It is an established principle that the interpretation within the jurisdiction of a state by its highest court of a local statute becomes a part of that law, as much so as if incorporated by the legislature in the body of the statute. Christy v. Pridgeon, 4 Wall. 196, 203. In Shelby v. Guy, 11 Wheat. 361, 367, the supreme court of the United States, speaking of state statutes, said:

"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."

We think it very clear that the decision of the supreme court of Kansas in Pierce v. Security Co., supra, is founded upon the construction of the Kansas statute. The language of the court we have quoted makes this plain. The basis of the decision is the nature of the statutory liability, and the character of the statutory proceeding for its enforcement. This is not an equitable defense in any technical sense. The phrase was not used in that sense by the Kansas court. The claim and the defense are cognate. Both are cognizable at law. The defense grows out of the nature of the liability. There is no necessity or reason for the defendant's resorting to a court of equity. No distinctive equitable relief is required by the defendant. No accounting, or apportionment, or other equitable adjustment is involved. The issue is simply be-

tween the plaintiff, who proceeds upon the footing of a supposed existing liability, and the defendant, who sets up the extinguishment of that liability. The defense is purely a legal one, arising under the statute of Kansas as interpreted by the supreme court of that state. If this statutory liability is to be enforced at all in a court of law, it must be enforced according to its limitations as defined by the supreme court of Kansas. It would be most remarkable if nonresident stockholders of a Kansas corporation, sued at law in courts of the United States upon a liability under the statute of Kansas, were denied the benefit of a personal defense authorized by the statute as construed by the supreme court of that state, and available to every local stockholder proceeded against by personal action in the courts of Kansas. We do not think that the cases relied on sanction a result so unjust and so unnecessary. The right of set-off, generally, defenses arising from counterclaims, and even "any equitable defense growing out of the same transaction," are freely open to defendants sued at law in circuit courts of the United States. Winder v. Caldwell, 14 How. 434, 443; Partridge v. Insurance Co., 15 Wall. 573, 580. Speaking for the supreme court, Mr. Justice Miller, in the latter case, said:

"It would be a most pernicious doctrine to allow a citizen of a distant state to institute in these courts a suit against a citizen of the state where the court is held, and escape the liability which the laws of the state have attached to all plaintiffs, of allowing just and legal set-offs and counterclaims to be interposed and tried in the same suit and in the same forum."

The judgment of the circuit court is reversed, and the case is remanded to that court, with direction to enter judgment for the defendant upon the reserved question of law arising upon the defendant's fourth point non obstante veredicto.

YOUNG et al. v. GOLDSTEEN.

(District Court, D. Alaska. October 18, 1899.)

1. MINING CLAIM—ADVERSE—WHO MAY.
   The owner of a town lot in Alaska, unpatented, may adverse an application for patent for a lode claim, and may maintain an action in a court of competent jurisdiction in support of such adverse.

2. PUBLIC DOMAIN IN ALASKA—RIGHTS OF SETTLERS THEREON.
   The act of congress of May 17, 1884, providing a civil government for Alaska, also provides that "the Indians or other persons in said district shall not be disturbed in the possession of any lands actually in their use or occupation or now claimed by them, but the terms under which such persons may acquire title to such lands is reserved for future legislation by congress." By this provision all persons in the peaceable possession of lands in Alaska on the date of said act are guarantied the right to ultimately acquire a perfect title to such lands through such legislation as the congress may enact for that purpose.

3. ADVERSE MINING CLAIMS—ENFORCEMENT.
   The proceedings directed and authorized by section 2326, Rev. St., may be either by suits in equity or actions at law; the former when the plain-

tiff is in possession, and the latter when he is out of possession of the premises.

(Syllabus by the Court.)

C. S. Blackett, for plaintiffs Young and others.

A. K. Delaney, for plaintiffs Last Chance Gold-Min. Co. and others.

R. F. Lewis and W. D. McNair, for plaintiffs Lewis and others.

Maloney & Foote and F. D. Kelsey, for plaintiffs Harkrader and others.

J. H. Cobb and H. H. Fulsom, for defendant.

JOHNSON, District Judge. Thirty-nine persons, including the plaintiff, bring separate actions against the defendant, the object and purpose in each case being the same. The allegations common to all the pleadings are that the defendant, on the 6th day of February, 1899, made application in the United States land office at Sitka, Alaska, for a patent to the Bonanza lode claim, being United States survey No. 316; that the plaintiffs adversed defendant's application for patent, and now bring their actions in this court in furtherance of said adverse, as provided by section 2326 of the Revised Statutes of the United States. Each plaintiff claims to be the owner of one or more town lots situated within the exterior boundaries of the surveyed, platted, and (excepting only the lands embraced within mineral survey No. 316) patented town site of Juneau, in the district of Alaska. Ownership in these lots is claimed by plaintiffs by virtue of prior appropriation, occupation, improvement, and continued and undisputed and notorious possession of the nonmineral public lands of the United States in the district of Alaska, either by themselves in person or by their grantors. The plaintiffs allege that at the times mentioned in the various bills and complaints as the times when they took possession of these lots the same were wholly unoccupied, unimproved, and unclaimed, and were a part of the nonmineral public domain of the United States; that there is no known lode or ledge of rock in place within the exterior boundaries of the Bonanza claim carrying gold or other precious metals. There are also allegations in different complaints and bills which are peculiar to those cases, and which it may or may not be necessary to notice hereafter. The plaintiffs have not, however, all pursued the same form of action. Mr. Blackett, for the plaintiff in case No. 872 and in case No. 873, has entitled his pleading a "complaint," and has had a summons at law issued and served; but the pleading itself is in the nature of a bill in equity, and the relief asked is purely equitable. Messrs. McNair and Lewis, in case No. 885, have filed a bill in equity, while all the remaining cases, brought by Mr. Delaney and by Messrs. Maloney & Foote and F. D. Kelsey, being Nos. 892 to 897, inclusive, and Nos. 906 to 935, inclusive, are brought on the law side of the court by complaints somewhat in the nature of actions in ejectment. However, to all these complaints and bills the defendant has interposed demurrers, all of which were argued and submitted together to the court. Various grounds of demurrer are alleged. But the principal ones, and those common

to all the cases, are that the pleadings show that plaintiffs have no title or ownership in the lots in dispute, and are not entitled to any relief; that the court has no jurisdiction to hear and determine the matters and things alleged, but that the land department has the exclusive jurisdiction of the same; that these actions purport to be brought in support of adverse claims as provided in sections 2325, 2326, Rev. St., and, as such, do not state facts sufficient to constitute a cause of action. The bills in equity are further demurred to because of insufficiency in form, and the complaints because the plaintiff can have no action at law, even if entitled to relief.

By far the most serious question to be determined is whether the owner of a town lot in Alaska, unpatented, can adverse the application of one applying for a patent to a lode claim, under section 2325, Rev. St., and maintain any kind of an action in support of such adverse, under section 2326 of the same statutes. If he cannot, then there is an end of these cases, unless the laws of Oregon, extended to this territory by an act of congress passed May 17, 1884, are sufficient to give relief. Mr. Lindley, in his work on Mines (section 717), holds that adverse proceedings under section 2325, Rev. St., can only be maintained by a rival mineral claimant; and in support of this contention he cites the case of Mining Co. v. Campbell, decided by the supreme court of the United States, and reported in 135 U. S. 286–289, 10 Sup. Ct. 765. An examination of that case discloses the fact that both parties were claiming title to the land in dispute by virtue of separate patents issued by the United States. The plaintiff claimed through a patent to a lode, and the defendant by virtue of a patent to a placer, claim. The court's attention was at no time called to the question of the right of a nonmineral claimant to adverse a mineral claimant. The court had in mind only the issues involved in the case before it, and the rights of nonmineral claimants were not one of them. The language of the court immediately preceding that quoted by Mr. Lindley is as follows:

"A careful examination of this statute concerning adverse claims leads us to the conviction that it is not intended to affect a party who, before the publication first required, had himself gone through all the regular proceedings required to obtain a patent for mineral land from the United States; had established his right to the land claimed by him, and received his patent; and was reposing quietly upon its sufficiency and validity. It is true that there are no very distinctive words declaring what kind of adverse claim is required to be set up as a defense against the party making publication, but throughout the whole of these sections, and the original statute from which they are transferred to the Revised Statutes, the words 'claim' and 'claimant' are used. This word is, in all legislation of congress on the subject, used in regard to a claim not yet perfected by a title from the government by way of a patent."

There is nothing in this language tending to limit the provisions of section 2325 to rival claimants of mining property. On the contrary, a fair construction of the text would be that any person having a claim, other than a patented one, adverse to the applicant for patent, might adverse the same. And, keeping in mind the question before the court, the language quoted by Lindley does not de-

tract from the conclusion above reached. "It is true that there are no very distinct words declaring what kind of adverse claim is required to be set up as a defense against the party making publication," say the court; and then they say that, because the word "claim," as used by congress, means some other interest in lands than a patented one, that one claiming under a patent cannot adverse. Counsel for defendant lays much stress upon the clause in section 2326 wherein it is provided that the party, after trial, found to be entitled to the possession of the claim, may, by paying five dollars an acre, and complying with other requirements therein stated, have patent issued to him, etc.; claiming that the language indicates almost conclusively that only mineral claimants are included within the meaning of that section. On this line counsel asks how, if a nonmineral claimant is permitted to adverse a mineral claimant, and he be adjudged entitled to the possession of the disputed premises, is he to pay his five dollars an acre, and procure his patent? We answer, he certainly cannot do so. That part of the section cannot apply to him. Neither can it apply to a placer claimant, where he adverses a lode claimant; nor to the owner of a lot in an incorporated town; nor to the owner of any nonmineral patented lands. Yet in all these cases the right to adverse, and to bring suit in support thereof, is conceded by counsel and sustained by the authorities. And Mr. Lindley seems to stand alone among the law writers in his contention, so far as we are able to ascertain. Morrison, without giving reasons therefor, says a town lot or other surface right should adverse. Morr. Min. Rights, p. 403. And Barringer & Adams, in their valuable work, "The Law of Mines and Mining" (page 383), say:

"The claimant of land as a town lot, * * * and all other claimants whose title does not itself already rise to the dignity of a grant, must, in order to preserve their rights, file adverse claims in the proper land office."

And this, it seems to us, is much more in harmony with the opinion of the supreme court as expressed in Mining Co. v. Campbell, supra, than the deductions advanced by Lindley. And it will be conceded that the right to adverse carries with it the right to maintain an action in any court of competent jurisdiction in support of the same. The last-cited authors assign the following reasons for the deductions above stated:

"The policy of the law is to require all rights and equities to the premises sought to be purchased, and which are adverse to the title upon which the applicant relies, to be adjusted prior to the issuance of the patent. The right to file an adverse claim belongs to every one having a claim to an interest in the land, of whatever kind, and is not affected by the character of the land."

But one adjudicated case directly in point has been cited by either side to this controversy. This was the case of Bonner v. Meikle (C. C.) 82 Fed., at page 697. This case arose in Nevada, and was decided by Judge Hawley as recently as 1897. The facts before that court were so similar—in truth, so nearly identical—in all their details with the cases at bar that counsel for defendant concedes that, if that decision is binding upon this court, then his demurrer cannot be sustained in so far as it raises the question of the right of a

lot holder to adverse an applicant for patent to mineral lands. Without conceding that the decision of that court is binding upon the district court of Alaska, the reasoning of the judge is admitted to be good, and to meet our full approval. And there is one additional fact in the cases at bar not appearing in the case above referred to, which would, in our opinion, give the plaintiffs the right to adverse the application of the defendant, even though we should fail to approve the decision in Bonner v. Meikle. We refer to the peculiar laws governing Alaska. Prior to May 17, 1884, civil law was unknown in Alaska. From the time the United States acquired the territory, in 1867, to the date referred to, the citizens from all parts of the United States had been coming here, locating mining claims, laying out town sites, dividing the same into lots, blocks, streets, and alleys, developing the former and improving the latter by the erection of substantial and expensive buildings for residence, mercantile, and manufacturing purposes. Where the mines were most productive and most numerous, there the towns were most extensive and the improvements most substantial. The one was dependent upon the other for existence. The one was as necessary to the development of the new territory as was the other. The title to all these lands, mineral and nonmineral, remained in the federal government. Those making the improvements had a possessory right or title only to the premises occupied and improved by them. The mineral claimant had no greater or different right or title to the premises occupied by him than had the nonmineral claimant. This was the condition of land titles in Alaska when a form of civil government was extended to the territory in 1884. Realizing, apparently, the possibility that those who had risked so much in establishing their homes in this then well-nigh unknown country might not reap the fruits of their labor, and for the purpose of protecting them in their property rights, the congress passed the following law:

"That the Indians or other persons in said district shall not be disturbed in the possession of any lands actually in their use or occupancy or now claimed by them, but the terms under which such persons may acquire title to such lands is reserved for future legislation by congress."

At the same time the congress extended the laws of the United States relating to mining, and expressly withheld the general land laws of the United States. A construction of this statute by the courts, under the pleadings in these cases, is necessary, before the land department can intelligently pass upon defendant's application for a patent, for the reason that the plaintiff in nearly every case alleges peaceable possession of the premises in dispute antedating May 17, 1884, and in every case possession is claimed prior to any claim of the defendant; for I take it that, if the courts should hold that all those plaintiffs who were in possession of their respective lots prior to the date referred to are entitled to them as against the defendant, then their decision would be binding upon the land department, and all such lots would have to be excluded from the survey before the patent could issue to the defendant. And while this court may not be called upon at this time, under the pleadings, to construe this law, nevertheless the question necessarily arising upon

the trial of these causes, and having been raised upon the argument of the demurrers, it is deemed to be not inexpedient to pass upon the question now. In our opinion, the language used is susceptible of but one construction; i. e. that congress guarantied to all persons in possession of lands in Alaska at that date the right ultimately to acquire a perfect title to the same. If anything less was intended, then the act is wholly meaningless. If congress meant only to guaranty to them undisturbed possession for the time being, reserving the right to ultimately pass such laws as would confiscate the property to the government, or give it to another, then the act is worse than a mockery. If the expression, "the terms under which such persons may acquire title," means anything, it means that at some future date the congress will pass the needful legislation whereby their possession will ripen into perfect ownership. And until such legislation is enacted the "future legislation" is yet to be achieved. It is not too broad a construction of the language used to apply it to those who, in good faith, were the first to take up, occupy, and improve the public lands since that date. With the absolute guaranty of protection to those in possession of lands prior to May 17, 1884, and with the laws relating to mineral lands only having been extended to Alaska, all persons had a right to expect protection from congress if they were first in point of time to go upon the public domain, and occupy and improve the same, even though they went there after May 17, 1884. The bills and complaints in the cases at bar set up prior appropriation, continued occupancy, etc., and this is sufficient to put the defendant upon her answer.

Different pleadings set up other grounds of complaint peculiar to their respective claims,—such as that, after the location of the Bonanza lode, the boundaries thereof were so changed as to include the lots in controversy; that the end line of the Bonanza claim is at the mean high-tide line of Gastineaux Channel; and that, if it shall be so determined, the 300 feet on either side of the lode line would not include certain lots claimed to be within the survey of the Bonanza lode, etc. These and other issues having been tendered, the plaintiffs have a right to be heard upon them in the courts. The demurrer is overruled in so far as it denies the jurisdiction of the court to try the issues raised by the pleadings.

The remaining grounds of demurrer go to the form and sufficiency of the respective pleadings, and the demurrers must be sustained on these grounds. Not one of the bills or complaints is sufficient in form and substance. In Doe v. Mining Co. (C. C.) 43 Fed. 220, it is said "the proceeding directed and authorized by section 2326 of the Revised Statutes has no relation whatever to the action of ejectment or to any other common-law action." The action is purely statutory, with no form prescribed. The relief demanded being generally equitable in its nature, some of the courts go so far as to indicate that the action should always be brought on the equity side of the court. Rutter v. Mining Co. (C. C.) 75 Fed. 37. But the question of the form of the action to be brought in such cases is settled, once and for all, by the supreme court of the United States in the case

of Perego v. Dodge, 163 U. S. 165–168, 16 Sup. Ct. 974, when the court say:

"Apparently an action at law or a suit in equity would lie, as either might be appropriate under the particular circumstances,—an action to recover possession when the plaintiff is out of possession, and a suit to quiet title when he is in possession."

The plaintiffs in the cases before us are in possession of the premises, and suits in equity to quiet title should have been brought. Such suits have been brought in cases Nos. 872, 873, and 885, but they are deficient in form; the first two in several respects, and the last one in not alleging the citizenship of the defendant, as required by the rules of the supreme court. The remaining thirty-six cases are actions at law, although in each case the plaintiff admits he is in possession of the premises. For the reasons assigned, the demurrers in each case will be sustained.

DE WEESE v. SMITH et al.

(Circuit Court, W. D. Missouri, C. D. October 19, 1899.)

1. NATIONAL BANKS—ASSESSMENTS AGAINST STOCKHOLDERS—CONCLUSIVENESS OF COMPTROLLER'S ACTION.
   The action of the comptroller of the currency in ordering an assessment upon the stockholders of an insolvent national bank involves a determination of the necessity for such assessment, which is quasi judicial, and is conclusive on the stockholders.
2. SAME—ACTION TO RECOVER ASSESSMENTS—FORMER RECOVERY AS A BAR.
   When the comptroller of the currency has directed the receiver of an insolvent national bank to enforce the collection of an assessment against the stockholders for an amount less than the par value of their stock, and the receiver has recovered a judgment at law thereon against a stockholder, which has been satisfied, he cannot maintain a second action against such stockholder to recover a further assessment. The cause of action to recover an assessment is one upon the stockholder's contract, which cannot be split, and the first recovery is a bar to any subsequent action on the same contract.
3. SAME—POWER TO MAKE SECOND ASSESSMENT.
   The ordering of the making and enforcement of an assessment on the stockholders of an insolvent national bank by the comptroller is a quasi judicial act, which exhausts the power and jurisdiction conferred upon him by the statute, and he is without authority to make a second assessment.
4. LIMITATION—ACCRUAL OF CAUSE OF ACTION.
   The liability of the stockholders of a national bank to an assessment on the bank's insolvency is so far conditioned upon the sufficiency of the general assets to pay its indebtedness that the receiver is only authorized to proceed against a stockholder after the comptroller has determined the necessity of the assessment, and the amount required; hence the statute of limitations does not commence to run against an action to enforce the stockholder's liability until such determination has been made.

This is an action at law by the receiver of an insolvent national bank to recover the amount of an assessment from stockholders. Heard on motion for judgment for want of sufficient answer.

William S. Shirk, for plaintiff.

William M. Williams and James T. Montgomery, for defendants.

PHILIPS, District Judge. This is an action at law to recover of the defendants, as stockholders in the First National Bank of Sedalia, the sum of $2,500 and interest, as a second assessment imposed by the comptroller of the currency upon the stockholders of said bank. The petition alleges that the bank became insolvent, closed its doors, and ceased to do business on the 4th day of May, 1894, and that on the 10th day of May, 1894, the comptroller of the currency appointed a receiver for said bank, who duly qualified, and began winding up the affairs of said bank; that on the 13th day of April, 1895, said comptroller determined that it was necessary to enforce the individual liability of the stockholders, and to collect from them an assessment equal to 75 per cent. of the amount of their stock; and that, said assessment proving insufficient to satisfy the debts of the bank, the comptroller on the 7th day of February, 1899, made a further assessment on said stockholders of $25 upon every share of the capital stock held by them. This and other suits against said stockholders for the collection of this additional assessment, so called, were instituted in this court on the 5th day of September, 1899. This opinion is to apply to all of these cases, in so far as the questions herein involved are common to all of them. The defendants answered, pleading three facts as a defense to the action: First. That the sum of $187,000, which was the sum the stockholders were called upon to contribute under the first assessment, together with the other assets of the bank which came into the hands of the receiver, was sufficient to pay all the debts and engagements of the bank. But, after the failure of the bank and the appointment of the receiver, the sum of $80,000 of the assets in the receiver's hands was wrongfully and without the authority of law diverted by an investment in property in the state of California, and subsequently lost, and that the last amount, 25 per cent. of the stock of said bank owned by the defendants, is called for solely to make good the losses sustained by said wrongful diversion and investment of the funds as aforesaid, and to supply the deficiency caused by the loss arising from such investments. Second. The facts respecting the first assessment aforesaid are recited, and the answer further alleges that, to enforce the collection of said 75 per cent. of stock, the said receiver on the 25th day of July, 1895, instituted in this court an action against the defendants, and on the 19th day of October, 1896, the receiver recovered judgment against them therein for the sum of $7,500, the amount of said demand, which judgment the defendants satisfied. The answer then alleges that the liability of the defendants, as such shareholders, for the contracts, debts, and engagements of the bank, was concluded by the judgment aforesaid. Third. The statute of limitations of five years, under the state statute, is pleaded against the demand. On this answer the plaintiff has filed motion for judgment on the ground that the matters pleaded in the answer constitute no defense to the plaintiff's action.

The first matter of defense pleaded rests, as is inferred from the brief of defendants' counsel, upon the act of congress approved March 29, 1886 (24 Stat. 8). This act prescribes the course to be

taken by a receiver of an insolvent national bank when it is deemed necessary to apply the assets in his hands for the protection of the equity of the bank in any property, real or personal, under mortgage or assignment, or other legal claim attached thereto, when the property is to be sold under execution, foreclosure, or other proper order of a competent court. It directs that the receiver shall certify the facts, with his opinion as to the value of the property to be sold, and the value of the equity of his trust therein, to the comptroller of the currency, with a request to use and expend the money in his trust as may be necessary to protect such equity. The act requires the approval of the comptroller and of the secretary of the treasury to authorize such application of the funds in the hands of the receiver. The allegations of the answer touching this matter are predicated of the noncompliance of the receiver with the requirements of this statute. The difficulty in entertaining this defense to this action lies in the ruling of the supreme court in Kennedy v. Gibson, 8 Wall. 498–505, in which it is held, in effect, that the comptroller, in deciding when it is necessary to institute proceedings against the stockholders to enforce their personal liability, acts quasi judicially. "These questions are referred to his judgment and discretion, and his determination is conclusive. The stockholders cannot controvert it. It is not to be questioned in the litigation that may ensue." If the comptroller is authorized to make the assessment, matters of defense which go merely to the question as to the necessity of the collection of the additional sum to meet the liabilities of the bank are precluded by his determination. At all events, such a defense is equitable in its character, and in this jurisdiction could not be interposed in an action at law. Whether or not the defendants could, by cross bill on the equity side of the court, stay this action, and have such matters investigated, and prevent the entering of judgment herein, if the facts were found to exist, is not necessary to be determined in passing upon the motion herein.

The second question to be decided is whether or not, after the comptroller of the currency has directed the receiver to proceed to enforce the collection of the 75 per cent. of the stockholders, and the receiver has recovered judgment therein at law, and the judgment has been satisfied, the receiver can, under the direction of the comptroller of the currency, proceed to enforce by suit the further assessment of 25 per cent.? Section 5151, Rev. St. U. S. 1878, declares that "the shareholders of every national banking association shall be held individually responsible, equally and ratably, and not one for another, for all contracts, debts and engagements of such association to the extent of the amount of their stock therein at the par value thereof in addition to the amount invested in such shares." Section 5234 of this statute authorizes the comptroller, upon the declared insolvency of such bank, to appoint a receiver therefor. "Such receiver, under the direction of the comptroller, shall take possession of the books, records and assets of every description of such association; collect all debts, dues and claims belonging to it. * * * And may, if necessary to pay the debts of such association, enforce the individual liability of the stockholders." Early

in the history of the administration of this statute, the supreme court, in the case of Kennedy v. Gibson, supra, gave certain construction and directions with reference to this statute, which have ever since obtained. While the statute in terms directs that the receiver, if necessary to pay the debts of the bank, may enforce the individual liability of the stockholders, this must be done under the direction of the comptroller. Such direction of the comptroller is conclusive on the stockholders as to the necessity of proceeding against them for contribution. The comptroller determines the time when such demand shall be made upon, as also the per cent. to be collected from, the stockholders. In the very nature of things, he is supposed, after the suspension of the bank and the appointment of the receiver, to become advised at as early a day as possible of the condition of the bank's assets, and the necessities of the estate. It was anticipated, however, that it might be difficult for the comptroller, in certain cases, to determine the exact amount of contribution to be exacted from the stockholders, and that there might be dangers to a successful collection from them by delaying the proceedings to enforce their liability. Therefore the court, in anticipation that a greater sum might be collected from the stockholders than might ultimately be required to liquidate the indebtedness of the bank, said:

"If too much be collected, it is provided by statute that any surplus which may remain after satisfying all the demands against the association shall be paid over to the stockholders. It is better they should pay more than may prove to be needed, than that the evils of delay should be encountered. When contribution only is sought, all stockholders who can be reached by process of the court may be joined in the suit."

The court further in this opinion said:

"Where the whole amount is sought to be recovered [by the receiver], the proceedings must be at law. Where a less amount is required, the proceedings may be in equity; and in such case an interlocutory decree may be taken for the contribution, and the case may stand over for further action of the court —if such action should subsequently prove to be necessary—until the full amount of the liability is exhausted."

There is nothing in this postulate, it seems to me, to enforce the conclusion that the court meant to give countenance to the proposition that the comptroller might make a provisional assessment, and, after enforcing its collection in an action at law, repeat the process until the 100 cents on the dollar of the shares should be reached. What did the court mean by saying that, if the demand be for the whole amount, the proceeding must be at law? It is inferable that the learned justice had in mind certain well-established principles of the common law applicable to the enforcement of this statute. Among these principles the following summary is deducible from the best text writers on the construction of statutes: Where the statute directs that an act be done by a given officer, without pointing out the special manner of doing it, it is presumed that the method shall be according to the course of the common law; and, where a statute affirms or supplements or supersedes the rule of the common law, the legislative act "must be construed with reference to the common law"; and, in so far as it is reasonable, the interpreta-

tion of the new law must be in accordance with the common law. In other words, legislative enactments, in the absence of express contrary provisions therein, when sought to be enforced, must have applied to them the rules and methods of common-law procedure, as such statutes are not presumed to make any change beyond what is expressed in their provisions, or fairly implied in them in order to give them full operation. Suth. St. Const. § 290; Black, Interp. Laws, p. 232; End. Interp. St. § 127. So, while the provisions of the national banking act authorize the receiver, under the direction of the comptroller, to proceed to enforce the individual liability of the stockholders, the mode of such procedure is referred to the established rules of the common law, and the system of practice in the courts where the action is brought. It must be conceded that the right of action against the stockholders created by this statute is one arising ex contractu. "As the ownership of stock, in most cases, arises from the voluntary act of the stockholder, he must be regarded as having agreed or contracted to be subject to the obligation." Bank v. Hawkins, 174 U. S. 370, 19 Sup. Ct. 742. So Judge Blodgett, in Irons v. Bank (D. C.) 21 Fed. 198, said, "It was the intention of congress to make this a contract liability." The statute declares what the liability of the stockholder is. Therefore, when a stockholder takes his stock, the provision of the statute, in contemplation of law, is regarded as written into his subscription. This constitutes his undertaking, the bond of his obligation; and, when proceeded against to enforce this liability, it is essentially a declaration on a contract. The contract is a unit, indivisible, in solido. When the comptroller directs the receiver to proceed against the individual stockholder, it is to enforce the contract which the statute, in effect, writes into his subscription. The contract being a unit, how can the receiver split it up and sue upon it in parts? No rule of the common law is more firmly rooted than that a cause of action arising out of a single contract cannot be halved, or in less degree subdivided. So that, if the demandant proceeds to enforce the collection of a part only of his demand, he is held to have made his election to take a part in satisfaction thereof; and such recovery is an effectual bar to the enforcement of any claimed residue. As said by Mr. Justice Miller in U. S. v. Throckmortin, 98 U. S. 65:

"There are no maxims of the law more firmly established, or of more value in the administration of justice, than the two which are designed to prevent repeated litigation between the same parties in regard to the same subject of controversy, namely, 'Interest reipublicæ ut sit finis litium,' and 'Nemo debet bis vexari pro una et eadam causa.'"

Accordingly Chief Justice Waite, in Baird v. U. S., 96 U. S. 432, said:

"It is well settled that where a party brings an action for a part only of an entire, indivisible demand, and recovers judgment, he cannot subsequently maintain action for another part of the same demand. Thus, if there are several sums due under one contract, and suit is brought for a part only, a judgment in that suit would be a bar to another action for recovery of the residue."

Judge Napton, in Transportation Co. v. Traube, 59 Mo. 362, said:

"It is now well settled that a judgment concludes the rights of the parties in respect to the cause of action stated in the pleadings on which it was ren-

dered, whether it includes the whole or only part of the demand sued on, upon the ground that an entire claim, arising either upon a contract or wrong, cannot be split up into several actions. * * * And even where several claims, payable at different times, arise out of the same contract or transaction, separate actions may be brought as each liability accrues; but in this case it has been held that, if no action is brought until more than one is due, all that are due must be included in one action, and, if an action is brought when more than one is due, a recovery in that suit will be a bar to a second suit brought to recover the other claims that were due when the first was brought."

The reason of this rule is very succinctly and clearly expressed by Judge Thompson in Laine v. Francis, 15 Mo. App. 108, in which it was held that, where a party took a decree charging a portion of the separate estate of a married woman with the payment of his promissory note, it was a bar to a second action to charge other of her separate estate for the payment of an unpaid balance thereon:

"It is the general rule that where a party has chosen his ground, and litigated the subject-matter of an action to its final conclusion, he has exhausted his remedy, except for the purpose of such supplemental proceedings as the statute law or principles of equity may give him for the enforcement of his judgment. * * * The rule rests upon two reasons. The one is technical, and the other substantial. The technical reason is that, where a party having a cause of action prosecutes it to judgment, his cause of action is thereafter merged in the judgment, and whatever further remedy he may have under the law must be founded on the judgment, and not on the original cause of action. The substantial reason is that the law, on the grounds of obvious justice and convenience, discountenances splitting of causes of action and multiplying of suits."

Freem. Judgm. § 238, asserts that:

"It may be laid down as a general rule that each separate agreement or transaction will give rise to one entire and independent cause of action, and to but one."

Bliss, Code Pl. § 118, expresses the rule thus:

"It is a rule that a cause of action, as one springing from a single contract, cannot be so split as to authorize more than one action; and the same rule would make it improper to so divide a single cause of action by separate statements in one complaint as to show more than one cause of action."

And the supreme court of this state, in Hoffmann v. Hoffmann's Ex'r, 126 Mo. 497, 29 S. W. 606, said:

"Undoubtedly we think the liability of the trustee under the marriage contract would constitute but a single demand, though the items with which he is chargeable came into his hands at different times and from different sources."

The court of appeals of New York, in Secor v. Sturgis, 16 N. Y. 548, states the distinction between demands which are single and entire and those which are several to be that the former arise immediately out of one and the same contract, and the latter out of different contracts. This rule of law is so inflexible that it has been applied to a suit for the foreclosure of a mortgage; so that if the mortgage covers several tracts of land, and the mortgagee proceeds to foreclose as to a portion of the land, it is a waiver of the lien as to the rest of the tract, and he cannot foreclose as to the residue in a second suit. Mascarel v. Raffour, 51 Cal. 242; Sedam v. Williams, 4 McLean, 51, Fed. Cas. No. 12,609. It has also been applied to the instance of the vendor having a lien for the purchase money on lands. If he enforces the lien as to a portion of the land, he

is precluded from a second suit for any balance. Day v. Preskett, 40 Ala. 624–629. So, also, if he proceeds to enforce his lien for that portion of the money which is due, without more, he exhausts his remedy as to the rest of the land for that portion of the debt afterwards maturing. Codwise v. Taylor, 4 Sneed, 346. The liability of the stockholders partaking of the nature of a trust fund for the benefit of the creditors of the bank, in the absence of any interdicting statutory provision, all of the beneficiaries of the fund, under equity jurisprudence, would be entitled to unite in a bill in equity against the stockholders for contribution. If such beneficiaries should bring such suit to enforce the liability of the stockholders, say for 50 per cent. of the amount of stock held, and, after its recovery, such sum not proving adequate to the full protection of the creditors, could they institute a second suit for the recovery of the remaining 50 per cent.? Unquestionably not. What difference in principle can it make that the statute under review authorizes the receiver of the bank, under the direction of the comptroller, to enforce the liability? In such case he represents the bank and the creditors, and acts for them,—as much so as if the suit were in his name to the use and at the relation of the creditors. The statute gives the comptroller and the receiver no more authority to split up the demand, and twice vex the debtor, than the creditors would have if permitted to proceed at common law.

While the term "assessment" is employed conventionally to designate the action taken by the comptroller looking to the enforcement of the liability of the stockholders, no such term as "assessment" or "assessments" is found in the statute. The statute simply declares that the liability of the stockholder is to the extent of his stock, and in case of a deficiency of general assets the receiver "may enforce the individual liability of the stockholders." The court, in Kennedy v. Gibson, supra, pointed out the very path to be pursued in enforcing this liability, to avoid the risks of either prematurely fixing the amount to be collected at law from the stockholders, as also of improvidently waiting too long in calling upon the stockholders to respond, as also how to avoid hardships upon the stockholders by exacting from them more than might be necessary to meet the demands of the creditors. If he sues at law, it is for the whole amount to be collected under the stockholders' contract; or he may proceed in equity against all of the stockholders, to avoid a multiplicity of suits, for contribution; "and in such case an interlocutory decree may be taken for contribution, and the case may stand over for further action of the court—if such action should subsequently prove to be necessary—until the full amount of the liability is exhausted."

It is suggested that the supreme court, in the later case of U. S. v. Knox, 102 U. S. 422, took it for granted that the right of successive assessments by the comptroller, and consequently the right of separate actions for their enforcement, exist, from the following paragraph in the opinion:

"Although assessments made by the comptroller under the circumstances of the first assessment in this case, and all other assessments, successive or other-

wise, not exceeding the par value of all the stock of the bank, are conclusive upon the stockholders, yet if he were to attempt to enforce one made, clearly and palpably, contrary to the views we have expressed, it cannot be doubted that a court of equity, if its aid were invoked, would promptly restrain him by injunction."

The language of courts in the course of an opinion must be "restrained unto the fitness of the matter." The question, and the only question, under consideration in that case, was whether or not, after the receiver, under the direction of the comptroller, had proceeded to enforce the assessment against the stockholders, which, if paid by all the stockholders, would have been sufficient to liquidate the debts of the bank, he could proceed against the stockholders to contribute their quota on the balance of the amount of their stock to make up the deficit occasioned by the failure to collect from the other stockholders. It is to be observed that the original proceeding in that cause was in equity, to enforce the demand against all the stockholders, in which an interlocutory decree might have been taken, and the cause continued subject to supplemental decree or further proceeding, according to the course suggested in Kennedy v. Gibson, supra. The question decided was that the additional assessment could not be made, because the liability of the stockholders is several, and not one for another. Mr. Justice Swayne wrote the opinion in both of said cases, and, in employing the language in the paragraph above quoted, he did not have in mind the case here at bar, but the instance of "assessments made by the comptroller under the circumstances of the first assessments in this case, and all other assessments, successive or otherwise"; that is, under circumstances where, in conformity to what had been suggested in the Kennedy Case, the receiver proceeded in equity, under whose flexible rules the court could enter an interlocutory decree, and continue the case for additional orders in the controversy as the equities of the case might require; so that if the receiver sought in the name of equity to do inequity, the court could restrain him, as was done, by denying the writ of mandamus.

A further potential consideration enforcing the conclusion reached on this question is the fact, attested by the report of the present comptroller of the currency for 1898 (volume 1, p. 36), that, for 33 years after the adoption of the national banking act, by all of his predecessors in office this statute had received the construction, in practice, that but one assessment was enforceable, "notwithstanding further developments in the administration of a trust may demonstrate error in the assessment." In other words, during all that period the officers of the government intrusted with the execution of this statute proceeded upon the construction that, after they had enforced the per cent. ascertained to be necessary, they had exhausted their power under the statute, and never directed a further action against the stockholders. It is one of the fundamental rules in the interpretation of a statute to ascertain what has been its contemporary construction; the sense of the legal profession in regard to it; the course and usages of business thereunder. "A contemporaneous is generally the best construction of a statute. It gives

the sense of a community of the terms made use of by the legislature. If there is ambiguity in the language, the understanding and application of it when the statute first comes into operation, sanctioned by long acquiescence on the part of the legislature and judicial tribunals, is the strongest evidence that it has been rightly explained in practice." Packard v. Richardson, 17 Mass. 144. In U. S. v. Moore, 95 U. S. 760, the court said, "The construction given to the statute by those charged with the duty of executing it ought not to be overruled, without cogent reasons." In Scanlan v. Childs, 33 Wis. 663, the learned justice who wrote the opinion said, "The general understanding of a law, and constant practice under it for 20 years, by all the officers charged with the execution of it, unquestioned by any public or private action, is strong, if not conclusive, evidence of the true meaning." The comptroller's office, since the enactment of the national banking system, has been occupied by eminent lawyers, who are presumed, on grave questions of construction of statutes to be administered by them, to have recourse to the advice of the learned law officers of the government; and it is presumable that there was a consensus of opinion among those charged with the execution of this statute that it did not authorize the course of proceedings taken in this case. That opinion prevailed over a period of 33 years following the enactment of the statute, when the occasion had frequently arisen for such construction. These defendant stockholders therefore had the right to assume when they paid the first heavy assessment that the comptroller had made his election, and that no further demand would or could be made upon them. What "cogent reason" has arisen at this late day to compel the courts to overrule the construction given this statute by the executive officers of the government during the average life of a man? The effect of changing the rule is to subject these stockholders to exactions never before imposed upon other stockholders in the whole history of national banks. It would produce inequalities among antecedent subscribers to such stock, whose money and confidence have contributed to the building up of so valuable a governmental agency as national banks. Discrimination in the administration of a public law among subjects equal in rights is a perversion of justice in any government, to which the courts ought to be the last to contribute.

The further question, not less worthy of consideration, is, did not the comptroller, in ordering one assessment, and the enforcement thereof, exhaust his power and jurisdiction in the case? "When the law, in words or by implication, commits to any officer the duty of looking into the facts, and acting upon them, not in a way which it specifically directs, but after a discretion in its nature judicial, the function is termed 'quasi judical.'" Bish. Noncont. Law, § 786. So the acts of assessors in determining what property is liable to, and what is exempt from, taxation, and the value of the taxable property, "and otherwise in making up the assessment roll, are essentially judicial in character, and the assessment roll, when finally completed by the supervisors, stands as a judgment." Throop, Pub. Off. § 541; Barhyte v. Shepherd, 35 N. Y. 238; Weaver v. Deven-

dorf, 3 Denio, 117; Swift v. City of Poughkeepsie, 37 N. Y. 511; Buffalo & State Line R. Co. v. Board of Sup'rs of Erie Co., 48 N. Y. 93. Where a statute has clothed a designated officer with power to perform a quasi judicial act, and in a particular way, the power is single, and, when once exercised, is exhausted, and the act can neither be recalled nor supplemented by such officer. 19 Am. & Eng. Enc. Law, p. 548. This doctrine is illustrated by the case of Jermaine v. Waggener, 1 Hill, 279, 284, 285, where the commissioners were authorized to adopt a plan for the construction of a canal, who, having passed upon the plan, the court held, put an end to their functions. The court said:

"Their powers were at an end. These were quasi judicial. The adoption of a specific plan was but another name for the rendition of a judgment by a court of limited jurisdiction. The judicial power is limited to a single act, and has become functus officio by its performance."

See, also, People v. Board of Sup'rs of Schenectady Co., 35 Barb. 408.

It is on this ground that the action of the comptroller, under the national bank act, in determining the necessity of an assessment, and directing the proceeding against the stockholders, is conclusive, as he acts quasi judicially. His power in this respect is wholly derivative. It comes from the statute. Why, then, is not this judicial determination "limited to the single act," and why does it not "become functus officio by its performance" in making the first assessment? Is he authorized by this statute to either recall and revise his determination, or to repeat the exercise of power by supplemental judicial determinations, especially where the first judgment has been executed?

The statute of limitations: It is to be conceded to the defendants that the period of limitation fixed by the statute of the state of Missouri is applicable to this case. Butler v. Poole (C. C.) 44 Fed. 586; Thompson v. Insurance Co. (C. C.) 76 Fed. 892; Campbell v. City of Haverhill, 155 U. S. 610, 15 Sup. Ct. 217. It is the established rule that the statute of limitations begins to run the instant the cause of action arises, and there is a person competent to institute suit, or as soon as the party has the right to apply to the proper tribunal for redress. Tapley v. McPike, 50 Mo. 589. The contention of the learned counsel for defendants is that the liability of the stockholder is complete, and subject to proceedings for its enforcement, when the banking association becomes insolvent and suspends business, that the comptroller merely directs when and to what extent the liability shall be enforced, and that the mere fact of his having to make investigation of the condition of the affairs of the bank, to enable him to determine whether resort shall be had to the stockholders, does not suspend the running of the statute,—it merely postpones the proceeding. In support of this contention, reference is made to the decision of the supreme court of Ohio in King v. Armstrong (Ohio) 34 N. E. 163, which is, it must be conceded, a very able presentation of this view of the law. The supreme court, in Hawkins v. Glenn, 131 U. S. 319, 9 Sup. Ct. 739, Glenn v. Liggett, 135 U. S. 533, 10 Sup. Ct. 867, and Glenn v. Mar-

bury, 145 U. S. 499, 12 Sup. Ct. 914, has laid down the rule that statutes of limitation do not commence to run against claims against stockholders, where the subscription is payable as called for, until such call is made, upon the ground that no obligation rests upon the stockholder to pay until some authorized demand in behalf of the creditors is made therefor, as he owes the creditors nothing, and he owes the company nothing, "save such unpaid portion of his stock as might be necessary to satisfy the claims of the creditors." So under the statute respecting the liability of stockholders in a national bank. While the statute makes them liable, to the extent of their stock, for the payment of the debts of the bank, yet this liability is so far conditioned upon the sufficiency of the general assets that the receiver is only authorized to proceed against the stockholder after the comptroller has found it "necessary to pay the debts of such association"; and without this ascertainment on the part of the comptroller, and his direction to the receiver to proceed, there is no cause of action against the stockholder. On the declared insolvency of the bank, and the appointment of the receiver, no demand could be made upon the stockholder by the receiver; and the stockholder could not, if he so desired, go to the receiver and make a tender of his assumed liability, for the receiver would not be authorized to receive it, as he would not know how much would be necessary to be paid. In other words, upon the declared insolvency of the bank, and the appointment of a receiver therefor, the stockholder knows that his liability is contingent upon the insufficiency of the assets of the bank, and the declared ascertainment of that fact by the comptroller, and he knows that he is not required to pay until called upon; and I am therefore unable to distinguish, in principle, this case from those ruled upon by the supreme court. As no demand was made upon the defendants until April, 1895, and February, 1899, the five years had not run. This defense, therefore, would not avail, if the statute hinged alone upon the statute of limitations. On the second ground of defense the ruling is in favor of the defendants, and the motion for judgment on the answer is therefore denied.

In re HORGAN et al.

(District Court, S. D. New York. October 5, 1899.)

BANKRUPTCY—EXAMINATIONS—BOOKS OF CORPORATION NOT A PARTY.

Two partners, after failing in business, organized a corporation for the prosecution of the same business, composed of themselves, their wives, and one other. The wives held substantially all of the stock, but contributed no value therefor, while the husbands were the officers of the corporation, managed its business, and drew the money earned, the other stockholders receiving nothing. The partnership, as such, being adjudged bankrupt on the voluntary petition of the former partners, and their creditors claiming the right to examine the books of the corporation, *held*, that the circumstances indicated that the corporation was a mere fiction, and that its assets were really assets of the bankrupts, and therefore the books must be submitted for examination, so far as to ascertain what debts were owing to the corporation at the time of the adjudication in bankruptcy.

In Bankruptcy. On certificate of referee.

On August 3, 1899, a voluntary petition in bankruptcy was filed in this court by the firm of Horgan & Slattery, composed of the two partners Arthur J. Horgan and Vincent J. Slattery, and the firm and its members were on that day duly adjudged bankrupts, and the case was referred to Stanley W. Dexter, Esq., referee in bankruptcy. As bearing on the present question in the case, the referee certified that the following facts appeared in the proceedings had before him: The partnership, composed of Horgan and Slattery, as above mentioned, was formed for the purpose of carrying on the business of architects and builders, but failed in 1894, with liabilities then amounting to about $190,000. Thereafter, for several years, the partners continued in the same business, either under the name of a corporation called the "Horgan & Slattery Company," or in the names of their wives, in both cases drawing to their own use the entire net proceeds of the business. In 1898, a corporation was formed, for the practice of architecture as a profession, called "Horgan & Slattery." It was composed of Horgan and his wife, Slattery and his wife, and one James Slattery. Its capital was divided into 1,000 shares of $10 each. Of these, Horgan, Slattery, and James Slattery each held one share, and the remaining 997 shares were in the names of the wife of Horgan and the wife of Slattery. The stated consideration for the issue of this stock to the wives was the conveyance by them to the corporation of the equity of redemption in a certain property; but no money was realized by the corporation on this transaction, and it was doubtful whether the property so conveyed was ever of any value, inasmuch as, when the mortgage was thereafter foreclosed, no surplus was realized on the foreclosure sale. Horgan and the two Slatterys each paid $10 in cash for his one share of stock. Horgan was president of the corporation, and Vincent J. Slattery, the other bankrupt, its secretary and treasurer, and they acted as its directors and had entire control of the management of its business and affairs. Since the formation of this corporation, Horgan and Slattery had each drawn from it, in the way of salary and advances, about $10,000, and the other stockholders had never received any dividends.

At the first meeting of creditors, the referee made an order requiring the production of the books of the corporation; and thereafter, on the examination of the bankrupt, Horgan, at the instance of certain of the creditors, in compliance with the said order, he produced a book which he identified under oath as the ledger of the corporation of "Horgan & Slattery," and stated that it contained all the accounts of that corporation. Counsel for the examining creditors then demanded that the book should be placed in his hands for the purposes of an examination, and the referee so ordered. But the bankrupt, under advice of his counsel, refused to deliver up the ledger, whereupon the referee adjudged him to be in contempt, and certified the facts to the judge.

Adams & Hyde, for bankrupts.
Herbert J. Hindes, for examining creditors.

BROWN, District Judge. The examination of the books should be allowed and made, so far as to ascertain what sums if any were owing to the Horgan & Slattery corporation at the time of the adjudication, because the circumstances already in evidence justify the court in treating the corporation as a mere fiction, and the sums due to it as assets of the bankrupts.

It would be intolerable if the discovery of assets in bankruptcy were to be embarrassed and delayed by mere transparent and fictitious devices to shield property from creditors.

If the corporation were apparently a bona fide outside concern wholly distinct from the bankrupts' interests, I should agree that its books could not be thus treated and the case of Henry v. In-

surance Co., 35 Fed. 15, would apply. But the circumstances indicate the contrary (much stronger than in Tripp v. Childs, 14 Barb. 85) and the books must be treated as in substance and reality those of the bankrupts themselves, and not of a genuine outside corporation. See Abbey v. Deyo, 44 N. Y. 347; Hyde v. Frey, 28 Fed. 819; Lachman v. Martin, 139 Ill. 450, 28 N. E. 795.

In re ANDERSON.

(District Court, S. D. New York. June 28, 1899.)

BANKRUPTCY—DEBTS RELEASED BY DISCHARGE—ALIMONY.

Alimony awarded to a divorced wife by the judgment of a court of competent jurisdiction, to be paid in fixed weekly installments, and overdue at the time the husband files his petition in voluntary bankruptcy, is not such a debt as will be released by his discharge; and therefore the wife will not be stayed, pending the bankruptcy proceedings, from pursuing appropriate remedies for its collection, except where a preference upon the assets of the bankrupt is sought.

In Bankruptcy.

In an action in the supreme court of the state of New York for absolute divorce, brought by Carrie P. Anderson against her husband, Andrew Anderson, Jr., a decree was entered on December 30, 1897, granting the prayer of the complainant, and ordering the defendant to pay her alimony, in weekly installments, at the rate of $28.24 per week. Defendant's application to the said court to reduce the amount of the alimony, on account of changes in his circumstances since the decree, was denied May 10, 1899, but with leave to renew the motion upon payment to the plaintiff of all arrears of alimony. On June 6, 1899, Anderson filed his voluntary petition in bankruptcy, and was duly adjudged bankrupt thereon, and an order was entered referring the case to a referee in bankruptcy. Two days later there was served on the bankrupt an order of the state court, issued at the instance of his divorced wife, requiring him to show cause why he should not be punished as for a contempt of that court in failing to pay the alimony then overdue. Thereupon the bankrupt applied to the court of bankruptcy for an order restraining and staying all further prosecution of the contempt proceedings in the state court, and the case is now before the court on this petition; the bankrupt's application being based on Bankr. Act 1898, § 11.

Foley, Wray & Taylor, for bankrupt.

BROWN, District Judge. In my judgment a liability to pay alimony would not be released by a discharge in bankruptcy (section 11), and no stay should, therefore, be granted on its enforcement, except where a preference is sought upon assets. In re Lachemeyer, 18 N. B. R. 270, Fed. Cas. No. 7,966.

In re GEISTER.

(District Court, N. D. Iowa, W. D. November 4, 1899.)

1. BANKRUPTCY — STAY OF PENDING SUITS — VOLUNTARY AND INVOLUNTARY CASES.
   Bankr. Act 1898, § 11, providing for a stay of proceedings in certain cases where an action is pending against a person "at the time of the filing of a petition against him," applies, not only to involuntary cases, but also to voluntary bankrupts, since clause 1 of section 1 of the act declares that the phrase "a person against whom a petition has been filed" shall "include a person who has filed a voluntary petition."
2. SAME—APPLICATION TO STATE COURT.
   Where, at the time of an adjudication in bankruptcy, an action is pending in a state court against the bankrupt, based on a claim from which his discharge in bankruptcy, if granted, will release him, an application by the bankrupt for a stay of proceedings in such suit until the question of his discharge is determined, under section 11 of the bankruptcy act, should be made to the state court, not to the court of bankruptcy.

In Bankruptcy. On petition praying for an order restraining the further prosecution of an action pending in a state court against the bankrupt.

P. R. Bailey, for petitioner.

SHIRAS, District Judge. In the petition now submitted to the court and filed by Henry W. Geister it is averred that on the 13th day of October, 1899, he was duly adjudicated a bankrupt by the referee of O'Brien county, Iowa, and that the proceedings are still pending before the referee; that on the 21st of September, 1899, an action was commenced in the district court of O'Brien county against him, on behalf of Knapp, Spencer & Co., Henry H. Van Brunt, and the Tredway & Sons Hardware Company, upon a claim which will be barred by the discharge in bankruptcy, should one be granted him in the bankruptcy proceedings now pending; and, based upon these facts, an order is sought to restrain further proceedings in the case pending in the state court until the question of petitioner's right to a discharge is determined, in order that, if a discharge is granted, the bankrupt may be enabled to plead the same in bar of the action now pending against him.

In section 11 of the bankrupt act it is provided that:

"A suit which is founded upon a claim from which a discharge would be a release, and which is pending against a person at the time of the filing of a petition against him, shall be stayed until after an adjudication or the dismissal of the petition. If such person is adjudged a bankrupt, such action may be further stayed until twelve months after the date of such adjudication, or, if within that time such person applies for a discharge, then until the question of such discharge is determined."

It being declared in the first clause of section 1 of the act that "a person against whom a petition has been filed shall include a person who has filed a voluntary petition," it follows that the provisions of section 11 are applicable to cases of voluntary and involuntary bankruptcy alike; and it is thus made plain that the bankrupt in this case is entitled to have the action pending in the state court stayed for a period of 12 months from the date of the adjudication, or until the

question of the granting of a discharge is determined; but, while this may be true, it does not follow that this court should grant the desired order upon the showing now submitted to it. The proper practice to be followed in this class of cases is to make the application to the court wherein the action sought to be stayed is pending, and it is the duty of that court, whether it be state or federal, to grant a stay according to the provisions of the bankrupt act. Thus, in construing a substantially similar section found in the act of 1867, the supreme court, in Hill v. Harding, 107 U. S. 631, 2 Sup. Ct. 404, ruled as follows:

"The terms of this enactment are as broad and as peremptory as possible: 'No creditor whose debt is provable shall be allowed to prosecute to final judgment' any suit thereon against the bankrupt; and such suit 'shall, upon application of the bankrupt, be stayed.' This provision, like all laws of the United States made in pursuance of the constitution, binds the courts of each state as well as those of the nation. Upon the application of the bankrupt to the court, state or national, in which the suit is pending, it is the duty of that court to stay the proceedings, 'to await the determination of the court in bankruptcy on the question of the discharge,' unless there is unreasonable delay on part of the bankrupt in endeavoring to obtain his discharge."

To the same effect is the ruling in Boynton v. Ball, 121 U. S. 457, 7 Sup. Ct. 981, wherein it is said:

"The state court could not know or take judicial notice of the proceedings in bankruptcy unless they were brought before it in some appropriate manner, and the provisions of this section show plainly that it does not thereupon lose jurisdiction of the case, but the proceedings may, upon the application of the bankrupt, be stayed to await the determination of the court in bankruptcy on the question of his discharge."

In Eyster v. Gaff, 91 U. S. 521, in speaking of the effect of an adjudication in bankruptcy on the jurisdiction of a state court over a case commenced therein prior to the institution of proceedings in bankruptcy, the supreme court said:

"The court in the case before us had acquired jurisdiction of the parties and of the subject-matter of the suit. It was competent to administer full justice, and was proceeding, according to the law which governed such a suit, so to do. It could not take judicial notice of the proceedings in bankruptcy in another court, however seriously they might have affected the rights of the parties to the suit already pending. It was 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."

The rule thus announced under the provisions of the act of 1867 is clearly applicable to section 11 of the act of 1898, and points out the course to be pursued in cases like that now under consideration. The bankrupt who is the defendant in the state court should file in that court a proper pleading setting forth the pendency of the proceedings in bankruptcy, and, based thereon, should ask a stay as provided for in section 11; and, upon being thus informed of the pendency of the proceedings in bankruptcy, it will become the duty of the state court to grant the stay prayed for. Not only is this the proper method of bringing to the judicial notice of the state court the fact that proceedings in bankruptcy have been instituted, and therefore the bankrupt has a right to a stay of the case until the question of a discharge can be heard, but it is also the proper procedure, for the

reason that the creditors, who are the plaintiffs in the suit sought to be stayed, are parties to the action in the state court, are within its jurisdiction, and will therefore be bound by its action in the premises, whereas they are not now subject to the jurisdiction of this court, as they have not been notified of the filing of this petition now before the court, nor in any way brought within the actual jurisdiction of this court. For these reasons the prayer of the petition is refused, on the ground that the application for a stay should be made in the state court in which the case is pending.

In re MOYER.

(District Court, E. D. Pennsylvania. November 2, 1899.)

No. 6.

BANKRUPTCY—OBJECTION TO ALLOWANCE OF CLAIMS—ESTOPPEL.

Where judgment creditors caused execution to be levied on property of their debtor within two months before the filing of a petition in involuntary bankruptcy against him by other creditors, and, pending a contest over the adjudication in bankruptcy, it was agreed between the judgment creditors and the petitioning creditors that the sheriff should sell the property levied on, deduct the costs of sale from the proceeds, and hold the balance until further orders, and after the adjudication the sheriff paid such balance to the trustee in bankruptcy, and the judgment creditors, abandoning all claims to priority, proved their claims as unsecured, *held*, that the petitioning creditors would not be heard to insist that the costs of the executions should be refunded by the judgment creditors before they were entitled to participate in the fund, being bound by the agreement.

In Bankruptcy. On review of decision of referee in bankruptcy as to allowance of certain claims.

Greenwald & Mayer, for petitioning creditors.
Charles Heebner, for judgment creditors.

McPHERSON, District Judge. The question for decision arises upon the following facts:

Certain judgment creditors of the bankrupt had issued execution in a state court against his personal property within two months before the petition was filed in this court by other creditors. The bankrupt resisted the petition, but an adjudication was finally entered. (D. C.) 93 Fed. 188. While this controversy was pending, the judgment creditors and the petitioning creditors agreed, "for the purpose of avoiding further litigation," that the sheriff might sell the property, "the costs of the sale to be paid and allowed immediately after the sale, and deducted from the proceeds realized, and the sheriff to impound the proceeds realized after deduction and payment of costs and collection fees, until further order of court." After the adjudication—which, in effect, determined that the bankrupt act prevented the executions from obtaining a preference—the sheriff paid the balance in his hands to the trustee, and this is the fund now being distributed.

The judgment creditors appeared before the referee and proved their debts, asserting no preference, but claiming as unsecured cred-

itors. No fraud upon their part was proved, but objection was made that they should not be allowed to share in the fund, upon the ground that they had received, and had not surrendered, a preference. Bankr. Act 1898, § 57, cl. "g." The question thus raised has been certified to the court by the referee, but upon the argument the objection was abandoned in view of the decision in Re Richard (D. C.) 94 Fed. 633; and the court was merely asked to impose terms upon the judgment creditors, so as to permit them to participate in the distribution only upon payment of the costs incurred on the executions. The argument is that, although a preference was not obtained, an effort to obtain it had undoubtedly been made, and that the costs of the attempt should not be borne by the fund,—that is, by the whole body of creditors,—but by the unsuccessful creditors themselves. It is unnecessary to decide the point now, for in my opinion the agreement above referred to binds the creditors that are now objecting. Having expressly agreed that the costs should be paid out of the fund, they cannot now be heard to insist that payment should be exacted from the judgment creditors.

The referee is instructed that the judgment creditors may share in the distribution.

In re SILVERMAN et al.

(District Court, S. D. New York. November 3, 1899.)

1. BANKRUPTCY—FEES AND COSTS—ATTORNEY'S FEE IN INVOLUNTARY CASES.
   Under Bankr. Act 1898, § 64b, subd. 3, providing for the allowance of a "reasonable attorney's fee for professional services actually rendered to the petitioning creditors in involuntary cases," where the adjudication is not contested, and the attorney's special duties to the petitioning creditors end with the first meeting of creditors, when a trustee is chosen, and there is no proof of special services by the attorney in the collection of assets, $75 will be allowed as a reasonable and proper fee.
2. SAME.
   No allowance can be made to the petitioning creditors in a case of involuntary bankruptcy for the services of an attorney or counsel on examinations of the bankrupt held after the appointment of a trustee, for such services are for the benefit either of the trustee or of the creditors individually.
3. SAME—FILING FEE ADVANCED.
   Where the petitioning creditors in a case of involuntary bankruptcy deposit with the clerk, on filing the petition, the $25 required by the act as a filing fee, they are entitled to have the same refunded to them out of the estate.

In Bankruptcy. On application for allowance of attorney's fee and other costs and disbursements.

Epstein Bros. and S. F. Kneeland, for petitioning creditors.
M. R. Ryttenberg, for trustee.

BROWN, District Judge. There being no answer interposed by the bankrupt to the involuntary petition, and the attorney's special duties for the petitioning creditors ending with the first meeting of creditors, when a trustee was chosen, the sum of $75 will be a

sufficient "attorney's fee" in this case under section 64b, subd. 3, allowance being made for the delays and the trouble in getting schedules filed. The affidavits do not show any special benefits by attorney or counsel in the collection of assets, beyond obtaining the ordinary stay of proceedings. In re J. W. Harrison Mercantile Co., 95 Fed. 123.

After the appointment of a trustee, no allowance to petitioning creditors can be made for attorney or counsel on examinations of the bankrupt, such services being either for the trustee or the creditors individually.

The filing fee of $25 and marshal's charges of $8.48 should also be repaid. The other disbursements are disallowed on this application. The indemnity deposit will be returned by the referee and charged to the trustee.

In re MELLEN.

(District Court, S. D. New York. October 2, 1899.)

BANKRUPTCY—EXAMINATION OF BANKRUPT.

A bankrupt may be ordered before the referee for examination whenever reasonably required by creditors for the purpose of establishing their objections to his discharge; and the fact that he attended and was examined on the return of the order to show cause why his discharge should not be granted will not excuse him from undergoing a further examination, on the application of objecting creditors, if the referee shall deem it reasonable and necessary.

In Bankruptcy.

H. M. Hitchings, for bankrupt.
Louis Meyer, for creditors.

BROWN, District Judge. The practice hitherto followed, which I have no doubt is the correct practice, is to require the bankrupt to attend for examination whenever reasonably required by creditors for the purpose of establishing their objections to his discharge. The bankrupt must plead his privilege, if any privilege legally exists, to the particular questions propounded, and the proper rulings can then be made. The attendance of the bankrupt on the return day of the order to show cause is required for the purpose of enabling creditors to form specifications against his discharge. If an examination be then had, it may be used in the subsequent proceedings in support of the specifications before the referee; but this does not necessarily supersede a further examination of the bankrupt if on application by objecting creditors, the referee shall deem a further examination reasonable and necessary.

In re SCHLOERB et al.

(District Court, E. D. Wisconsin. October 26, 1899.)

BANKRUPTCY—CUSTODY OF BANKRUPT'S PROPERTY—CONFLICT OF JURISDICTION.

When an adjudication is made upon a voluntary petition in bankruptcy, personal property which is then in the possession of the bankrupt, and which he lists in his schedule as assets of his estate, comes within the jurisdiction and into the custody of the court of bankruptcy, although a

trustee has not yet been appointed; and it cannot rightfully be seized by an officer acting under a writ of replevin from a state court. If it is so taken, the officer will be forbidden, by injunction, to sell or otherwise dispose of the property under his writ, and will be ordered to restore it to the custody of the court of bankruptcy.

In Bankruptcy.

On September 13, 1899, Schloerb & Schickedantz were adjudicated bankrupts on their voluntary petition, and the case was referred to a referee in bankruptcy, who ordered that a certain store containing a stock of goods in the possession of the bankrupts, and which they listed in their schedule as assets of their estate, should be closed. Thereafter, but before the day fixed for the first meeting of creditors and the election of a trustee, the sheriff of the county, acting under a writ of replevin from a state court, sued out by P. Cogan & Son, claiming the goods in question as their property, entered the said store, and seized the goods in the execution of his writ. The case now comes before the court on an order to show cause why the sheriff and the claimants should not be restrained from removing the property, and from selling or otherwise disposing of it.

Hume, Oellerich & Jackson, for bankrupts.
Thompson, Harshaw & Thompson, for creditors.

SEAMAN, District Judge. The inquiry on this order to show cause is within narrow compass. It depends neither on the ultimate question of fact as to the ownership of the goods, nor on the question whether power is vested in the court of bankruptcy to bring in adverse claimants, and determine their rights in respect of property not in the hands of the court, but adjudged to belong to the estate of the bankrupts. Both of these questions, which are elaborately discussed in the arguments of counsel, are left out of consideration for the single inquiry of jurisdiction of the res. If the property claimed in the replevin process was within the custody of this court when the seizure was made by the sheriff, the decisions are uniform and controlling that it was not subject to interference through process issued out of any other court of co-ordinate jurisdiction. Taylor v. Carryl, 20 How. 583; Freeman v. Howe, 24 How. 450; Buck v. Colbath, 3 Wall. 334; Krippendorf v. Hyde, 110 U. S. 276, 4 Sup. Ct. 27; Covell v. Heyman, 111 U. S. 176, 4 Sup. Ct. 355; Appleton Waterworks Co. v. Central Trust Co. of New York, 35 C. C. A. 302, 93 Fed. 286. The voluntary petition of the bankrupts was filed in this court. An adjudication of bankruptcy was entered thereupon, and the matter referred to the referee; all on September 13, 1899, at the session of the court at Oshkosh. The referee took cognizance the same day, ordered the meeting of creditors for September 25, 1899, to appoint a trustee, and directed that the store containing the stock of goods scheduled by the bankrupts be closed; and it remained and was so closed when the sheriff made forcible entry under the replevin process on September 21, 1899, pending the appointment of a trustee. On this state of facts I am of opinion that this court obtained complete jurisdiction over the property in the possession of the bankrupts, and scheduled as owned by them, from the date of adjudication on September 13th, if not from the filing of the petition, and that the property taken by the sheriff was, therefore, in custodia legis, and not subject to seizure on the replevin process. The purpose and

scope of the bankruptcy act clearly intends such exercise of jurisdiction over the res, which is not dependent upon the taking possession by a trustee or other officer of the court, but upon the fact of an adjudication or other order by which the court takes cognizance of the matters and property involved. See Appleton Waterworks Co. v. Central Trust Co. of New York, 35 C. C. A. 302, 93 Fed. 286. In this view neither the provisions of the act which are cited by counsel as retaining jurisdiction in the state courts over certain controversies, nor the authorities relating to summary proceedings in the bankruptcy court, are applicable here. The case of Donaldson v. Farwell, 93 U. S. 631, does not appear to touch the question involved here, as the goods were taken by the vendor before adjudication of bankruptcy, and the action was brought by the assignee subsequently appointed to recover their value; and it has no inferential value, as argued by counsel, in the fact that the action appears to have been maintained in the circuit court instead of the district court, for the reason that the statute gave concurrent jurisdiction in such controversy. Section 4978, Rev. St. By the adjudication the court of bankruptcy accepted the estate of the bankrupt for administration under the act. The property surrendered by the bankrupt was thus taken into its custody, and "it was impossible for that court to perform its duty in respect of the property surrendered if its possession was disturbed." Tua v. Carriere, 117 U. S. 201, 208, 6 Sup. Ct. 565. When so taken, its jurisdiction over the property became exclusive, and all controversies respecting the title or other rights therein must be determined either in the bankruptcy matter or in ancillary proceedings in the district or circuit court, as the case may arise. Krippendorf v. Hyde, 110 U. S. 276, 281, 4 Sup. Ct. 27. The "res is as much withdrawn from the judicial power of another court as if it had been carried physically into a different territorial sovereignty." Covell v. Heyman, 111 U. S. 176, 182, 4 Sup. Ct. 355. The rights of the claimants, P. Cogan & Son, to recover the goods, or their value, on proof of the facts alleged, and in a proper proceeding, is undoubted; but there can be no sanction for its taking on replevin process issued out of another jurisdiction. Section 720, Rev. St., recognizes the authority of the bankruptcy court to enjoin such interference. Let the injunction be allowed restraining sale or disposition of the property, and requiring its return to the custody of this court within a time to be fixed.

In re MAYER.

(District Court, E. D. Wisconsin. October 6, 1899.)

BANKRUPTCY—WIFE OF BANKRUPT AS WITNESS.

Where, by the law of the state in which the proceedings are had, a wife cannot be a witness for or against her husband, she cannot be required, in proceedings in bankruptcy against the husband, to testify concerning sums of money alleged to have been placed in her hands by the husband shortly before the institution of the bankruptcy proceedings, with a view to their recovery by the trustee.

In Bankruptcy.

On proceedings before the referee in this case under Bankr. Act 1898, § 21, Marie Mayer, wife of the bankrupt, was required to appear for examination, and was sworn as a witness, against general objections on her own behalf and on behalf of the bankrupt that she was "not a competent witness under the laws of the state of Wisconsin." Counsel for the trustee thereupon offered to interrogate the witness in reference to sums of money alleged to have been delivered to her by the bankrupt "within a few months prior to the filing of this petition," purporting to be "either in payment of an alleged indebtedness to her or as a gift," and stated as the object of the examination "to ascertain where that fund is, and the consideration for which it was received by the witness," and to "obtain discovery in relation to transactions with the bankrupt during the same period, to ascertain whether she holds moneys by a title void or fraudulent as to the trustee." Objections were taken that she was not a competent witness in such matters, and were sustained by the referee, who thereupon certifies the question of competency for ruling by the court.

Timlin & Glicksman and J. A. F. Groth, for bankrupt.
Bloodgood, Kemper & Bloodgood, for creditors.

SEAMAN, District Judge. The proceeding before the referee in which this question arises is governed by section 21 of the bankruptcy act, which authorizes only the examination of a person "who is a competent witness under the laws of the state in which the proceedings are pending." Unlike the act of 1867, no express provision is made to bring in the wife of a bankrupt "to be examined as a witness" (Rev. St. § 5088), and the decisions under that act are inapplicable. The present act establishes as the sole test of competency in these proceedings the law which prevails in the state of Wisconsin, and by repeated decisions of the supreme court of the state it is well settled that "the common-law disability and incompetency of husband and wife to testify for or against each other" remains unimpaired by statute, except in special instances, not involved in the question submitted here. Carney v. Gleissner, 62 Wis. 493, 22 N. W. 735; Smith v. Merrill, 75 Wis. 461, 44 N. W. 759; 2 Sanb. & B. Ann. St. Wis. § 4072, and notes. Under the rule at common law "a wife cannot be received as a witness for or against her husband," aside from certain exceptions, not applicable here; and that rule is not dependent upon interest in the issue, but "rests solely upon public policy." Therefore it is not affected by statutes which remove objections to the competency of a witness on account of interest. Lucas v. Brooks, 18 Wall. 436, 452. The testimony was originally excluded because "husband and wife are considered as one and the same person in the law, and to have the same affections and interests" (Bac. Abr. tit. "Evidence" A, 1), but the ground of public policy finally prevailed, as demanding "that those living in the marriage relation should not be compelled or allowed to betray the mutual trust and confidence which such a relation implies," and was not limited to mere confidential communications, "but was an absolute prohibition of the testimony of the witness to any facts affecting the husband or wife, as the case might be, however the knowledge of those facts might have been acquired." 3 Jones, Ev. § 751; 1 Best, Ev. § 175. The doctrine thus stated clearly excludes the wife of the bankrupt from competency as a witness on the inquiry certified, and this view

is well fortified by the ruling of Judge Bunn in Re Fowler (D. C.) 93 Fed. 417. The case before Judge Brown in Re Foerst (D. C.) 93 Fed. 190, is not applicable, as the question of competency did not arise, and presumably was not open under the statute of New York which removes the common-law restriction. Southwick v. Southwick, 49 N. Y. 510, 513; People v. Wood, 126 N. Y. 249, 271, 27 N. E. 362.

In the argument of counsel to support this offer of testimony distinction is claimed in the peculiar nature of the proceedings in bankruptcy, and on the assumption that the bankrupt is not directly interested in the inquiry, and not a party to this branch of the proceedings. The bankrupt is clearly a party throughout the proceedings, and matters of interest to him, and even of criminal responsibility, may be involved in the inquiry. In either aspect, the testimony of the wife cannot be received when she is not brought in as a party. Let the answer be certified to the referee that the wife is not a competent witness in the matters proposed for inquiry.

PARMENTER MFG. CO. v. STOEVER et al.

(Circuit Court of Appeals, First Circuit. October 25, 1899.)

No. 295.

ACT OF BANKRUPTCY—TIME OF FILING PETITION.

Under Bankr. Act 1898, § 3, cl. 3, the act of bankruptcy is in the failure to vacate the execution five days before the sale or other disposition of the property seized on the execution, and the four months period runs from that date; and this is irrespective of the question whether the attachment in the suit in which the execution was issued was made in season to give the attaching creditor a valid lien.

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

Ernest I. Morgan and Ralph A. Stewart, for appellant.

Henry E. Cottle and Joseph W. Spaulding, for appellees.

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

PUTNAM, Circuit Judge. This is an appeal from a judgment of the district court for the district of Massachusetts adjudging the appellant a bankrupt. The appeal is provided for by section 25 of an act to establish a uniform system of bankruptcy throughout the United States, approved July 1, 1898 (30 Stat. 553). The adjudication was based on clause 3 of section 3 of the statute (30 Stat. 546), as follows:

"Or (3) 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."

The proceedings on which the petition for an adjudication of bankruptcy relied were an attachment of the appellant's real and personal estate on the 5th day of July, 1898, by virtue of a writ issued from the superior court for the county of Essex, in the state of Massa-

chusetts, followed by a declaration containing two counts on promissory notes signed by the appellant, a judgment on default, entered on September 21, 1898, and an execution on which the attached property was seized on October 15, 1898, and sold on October 27th. The petition in bankruptcy was filed on February 1, 1899. This was more than four months after the attachment was made, but within four months from the times of seizure and sale on execution.

On the trial in the district court the appellant was duly adjudged bankrupt, and it seasonably and duly appealed to this court. The propositions submitted by the appellant are two: That the period of four months within which the petition might be filed dates from the day of the attachment, and not from the seizure or the sale on execution; and that the words "suffered or permitted," found in the statute which we have cited, must have a narrow, literal interpretation. We will first consider the latter proposition. In giving these words a narrow interpretation, the appellant refers only to the following portion of the statute cited, namely, "suffered or permitted, while insolvent, any creditor to obtain a preference through legal proceedings." It maintains that a corporation cannot file a voluntary petition in bankruptcy, and thus defeat legal proceedings, and that, therefore, as the appellant is a corporation, it cannot be said to have "suffered or permitted" what ensued from them. Regard, however, must be had to the whole of clause 3; and, in view of that, what the appellant "suffered or permitted" was the sale of its property through legal proceedings. This was clearly the true act of bankruptcy within the contemplation of the statute, although the statute is somewhat awkwardly expressed.

In like manner, as the failure to vacate the execution before the sale was the act of bankruptcy, it is clear that the four-months period runs, not from the attachment, but from a date connected with the proceedings after the judgment.

In order to prevent any misapprehension, we will add that the question whether or not the attaching creditor acquired a valid lien as against these proceedings in bankruptcy is not in issue on this appeal.

The judgment of the court below is affirmed, and the costs of appeal are awarded to the appellees.

NATIONAL FOLDING-BOX & PAPER CO. v. DAYTON PAPER-NOVELTY CO. et al.

(Circuit Court, S. D. Ohio, W. D. November 2, 1899.)

PATENTS—DAMAGES FOR INFRINGEMENT—INTEREST.

Under the settled rule of the supreme court, interest is not recoverable on profits allowed in equity for infringement of a patent prior to the time the master has liquidated the damages, unless under special circumstances of fraud or wantonness.

On Rehearing.

Walter D. Edmonds and A. M. Allen, for complainant.

Wood & Boyd, for defendants.

TAFT, Circuit Judge. An opinion was filed in this cause July 10, 1899 (C. C.) 95 Fed. 991, finding the profits received by defendant from the sale of the infringing boxes to be $12,275.51. At the close of the opinion it was said:

"Interest will be allowed on the amount found due from January 1, 1893. The unlawful action of the defendant, in its willingness to run the chances of the validity of complainant's patent, seems to have been deliberate. I see no reason, therefore, for not including this usual element of damages in the recovery."

A petition for rehearing on the question has now been filed.

It was assumed in what was said in the original opinion that in the recovery of profits for the infringement the question of interest would resemble that of interest in a suit for money had and received, or at least that the court might exercise the same wide discretion intrusted to a jury, in estimating unliquidated damages. Lincoln v. Claflin, 7 Wall. 132. The matter of interest was not the subject of discussion, and the cases were neither cited nor considered. On this hearing many cases in the supreme court and the circuit courts have been presented and examined. They are summed up by Mr. Justice Gray in Tilghman v. Proctor, 125 U. S. 136, 160, 8 Sup. Ct. 906, as follows:

"The only exception of any importance not disposed of or rendered immaterial by what has been already said is the exception of the plaintiff to the refusal of the master to allow interest on profits before the date of his report. If the question thus presented were a new one, it would require grave consideration. But by a uniform current of decisions of this court, beginning thirty years ago, the profits allowed in equity for the injury that a patentee has sustained by the infringement of his patent have been considered as a measure of unliquidated damages, which, as a general rule, and in the absence of special circumstances, do not bear interest until after their amount has been judicially ascertained; and the provision introduced in the patent act of 1870, regulating the subject of profits and damages, made no mention of interest, and has not been understood to affect the rule as previously announced. Silsby v. Foote, 20 How. 378, 387; Mowry v. Whitney, 14 Wall. 620, 651; Littlefield v. Perry, 21 Wall. 205, 229; Act July 8, 1870, c. 230, § 55 (16 Stat. 206); Rev. St. § 4921; Parks v. Booth, 102 U. S. 96, 106; Root v. Railway Co., 105 U. S. 189, 198, 200, 204; Railroad Co. v. Turrill, 110 U. S. 301, 303, 4 Sup. Ct. 5."

It seems to me, with submission, that substantial grounds could be stated against this elimination of interest as a usual element of damage in the recovery of profits for infringement; but an examination of all the cases in the supreme court shows the greatest reluctance on the part of that court to allow interest in a patent case before the master has liquidated the damages, and I have found no statement of the circumstances by that court in which it would be permitted, though there are vague intimations that there might be circumstances justifying the allowance. I am constrained by the weight of this authority to hold that the present case is not so exceptional as to justify the imposition of interest from the date fixed in the opinion. While I think the evidence shows a deliberate willingness on the part of defendants in their infringement to take their chances of being mulcted in damages, I cannot say that their infringement was of the fraudulent and wanton character that seems to be necessary to justify the impo-

sition of interest under the supreme court decisions. They had legal advice that there was a probability of their being able to defeat a suit on the patent, and they had a patent for a paper box under which they claimed to make their boxes. The case was originally referred to a master, who reported the profits received by the defendants from the sale of the infringing boxes to be larger than that now found by the court. This report was filed May 13, 1898. On the 23d of June, 1898, he filed a substituted report, finding that there were no profits chargeable to the defendants. For reasons stated in a former opinion, both reports were set aside, and the court considered the question of profits de novo. The result reached was in effect a substantial confirmation of the first report of the master. I think it within the power of the court to treat the filing of that report as a judicial ascertainment of the damages, and to allow interest at 6 per cent. on the sum of $12,275.51 from May 13, 1898. It would be unjust to charge to the complainant the loss sustained by the delay from that time to the filing of the opinion. The bill may stand dismissed against the individual defendants, but, in view of the fact that they were privy to the infringement, they must pay their own costs, and such as were incurred in bringing them into the suit. The docket fee will not, however, be imposed on them.

COBURN TROLLEY-TRACK MFG. CO. v. CHANDLER et al.

(Circuit Court of Appeals, First Circuit. September 14, 1899.)

No. 277.

PATENTS—INFRINGEMENT—TROLLEY TRACKS.

Claim 1 of the Coburn patent, No. 365,240, for an improved trolley track, as narrowed by amendment, while the application was pending in the patent office, to meet the objection of want of novelty and invention, covers only the specific device described, which consists of a tube "having the lower edges curved in towards the median line, and then turned upward, so that the bottom of the tube has a rounded trough at each side of a longitudinal central opening," and is not infringed by a tubular track similar in other respects, but having the sides turned in at right angles, leaving a flat surface for the track on each side of the opening, and fairly adapted to rollers with flat faces.

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

For opinion of the circuit court, see 91 Fed. 260.

Arthur v. Briesen, for appellant.

Lester L. Bond (Bond, Adams, Pickard & Jackson and George M. Weed, on the brief), for appellees.

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

PUTNAM, Circuit Judge. This appeal relates to claim 1 of the patent issued to Lemuel Coburn on June 21, 1887, as follows:

"(1) A trolley track consisting of a tube of substantially rectangular cross section at its upper portion, and having the lower edges curved in towards the median line, and then turned upward, so that the bottom of the tube has a rounded trough at each side of a longitudinal central opening, substantially as described."

The patent relates to two distinct alleged inventions,—the first in trolley tracks, and the second in carriers. The latter is covered by another claim not in issue. The specification states that the purpose of the alleged invention with which we are concerned is "to provide a track of improved construction, particularly in respect to strength." The track is described as constructed from a metal "tube" rolled to the required form. The upper part of the "tube" is flat. It has perpendicular sides, practically at right angles with the upper surface. The lower edges of the sides are bent, to use the language of the specification, "inward and upward, thereby giving to them substantially a half-round form in cross section," leaving a longitudinal slot between them, through which runs whatever sustains the load depending from the carriers. Thus, we have, extending the length of the tube, two parallel, half-round grooves in which the carriers run. The specification further says that this "form and construction," including the parallel, half-round roller-grooves, "constitute special elements of strength, and great resistance against any deflection of the track between its ends, supposing that it is suspended by bolts at said ends," though there may be between the ends a "considerable length of track." It continues that, as the sides of the "tubes" are in line with any load to which the track may be subjected, they "constitute of themselves such a rigid bridge feature of the construction as greatly strengthens the track," and that the half-round roller-grooves "add considerably to such rigidity and resistance to deflection under a load."

On the simplest mechanical principles, it is quite apparent that a track constructed in this way will have comparatively great rigidity with reference alike to perpendicular and horizontal resistances, thus incidentally involving a corresponding saving of material. This seems to be admitted by the respondents, in that they urge on the court that merely to make a device of greater strength is not invention; and it is also admitted by the testimony of Mr. Simpson, the manufacturer of the respondents' infringing structure, who, in speaking of the form in which that structure is constructed, says: "We had various reasons for making it in this form. First, we found it stronger than any other shape, as each bend or corner is equivalent to a corrugation, and adds strength."

The defenses cover the questions of invention and infringement. The device used by the respondents is in all respects like that shown by the patent, except that the turning of the sides "inward and upward," instead of following circular lines throughout, is at first inward at as near a right angle as wrought metal can conveniently be bent, then horizontal, giving a flat tread for the carrier, and then upward on substantially the same lines in cross section as those on which it turns inward. The respondents' device evidently has the advantages of the complainant's construction with reference

to the only point named in the specification,—that is, of strength,—though not to the same extent. Therefore, on the issue of invention, the special facts of the case might so far support the presumption arising from the granting of the patent as to compel us to hold that the claim is valid, if we could so construe it as to cover the respondents' device as an infringement. The proceedings in the patent office, shown by the record, prevent our doing this.

. The effect of proceedings of this character was so fully considered by us in Reece Buttonhole Mach. Co. v. Globe Buttonhole Mach. Co., 10 C. C. A. 194, 203–206, 61 Fed. 958, 967–970, that we have no occasion to refer to the numerous cases cited by the respondents in reference thereto; overlooking, nevertheless, as they do, the fact that we have thus carefully reviewed this special matter. The effect of Reece Buttonhole Mach. Co. v. Globe Buttonhole Mach. Co., as shown at the foot of page 969 of 61 Fed., and page 205 of 10 C. C. A., is to hold that such proceedings are of no effect when no direct issue of novelty or invention was involved, or when the amendments made by the applicant came in only incidentally, or in reference to an incidental matter. The case at bar, however, is clearly not excluded by the rule thus given, because the patent-office records leave an unavoidable impression that the subject-matter of the amendments shown did touch the issues of novelty and invention, and were directly passed on with full understanding as to their effect, alike on the part of the office and the patentee. The application, as originally made, contained three claims, one of which was broadly for a track having vertical sides, with edges turned "inward," as follows:

"A tubular trolley track, having parallel vertical sides, the lower edges of which are bent inward and upward, thereby forming carrier-roller grooves therein, and having a hanger-slot between said edges, substantially as set forth."

This claim, if allowed, would clearly have been broad enough to cover the respondents' device; but it was rejected, and thereafterwards, in order to save the patent, in lieu of it there was substituted the claim in issue, which contains the words, not in the claim as originally drawn, as follows, "and having the lower edges curved in toward the median line, and then turned upward," and also the words, "so that the bottom of the tube has a rounded trough at each side of a longitudinal central opening." In addition thereto, the specification, as originally drawn, contained the following:

"If desired, the lower edges of the sides may be turned inward simply at right angles to the latter, and not made of half-round form, thereby constituting suitable bearings for flat-faced carrier rollers."

If this had been allowed to remain in the specification, it would have suggested that the patentee was entitled to cover a track having a flat tread, like the respondents' device; but, after the claim was amended as we have stated, the examiner advised the applicant as follows:

"In view of the paragraph from lines seven to eleven, inclusive [referring to the sentence in the specification which we have cited], in which applicant

describes an equivalent construction, his claims are still met by the references before cited."

Of course, this held up the application, and the result was a communication from the solicitor for the applicant to the commissioner of patents, directing the erasure of the sentence objected to.

The complainant maintains that the patentee originally thought he was entitled to a patent for every track with vertical sides and inwardly bent wheel supports, between which a slot was formed, and that all these amendments were intended only as an abandonment of that broad idea; but clearly this is not correct. The original claim, for which the present claim 1 was substituted, was not so broad, but covered a track formed by turning the edges of the vertical sides inward and then upward. The sentence in the specification which was stricken out had relation only to the claim as drawn, and could not have had relation to the broad idea of a track with vertical sides bent inwardly, and not also bent upwardly. It is impossible to maintain otherwise than that the reasonable effect of the proceedings in the patent office is that the applicant understandingly abandoned the broad construction now contended for.

We are also strengthened in the conviction that the result of this proposition is not merely to technically narrow the inventor's claim contrary to his intention, and that it is in line with his actual purpose, because the carriers to which his patent refers, and which are covered by claim 2, are stated in that claim to be rounded on their peripheries to fit rounded troughs. Therefore, the narrowing of claim 1 so as to limit it to a rounded trough suitable for rollers rounded on their peripheries is in harmony with the leading thought of the inventor. However this may be, the proceedings in the patent office make it plain that claim 1 cannot be construed to cover a track having a flat surface fairly suitable for, and adapted to, rollers with flat peripheries. If, in the case at bar, the departure of the respondents' device from the form of a rounded trough was clearly only colorable, and still left a trough only partially flattened, and not peculiarly and fairly adapted to a roller with a flattened periphery, we might be compelled to hold that it was a mere evasion, and therefore an infringement; but the departure was without doubt bona fide, and is such as adapts the device in this particular to the form of carriers which the respondents use. Therefore, without determining the question of invention, we are compelled to hold that there is no infringement.

The decree of the court below is affirmed, and the costs of appeal are awarded to the appellees.

KENNEY v. BENT.

(Circuit Court of Appeals, First Circuit. September 14, 1899.)

No. 283.

PATENTS—INVENTION—WIRE-MATTRESS FRAMES.

The Kenney patent, No. 549,370, for a device for holding woven-wire fabrics on a mattress frame, as to claim 2 discloses no patentable invention, and is void, because its advantages over prior devices are fanciful, or a minimum of which the law does not take cognizance.

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

For opinion of the circuit court, see 91 Fed. 259.

Edward S. Beach, for appellant.

Odin B. Roberts, for appellee.

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

PUTNAM, Circuit Judge. The patent in issue relates to wire-mattress beds, supported by frames made of tubular metallic rails, and it bears date of November 5, 1895. The application therefor was filed on August 12, 1895. It is maintained that the invention somewhat antedated the application. The claims in controversy are 2 and 4, as follows:

"(2) The combination, with a tubular metallic mattress frame and the wire fabric therefor, of the flattened metallic strips, J, mounted longitudinally on the end rails, the ends of the wire fabric passing over the upper surface of said strips and around their outer edges, and being then turned under, and clamped between the flat under-surfaces of said strips and the surfaces of the end rails, said strips being secured to the end rails by the screws, K, substantially as set forth." "(4) In a metallic bed bottom, tubular metallic side rails and end rails and rigid metallic brackets uniting said rails into a rectangular frame, in combination with a woven-wire fabric secured to the end rails by flattened metallic strips held thereon by screws passing through said strips and fabric, the ends of such fabrics being hooked over the outer edges of said strips, and the screwheads, strips, and wire ends being covered by the body of wire fabric, to prevent contact of the bedding therewith, substantially as set forth."

Claim 2 seems to be broader than claim 4, and is the only one which need be especially considered. The specification states that the invention relates to the method of connecting together the rails, and to the means of securing the ends of the wire fabric. The claims in issue cover the second subject-matter. The specification further states that the invention is an improvement on that of letters patent No. 510,541, granted on December 12, 1893, to the patentee and W. H. Taber, for mattress frames, and on that of letters patent No. 545,801, granted to the patentee on September 3, 1895, for metallic mattress frames. It also states that in both prior patents the frame was provided with adjusting screws, but that the patentee now omits all adjusting devices, and it adds: "I give the wire fabric at the outset such permanent tension as is desirable, by attaching it under suitable strain." Several prior patents relating to wire mattresses for beds, shown in the record, contained special devices for adjusting the

mattress as it sagged by use; and it appears by the patent to Thompson and Wells, of March 22, 1881, put in by the respondent below, that the ordinary methods of adjusting had proved ineffectual. Apparently, therefore, a construction which would dispense with adjusting devices, and hold the wire fabric in position by merely giving it at the outset a suitable strain, would be useful; but nothing of this kind is claimed in the patent, and the fact is referred to by us for a purpose which we will make evident. It is plain that, as a new proposition, the proper securing of the ends of wires between metallic surfaces so as to resist great strain would involve difficulty. This is, of course, increased in the patentee's method of construction, which gives the mattress, at the outset, a special strain. It is this difficulty which, in the case at bar, the patentee claims to have overcome. The advantage of the patentee's construction is stated by an expert as follows:

"The wire fabric is pinched and firmly held along the line where the flat bottom of the strip comes nearest to the convex surface of the tubular end rail. Any tilting or slight tipping movement of the strip tends to press it more closely upon the fabric held between the rail and the strip, thus preventing the ends of the wires from being pulled toward the outer edges of the strip."

There is no evidence, and it is probably not the fact, that, when the construction is in its perfect form, there is any tilting, as spoken of by this witness; and such tilting, if it exists, occurs after the screws or other devices for securing the parts together work loose in use. But this fact alone would not defeat invention, because it may sometimes be quite as useful to secure the efficient continuous working of a device as to obtain its successful working in its new and perfect condition. The tilting in the patented device in issue operates with the advantages of leverage. The fulcrum is at the point at which the curved surface of the rail comes in contact with the flat under-surface of the metallic strip around which the wire fabric passes. The lever is a transverse section of that flat surface. The point at which the power is applied is the exterior edge of the transverse section. The point through which it is communicated, so as to bear upon the wire and give a pinch, is, of course, very close to the point of contact, or fulcrum, so that the ratio of leverage may be very great. The complainant below, in his prior construction, shown by his patent of September 3, 1895, secured the ends of the wire fabric between two metallic surfaces, one of which was concave and the other convex. With such a construction, the point at which the power is applied to the lever and the point at which it is delivered for the purpose of holding the fabric are ordinarily equally distant from the fulcrum, so that there is no effective ratio.

Before proceeding further, it is necessary to understand what was the date of the alleged invention. It appears by the record that a corporation in which the respondent below had an interest purchased from the complainant below mattresses constructed as shown in the patent in suit as early as March 12, 1894, although the record fails to show that the respondent himself had any knowledge of the transactions. The complainant, in his patent of September 3, 1895,

to which we have referred, and which was applied for on March 16, 1894, used the concave-convex surfaces which we have described. The specification in that patent contained the following:

"I make no present claim to the described means of securing the ends of the wire fabric, since such fastening, in more perfect form, is fully set forth and claimed in my application for patent on metallic mattress frames, filed Aug. 12, 1895, serial No. 559,049."

Thus we have evidence of the patentee's invention of the device in suit as early as March 12, 1894. We also have a patent applied for by him in March, 1894, showing the concave-convex surfaces to which we have referred; but we have no precise proof as to which form, namely, the concave-convex or the convex-flat, was first devised. The pith of the concave-convex form, so far as the patent law is concerned, is found in the patent to Segar, of March 19, 1889, although the precise form there shown consists of flat surfaces against flat surfaces, and this must be held to be a part of the art at the time of the alleged invention in suit.

The difficulty with the case at bar is that the advantages of the patentee's form of construction over those which must be taken to be old are fanciful, or a minimum to that extent that the law cannot take cognizance of them. The only testimony on this point is that of Livermore, who says, with reference to the form of construction covered by the patent in suit, that, if the strain were continued to the breaking point, he should expect the wire to break where it passes around the outer edge of the strip, before it would pull out from between the strip and the pipe. But he also testifies that there would be no substantial difference in effectiveness whether the wire were clamped between two flat surfaces, or between curved surfaces, or between a flat and a curved surface, and that any of these fastenings, if properly applied, would hold the wire fabric securely. Therefore, if we look at the matter of any claimed advantages of the complainant's form of construction, there are none such that the law can recognize them as the basis of a patent. It is true that, while the patentee claims that his construction contains advantages arising from the facts which we have described, he at the same time maintains that it is the simplest and least expensive known. Under some circumstances it may happen that there is invention in substituting for a complex or expensive form something simple or inexpensive. If, therefore, the concave-convex form had been a long time in use, and the patentee had discovered that the convex-flat form was less expensive, and more simple, and yet would answer the purpose, and if he had been the first to put that discovery into practice, there might be invention in so doing, notwithstanding he had made a mistaken claim that his construction had other advantages; but the case does not show such a condition of things.

On the question of invention the complainant below urges the usual argument of a large demand for his particular structure, but there is no evidence that this arose from the peculiar feature in issue here. From aught that appears, it may have come from his superior construction, or the other claims of the patent, and especially from the fact that he omitted all adjusting devices. In like

manner, the use of the complainant's form of construction by the respondent does not, in this particular case, bear on the question of invention, because the record shows that this form was used by Bent before the application for the patent in suit was filed, and without any evidence that its use was in any way suggested to him. Apparently, Bent used it as most nearly at hand, as shown by the fact that he could thus avail himself of a flat bar without going to the expense of forming a curved surface. On the whole, both parties made use of this form of construction within a few months of each other, and in the early stages of the art of making beds with metallic rails and ends, cylindrically formed, and each of them used what was first at hand, namely, a bar with a flat surface; and also the patented construction, so far as it differs from anything shown in the prior art, yields such unimportant results as not to furnish the basis of a patent, in the absence of all proofs of any peculiar circumstances appertaining thereto. The decree of the court below is affirmed, and the costs of appeal are awarded to the appellee.

THE ST. CUTHBERT.

(District Court, S. D. New York. October 25, 1899.)

1. SHIPPING—LIABILITY TO SHIPPER—LOSS OF MEMORANDA.
   Memorandum books containing entries of one's experiences and observations at different times and places in the line of his business, valuable to him for reference, are "writings," within Rev. St. § 4281, relating to a large number of small articles of small size, but of proportionately large value, including "writings," and providing, if a shipper shall lade them as freight on any vessel without giving notice of the true character and value thereof, the owner of the vessel shall not be liable therefor; but such memoranda are not within a like exception of the bill of lading as to "documents."
2. SAME—FRAUD OF SHIPPER—DESCRIPTION OF GOODS.
   A shipper who puts books containing valuable memoranda with some clothing in a package described in the bill of lading as worn clothing is guilty of fraud destroying his claim to indemnity.

In Admiralty.

Wingate & Cullen, for libelant.
Convers & Kirlin, for respondent.

BROWN, District Judge. The libel was filed to recover for the loss of a small package shipped from Antwerp by the steamer St. Cuthbert on April 13, 1897, described in the bill of lading as "1 ballot habillements supportés," i. e. a little bale of worn clothing. On arrival at New York the package could not be found, and its loss cannot be accounted for. The respondent offered to pay $25, which was regarded as the maximum value of the clothing referred to; but the libelant claims to recover in addition some $400 or $500, the alleged value of five memorandum books, said to have been contained in the package, which the respondent has refused to pay on the ground that they are not within the description given of the package, and that this claim is covered by the exceptions of the bill of lading,

and by section 4281 of the Revised Statutes of the United States, as "writings" not entered in the bill of lading.

The libelant had been for 13 years employed in his father's business at Antwerp, dealing in materials for hats, and he had traveled extensively in Europe and America in procuring furs. He had been accustomed to enter in memorandum books from time to time the results of his experience and observation as respects the quality, quantity, use and combination of the furs to be found in numerous different localities; and these memoranda were valuable to him for information and comparison in the continued prosecution of the same business. He came to this country in January, 1897, and engaged in business here. In April following his father shipped to him from Antwerp the package of the used clothing including the five memorandum books of the character above specified. An expert in the business testified that he would be willing to pay $400 or $500 for memorandum books of the kind described. The libelant regarded them as of that value. He also stated that persons engaged in traveling are accustomed to make such memoranda for their future use and convenience; that his father had made similar books, covering partly the same ground, and had continued to do so up to the time he left Antwerp; that such memorandum books, however, are not ordinarily bought and sold, and have no strictly market value; but that they would have a value to other persons in the same business, for the information and knowledge of the business of others imparted by them.

I am of the opinion that the memoranda in question are within the provisions of section 4281 of the Revised Statutes. That section covers a large number of articles, precious metals, precious stones and other articles of small size, but of proportionately large value and also

"Notes or securities for payment of money, stamps, maps, writings, title deeds, printings, engravings, pictures, gold or silver plate, or plated articles, china, silk manufactured and unmanufactured, furs, lace or any of them contained in any parcel or package or trunk,"

And provides, that if any shipper

"Shall lade the same as freight or baggage on any vessel without at the time of such lading giving to the master, clerk, agent or owner of such vessel receiving the same a written notice of the true character and value thereof and having the same entered on the bill of lading therefor the master and owner of such vessel shall not be liable as carriers thereof in any form or manner; nor shall any such master or owner be liable for any such goods beyond the value and according to the character thereof so notified and entered."

The bill of lading contains a somewhat analogous exception, though much less broad, in which the term "documents" occurs, but not the word "writings"; and it is urged that the use of the term "documents" in the bill of lading should be deemed a substitute or equivalent of the term "writings" in the statute, and as the exception intended.

It seems to me, however, that aside from the bill of lading, no such limitation could be fairly placed on the statutory word "writings"; but that the word "writings" should be held to embrace private memoranda of the kind described. The libelant states that

these memoranda were contained in five books, three of which were about 5 inches long by 3 wide, and the other two about 10 inches by 8, each of about 100 pages. They are books only in the sense that they were probably bound in some kind of covers. They could not be treated differently had they been memoranda upon sheets unbound. The value put upon them, if correct, brings them plainly within the general class of articles contemplated by the statute; namely, articles of small bulk but high proportionate value. They are essentially private "writings." They are not "documents," in the sense of the bill of lading, which are technically writings of a more limited class. But I see no reason for narrowing the statute merely because the bill of lading uses a narrower word. The narrower scope of the exception in the bill of lading shows that it was not intended to be a substitute for the statute; and I think the vessel is, therefore, entitled to the statutory defense.

Aside from the statute, I have great doubt whether a claim of this kind could be sustained upon the description of the goods in the bill of lading. The package in question is described as being about 23 inches long by 16 wide and 19 inches high, first wrapped in paper and then in bagging and sewed up. The description of such a package as worn or old clothing, without more, suggests but small value, calling for little comparative care. Putting within a package so marked articles of the supposed value of $400 or $500 without any indication of the value of the package, instantly impresses the mind with a sense of concealment. The answer charges concealment and fraud. For the libelant it is urged that clothing being the chief articles in bulk, the package would naturally be described as above stated and that there was no bad faith intended. There are two views, however, that might possibly be taken upon the evidence on this point.

When the package could not be found, the libelant sent word to his father to make reclamation at Antwerp; and under the father's direction a claim was made through the shipping agents for $20 for the loss of the package. It was the father who had made up the package, and taken the memorandum books from the libelant's desk and placed them within the package. He must have had full knowledge of the nature of the books, and of whatever value they had. If the libelant's memoranda, which the libelant testified were partly covered by his father's books, were in fact wholly covered by them, the value of these books, even to the libelant, would be no more than the cost of transcribing them from his father's. The claim of $20 must have been made with the father's approval, and must be taken, therefore, to express his estimate of the value of the old clothing and books combined. Upon that view of the value of the package, it doubtless was well enough described, since the value of the writings contained in them was comparatively unimportant. If, on the other hand, the memoranda books as private entries or private "writings" were of any such value as is now claimed for them, so that the package consisted of old clothing of a few dollars value, and of books worth $400 or $500, it seems to me impossible to regard the description of the package as having been made in good faith. In the case of Hart v. Railroad Co., 112 U. S. 331, 340, 5 Sup. Ct. 155, it is said:

"If the shipper is guilty of fraud or imposition by misrepresenting the nature or value of the articles, he destroys his claim to indemnity, because * * * what he has done has tended to lessen the vigilance the carrier would otherwise have bestowed."

These observations seem to me entirely apposite to the present case. It was evidently the design of section 4281 to prevent impositions of this character. But I am inclined to regard the package as probably of but small value; and on that ground instead of dismissing the libel under section 4281, I am authorized to allow the libelant a decree for $25, but without costs.

HERBST v. THE ASIATIC PRINCE.

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

1. SHIPPING—DELIVERY TO CUSTOMS OFFICERS—USAGE.
   A ship's delivery of a consignment of dutiable goods to the customs authorities, being required by the law and usage of the place,—delivery to the proper party thereafter devolving on such authorities,—is a good delivery as between the shipper and carrier.
2. SAME—RIGHTS OF CONSIGNEE — APPLICATION OF PAYMENTS — BILLS OF LADING WRONGFULLY WITHHELD.
   H., a commission merchant, had an agreement to buy goods for B. & Co. on their orders, and ship the same to them on their account and risk, and to allow them a credit of $5,000; all invoices to be charged in account current, and to bear interest from date of shipment; payments to be by remittances after notice of shipment; remittances to bear interest from time of receipt. *Held*, that B. & Co., having, after notice of shipment, but before arrival of the goods, sent remittances for part of the price, with notice that they were on account of such shipment, and having, after arrival of the goods, made tender and deposit of the balance of the price, were equitably entitled to delivery,—H. having no right to make application of the remittances on an old account; that the bills of lading were wrongfully withheld, and that the carrier was not liable for irregularity in delivering the goods to B. & Co. without the bills of lading.

Owen & Sturges, for libelant.
Convers & Kirlin, for claimant.

BROWN, District Judge. This libel was filed to recover $35,750 damages for the alleged nondelivery as per bills of lading of a consignment of merchandise invoiced at £6449.11.3, consisting of flour, lard, bacon and kerosene and shipped by the libelant on the steamer Asiatic Prince about December 31, 1895, "by order and for the account and risk of Belmarco & Co.," merchants, at Santos, Brazil, to whom the goods were invoiced and consigned.

Three bills of lading were issued to the libelant for the goods, reciting that they were marked "B. & C." and deliverable to *order* at Santos. The steamer arrived at Santos on February 5, 1896, and delivered all the goods, being dutiable, to the customs authorities at that port, in accordance with the local law and usage. The bills of lading indorsed in blank had been sent by the libelant on January 4th by the same steamer to the Brazilian German Bank at Santos with a sight draft on Belmarco & Co. attached for £4986.6.2, the

unpaid residue of the invoice price with instructions to the bank to collect the draft against delivery of the bills of lading to Belmarco & Co. The rest of the invoice price, viz. £1483.9.8, had been previously drawn by libelant against a letter of credit on London for £3000 received by mail from Belmarco & Co. a few days before (December 28th), which sum libelant applied upon this shipment and notified Belmarco & Co. thereof by letter sent by the same steamer, and credited it also on the debit note and invoices inclosed therein. Soon afterwards a second draft for £6494.8.4, the whole amount of the invoice price, was sent to the bank by the libelant by the European mail to be substituted in place of the first draft.

The steamer arrived at Santos on February 5th, and the first draft for £4986.6.2 was on the 6th presented for payment. Belmarco & Co., however, in ignorance of this draft having made payments by remittances during January on libelant's account expressly for this specific shipment to the amount of £6386.5.0 (including the sum drawn against his letter of credit) or within about £60 of the whole invoice price, at first refused payment of the first draft; but afterwards and on the same day, in order to obtain immediate possession of the goods, they concluded to pay that draft and notified the bank to that effect, at the same time seeking to cancel by cable to the bankers the remittances to London. Of these remittances, however, £2900 had been actually received by the libelant on and prior to January 29th; he insisted on retaining those remittances, and the cable notice of February 6th was too late to recall them. The residue of £2032.15.4, sent by mail on January 20th not having been then received in London, was afterwards recovered by Belmarco & Co. through the English courts.

The next morning, February 7th, Belmarco & Co. deposited with the bank a sufficient check to cover the first draft; but before the details of the settlement could be completed, the manager being absent and the precise rate of exchange undetermined, the second draft for £6494.8.4 was received by the bank, and delivery of the bills of lading was refused except on payment of that sum. Belmarco & Co. thereupon and on the same day, after again tendering the amount of the first draft and demanding the bills of lading, commenced judicial proceedings, and under the order of the local district court, deposited on February 7th with the Bank of Santos, for libelant's account, the first draft and an amount in Brazilian currency stated in the order to be sufficient to cover it, which under the local law operated as payment of that draft to the libelant.

Thereafter Belmarco & Co. on the production of the master's unsigned copies of the bills of lading, showing by the marks "B. & C." the identity of the goods with the descriptions in the invoices, and on proof then or later of the above circumstances to the customs authorities, were authorized by them pursuant to article 476 of the Brazilian customs regulations to pay the duties and to enter and receive possession of the goods, on filing an indemnity bond, without obtaining the libelant's bills of lading, or paying the full amount of the second draft; and this was allowed notwithstanding the protests of the bank and of Karl Valais & Co., the libelant's agents, to whom

on January 10th the business was turned over by the bank on libelant's orders by cable. These protests interrupted the discharge of the goods for a time, and caused a re-examination by the customs authorities of Belmarco & Co.'s claim, resulting in requiring the bond of indemnity as above stated, whereupon the final delivery to Belmarco & Co. seems to have been made on February 13th. For this alleged irregularity in delivery, without the use and authority of the libelant's bills of lading, and hence without his technical *order*, the ship is claimed to be liable for the whole value of the goods.

The ship is no doubt bound prima facie to deliver the goods to the holder of the bill of lading; but if they are not so delivered, she may show in defense, or in mitigation of damages, that the goods went to the true owner, and avail herself of the same defense he might have made (The Enchantress [D. C.] 58 Fed. 910; Id., 14 C. C. A. 180, 63 Fed. 272; Insurance Co. v. Ruden's Adm'r, 6 Cranch, 338); or show that they were delivered according to the laws and usages of the place of delivery, which is all the delivery required of her, and which fulfills the obligations of the bill of lading (Constable v. Steamship Co., 154 U. S. 51, 63, 16 Sup. Ct. 1062). If the bill of lading is wrongfully withheld, and the goods go to the person who is legally or equitably entitled to them, as between him and the shipper, though without the use of the bill of lading, the shipper sustains no actual damage, where there is no other outstanding interest in the goods; and his claim for a merely technical irregularity in delivering them without the bill of lading, is damnum absque injuria. In a court of admiralty, which proceeds upon equitable principles, nominal damages are not given; but, as in equity, a decree passes for the defendant in such a case, according to the substance of right. Barnett v. Luther, 1 Curt. 436, Fed. Cas. No. 1,025.

Such seems to me to be the situation of the present case in both its aspects.

1. The proof is here overwhelmingly in favor of the respondent, that by the law and usage at Santos, the delivery of all dutiable goods like these must be made by the ship to the customs authorities, as was done in this case, and cannot be made otherwise; and that the allowance of entry and the responsibility for a delivery of the goods, on payment of duties, to the proper party thereafter, devolves wholly upon the customs authorities. So completely is this the case, according to the evidence, that the ship cannot enforce her own claim to possession for collection of freight, nor retain the goods for her own lien, against the custom-house decision; but she must resort to a judicial embargo, which will be removed by a bond filed to answer for the ship's demands. Not only do numerous witnesses for the claimant, including experts, so testify, but several of the libelant's witnesses say the same thing; notably, Mr. Riviere, the chief person of Valais & Co. in charge of libelant's interests, who testifies:

"The custom house has charge of all deliveries. * * * All cargo under any conditions at Santos is delivered to the customs officers, who in turn deliver to the consignees. * * * All protection of goods is alone reserved for the custom house. * * * The ship's agent is only responsible for the complete delivery to the custom house. * * * The master can only deliver to the custom house."

In the three protests, moreover, that were filed in the libelant's behalf by Valais & Co., viz. in the custom house, and in the district court, and in the federal court, it is expressly stated that for the alleged wrong delivery "the custom-house employés and the Union were liable"; and the official certificate states that the ship is released. No legal experts were called by the libelant to contradict or qualify the ample testimony in the respondent's behalf on this point. No claim, or demand of any delivery of these goods in libelant's behalf was ever made at Santos upon the master, or upon the ship's agents, as such; nor was any protest or notice of nondelivery served upon either, as required by the bill of lading for any failure in proper delivery.

In the light of the above testimony, this is very persuasive evidence of the knowledge and understanding of the libelant's agents at Santos, that the ship was not in default, but had made all the delivery legally required of her; and that the libelant's remedies, if he had suffered any wrong, were against the customs authorities, and upon the bond filed by Belmarco & Co. in the custom house, or on the judicial deposit to his credit. This is further confirmed by the fact that notwithstanding libelant's orders to Valais & Co. to enforce his claim by attachment, no such remedy was sought, though the ship's presence at Santos gave full opportunity for an attachment against her. Delivery of goods upon a river bank in the custody of no one, is a good delivery and discharges the carrier, where such is the customary mode and place of delivery. Hutch. Carr. § 366, and note; Ang. Carr. §§ 312, 316. The above evidence seems to require a similar ruling here, as respects the ship's delivery to the custom house, without regard to the merits of Belmarco & Co.'s claims, and the delivery made by the custom house to them afterwards.

2. If, however, there is any error or mistake in the foreign testimony on the above point, the evidence seems to me clearly to show that Belmarco & Co. were equitably entitled to the possession of the goods on payment or tender of the amount actually due on them, which was much less than the first draft; and that on tender of the amount of that draft the bills of lading were wrongfully withheld.

The libelant was a commission merchant in New York. For a year previous he had been dealing as such with Belmarco & Co. in the purchase and shipment to them of goods as ordered. The agreement under which the goods were shipped, as disclosed in their correspondence, and the course of dealing when goods were desired, were for the libelant to ascertain and report at what price he could buy them, adding a commission of 2½ per cent. for himself to make up the cost; if the price as thus made was acceptable, the final order was given, the goods were bought by the libelant in his own name, the commission of 2½ per cent. added, and the goods shipped by him to Belmarco & Co. for their account and risk, the libelant prepaying the insurance and freight, and adding these charges in the invoice. The invoices and bills of lading were forwarded direct to Belmarco & Co., who by agreement were to be allowed by libelant a credit of £5000, and all goods were charged up in account current, bearing interest from the date of shipment. Belmarco & Co. in payment were

to remit funds to London bankers for account of the libelant after notice of shipment, either after arrival of the goods at Santos, or prior thereto during transportation, as they might desire; remittances to bear interest from time of receipt. Such remittances during transit of the goods had been customarily made, and in no prior shipment since their agreement on the above course of dealing, had any draft been drawn against delivery of the bills of lading.

The libelant testified that his credit of £5000 was to extend only up to the time when the goods were delivered at Santos, which would in effect require of Belmarco & Co. cash on delivery there, without even opportunity for inspection. That such was not the agreement, as it certainly was not the practice, seems to be decisively settled by the language of the libelant's own letter of June 4, 1895, in which after stating, as the terms of their dealings, that the invoices were to be charged in account current and bear interest from date of shipment, with interest to be credited on remittances from the date they were received, the libelant continues:

"You will remit to our London bankers as we shall indicate to you in letters which inclose documents of shipment, within 30 days from their arrival; or if you wish to make remittances before, you will send them to Union Discount Company of London."

The credit of £5000 was, therefore, to run 30 days after arrival at Santos; but this limit had been reached, in libelant's view, prior to this shipment by the Asiatic Prince about December 31, 1895.

By the libelant's account current, Belmarco & Co. were indebted to him for shipments prior to the present, in the sum of £5250.14.4. This made no account, however, of considerable offsets, which Belmarco & Co. claimed for alleged inferiority of certain flour in previous shipments, which the libelant refused to allow. In September 50,000 sacks had been ordered like a sample shipment by the Creole Prince. Subsequent shipments, in part fulfillment of this order, it was claimed, were not according to sample, in consequence of which Belmarco & Co. claimed both a deduction in price, and special damages for flour thrown back on their hands by their vendees. These differences not being adjusted, and the unpaid amount claimed to be due on former shipments being in excess of the stipulated credit of £5000, the libelant was unwilling to extend his line of credit further, and for that reason, as he testifies, after applying thereon £1483.9.8 drawn against the letter of credit, he drew a sight draft for £4986.6.2, the unpaid balance of the invoices, against the delivery of the bills of lading, so as to secure payment on delivery without an extension of credit further than had been agreed.

This course was not only justifiable, but strictly compatible with the terms of the contract between the libelant and Belmarco & Co., since the latter were not entitled to any credit on goods after their arrival at Santos beyond the limit of £5000; and as that limit had been previously reached, a draft attached to bills of lading drawn to order and indorsed in blank so as to control possession until payment, was a legitimate commercial method of restricting the credit to the agreed limit. This being the only purpose of the draft and of sending the bills of lading to the bank, all the other terms of the

contract, however, and the mode of dealing between the parties, remained applicable as before. In prior shipments the property in the goods as well as the right of possession vested in Belmarco & Co. from the time of shipment; and I should regard the general property in these goods also, being shipped under the same general course of dealing, as vesting in them from the time of shipment, subject to libelant's right of possession until payment of the price, for which purpose alone the bills of lading were made to order. The goods were all bought for Belmarco & Co.; the flour, the most important part, was shipped under an "old contract" of September previous; the kerosene was bought for them strictly on commission; all the goods were finally and definitely appropriated by libelant to his contract with Belmarco & Co., and no other destination for them was ever proposed; all were consigned to Belmarco & Co.; all were "invoiced and shipped by order and for account and risk of Belmarco & Co."; all bore interest from date of shipment; from that date, they were all, in case of loss, at Belmarco & Co.'s sole risk; they were partly paid for at the time of shipment by the libelant's own application, in accordance with his previous agreement, of £1483.9.8; and on the same basis the bills of lading were indorsed in blank with draft attached, merely for collection of the balance. Under such circumstances the mere fact that the bills of lading indorsed in blank were sent to the bank for the special purpose of keeping possession until payment of the residue of the price, would not prevent the general property from passing on shipment, subject only to libelant's right of possession till payment. Mirabita v. Bank, 3 Exch. Div. 164. The libelant testifies:

"When I put the documents in the mail the goods would belong to him."

And in his letter of January 4th he says:

"We hand you inclosed documents [debit note, invoices, etc. Ex. 49 to 62] as per statement, drawing for the balance as formerly at sight."

The debit of the goods to Belmarco & Co., the charging of interest from date of shipment, and the libelant's testimony, his letter of January 4th, and exhibits inclosed showing the invoices and shipment at Belmarco & Co.'s sole risk, indicate that the property was intended to vest on shipment, reserving only the control of possession for the purpose of securing payment.

It is not very material, however, whether the general property in the goods be deemed to have vested in Belmarco & Co. at the time of shipment or not; because, if the libelant's draft for £1483.9.8 against Belmarco & Co.'s letter of credit, as well as Belmarco & Co.'s remittances of £2000 on January 6th, and of £900 on January 10th, are entitled to stand as originally applied by them in part payment of these goods, there can be no doubt that Belmarco & Co. by these payments, made on the faith of the shipment, with the other circumstances above mentioned, acquired such a special property in these goods (Langton v. Waring, 18 C. B. [N. S.] 315), and that the contract itself was so far executed by both parties, that Belmarco & Co. had an equitable right to the completion of the contract, and to the property and possession of the goods upon their payment of the bal-

ance of the price on arrival at Santos; and that inasmuch as they obtained possession after payment, or tender and judicial deposit, of the residue of the price, even if that possession had been irregularly acquired, the libelant could not be held in law or equity to have sustained any damage, and hence is not entitled to any recovery against the ship. Had the libelant become a bankrupt after such payments by Belmarco & Co. and before the arrival of the goods at Santos, his trustee in bankruptcy could not have kept both the money and the goods; but Belmarco & Co. on taking the goods and paying or tendering the balance of the price, could have kept them as against the trustee. Langton v. Waring, 18 C. B. (N. S.) 315. The libelant's rights are no greater.

This branch of the case turns, therefore, upon the question whether the three payments made by Belmarco & Co. on account of these goods to the amount of £4383.9.8, which was actually received by the libelant with notice some time before the arrival of the goods at Santos, could be lawfully diverted and applied by the libelant upon his prior account current, as he now claims. In his support, it is urged that when these moneys were received by him, Belmarco & Co. owed no debt for these goods; and that the moneys received from them could therefore be lawfully applied by libelant to Belmarco & Co.'s prior indebtedness without regard to Belmarco & Co.'s directions as to the application of the remittances. If it were essential to rule on the question of indebtedness, I should feel constrained to find that under the contract and dealings of the parties as disclosed by the evidence before me, differing from that in the English case, an indebtedness for these goods from Belmarco & Co. to the libelant, bearing interest, did arise from the date of shipment, according to libelant's debit. But no ruling on that point is essential; because the general contract of the parties as evidenced by the libelant's letter of June 25th above quoted, provided for such advance remittances and allowance of interest thereon from date of receipt; while the draft for £1483.9.8 against the letter of credit, was subject to an additional special agreement that it was to be applied to "new shipments."

The letter of credit for £3000 on London was mailed to the libelant on November 25th for account of new shipments, as the libelant was advised by cable of that date, as appears from the libelant's letter of November 29th acknowledging the receipt of the cable, saying:

"We also thank you for the remittance which you advise in your telegram of 25th inst. and our authorization to draw for your account on the London & Hanseatic Bank against new shipments."

In this letter of December 28th he again writes his thanks for the letter of credit (then received), which he says:

"We shall use against new shipments by Asiatic Prince."

A few days afterwards on January 3d, that shipment being completed, the libelant drew £1483.9.8 upon that letter of credit, upon account of these goods; he so notified the London bankers in his letter of January 3d; so wrote to Belmarco & Co. in his letter to them of January 4th; credited it on the debit note and invoices, and on that basis drew his draft for the balance of the shipment. The applica-

tion thus made, he was bound to make by his contract; and when actually made as agreed, it became an executed contract, and incapable of change except by Belmarco & Co.'s consent.

The remittances of £2000 on January 6th and of £900 on January 10th were in conformity with the letter of June 25th. The right given to Belmarco & Co. to make remittances prior to the receipt of the goods or of the shipping documents, necessarily imports libelant's agreement to accept such payments as they are remitted, and for the accounts expressed in the remittance. Here there was a specific agreement between the parties on this very subject; and this agreement binds the libelant to abide by the application made by Belmarco & Co. of their remittances.

Both the remittances of January 6th and January 10th were particularly stated at the time of the remittance to be for account of goods by the Asiatic Prince. The libelant was also specially notified to this effect as to the £2000 by cable of January 7th, which he received on the same day; and the cable of January 10th must have conveyed to him similar knowledge as to the £900. The latter was a cable remittance received in London at once; the remittance of £2000 was received by the London bank for libelant's account on January 29th, and the libelant was notified of that fact; and he instructed the bank to retain it to his credit. These appropriations by Belmarco & Co., being in conformity with the contract, could not be altered by the libelant.

Good faith and fair dealing, moreover, required the two latter remittances to be applied on the first draft, because they were evidently made by Belmarco & Co. on the faith of this shipment. The libelant was cabling to them for funds, but suppressing in his cables the fact of the draft, and thus inducing additional remittances from them by practising upon their ignorance. On December 26th he cabled,

"We are executing your orders, but would thank you for assisting us with bank credit £7000."

This was evidently a request for remittances on account of new shipments; Belmarco & Co. having complied with this request, the libelant is estopped from any different application.

On December 28th he wrote,

"Our shipments by Asiatic Prince will amount to more than £7000."

And on January 3d he cabled,

"We have executed all your orders except 5000" (bags of flour).

On January 6th he again cabled for remittances, and also on the 7th, the same day that he received express notice of the remittance of £2000 on account of the shipments by the Asiatic Prince. That Belmarco & Co. were acting in good faith in respect to this shipment, and not with any idea of obtaining possession of the goods and delaying or refusing remittances, is conclusively proved by the fact above stated of their remittances within about £60 of the invoice price, three weeks before the arrival of the goods.

Belmarco & Co. were therefore entitled to have their remittances to the amount of £4383.9.8 stand as applied by them against these goods. On arrival at Santos, less than one-third the invoice price

remained owing; the tender and judicial deposit by Belmarco & Co. to libelant's credit were £2900 in excess of the amount owing for the goods, and even if the draft for £1483.9.8 were applied on the old account, the tender and deposit would still be largely in excess of the amount due.

As Belmarco & Co. were therefore equitably entitled to the goods on tender of more than the whole amount due, and as the libelant has sustained no damage in the eye of the law from their subsequently obtaining possession, the decree should be for the respondent with costs.

THE JAMES A. LAWRENCE and THE COMANCHE.

FLOAT NO. 1.

(District Court, S. D. New York. October 31, 1899.)

COLLISION—STEAMERS CROSSING—LOOKOUT—CHANGE OF COURSE.

An incoming steamer, bound up East river, which took a diagonal course across the river, and across the course of a tug with a tow crossing from Brooklyn, and having the right of way, when by the rules and state statutes she was required to keep to the right and as near the middle of the river as might be, *held* in fault for a collision with the tow. The tug also *held* in fault for failing to keep a proper lookout, and for changing her course.

In Admiralty. Cross libels for a collision between the steamship Comanche and Float No. 1, in tow of the tug James A. Lawrence.

Black & Kneeland and Bowers & Sands, for the Car Float No. 1.
Goodrich, Whitney & Hagen, for the Lawrence.
Robinson, Biddle & Ward, for the Comanche.

BROWN, District Judge. The collision in the above cases occurred about 4 o'clock in the morning of December 30, 1897, about 300 feet off South Ferry. The Comanche was coming in from sea and bound up the East River. At the moment of collision she was about in line with the New York shore off South Ferry, and struck the Float No. 1, in tow of the steamtug Lawrence, on her port side at nearly right angles, the float then heading nearly directly on shore, or a little to the westward. The stem of the Comanche penetrated the forward part of the float about 16 inches, while the forward motion of the float carried the Comanche's stem somewhat over to port. The tide was strong ebb, the weather clear, excepting a little haze upon the water. The float had left Woodruff's Stores on the Brooklyn side near Montague street, and was going around the Battery to the Erie Railroad docks at Jersey City. The Comanche was bound for pier 29 East river, just below the Brooklyn Bridge.

The evidence as to the time when the vessels were seen by each other and as to their lights and signals, is extremely confused and uncertain. I think a proper lookout was not maintained on either vessel. The Comanche's lookout was changed at about that time—a fruitful occasion of collisions; and the Lawrence had no separate lookout proper, but only the mate who was directing the navigation

from the top of the float, which obscured the view of the pilot in the pilot house of the tug. The Comanche had come past Ft. William about 300 yards off, and according to the statement of her master, shaped her course for about the middle of the Brooklyn Bridge, which would carry her near the New York shore. She proceeded over to near the New York shore and then ported two or three points. A straight course of the Lawrence with her float would likewise take her near South Ferry. The rule of the road, as well as the state statute of New York, required the Comanche to keep to the right, and as near the middle of the river as may be; while the starboard-hand rule required the Comanche to keep out of the way of the tug and float. There was nothing to prevent the Comanche from keeping out of the way of the tug and float, as well as of the ferryboat and the other tug, by going to the right of the middle of the river, instead of continuing her course across that of all these vessels. Contrary signals were sounded when the tug was only a few hundred yards distant. I am not satisfied of the alleged early giving of one whistle by the Comanche to the Lawrence; it is denied by the officers and none such was heard by Clapper or Vandecar on the Depew; and the actual navigation of the Comanche indicates the contrary. I cannot accept, however, the excuses suggested for the Comanche's not seeing the lights of the Lawrence earlier, and giving timely signals. The attempt to cross the bows of the tug and float and go to the left, in violation of the rules and statutes, is sufficient to charge the steamer with fault.

I think the tug must also be held to blame for not maintaining a good lookout, and for not keeping her course, as the rules required. Her helm was put hard to port and she also reversed, and the combined effect of both was to swing her to starboard at about right angles from her previous course. It seems to me impossible that the tug could have done this with so cumbersome a tow as a loaded float 200 feet long on her port side, unless this change of helm had been made some time before the collision. At the time of the collision the tug and float must have been moving ahead with some speed, or the stem of the steamer would not have been carried to port. The master's intimation (he does not state definitely) of the distance in which the tug and float could be stopped, is I think erroneous and misleading. The tug by her swing to starboard some six or seven points, must have run in a considerable distance towards the shore. This was in direct violation of the present rule requiring the privileged vessel to keep her course. The necessary inference is that but for this change of course, the float being struck only about 16 feet aft of her forward port corner, the collision would have been avoided, notwithstanding the Comanche's fault. A change of six or seven points by a cumbersome float of such size, is too great and occupies too much time to be considered as made in extremis; and I must, therefore, treat the tug as also in fault. The float not being shown to be in fault, the damages should be apportioned between the tug and the steamer, without touching upon the many contradictions and obscurities which the case otherwise presents.

STATE OF MINNESOTA v. DULUTH & I. R. R. CO. et al. DULUTH & I. R. R. CO. et al. v. STATE OF MINNESOTA et al. COBB v. DULUTH & I. R. R. CO. et al.

(Circuit Court, D. Minnesota, Third Division. November 22, 1899.)

1. PUBLIC LANDS—RAILROAD GRANT OF SWAMP LANDS BY STATE.
The Minnesota act of March 9, 1875, granting swamp lands of the state in aid of the construction by the Duluth & Iron Range Railroad Company of a road from Duluth to a designated point on the Mesaba iron range by the "shortest and most feasible route," provided for the making of a survey, and the filing of a map with the secretary of state, on which all swamp lands within 10 miles on each side of the line as shown should be withdrawn and reserved from sale; that on the construction of each section of the road the governor should cause it to be examined by commissioners, and on their certificate of its completion in a good and substantial manner, as contemplated by the act, to notify the secretary of state, who should issue swamp-land certificates for the lands earned. *Held*, that under such provisions the executive department of the state was vested with authority to determine not only as to the proper construction of the road, but also as to whether the route selected was in compliance with the act; and that, in the absence of fraud, its determination of such questions in favor of the company, and the conveyance to it of a portion of the lands in accordance with the provisions of the act, were conclusive upon the state, not only as to the lands so conveyed, but as to all others earned, and to which the company was entitled, under the terms of the grant.

2. SAME—POWER OF LEGISLATURE TO AMEND—CHANGE OF TERMINUS.
The purpose of the grant being to secure the construction of a railroad into the mining region, and the northern terminus, as fixed by the act, being short of such region as it subsequently developed, it was within the province or power of the legislature, as it did by the amendatory act of 1883, to change such terminus.

3. SAME—FORFEITURE OF GRANT—CONSTITUTIONAL AMENDMENT.
The amendment to the constitution of Minnesota, adopted in 1881, providing generally the manner in which "all swamp lands now held by the state" should be disposed of, did not operate as a forfeiture or resumption of the grant of swamp lands that had previously been made by the legislature to the Duluth & Iron Range Railroad Company, although the company was then in default, under the conditions of the grant, in view of the rule that a declaration of forfeiture must be clear, unambiguous, and unmistakable.

4. RAILROAD MORTGAGE—VALIDITY.
A mortgage given by a railroad company to a trustee is not void under the Minnesota statute of uses and trusts.

5. PUBLIC LANDS—GRANT BY STATE TO RAILROADS—POWER TO FORFEIT GRANT.
The Minnesota act of April 21, 1897, purporting to declare a forfeiture of lands previously granted to the Duluth & Iron Range Railroad Company, is invalid, as impairing the obligation of the contract made by the grant, the railroad having been fully completed, and the lands earned, prior to its passage.

Henry W. Childs and W. P. Warner, for the state of Minnesota.
Frank B. Kellogg, for Walter F. Cobb.
J. H. Chandler, for Duluth & I. R. R. Co.
M. D. Grover, for Minneapolis & St. C. and Great Northern R. Cos.

LOCHREN, District Judge (orally). The question in the case is whether the lands granted by the state of Minnesota to the Duluth

& Iron Range Railroad Company by the act of March 9, 1875, as amended, on condition that the company should build the railroad described and contemplated, have ever become vested in the railroad company by the performance of the condition, or whether the railroad company failed to perform such condition, and the state, by a declaration of the forfeiture of the grant while there was such a failure, has devested or ended the grant, and resumed the title to the lands. I think all these cases depend upon the solution of that question. The act of March 9, 1875, enacts substantially as follows:

"That for the purpose of aiding the Duluth & Iron Range Railroad Company, to construct a railroad from Duluth by the shortest and most feasible route, to the northeast corner of township 60, range 12, west, on the Mesaba iron range, there is hereby granted to said corporation or its assigns, an amount of swamp lands belonging or hereafter to accrue to the state under the act of congress of March 12th, 1860, equal to ten sections per mile for each mile of road that may be completed and can be selected within ten miles on each side of the road."

Then it provides that, should there not be a sufficient amount of said lands unsold and unappropriated within the 10-mile limit, the grant may be located on swamp lands that had accrued to the state, not otherwise disposed of, within the counties of St. Louis, Lake, and Cook, and no other counties in the state. It also provided that the gauge of the road should not be less than three feet, laid with iron or steel rails not less than 25 pounds to the yard, and that no land should accrue to the company until previous land grants of the state should become satisfied or forfeited. Then it provided that the governor of the state should be notified by the company of the completion of each 10 miles of road, and then it should be "his duty to have the same examined by sworn commissioners, and on their certificate of the completion of each consecutive ten miles in a good and substantial manner, as contemplated by this act, he shall notify the secretary of state, who shall forthwith cause swamp-land certificates to be issued to the president and directors of the company for the number of acres they shall be entitled to under this act." It further provided that within 12 months from the passage of the act the company should cause a survey of the road to be made, and file a map with the secretary of state; that at least 20 miles of the road should be built within two years, and the whole completed within five years. There was also a provision exempting the land from taxes for a certain time. Section 3 provided that, after the filing of the map showing the line of the road, as provided in the last preceding section, the swamp lands belonging to the state for 10 miles on each side of the line of the road should be withdrawn from sale for the purposes contemplated in the act.

It is admitted by counsel in the arguments, and is a matter of undisputed history, that previous to the passage of this act iron ore had been discovered to some extent on what is known as the "Mesaba Range" and in other parts of that country lying to the north or northeast of Duluth, and it was deemed a matter of interest to the people of the state that these iron mines should be developed in some manner. Duluth was the nearest point to these mines at which there were any railroads, or any improved harbor in connec-

tion with lake navigation; and it was deemed essential to the development of these mines that there should be railroad connection between these points and Duluth, so that persons and supplies could be taken to the mines, and their product, wherever it came from, brought out on this railroad, and connected with the commerce and transportation of the world. Undoubtedly it was the expectation that there would be an advantage to the city of Duluth itself, by its railroad connection, in supplying these mines and the industries that might be connected with them, and perhaps in handling the products that would come therefrom. Where these industries should be located was not specified in the act. There was no provision that there should be smelting works, docks, or anything of that kind erected in the city of Duluth; but there was a provision that there should be railroad connection with the mines; and the advantages incidental thereto, whatever they might happen to be, in the development of the enterprises, might naturally be expected to come to Duluth. It is evident, when we look at this act, that the discoveries of such an immense extent of iron ore in that region as have since been made were not contemplated by the legislature at the time of the passage of the act; otherwise, it would scarcely have provided for a railroad of not less than three-foot gauge, and a weight of rails of not less than 25 pounds to the yard. When we consider what has been developed in that region, the kind of railroad that has been built in connection therewith,—a commercial railroad, with rails 80 to 100 pounds to the yard, with immense locomotives running upon them,—and also consider the other railroads that have been extended into that same region in the development of these mines, it is evident that the extent of these mines was not contemplated by the legislature at the time the act was passed. It does not appear whether the legislature contemplated that the crude product as it came from the mines should be brought to Duluth, and there transshipped to other places throughout the country, whether smelting works might be established there, or near the mines, where they could bring coal and coke and other supplies for the carrying on of that business, or whether rolling mills might be established near the mines, or at some convenient and suitable point intermediate, or what the particular advantages to Duluth might be. There has been testimony in the case, referred to by counsel at considerable length, showing that the docks which were erected by the Duluth & Iron Range Railroad Company at Two Harbors might have been placed in Duluth harbor. It appears that before this railroad was built, or, at any rate, prior to the amendment of this act, the St. Paul & Duluth Railroad Company, the Omaha Railroad Company, and perhaps other railroad companies, had established their lines along the front of the wharves or docks in the city of Duluth, and occupied considerable territory back of those docks. It is evident it would be important for commercial railroads, in connection with material which might be brought to Duluth for shipment elsewhere, to be taken and transported by water transportation, or the reverse, where they receive shipments of material brought from other places by water to Duluth, to have docks con-

venient for these purposes upon or adjoining their own grounds, and that these terminal facilities along the docks were of great importance to these railroad companies. It is urged in the argument that the Duluth & Iron Range Railroad might have crossed the lines of these railroad companies which had already occupied these docks, even against the desires of these companies. But I think it may be fairly presumed that these companies would have opposed the occupation of these docks or this dock frontage by the Duluth & Iron Range Railroad Company; and it is evident that such occupation of this frontage by ore docks would have very much impeded the use, and very much lessened the value, of the terminals of the railroad companies along those docks. If the question were an open one, or if it were conceded that the Iron Range Company had the right in law, by paying compensation such as would be assessed, to make this crossing (not for the purpose of extending the road any distance further, but for the very purpose of taking possession of what was virtually the terminals of these other railroads), I do not think it would be a public advantage to the city of Duluth. That is the way it strikes me. The dockage front in Duluth between Minnesota Point and Rice's Point, as shown on the map, and as every one knows who has examined it, is limited, and not more than is necessary for the present and the reasonable future prospective necessities of the city in carrying on its ordinary commercial business. The transfer of passengers back and forth from the boats to the cars, and the transfer of ordinary merchandise in which all the merchants and business men of Duluth are interested, which constitute the business that has built up the city, require this frontage; and it appears that this frontage is not more than sufficient to accommodate that class of business. Now, suppose the Duluth & Iron Range Railroad Company should cover that dockage front, or a large portion of it, such as would be necessary for its ore docks, which the testimony shows are large,—some 50 feet or thereabouts in height,—and between the docks there would have to be slips on each side (I do not know that their width is shown by the testimony), if that would be a benefit to the city, then it would be a benefit to it that all the roads coming from that iron region should locate their iron-ore docks at that place; and if, in addition to the Duluth & Iron Range ore docks, the docks of the Duluth, Mesaba & Northern Railroad were brought in there, and those of the Great Northern Railway Company, all of which now go into Two Harbors, St. Louis and Allouez Bays,—if those docks are all put into the space between Rice's Point and Minnesota Point,—they would fill the whole of it, and shut off and destroy the harbor of Duluth for all commercial purposes. This transshipment of ore is a business in which the people of Duluth could have no special connection or interest. Only the owners of the mines and the purchasers of the ore for large smelting works East would have any connection with it. It would afford very little employment, because the ore is carried up on high tracks, and dumped by the force of gravitation into pockets in the docks, and by the same force into the holds of vessels, giving very little employment to persons in the city. I do not

believe that the people of the city of Duluth would submit quietly to the occupation of the entire dock frontage there by ore docks. Such occupation would not be an advantage to the city of Duluth, but, it seems to me, would be the greatest detriment.

Now, should smelting works, or rolling mills, or other works for the manufacture of iron be established in the city of Duluth, a railroad is built, and ore in any needed quantity for works of that kind can be brought there by this railroad. It appears that Two Harbors was a convenient point at which to establish the docks of this Duluth & Iron Range Railroad, and to receive the ore merely for the purpose of transshipping it to points on the Lakes; and it was a place where such transshipment did not disturb injuriously the business of Duluth. So far as Duluth is concerned, I think it was as advantageous as if the road had been carried through to St. Louis Bay, or where the other ore docks are at Allouez Bay. If we suppose that at the time this road was built smelting works, rolling mills, or anything of that kind had been established or in contemplation at Two Harbors, I do not think there would have been any question that, in the exercise of good judgment, it would have been regarded as the duty of the railroad company to make that place one of the points upon their route between Duluth and the mines. It seems to me that would be a good place for the establishment of works of that kind, because it is not far from the mines, and is a point where the product of the works or mills could be shipped to the markets where needed, and a point where coal, coke, and other necessary supplies for works of that kind could be readily received from where they are produced at Eastern ports of the Lakes.

But I think this is not the question for the court to determine in this case. This act did not contemplate that there should be a lawsuit in order to determine whether its terms were complied with. The act contained in itself the provisions for carrying it out, and it referred these matters to the executive department of the government, to be administered by them. It provided that the route should be the shortest and most feasible. That does not mean an air line,—a direct line,—but a route which should be determined not only by being short, but also by reference to other considerations, both such as would affect the building of the road by a route on which it could be profitable and fairly cheaply built, and also a route that had reference to the advantages to the road itself when built, and to the advantages which the road would afford to the business which would naturally result from or be connected with it. The act itself provides, in the first place, that a survey of the road shall be made, and a map of the route filed with the secretary of state within one year. The filing of such map would be a notification to the executive department having charge of the administration of this act as to the route selected; and I think the governor and the secretary of state had the same right to determine whether the route so selected conformed to the provisions of the act as the interior department has in relation to routes designated in land grants made by the United States. They would have a right to determine as to whether the route selected and shown upon the map

thus filed was a compliance with the act. The executive department is the department to which the act intrusted this matter, and therefore, unless its action can be attacked for fraud, or unless it can be shown that the governor and secretary of state were imposed upon by fraud, or something of that kind, their decision is final in this matter that was intrusted to them. The act provides that upon the filing of the map showing the line of road certain acts shall be done by the executive department; that is, the lands along the line for 10 miles on each side of the road were to be withdrawn from sale for the purposes contemplated in the act. The northern terminus of this road was changed by the act of 1883. It does not seem to me, if the question were an open one, that such change was beyond the power of the legislature. The object of the act was to reach this mining region. It is admitted in the argument that the point named in the original act was one which would not reach this region; therefore the legislature properly agreed to the change as to the northern terminus by the act of 1883. The grant, up to that time, was a float, until there was a location of the line. There was no particular or special description of lands granted; and it was within the power of the legislature, taking into consideration the purposes for which the act had been passed, to change the route sufficiently to accomplish the original purpose. It seems to me that this matter has necessarily been passed upon by the supreme court of the state of Minnesota in the case of Minneapolis & St. C. R. Co. v. Duluth & W. R. Co., 45 Minn. 104, 47 N. W. 464, cited by counsel.

It is urged further that the constitutional amendment of 1881 having been adopted at a time when the road was in default, amounted to a declaration of forfeiture; that thereupon the land was resumed by the state; and that the legislature of 1883 could not make a new grant. This would be true if the constitutional provision had that effect. I think it has not. The holdings of all courts in relation to legislative declarations of forfeiture are that they must be clear, unambiguous, and unmistakable. There is not a word in the constitutional amendment of 1881 which indicates a purpose on the part of the state to forfeit any grant. It provides that "all swamp lands now held by the state or that may hereafter accrue to the state, shall be appraised and sold in the same manner and by the same officers, and the minimum price shall be the same, less one-third as provided by law, for the appraisement and sale of school lands." It does not declare that lands which the state has granted, as to which, under the conditions of the grant, there has been a default, should be resumed. Nothing of the kind. There were swamp lands at the time in a condition where the purposes to which they should be applied might be properly provided for by a constitutional amendment or by a legislative act. It is not necessary to give such construction to the act, and the language does not, by any fair interpretation, bear that construction. I think it may be fairly said that this matter is passed upon in the case to which I have already referred in 45 Minn. and 47 N. W. In that case the title claimed by the defendant the Duluth & Winnipeg Railroad

was dependent entirely and wholly upon the assumption that the Duluth & Iron Range Railroad Company had forfeited its grant, and that was one of the questions before the supreme court. It appears that this constitutional amendment was called to the attention of the court in that case, because the court referred to it in connection with another matter. It is true the court does not suggest or consider it with reference to forfeiture, but it seems to me the only inference from that is that it was so plain that the act did not refer to anything of the kind that neither the court or the attorneys considered it had that effect, for the court held that, in order to be effectual as the legislative forfeiture of the grant, the language of an act must be clear, unambiguous, and unequivocal. Now, it appears after the road was built, no land having been certified to the company (as the act of 1883 provided that should not be done until after the road was built), sworn commissioners, provided for in the act of 1875, were appointed, and went over the road, and made a report that the road had been built in accordance with the act; and there is no question that, so far as the construction of the road is concerned, it did come up to the requirements of that act. Upon that lands have been conveyed to the railroad company as earned by it under this grant, and it seems to me upon the whole case it is clear that the railroad company was entitled to those lands.

As far as the case of complainant Cobb is concerned, it appears a mortgage was made before the passage of the act of April 21, 1897, and that he was named as trustee in such mortgage. I do not think that this mortgage was void under our statute as to uses and trusts. That has come down to us from a New York statute upon the same subject, and the same statute has been adopted in the states of Michigan, Wisconsin, and several Western states. In all of those states there have been from that day to this railroad mortgages more or less like this one under consideration, and the authority to make them has never been questioned. I do not think I am required to examine as to the validity of a trust of this nature, inasmuch as there have been similar trusts ever since the adoption of this statute of uses and trusts in New York and other states, which have not been questioned under that statute. It appears that Mr. Cobb is a resident of the state of Illinois, and, it being admitted that the amount involved is sufficient to give jurisdiction to this court, I think, as far as that case is concerned, this court has jurisdiction, and that the complainant Cobb is entitled to the relief asked, and that the temporary injunction granted against the state officers be made permanent. I think the state of Minnesota is not entitled to the lands that have been deeded to the Duluth & Iron Range Railroad Company, and that the state is under obligation to convey to that railroad company lands which have not yet been selected or conveyed; and, further, that in the state case the state is not entitled to the relief demanded.

I may say further that it follows from what I have already said that the act of April 21, 1897, is invalid, as impairing the obligation of previous contracts. That act purports to declare a forfeiture of these lands, but, as the condition had been entirely fulfilled, the rail-

road completed, and the lands earned, it was not within the power of the state, as held by Judge Mitchell in the case cited, to resume the lands. Decrees will be entered accordingly.

UNION MORTGAGE BANKING & TRUST CO., Limited, v. HAGOOD et al. HAGOOD et al. v. UNION MORTGAGE BANKING & TRUST CO., Limited, et al. CORBIN v. SAME. UNION MORTGAGE BANKING & TRUST CO., Limited, v. CORBIN et al.

(Circuit Court, D. South Carolina. November 3, 1899.)

1. FEDERAL COURTS—STATE LAWS AS RULES OF DECISION—USURY.
Upon questions of usury the federal courts of equity are governed by the laws of the state applicable to the contract, as construed by the state courts.[1]

2. USURY—CONSTRUCTION OF CONTRACT—PROVISION FOR INTEREST AFTER MATURITY.
If, from the language of a note, it appears that the parties, when making it, understood that a provision for the payment of increased interest, after maturity, beyond the rate permitted by law, was not peremptory, but that the maker would be indulged provided he paid the increased rate of interest, such provision will render the note usurious; but if the provision was intended to enforce prompt payment, and the increased rate was a penalty for default, the note is not thereby rendered usurious.

3. SAME.
Under the decisions of the supreme court of South Carolina, a note containing in the body thereof the provision, "with interest thereon, after maturity, until paid, at the rate of ten per cent. per annum, payable annually; value received," is usurious, 10 per cent. being in excess of the lawful rate.

4. SAME—STATUTE OF SOUTH CAROLINA—CONSTRUCTION OF PROVISO.
Under the proviso in the South Carolina act of 1889 relating to usury (20 St. at Large, p. 377) that its provisions shall not apply "to contracts or agreements entered into or discounts or arrangements made prior to the first of March, 1890," a case is within the exception as to "arrangements made" where, prior to the date specified, the amount, terms, and security for a loan had all been agreed upon, and all that remained to be done after that date was to execute the papers and transfer the money.

5. SAME—EXCEPTION IN STATUTE—BURDEN OF PROOF.
The burden rests upon a complainant seeking to enforce a note to which a plea of usury based on such statute is interposed, where the note bears date after March 1, 1890, and is usurious on its face under the provisions of the statute, to bring the note within the exception by showing that the arrangement in pursuance of which the note was executed was in fact made prior to the 1st of March.

6. SAME—EFFECT OF COMMISSIONS PAID TO AGENT.
Where a loan on the security of real estate was negotiated by a bank and its local agent, who acted in behalf of the borrower, the notes and mortgage being executed to a third party, which furnished the money on the delivery to it of the notes and the executed and recorded mortgage, the notes, bearing a legal rate of interest, are not rendered usurious by reason of any commission paid by the borrower to the bank or its agent.

7. SAME—PROVISION FOR PAYMENT OF TAXES.
A provision, in a mortgage securing notes, requiring the mortgagor to pay the taxes on the mortgaged property, does not render the notes usuri-

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

ous where the mortgagor is, by statute, the holder of the legal title, and liable for such taxes.

8. SAME—PROVISION FOR ATTORNEYS' FEES.
A provision in a mortgage for the payment of attorney's fees by the mortgagor in case of foreclosure does not render the notes secured thereby usurious.

9. SAME—PENALTY—SOUTH CAROLINA STATUTE.
The provision of the South Carolina act of 1882 (18 St. at Large, p. 36, § 2) that any person or corporation who shall receive as interest any greater amount than therein provided for shall forfeit double the sum so received, to be collected by separate action or by counterclaim, applies only to interest paid and received, and does not entitle a borrower to recover the penalty for usurious interest charged, but not paid.

This was a suit for the foreclosure of a mortgage, in which a cross bill was filed for the foreclosure of a second mortgage, and a cross bill by defendants, to recover penalties for usury taken, under the statute of South Carolina.

Allen J. Green, for complainants.
Wm. H. Townsend and Legare & Hollman, for defendants.

SIMONTON, Circuit Judge. This is a bill for foreclosure of a mortgage of realty in Barnwell county, S. C. The mortgage purports to secure the payment of four notes, each in the sum of $1,000, and payable on 1st days of December, 1891, 1892, 1893, 1894, respectively. The current annual interest on the notes is represented by coupons, each for $70. The notes each provide for the payment, after maturity, of interest at the rate of 10 per cent. per annum, payable annually until paid. The facts attending this transaction are these: The defendant Mrs. Sallie E. Hagood is the wife of William H. Hagood. W. J. Duncan, a resident of Barnwell, had advertised that he had, or could obtain, money to be lent on security. W. H. Hagood, acting on behalf of his wife, made application for a loan of $5,000. This application was made 1st February, 1890. Duncan found that he could not obtain a loan for $5,000, but that she could get $4,000. She consented to this, and on 15th February Duncan so informed the Corbin Banking Company, of New York, for which company, or with which company, he was acting. Thereupon the Corbin Banking Company sent to Duncan all the papers necessary for completing the transaction; that is to say, the notes, mortgage, and abstract of title. These came to Duncan about 20th March, 1890. He then informed Mrs. Hagood. The papers were executed by her on March 28, 1890. Duncan, upon their execution, paid her the money, less $200,—his commissions,—and recorded the mortgage. The money was paid by the cashing of his draft on Corbin & Co. through a bank in Barnwell, the documents being attached to the draft. Besides this mortgage, Mrs. Hagood executed to Willis J. Duncan a second mortgage of the same land, securing the payment of five notes for $120 each, representing a commission of 15 per cent. to Corbin & Co. for effecting the loan. In this commission W. J. Duncan had one-third interest. The defendant sets up in her answer the defense of usury, and she also filed a counterclaim for the penalties

provided in the act of the general assembly of South Carolina for usury.

The first question is, are these contracts, on their face, usurious? Usury is merely a statutory offense, and federal courts, in dealing with such a question, are governed by the laws of the state in which the transaction took place, and follow the construction put upon such laws by the state courts. Even in case of a resort to the court to be relieved of a usurious contract, the law of the state controls, and overrules the general rule that he who seeks equity must do equity. Trust Co. v. Krumseig, 172 U. S. 351, 19 Sup. Ct. 179. The statute in existence at the time of the transaction in question is found in 20 St. at Large S. C. 377. It is in these words:

"No greater rate of interest than seven (7) per centum per annum shall be charged, taken, agreed upon, or allowed upon any contract arising in this state for the hiring, lending or use of money or other commodity except upon written contracts wherein by express agreement a rate of interest not exceeding eight per cent may be charged. No person or corporation lending or advancing money or other commodity upon a greater rate of interest shall be allowed to recover in any court of this state any portion of the interest so unlawfully charged; and the principal sum, amount or value so lent or advanced, without any interest, shall be deemed and taken by the courts of this state to be the true legal debt or measure of damages to all intents and purposes whatsoever, to be recovered without costs: provided, that the provisions of this act shall not apply to contracts or agreements entered into, or discounts or arrangements made, prior to the first of March, 1890."

Previous to this statute the rate of interest in written contracts could be 10 per cent. 18 St. at Large S. C. p. 36. It is in these words:

"No greater rate of interest than seven (7) per centum per annum shall be charged, taken, agreed upon or allowed upon any contract arising in this state for the hiring, lending or use of money or other commodity except upon written contracts, wherein, by express agreement, a rate of interest not exceeding ten per cent may be charged. No person or corporation lending or advancing money or other commodity upon a greater rate of interest shall be allowed to recover in any court of this state any portion of the interest so unlawfully charged; and the principal sum, amount or value so lent or advanced, without any interest, shall be deemed and taken by the courts of this state to be the true legal debt or measure of damages to all intents and purposes whatsoever, to be recovered without costs."

Are the notes given by Mrs. Hagood, on their face, open to condemnation as usurious? It is contended that the provision for the payment of 10 per cent. per annum after maturity stamps them as usurious. In Brock v. Thompson, 1 Bailey, 327, plaintiff agreed to lend the defendant $3,000 in United States bank bills, upon his promise to pay it in a specified time with lawful interest, and that, if they were not paid in United States bank bills, he would pay the further sum of 5 per cent. as a premium. It was held that this additional 5 per cent. was not usury, but was a penalty intended to enforce the principal fulfillment of the contract. The case proceeded upon the idea that the payee of the note was in no way bound to grant indulgence, nor did the contract show that such indulgence was a part of the contract. And this seems to be the general rule. 3 Pars. Cont. 116; note to Davis v. Garr, 55 Am. Dec. 396. In Bank v. Strother, 28 S. C. 520, 6 S. E. 319, the words

of the note were: "And if not paid when due, bear interest from maturity at the rate of ten per cent. per annum as agreed for negotiating and carrying this loan so long as it remains unpaid." It was then contended that this provision was merely a penalty. But the court held otherwise, the words "as agreed for negotiating and carrying this loan so long as it remains unpaid" plainly show that the parties expected that the money would not be paid, and that the increased rate of interest was for forbearance as agreed. The principle seems to be this: If, from the contract, it appears that the parties, when making it, understood that the words of the note were not peremptory, but that the maker would be indulged provided he paid the increased rate of interest, this would be usury; but if the threat of increased interest was held out to enforce prompt payment, and if the increased rate was penalty for the default, it would not be usury. It is not an easy matter to construe this contract, applying the above principle to it. The words are, "with interest thereon, after maturity, until paid, at the rate of ten per cent. per annum, payable annually; value received." These words are in the body of the note. The consideration for this promise to pay interest is the same as that for the promise to pay the principal. The words "value received" come immediately after, and as a part of, the promise to pay interest. The language used in Bank v. Strother applies to this case. It will be observed that the promise to pay interest after maturity at an unlawful rate was incorporated in, and formed part of, the original contract. It was one of the terms of that agreement, and, if there was a valid consideration for such agreement, as it is conceded there was such consideration, being expressly stated in the note, it was clearly sufficient to support all of the terms of the agreement, including that by which the maker promised to pay an illegal rate of interest after the time fixed for the payment of the principal sum. It will be noticed that the notes provide for the payment of interest, after maturity, until paid, 10 per cent. per annum, payable annually. These last words, "payable annually," express a contract on the part of the promisor, and the acceptance of it on the part of the promisee. Indeed, they are the words used in an investment of money. They are covered by the reasoning in O'Neall v. Bookman, 9 Rich. Law, 80. It appears to the court that the note, on its face, without more, would be usury.

The next question is, do the facts of this case bring these notes within the exception of the statute? The words are: "The provision of this act shall not apply to contracts or agreements entered into or discounts or arrangements made prior to the first of March, 1890." The words of the statute are, "contracts or agreements entered into or discounts or arrangements made." We must give effect to all the words of the statute. This being so, the words "contracts or agreements entered into" must mean contracts or agreements completed; and the word "arrangements" must mean a transaction, all of the terms of which are fully understood, but not yet consummated. The negotiations began 1st February, 1890. Mrs. Hagood first desired a loan of $5,000. This was declined, and

an intimation was given that $4,000 could be had. After consideration, she became content with $4,000. This was on 15th February, 1890. There was delay in sending on the papers, but finally the Corbin Banking Company sent the documents about 20th March, and the transaction was consummated on 25th. The Century Dictionary defines "arrangement" thus: "Preparatory measure or negotiation; previous disposition or plan; preparation; commonly used in the plural, as, 'We have made arrangements for a journey.'" Webster defines "arrangement" to mean "preparatory measure; preparations; as, 'We have made arrangements for receiving company.'" In this case the parties were preparing for a loan. All the terms were distinctly stated in the proposal of Mrs. Hagood. At first they differed as to the amount, and as to the amount only. Mrs. Hagood wanted $5,000. The Corbin Banking Company offered $4,000. On 15th February, 1890, this was accepted; that is to say, this arrangement preparatory to the execution of the papers was made and concluded then. What followed was simply the consummation of the arrangement. This brings the case within the exception of the statute. This would be conclusive if Duncan or the Corbin Banking Company were the lenders. But the whole case of complainant goes upon the idea that the Corbin Banking Company and Duncan were intermediaries, acting for Mrs. Hagood, and placing the loan for her with complainant. The evidence shows that, as between her and the Corbin Banking Company, there was a definite arrangement prior to 1st March, 1890. There is no evidence whatever showing when the arrangement with the complainant was made. If this was not made prior to 1st March, 1890, it comes within the prohibition of the statute. Now, on 15th February, 1890, Mrs. Hagood consented to the loan of $4,000, and authorized it to be made. Nothing more seems to have been done until 20th March, 1890, when the documents were sent on to her for her signature. The reasonable and probable conclusion is that between 15th February and 20th March the Corbin Banking Company were trying to place the loan, and that they did place it with complainant. And, as no doubt the Corbin Banking Company are business people, the reasonable and probable conclusion is that they could not place the loan until a short time before they sent the documents on; that is to say, between 1st and 20th March, 1890. There is a painful want of evidence on this point. But it is the duty of a plaintiff to prove his case. The defect of testimony must tell against him. The complainant was bound to show that it came within the exception of the statute, and to prove that its arrangement was made prior to 1st March, 1890. It has not done so, and it is not unreasonable to infer that it could not do so. The result is that the notes and mortgages are usurious.

The next question is, is there in the circumstances of this transaction evidence of usury in the contract? It appears from the evidence in this case that W. H. Duncan advertised money to lend; that the defendant, through her husband, as agent, approached him with the purpose of obtaining a loan of $5,000; that for this pur-

pose she signed the application, in which she recognizes Duncan as her agent; that Duncan examined the title of the property, and made an abstract of title; that he sent this abstract, with a description of the property, to the Corbin Banking Company, of New York, with whom he had a business connection; that he was informed by the Corbin Banking Company that a loan for $5,000 could not be effected, but that $4,000 could be obtained upon the security offered; that the defendant then reduced her proposition to $4,000, whereupon the documents were returned to Duncan for execution; that the defendant then executed the notes and the mortgage, and Duncan had the latter recorded; that, with these attached to his draft, Duncan procured the money from a bank in Barnwell, and paid it over to the defendant, she paying him $200 for his services in preparing the abstract and the other papers. The notes were made payable to the complainant, and the mortgage was executed to it. Duncan did not know, and had no relation whatever with, the complainant. In order to affect the lender with the usurious features of a contract growing out of the compensation paid for making it, it must appear either that the lender effected the loan directly or through an agent who came to an understanding at the outset with the lender that he must make the borrower pay for his services. Fowler v. Trust Co., 141 U. S., at page 401, 12 Sup. Ct. 1. If, however, the borrower employs a broker to effect the loan, agreeing to pay him commissions, and if that broker has no regular or established connection with the lender in respect to his compensation, then the lender is not affected by any agreement made between the borrower and the broker, when he does not lend his money at a greater rate of interest than the statute permits. Id.; Grant v. Insurance Co., 121 U. S. 106, 7 Sup. Ct. 841; Whaley v. Mortgage Co., 20 C. C. A. 306, 74 Fed. 73, and 42 U. S. App. 90. There is no direct evidence whatever connecting Duncan with the complainant. On the contrary, he declares that no connection whatever existed between him and it. The only proof of any relation between the complainant and the Corbin Banking Company is that the debt and the interest coupons were payable at the office of this banking company. But this inference is not conclusive. The business in which the Corbin Banking Company is engaged—that of banking—is the collection of notes and of debts. It would be very natural for the complainant to put the collection of these choses in the hands of the Corbin Banking Company, who had placed the debt with it. The whole testimony seems to show that Duncan, with the banking company, acted as agents of the defendant in placing the loan; that they put the proposition of the defendant in a business shape, and then offered the loan to the complainant. No doubt the 7 per cent. interest was a great inducement to the acceptance of the loan. The legal rate in New York is 6 per cent., but the ordinary rates upon which money is lent are much less than this. The learned counsel for the defendant lay stress upon the fact that Duncan, after the execution of the papers, received them, and had the mortgage recorded; and that in this regard he must have acted for the complainant. But

before the papers could be negotiated and accepted, and the money on them obtained, it was necessary to record them; and at that time he had received no money from complainant. In fact, Duncan himself got the money from the bank on his own draft, and he retained control and possession of the papers for his protection in this behalf by attaching them to the draft. The draft was not drawn on complainant, but on the Corbin Banking Company, and it is most probable that the complainant paid out no money until it received the papers.

It is said, however, that the provision that the borrower shall pay the taxes upon the property makes the contract usurious. This is not true. The mortgagor is liable for the tax under the law. Rev. St. S. C. § 218. "Every person shall be liable to pay taxes and assessments on the real estate of which he may stand seised in fee or for life," etc. And in section 1893 it is provided that the mortgagor remains the legal owner of realty even after condition broken. So far is this recognized in the state of South Carolina that it is a very common covenant in a mortgage that, if the mortgagor fail to pay the taxes on the mortgaged property, the mortgagee may do so, and hold the mortgage as security for his repayment.

Nor is the provision for the payment of attorney's fees in case of suit on the mortgage usurious. Mortgage Co. v. Whaley (C. C.) 63 Fed. 743.

It having been determined that the notes held by complainant are usurious, the question arises, what is the penalty? The act of 1882 (18 St. at Large S. C. 36) declares the penalty in its second section:

"Any person or corporation who shall receive as interest any greater amount than is herein provided for shall in addition to the forfeiture herein provided for, forfeit also double the sum so received, to be collected by a separate action or allowed as a counterclaim to any action brought to recover the principal sum."

The first section of the act is quoted supra; and also the act of 1889, amending it, quoted in full supra, allowed the recovery of the principal, only, in an action brought upon the contract. The penalty above set out is for the "receiving as interest a greater amount than is herein provided for." Now, receiving usurious interest is one thing and charging usurious interest another. "They are two entirely distinct things." Hardin v. Trimmier, 27 S. C. 114, 3 S. E. 46. And the penalty is the forfeiture, not of the interest charged, but of the amount received greater than the amount allowed by law. The precise question was decided in Hardin v. Trimmier, 30 S. C. 398, 9 S. E. 342. In that case the defendant was allowed as counterclaim only that excess of interest received over 7 per cent. See Utley v. Cavender, 31 S. C. 289, 9 S. E. 957.

In the present case it appears that several of the interest coupons were paid by the defendant. If, in making such payments, she paid more than 7 per cent., she is entitled to set up by way of counterclaim the excess paid over 7 per cent. Upon the notes unpaid the complainant can recover the principal sum only.

With regard to the notes and mortgage given for commissions, it is clear that that was an agreement, contract, or at least an arrangement made before the 1st March, 1890.

The complainants in the second mortgage can recover the amount without penalty. If counsel cannot agree, let the case be referred to J. E. Hagood, Esq., as special master, to inquire and report what sums have been paid to complainant as interest in excess of 7 per cent., and also to inquire and report what notes for the loan yet remain unpaid. Let him also inquire and report what amount is due and unpaid upon the notes secured by the second mortgage.

DANIELS v. BENEDICT et al.

(Circuit Court of Appeals, Eighth Circuit. October 16, 1899.)

No. 1,206.

1. CONTRACTS—PRESUMPTION OF VALIDITY.
   Contracts between parties in confidential relations, which do not themselves disclose any injustice or inequity, are presumed to be valid.
2. HUSBAND AND WIFE—AGREEMENT FOR SEPARATION.
   An agreement of separation between a husband and wife, resident in Colorado, where by statute the wife has the same property rights and right to contract as though unmarried, is presumptively valid; and a party pleading it as a cause of action or matter of defense need not aver or prove that it was fair and just to the wife.
3. SAME—VALIDITY.
   It is the settled law of both England and the United States that an agreement of separation between a husband and wife, whereby he provides for her separate maintenance, and she covenants to release all her claims upon his estate, is lawful, and not in contravention of public policy.
4. EQUITY PLEADING—ISSUES AND PROOF.
   A complainant, by failing to set down a plea for argument, and by filing a general replication thereto and going to hearing on the issue thus made, admits the legal sufficiency of the plea; and, if the facts pleaded are established on the hearing, the defendant is entitled to a dismissal of the bill.
5. HUSBAND AND WIFE—AGREEMENT OF SEPARATION—TRUSTEE UNNECESSARY.
   The intervention of a trustee is not essential to the validity of an agreement of separation between husband and wife. A contract of this character, to which the husband and wife are the sole parties, is valid under the statutes of Colorado, both at law and in equity, and it is enforceable in equity under the common law.
6. SAME—ABROGATION OF AGREEMENT—SUBSEQUENT COHABITATION.
   Subsequent cohabitation does not abrogate an agreement of separation between a husband and wife, unless such is the intention. Where an agreement expressly provided that it should remain in force although the parties should again come together and live as husband and wife, occasional visits and cohabitation cannot be considered as establishing such an intention.
7. SAME—TERMS OF AGREEMENT.
   A provision in an agreement of separation that, in case the parties should again come together and live as husband and wife, it should in no way abrogate or modify the agreement as to their property rights, beyond entitling the wife to her support from the husband, is not immoral or against public policy.
8. SAME—COLORADO STATUTE.
   The provision of the Colorado statute (Mills' Ann. St. Colo. §§ 3010, 3011) that a husband may not by will deprive his wife of more than one-

half his property, unless she accepts the conditions of the will after his death, does not evidence a public policy which would render invalid a property settlement made in an agreement of separation. The inhibition of the statute is limited to disposition by will. It leaves all parties full power of disposition by contract or conveyance.

9. SAME—RELEASE BY WIFE OF INTEREST IN HUSBAND'S ESTATE.
It is no objection to the validity of a covenant by a wife in an agreement of separation to release all claim to her husband's estate on his death, in consideration of the present conveyance to her of property by the husband, that her interest in his estate is a mere expectancy; and, where the agreement has been fully executed by the husband, such covenant is valid and enforceable against the wife.

10. SAME—GROUNDS FOR SEPARATION AGREEMENT.
The cause or reason for the making of an agreement of separation between a husband and wife is for their own consideration exclusively, and the courts cannot inquire into its sufficiency, as affecting the validity of the agreement.

11. SAME—FRAUD IN PROCURING AGREEMENT OF SEPARATION.
Fraud on the part of a husband in procuring the execution by the wife of an agreement of separation cannot be predicated on the fact that during the negotiations for the agreement he wrote letters to his wife in which he expressed the hope and expectancy that they would soon be living together again, where there were no misrepresentations of existing facts.

12. SAME.
Where it appears that the lawyer who acted for a wife in making an agreement of separation conducted the negotiation in her behalf in good faith, and with ability and success, obtaining for her a substantially larger allowance than she had previously offered to accept, the facts that he had previously been counsel for the husband, and was called by the husband to a conference between himself and wife, and, on his declining to act for both, was released from his retainer by the husband, that he might be employed by the wife, or that, in accordance with express provisions of the agreement, his fee was paid by the husband, where all such facts were known to the wife, do not constitute any ground for impeachment of the agreement.

13. SAME—REASONABLENESS OF SETTLEMENT.
A husband and wife, after living together less than seven months, made an agreement of separation, by which the husband gave the wife money and property of the value of $75,000, and each released all claims upon the estate of the other. There were no children of the marriage. The husband was worth $700,000, but no part of his property was received from his wife. Under the statutes of the state, the wife would have been entitled, on the death of her husband, to one-half his estate. *Held*, that such agreement could not be considered inequitable or unjust or unfair to the wife.

14. SAME—EXECUTED AGREEMENT OF SEPARATION.
Courts of equity sometimes enforce the specific performance of a contract, but they never undo the accepted execution of a lawful agreement. Where a wife voluntarily and advisedly entered into an agreement of separation with her husband, and accepted and retained the property conveyed to her by her husband in execution of such agreement, and lived apart from him during the remainder of his life, a court of equity will not, after his death, set aside such agreement, and restore her to the rights in his estate which she surrendered for those considerations.

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

T. J. O'Donnell and Hugh Butler, for appellant.

T. M. Patterson and Joel F. Vaile (Edward O. Wolcott, on the brief), for appellees.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

SANBORN, Circuit Judge. This is a suit by a divorced wife to recover from the devisees under the will of her former husband one-half of the property of which he died seised. Under the statutes of Colorado, one-half of the real and personal property of a deceased husband and father descends to his widow, and the other half to his surviving children. The husband may not take away from his wife her share of his estate by a will, nor can she deprive herself of her right to claim this share by consenting before the death of her husband to a will which bequeaths it elsewhere. Mills' Ann. St. Colo. §§ 1524, 3011. The appellant, Lilyon B. Daniels, exhibited her bill in equity in this case to set aside her divorce, for fraud, and to recover one-half of the estate which her deceased husband possessed when he died. It was met by an answer which denied the fraud in the procurement of the divorce, by a plea of an agreement of separation by which she covenanted never to claim any interest in her husband's estate, and by a plea of the statute of limitations. A general replication was filed to the answer and to the pleas, and upon the final hearing of the case the circuit court held that the agreement of separation and the decree of divorce constituted good defenses to the suit, and dismissed the bill. This decree is challenged by the appeal, and we will first consider the objections of the appellant to the sufficiency of the defense based upon the agreement of separation.

It is said that this contract constitutes no defense to this suit, because the burden was upon the appellees to show, by evidence outside of the agreement itself, that its terms were equitable, just, and fair to the appellant, in view of the value of the property of her husband, and of all the surrounding circumstances when the contract was made, and that they neither pleaded nor proved any facts which sustained this burden. To this contention there are two answers. They are that no such burden rested upon the appellees, and that by the course of her pleading the appellant conceded this to be the law. The argument of counsel for appellant in support of their proposition is that husband and wife occupy a fiduciary relation to each other, and that contracts between them are consequently presumptively void until they are proved to be valid. If all contracts between those in confidential relations to each other were presumptively fraudulent and void, the conclusion might be justified, but they are not, and hence the argument fails. Some contracts between parties in fiduciary relations to each other are valid, and some are voidable or void, and some contracts between strangers are valid, and some are void; so that no definite conclusion can be drawn as to the validity or invalidity of a contract from the fact that the parties to it occupied a fiduciary relation to each other. It will not do to say that all contracts between husbands and wives, between fathers and daughters, between principals and agents, and between others in similar relations, are ineffectual until proved aliunde to be just and fair, because the effect of such a rule would be to practically disable parties occupying such relations from making contracts with each other. Agreements between parties in these relations are either presumptively valid or pre-

sumptively void. If the former, then the power of such parties to bargain, trade, and agree with each other is plenary. If the latter, then their power to contract with each other is practically destroyed. No principle of equity, no rule of law or of morals, which occurs to us, requires a decision that the confidential and fiduciary relations of life disable all who enter them from making agreements with each other, or stamp their mutual contracts with the presumption of fraud or invalidity. Such a presumption is unfounded in fact, and runs counter to the common knowledge and experience of men. Cases may indeed be found in the books in which a husband, a wife, a son, or a daughter has become so lost to all considerations of honesty, honor, duty, or affection as to take an unconscionable advantage of a wife, a husband, or an infirm father by means of a contract. But these cases are rare exceptions to the general rule of life and of business. The vast majority of customary contracts between members of families, between principals and agents, between trustees and cestuis que trustent, and between others in like relations, by which property is divided, transferred, sold, and conveyed, and the various business relations of the parties are fixed, are not read in the books, because they are made in good faith, are fair and equitable, and are performed with satisfaction and pleasure. Men are at least as honest, just, and liberal in their contracts with their wives, with their children, and with others to whom they sustain confidential relations, as they are in their agreements with strangers. We do not question the settled rule that when one takes advantage of a fiduciary relation to make a contract with a person who trusts him, which the latter alleges to be unjust or inequitable, the charge will be investigated by the courts with searching scrutiny, that they will guard the rights of the confiding with jealous care, and that they will refuse to enforce the agreement if the proof sustains the charge. But they will not stamp the great multitude of fair contracts that are made between those in confidential relations with each other with the presumption of fraud and invalidity, and thus inject doubt and suspicion into the dearest and most intimate relations of life, because an occasional husband, wife, son, or daughter proves faithless, unscrupulous, or dishonest. A contract may indeed be so unjust, inequitable, or inconsistent with the duty of a trustee, on its face,—as when an agent to sell makes a contract with himself as purchaser, or a trustee obtains an inequitable agreement with his cestui que trust,—that it is presumptively voidable or void. But the general rule is that the existence of a fiduciary relation between the parties to an agreement does not disable them from making the contract, and does not render their agreement presumptively fraudulent or void. Contracts between parties in confidential relations which do not themselves disclose any injustice or inequity are presumed to be valid until they are proved to be fraudulent or unfair, and they are not presumed to be fraudulent and void until they are proved to be just and equitable.

We have not failed to carefully peruse and consider, before reaching this conclusion, the authorities which have been cited by coun-

sel for the appellant in support of their proposition that if an agreement of separation is relied on in pleading, either as a cause of action or as a matter in defense, the pleading must contain averments which show the contract to have been fair, just, and reasonable to the wife, and that a plea of the naked contract is insufficient: Garver v. Miller, 16 Ohio St. 528; Ireland v. Ireland, 43 N. J. Eq. 311, 12 Atl. 184; Boyd v. De La Montagnie, 73 N. Y. 498; Pierce v. Pierce, 71 N. Y. 154; Graham v. Graham, 143 N. Y. 573, 38 N. E. 722; Rogers v. Marshall (C. C.) 13 Fed. 60. But all these cases, except Garver v. Miller and Ireland v. Ireland, were decisions after the final hearing, in which it was affirmatively found that the agreements were obtained by fraudulent representations, and hence the general statements in the opinions in those cases that the burden was on him who would sustain them were mere obiter dicta. The cases of Garver v. Miller and Ireland v. Ireland fairly sustain the proposition of counsel, but they rest upon a presumption whose existence cannot be conceded in the case at bar,—upon the presumption that the wife was under the control of the husband when the contract was made. Thus, in Ireland v. Ireland the court said, "The wife is presumed to be sub potestate viri, and the affirmative is with the husband to show that the contract was fair, open, reasonable, and well understood." This presumption, and the general rule of pleading derived from it in these cases, is a deduction from the condition and disabilities of the wife under the common law. Under that law she was absolutely under the control of her husband, and without his consent she could neither act nor contract with reference to any right of property. During marriage the legal existence of the woman was suspended, or incorporated and consolidated with that of her husband. Whatever property belonged to her while single, or came to her while covert, passed absolutely to her husband, or fell under his dominion. She could possess nothing to her separate use; she could alienate nothing during her life, and she could bequeath nothing at her death; she could make no contract; and she could bring no suit. 1 Cooley, Bl. pp. 443, 444. The presumption that the wife was under the control of the husband was certainly in accordance with the fact, under such a law; and, while the statutes of the states of New York and New Jersey had greatly modified the common law when the decisions we are considering were rendered, still the presumption and the rule of pleading announced in those cases were derived from the condition of the wife under the common law, and were merely repeated and applied to the pleas then in question. In the case at bar, however, the appellant was in no such condition, when she made her agreement, as the wife under the common law. Her acts and rights were governed by the laws of the state of Colorado, where her contract was made, and under those laws no legal presumption can exist that she was sub potestate viri when she made her agreement, because such a presumption would fly in the teeth of the plain provisions of the statutes. They provided that marriage was a civil contract (Mills' Ann. St. Colo. § 2988); that the property of a married woman at the time of her marriage should

remain her separate property, free from the debts and the disposal of her husband (section 3007); that she could make any contract concerning, and could sell and convey, her personal property as if she were sole (section 3008); that she could carry on any trade or business as if she were unmarried, and that her earnings therefrom, and for her services, should be her sole and separate property (section 3012); that the separate deed of her husband should convey no interest in her lands (section 3017); that she could bargain, sell, and convey her real and personal property, and enter into any contract with reference to the same as if she were sole (section 3019); that she could sue and be sued in all matters as if she were unmarried (section 3020); and that she could enter into any contract as if she were sole (section 3021). Under these statutes the supreme court of Colorado has uniformly held that a married woman is no longer sub potestate viri in that state, and that contracts and conveyances between husband and wife are presumptively valid and effectual, without proof aliunde of their equity or justice. Wells v. Caywood, 3 Colo. 487, 493, 496; Kellogg v. Kellogg, 21 Colo. 181, 183, 40 Pac. 358; O'Connell v. Taney, 16 Colo. 353, 357, 27 Pac. 888. The result is that the fact that the parties to the agreement of separation occupied the confidential relation of husband and wife did not render it presumptively void, and did not cast upon the appellees the burden of pleading or proving that it was just and fair to the appellant. Com. v. Richards, 131 Pa. St. 209, 220, 18 Atl. 1007.

The contract of separation, therefore, like agreements between strangers, was valid and binding, unless it was illegal, immoral, or violative of public policy. There is certainly nothing illegal in an agreement for a husband and wife to live separate and to divide their property. There is no moral turpitude in such a contract, nor can it be said at this day to be otherwise than in accord with the public policy of England and the United States. Under the laws of the English-speaking nations, marriage is a civil contract, and not a sacrament. Many reasons suggest themselves to the thoughtful mind why a wise and enlightened public policy should encourage and enforce voluntary agreements of separation between husbands and wives whose wranglings, quarrels, and domestic infelicities have rendered their homes places of torment to themselves, and of discontent and misery for their children. We refrain from reciting these reasons here, because the public policy of a nation or of a state is not to be sought in the opinions of individual judges, or through a consideration of the better reasons, but must be ascertained by a comprehensive view of its laws and judicial decisions relative to the subject-matter in question. U. S. v. Trans-Missouri Freight Ass'n, 19 U. S. App. 36, 54, 7 C. C. A. 15, 23, and 58 Fed. 58, 67; Vidal v. Girard's Ex'r, 2 How. 126, 197; Swann v. Swann (C. C.) 21 Fed. 299. When the legislation of the nations is examined, we discover no prohibition of these agreements in England or in the United States, but express permission and authority granted to married women by the statutes and decisions of Colorado to make any contracts they choose with their husbands, or with any other

persons they may select. When the decisions of the courts are read, the uniformity of their conclusions is notable. The question has indeed been a fruitful source of debate among lawyers, and its discussion has afforded frequent and perhaps welcome opportunities for judges to express their abhorrence of the acts which led to such agreements, and to deprecate their existence; but there never seems to have been any real doubt, either in England or in the United States, that they were in accord with a sound public policy, and were enforceable in courts of equity. There is an unbroken series of decisions in England, from Seeling v. Crawley, which was decided by the master of the rolls in the year 1700 (2 Vern. 385), to Wilson v. Wilson, in which the opinion was rendered by the lord chancellor in the house of lords in 1848 (1 H. L. Cas. 538, 573), that agreements of this character are valid, and that they are not in contravention of sound principles of public policy. Angier v. Angier, 2 Prec. Ch. 496; Bateman v. Countess of Ross, 1 Dow, 235; Elworthy v. Bird, 2 Sim. & S. 372; Logan v. Birkett, 1 Mylne & K. 220; Frampton v. Frampton, 4 Beav. 287; Jones v. Waite, 9 Clark & F. 101; Wilson v. Mushett, 3 Barn. & Adol. 743; Wellesley v. Wellesley, 10 Sim. 256. Repeated decisions of the courts of this country announced the same conclusions, and enforced the performance of these contracts, until in 1869, in Walker v. Walker's Ex'r, 9 Wall. 743, 750, Mr. Justice Davis, in delivering the opinion of the supreme court, declined to discuss the question, and declared that:

"Contracts of this nature, for the separate maintenance of the wife through the intervention of a trustee, have received the sanction of the courts in England and in this country for so long a period of time that the law on the subject must be considered as settled." Carson v. Murray, 3 Paige, 483, 501; Wells v. Stout, 9 Cal. 480, 493; Walker v. Beal, 3 Cliff. 155, 166, Fed. Cas. No. 17,065; Hutton v. Hutton's Adm'r, 3 Pa. St. 100; Dillinger's Appeal, 35 Pa. St. 357, 362; Hitner's Appeal, 54 Pa. St. 110, 115; Com. v. Richards, 131 Pa. St. 209, 218, 18 Atl. 1007; In re Scott's Estate, 147 Pa. St. 102, 110, 23 Atl. 214; Thomas v. Brown, 10 Ohio St. 247, 250; Bettle v. Wilson, 14 Ohio St. 257, 269; Garver v. Miller, 16 Ohio St. 528, 531; Doyle v. Doyle, 50 Ohio St. 330, 34 N. E. 166; Dutton v. Dutton, 30 Ind. 452; Loud v. Loud, 4 Bush, 453, 461; Robertson v. Robertson, 25 Iowa, 350; Going v. Orns, 8 Kan. 87.

In view of the public policy of the nation upon this subject, evidenced by these decisions, and of the policy of the state of Colorado, declared by the acts of its legislature and the decisions of its courts to which we have adverted, there is no escape from the conclusion that an agreement of separation between a husband and wife, whereby he provides for her separate maintenance, and she covenants to release all her claims upon his estate, is lawful, and presumptively valid, without plea or proof of its equity, reasonableness, or fairness to the wife. The plea of the naked agreement as a bar to this suit was therefore good, without any averment of the facts and circumstances which made it just and equitable to the appellant when it was executed.

Moreover, the appellant conceded this to be the law by the course of her pleading. She did not allege that there was any fraud in the procuring, or any unreasonableness in the terms of, the agreement of separation, in her bill. Nor did she pray for its cancellation and

avoidance. She did not mention it. The bill was filed on April 2, 1891. The plea of the contract of separation as a bar to the suit was interposed on July 29, 1892. The office of a plea is to present some distinct fact which of itself is a bar to the suit, and avoids the necessity of going into the evidence at large. When a plea is interposed, the complainant has the option to set it down for argument, and thereby to challenge its legal sufficiency, or to deny the truth of the averments it contains, and to go to a hearing on the questions of fact. If he adopts the former course, he thereby admits the truth of the facts stated in the plea, but denies their sufficiency in law to prevent his recovery. If he takes the latter course, he admits that, if the facts stated in the plea existed, they were legally sufficient to defeat his suit, but denies their existence. The appellant took the latter course. She did not set the plea down for argument, but she filed a general replication to it, and went to a final hearing upon the issue thus presented. She thereby admitted that the plea was sufficient in law, and the only question she raised was whether or not the allegations of the plea were true in fact; and if, upon the final hearing, they proved to be true, the appellees were entitled to a dismissal of the bill. U. S. v. California & O. Land Co., 148 U. S. 31, 39, 13 Sup. Ct. 458; Farley v. Kittson, 120 U. S. 303, 314, 315, 316, 7 Sup. Ct. 534; Hughes v. Blake, 6 Wheat. 453, 472; Rhode Island v. Massachusetts, 14 Pet. 210, 215.

The suggestion in the brief of the appellant and in the assignment of errors that the court below improperly overruled an exception to this plea as impertinent, and erroneously refused to permit the appellant to file an amended bill, has not escaped our attention. There was certainly nothing impertinent in the plea, and, as counsel for the appellant has not deemed the ruling upon the proposed amendment to the bill of sufficient importance to point out the pages of the record on which the amended bill and the order concerning it may be found, we assume, in accordance with our usual practice, that the question they suggest here is not of such gravity as to warrant a search for it through the 1,398 pages of the printed transcript of the record in this case.

We come, therefore, to the consideration of the merits of the case,—to the consideration of a contract of a character in accord with the public policy of the state and the nation, and clothed with the presumptions of validity and fairness, under the evidence presented at the final hearing. Counsel for the appellant zealously and persuasively argue that the facts established by this evidence show that this agreement was void because it contained on its face stipulations in contravention of public policy, because it was procured by the fraud and misrepresentations of the husband, and because it was inequitable and unfair to the appellant. It will be conducive to clearness and brevity in the discussion of the reasons which they urge in support of this argument to briefly state here the material facts which the evidence discloses. They are these: In July, 1882, William B. Daniels was a prosperous merchant, about 50 years of age, residing in the city of Denver, and was the owner of property of the value of about $700,000, while the appellant was

a woman about 30 years of age. On July 8, 1882, Daniels and the appellant were married. Early in December, 1882, Daniels consulted Ebenezer T. Wells, a practicing lawyer of the city of Denver, who had been a judge of the supreme court of the territory and state of Colorado, and requested him to meet himself and wife at their residence in that city. Mr. Wells did so, and, after some conversation with them, he told Daniels that the differences between himself and his wife were so radical that he could not act for both; that he would act for and advise him, if he desired, or, if he would release him from his retainer, he would advise and act for the appellant. Thereupon Daniels released him from his retainer, and he proceeded to advise the appellant and to conduct her negotiations with her husband. Daniels wished a separation. The appellant wanted money or property. Daniels offered her $50,000. Mr. Wells demanded $100,000. Negotiations continued for five or six weeks, and they finally agreed that Daniels should pay his wife $75,000. Thereupon Mr. Wells prepared the agreement of separation, either read it to the appellant, or caused her to read it, and explained it to her until she fully understood all its provisions, and then it was executed. It was signed and delivered on January 16, 1883. During the negotiations preceding the contract, and for a few weeks afterwards, Daniels wrote affectionate letters to his wife, in which he expressed the hope, intention, and belief that in a few weeks after the agreement of separation was signed they would live together again as man and wife; and during a few weeks after the execution of the contract they occasionally visited and cohabited with each other, but with these exceptions they separated in December, 1882, and always thereafter lived apart. The stipulations of the agreement were these: Daniels agreed to convey and deliver to the appellant $15,000 in cash, and specified real property of the value of $60,000, making $75,000 in all, to pay her counsel fees to Mr. Wells, to release her from her obligation to live with him as his wife, and covenanted that all the property of which she should die seised should descend and be distributed to her other heirs at law as if he and the appellant had never been married. The appellant covenanted and agreed that she would support and maintain herself so long as she lived separate from her husband; that she would never ask, demand, or claim any part or portion of, or any interest in, the estate of which Daniels should die possessed; and that the same should descend and be distributed to his other heirs as if she and Daniels had never been man and wife. They mutually covenanted that unless otherwise agreed in writing they would live separate; that if at any subsequent time they should, by agreement in writing, come together and live as husband and wife, the appellant should be entitled to maintenance and support from her husband while they should so continue to live together, but that such coming together and living as man and wife should not abrogate, alter, or change in any other respect the agreement of the parties as to their rights to their respective property; and that, if Daniels should call upon or visit the appellant, that should not be deemed a resumption of the marriage relation, or entitle the

appellant to anything by way of maintenance or support. Daniels immediately performed his part of the agreement. He paid the appellant $15,000, paid her counsel fees, and conveyed to her the property specified in the contract, and she accepted and retained the money and the land. Daniels died on December 24, 1890, and this suit was commenced on April 2, 1891, to recover one-half of the property of which he died seised. It is upon this state of facts that the counsel for the appellant contend that she is entitled to ignore the contract and its performance, and to recover a share of the estate of her former husband. It is well to bear in mind, in considering this proposition, not only the facts we have recited, but the nature of this suit, and the relation which the parties sustain to it. It is a suit in equity. But it is not a suit by the appellees to enforce specific performance of the agreement of separation. That contract has been completely performed, and they seek no relief at the hands of this court. The appellant alone asks relief, and she prays a court of equity to disregard her agreement, her covenant never to claim any interest in the property here in question, and her acceptance and retention of the $75,000 which she received therefor, and to grant her the same share in the estate which her former husband left which she would have received if she had never covenanted to renounce it. We are now prepared to give attention to the several considerations which her counsel urge in support of their position that this relief should be granted.

They say that the contract is void, and constitutes no defense to this suit, because it was not made through the intervention of a trustee. But the only reason why a trustee was ever essential to such agreements was that under the common law the wife was disabled from contracting directly with her husband, and from bringing suits in her own name. Nevertheless, even under the common law, an agreement of separation without the intervention of a trustee was valid and enforceable in equity; and under the statutes of Colorado, which empower the wife to make any contract with any person, since the reason of the rule has entirely ceased, the rule no longer prevails. Under the statutes of Colorado a contract of separation between husband and wife without the intervention of a trustee is valid both at law and in equity, and under the common law such an agreement is enforceable in equity. Mills' Ann. St. Colo. § 3021; Wells v. Caywood, 3 Colo. 487, 496; Scott v. Mills, 7 Colo. App. 155, 157, 42 Pac. 1021; Jones v. Clifton, 101 U. S. 225, 229; Hutton v. Hutton's Adm'r, 3 Pa. St. 100, 104; Com. v. Richards, 131 Pa. St. 209, 218, 18 Atl. 1007; In re Scott's Estate, 147 Pa. St. 102, 110, 23 Atl. 214; Dutton v. Dutton, 30 Ind. 452, 455; Robertson v. Robertson, 25 Iowa, 350, 354; Going v. Orns, 8 Kan. 85.

It is contended that the contract was abrogated because there was subsequent cohabitation between the parties to it for a few weeks after its execution. But it is not subsequent cohabitation alone which avoids such agreements, but the intentional renunciation of them, and the reconciliation which the resumption of marital relations sometimes evidences. So far as subsequent cohabitation establishes such an intention, and so far only, does it have

the effect of avoiding the contract. It had no such effect in the case at bar, because it evidenced no such intention. The agreement expressly provides that, if Daniels should call upon or visit the appellant, this should not be deemed a resumption of the marriage relation, and should not entitle the appellant to anything by way of maintenance and support, and that, if the parties to it should subsequently come together and live as husband and wife, such coming and living together should entitle the appellant to maintenance and support while she so lived, only, but should in no way abrogate or modify the agreement so far as it related to other rights of property. These stipulations make perfectly clear the intention of these parties to secure and to preserve their rights and the rights of their heirs in their respective estates as they were fixed by the contract, regardless of the question whether or not there should be subsequent cohabitation. It is said, however, that this agreement was immoral and against public policy. The position is untenable. It is not contra bonos mores for a husband and wife to live together, and when, for any reason, unfortunate differences have separated them, it is not in violation of sound principles of public policy for them to make an agreement whose only tendency is to prevent a prolonged estrangement, and to induce a reconciliation and a resumption of the marital relations. In Walker v. Walker's Ex'r, 9 Wall. 743, 745, 752, an agreement of separation was made, whereby the husband settled upon the wife, in full, in lieu of dower, the sum of $50,000; and the parties agreed that, if they should come together again, the trust should remain and be executed in like manner as if they should live separate. They subsequently came together and lived as man and wife until June, 1860,—more than 14 years. When the claim was made that this subsequent cohabitation avoided the contract, and that the agreement that they might live together without affecting the rights secured under it was in contravention of a sound public policy, the supreme court said:

"It is insisted the obligation of the trust was discharged when the wife returned to her husband's house, but this is a mistaken view of the effect of the instrument. It was the intention of the parties that the arrangement should be permanent, and, to accomplish that purpose, the agreement was framed so that the wife should enjoy her separate estate during life, although she should subsequently become reconciled to her husband and cohabit with him. We can see no valid objection to such a provision, and it is certainly supported by authority [citing Wilson v. Mushett, 3 Barn. & Adol. 743; Bell, Husb. & Wife, 525–541]. The husband had a right to make a settlement upon his wife without any view to separation, and the insertion of this provision shows that he did not intend the settlement to cease on the return of the wife to cohabitation. There is no good reason why effect should not be given to the intention of the parties on the subject. If, on grounds of public policy, it is desirable that the parties should be reconciled, whatever tends to promote such a result will receive the favorable consideration of a court of equity."

In Randle v. Gould, 92 E. C. L. 456, a stipulation in an agreement of separation that the contract should not be invalidated unless the parties should subsequently make and perform a written agreement to live together as man and wife for a month was sustained. To the same effect are Hitner's Appeal, 54 Pa. St. 110, 116;

Walker v. Beal, 3 Cliff. 155, 166, Fed. Cas. No. 17,065; and Wells v. Stout, 9 Cal. 480, 499. But the decision in Walker v. Walker's Ex'r is conclusive here, and pretermits further discussion. Neither the subsequent cohabitation, nor the stipulations of the parties that their subsequent living together should not avoid or modify their contract as to their rights of property, abrogated the agreement of separation.

Another position taken on behalf of the appellant is that the contract is void because it contravenes the public policy of the state of Colorado, evidenced by sections 3010, 3011, Mills' Ann. St. Those sections provide that a married woman may not bequeath away from her husband more than one-half of her property without his consent in writing, and that the husband may not by will deprive his wife of over half of his property unless she accepts the condition of the will after his death. But since these restrictions are expressly limited to dispositions by will, and as the husband is left entirely free while he lives to sell and convey all his property, real and personal, without the joinder or consent of his wife (Hanna v. Palmer, 6 Colo. 160), and since the wife is expressly empowered to make any contract she chooses while she is living, we fail to perceive any indication in these provisions of a public policy adverse to this contract, by which living parties disposed of property, and fixed their rights to it, not by will, but by convention.

It is strenuously argued that the agreement is nugatory because it is a release or acquittance of a mere expectancy,—of the mere possible interest which the wife might have as a distributee of her husband's estate. It is true that a mere possibility, such as the expectancy of an heir, is not transferred or conveyed by a mere release or quitclaim, because such a release conveys interests in existence only, and a presumptive heir has no vested or existing interest in the property of his ancestor before his decease. Bayler v. Com., 40 Pa. St. 42; Dart v. Dart, 7 Conn. 254. It is equally well settled, however, that a contract or covenant with the ancestor, made for a valuable consideration, by a presumptive heir or distributee, to the effect that he will not claim or receive any share or interest in the property of which the ancestor may die seised, and that the latter's estate shall descend and be distributed to his other heirs, inures to the benefit of the latter, and constitutes a complete estoppel against any claim of the covenantor to the property at law, and a valid agreement to renounce it, enforceable in equity. The appellant made such a covenant, and is thereby estopped from asserting any claim to any share in the property left by her former husband. Thus, in Hobson v. Trevor, 2 P. Wms. 191, Lord Chancellor Macclesfield compelled the performance of an agreement in marriage articles to convey to a husband a third part of what should come to the father of the wife on the death of his father; and in Beckley v. Newland, Id. 182, the same chancellor enforced a contract between the husbands of two presumptive heirs to divide equally what should be left to them. In re Garcelon's Estate, 104 Cal. 570, 585, 38 Pac. 414; Havens v. Thompson, 26 N. J. Eq. 383, 386; Brands v. De Witt, 44 N. J. Eq. 545, 548, 10 Atl. 181, and 14 Atl. 894; Kershaw v. Ker-

shaw, 102 Ill. 307, 312; Quarles v. Quarles, 4 Mass. 680; Kenney v. Tucker, 8 Mass. 143; Nesmith v. Dinsmore, 17 N. H. 515. The contract of a husband not to claim his expectant interest in his wife's estate is effectual (Crum v. Sawyer, 132 Ill. 443, 461, 24 N. E. 956); and the covenant of a wife, in articles of separation, that she will not take or claim her expectant interest in her husband's property, is equally conclusive upon her, and inures to the benefit of his heirs and devisees. Thus, in Garver v. Miller, 16 Ohio St. 527, the widow was entitled to a distributive share of one-half of the first $400 and one-third of the residue of her husband's estate at his death, under the statutes of Ohio. But it was held that a reasonable parol postnuptial contract, made for a valuable consideration, and executed on the part of the husband, whereby the wife had agreed with him to release and relinquish all her claims as a distributee of his estate, constituted a legal and effective contract. To the same effect are Wilson v. Wilson, 1 H. L. Cas. 538; Thomas v. Brown, 10 Ohio St. 247, 250; Hutton v. Hutton's Adm'r, 3 Pa. St. 100, 104; Hitner's Appeal, 54 Pa. St. 110, 115; Dillinger's Appeal, 35 Pa. St. 357, 362.

The suggestion is thrown out that the contract was void because the evidence does not disclose any good cause for the separation, and because it does not show that the appellant knew the value of her husband's property when she made the agreement. The record contains no evidence upon these subjects, and these objections are therefore laid at rest by the conclusion reached in the earlier part of this opinion, that the presumption is that the contract is valid and not void. In accordance with this conclusion the legal presumption is, and it must prevail in the absence of countervailing proof, that the cause for the contract and for the separation was a good one, and that the appellant's knowledge of all the material facts which conditioned the negotiations and the agreement was ample. Besides, since the parties had the legal right to enter into this agreement, their cause or reason for so doing was for their own consideration and decision exclusively; and, as they deemed it sufficient, the question of its character or sufficiency is not open for the consideration of the courts, and the contract would stand even if in their opinion the cause for it was inadequate, or there was no cause for it.

A forcible and persuasive argument for the disregard of this agreement has been presented on the ground that it was procured by the fraud and misrepresentation of Daniels, and that it was unjust and unfair to the appellant. The facts upon which reliance was placed to establish the fraud are that Daniels repeatedly wrote to his wife, while the negotiations for the contract were in progress, that in a short time after it was signed they would again come together, and live as husband and wife; that the agreement shows on its face that it was made in contemplation of the fulfillment of this promise; that he brought his own lawyer to the conference with his wife in December; that, when the lawyer announced that the differences between them were so wide that he could not act for the wife while he was retained by the husband, the latter released him; that Mr. Wells thereupon acted for the appellant; and

that Daniels afterwards paid his fee. The facts relied upon to establish the proposition that the contract was unjust and unfair to the appellant are that the property of Daniels was worth $700,000, and the amount accepted by the appellant in lieu of maintenance and of her share in his estate was $75,000. There was nothing in the letters of Daniels or in the provisions of the contract relative to a future reconciliation of which fraud can be predicated. A willful intent to deceive, or such gross negligence as is tantamount thereto, and the actual deceit of the victim, to his damage, are essential elements of actionable fraud. The perpetrator must have been guilty of some moral turpitude or of some breach of duty, and the victim must have been deceived, and must have acted upon the deceit. Bank v. Farwell, 19 U. S. App. 256, 262, 265, 7 C. C. A. 391, 394, 396, and 58 Fed. 633, 636, 639; Insurance Co. v. McMaster's Adm'r, 57 U. S. App. 638, 644, 30 C. C. A. 532, 535, and 87 Fed. 63, 66; Henshaw v. Bissell, 18 Wall. 255, 271. The acts and letters of Daniels fail to indicate that he did not honestly intend to carry out the promises which he made, and to bring to fruition the hopes which he expressed in his letters. They impress us as the letters of an honest but anxious and disappointed husband, hoping and seeking for the reconciliation which he pictured. Moreover, neither the letters nor the contract contain any misrepresentation or misstatement of any fact which conditioned the bargain. The statements relied upon to establish the fraud all relate to the future. Under a fair construction, they are hardly more than expressions of a hope or an intention to live with his wife at some indefinite time in the future; and, at most, they were either promises or prophecies, and fraud may not be predicated of either. Railway Co. v. Barnes, 27 U. S. App. 421, 12 C. C. A. 48, and 64 Fed. 80; Sawyer v. Prickett, 19 Wall. 146, 163; Kerr, Fraud & M. (Bump's Am. Notes) 85, note 3; Insurance Co. v. McMaster's Adm'r, 57 U. S. App. 638, 644, 30 C. C. A. 532, 535, and 87 Fed. 63, 67. A careful reading of all the evidence relative to the connection with this case of Mr. Wells, who prepared the agreement of separation, and conducted the negotiations which led to it, on behalf of the appellant, has left our minds free from all doubt relative to this charge of fraud. His conduct throughout was in strict accord with the high ethical standards of that profession whose members have been advisedly selected by the common knowledge and experience of mankind as the safest trustees of their most important and sacred public and private interests. When he learned that radical differences existed between this husband and wife, he at once refused to act for or advise the latter while he remained under the retainer of the former. When the husband had released him from the obligations of his retainer, and he had consented to act for the wife, he demanded $100,000 for her separate maintenance and her covenant to renounce her share of her husband's estate, and he finally secured $75,000 for her, although before his retainer she had offered to accept $50,000. He drew a contract in strict accord with the decisions of the courts and the public policy of the nation, which clearly expressed the intention of the parties and firmly

fixed their rights. He read it to his client, or caused her to read it, and explained it to her until he was sure that she thoroughly understood it. It is true that he finally received his fee for this work from the husband, but it was no secret fee paid for services in behalf of the latter. It was a reward which he had honorably earned by efficient service for the appellant, and which her husband paid by express agreement between himself and his wife, and Mr. Wells took good care that this fact and this stipulation should plainly appear on the face of the contract. That he was the lawyer of the husband before he became the counsel for the wife is but another assurance that her interests were well and wisely guarded. It shows that Daniels had been inspired with a confidence in his character and ability which the appellant found, the event proved, and the record shows was well founded. Mr. Wells conducted the negotiations of the appellant for this contract for five or six weeks before it was signed. His knowledge was the knowledge of his client, and no surer guaranty could be afforded to a court that an agreement was advisedly made with full knowledge of the financial standing and relations of the parties, and without fraud or undue influence, than the fact that it was prepared and advised by a lawyer of the character, caution, and ability which this record shows that Mr. Wells possessed. There was no fraud in the procuring or making of this contract. Nor are we persuaded that it was inequitable, unjust, or unfair to the appellant. In Walker v. Walker's Ex'r, 9 Wall. 743, 745, the wife had lived with her husband for years, and had borne him two children. He had received about $50,000 from her father's estate, and his property was worth between $300,000 and $400,000. But $50,000 was considered a suitable amount to settle upon his wife for her separate maintenance, and in lieu of dower. In the case at bar the property of the husband was worth $700,000. But the appellant had brought none of it with her. She had not assisted to earn or to save it. She had borne her husband no children, and she had lived with him less than seven months. He had a son by a former wife, and she was childless. She received $75,000,—more than $10,000 per month for the brief period she lived with her husband, and an amount sufficient, with reasonable care and economy, to support her in comfort until she died. Her counsel at that time undoubtedly thought that he had procured a fair, just, and reasonable consideration for her covenant to release her share in the estate of her husband and to maintain herself, and we heartily concur in that opinion.

The various objections of the appellant to the defense based upon the agreement of separation have now been considered, and the result is that the contract was valid in its inception, and that its execution by Daniels constitutes a complete bar to the relief sought by the appellant in this suit. As we review the entire record, and part with this case, the righteousness of this result is clear. The appellant made her covenant that she never would claim anything from the estate of her husband, and that she would support herself; and for it she secured $75,000, and freedom from her obliga-

tions to live with her husband. Daniels paid her this consideration, and she accepted it, in 1883. She now asks that the performance and the contract be undone, and that she recover as if they had not been. She has enjoyed her freedom from marital duties during the life of her husband, and she has received the $75,000, and she is now praying a court of equity to grant to her the share of her husband's estate which she agreed to surrender for these considerations. She seeks to renounce the burdens of a valid contract, whose benefits she received. There is no equity in such a case. Courts of equity sometimes enforce the specific performance of a contract, but they never undo the accepted execution of a lawful agreement. U. S. v. Northern Pac. R. Co. (C. C. A.) 95 Fed. 864, 880; Illinois Trust & Savings Bank v. City of Arkansas City, 40 U. S. App. 257, 294, 22 C. C. A. 171, 193, and 76 Fed. 271, 293; U. S. v. Winona & St. P. R. Co., 32 U. S. App. 272, 291, 15 C. C. A. 96, 108, and 67 Fed. 948, 960.

The conclusion at which we have arrived upon a consideration of the agreement of separation renders it unnecessary for us to discuss the defenses founded on the statute of limitations and the decree of divorce.

At the December, 1898, term of this court, an order was made that the appellant should print such additional portions of the record in this case as the appellees should designate, and that, if the court should determine that the portions so designated by the appellees were not necessary for the consideration of the errors assigned, the cost of such printing should be taxed against the appellees. Under that order the appellees designated certain portions of the record for printing, and among others the entire certified record in the divorce proceedings of Minnie E. Warren v. Lyman E. Warren, which was introduced in evidence by the appellees. This portion of the record was not necessary for the consideration of the errors assigned by the appellant, and the cost of its printing must be paid by the appellees. The decree below is affirmed, with costs, but the appellant may recover of the appellees the cost of printing the certified copy of the record in Warren v. Warren, and the clerk will tax the same accordingly.

SOVEREIGN CAMP OF THE WOODMEN OF THE WORLD v. JACKSON.

(Circuit Court of Appeals, Eighth Circuit. October 9, 1899.)

No. 1,169.

APPEAL—ASSIGNMENTS AND SPECIFICATIONS OF ERROR—ENFORCEMENT OF RULES OF COURT.

Under rule 11 of the circuit court of appeals for the Eighth circuit (31 C. C. A. cxlvi., 90 Fed. cxlvi.), requiring assignments of error to "set out separately and particularly each error asserted and intended to be urged"; and rule 24 (31 C. C. A. clxiv., 90 Fed. clxiv.), requiring the brief of the plaintiff in error or appellant to contain a specification of errors relied upon, which, in cases brought up by appeal, shall state "as particularly as may be in what the decree is alleged to be erroneous,"—an assignment

and specification of errors in an equity case which, in effect, only charge that the decree was erroneous in being for the wrong party, and suggest none of the questions of fact or law argued in the brief, will be disregarded, and the appeal dismissed.

Appeal from the Circuit Court of the United States for the Southern District of Iowa.

H. C. Brome (A. H. Burnett, on the brief), for appellant.

C. C. Nourse (C. L. Nourse, on the brief), for appellee.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

SANBORN, Circuit Judge. May E. Jackson, the beneficiary named in a certificate of membership issued by the Sovereign Camp of the Woodmen of the World to her husband, D. Fay Jackson, exhibited a bill in the court below to recover the amount payable to her upon the death of her husband, according to the terms of the certificate, and to compel the officers of the camp to levy the necessary assessment upon its members, and to collect and turn over to her the proceeds thereof in payment of the sum due under the certificate. The Sovereign Camp alleged that the certificate had become void by its terms before Jackson died, because he had failed to pay his dues and assessments, and because many months before his death he became addicted to the excessive use of opiates and intoxicating liquors to such an extent as to permanently impair his health and to cause his death. Evidence was taken and presented to the circuit court, which covers 180 printed pages of the record before us, and upon the final hearing the court rendered a decree for the relief sought by the bill. Before the case came to a hearing in this court a motion was made to dismiss the appeal because the assignment of errors was insufficient, and that motion and the argument upon the merits of the case were heard together. The motion to dismiss will first be considered. The following excerpts from the rules of this court disclose the ground of the motion:

Rule 11 (31 C. C. A. cxlvi., 90 Fed. cxlvi.):

"The plaintiff in error or appellant shall file with the clerk of the court below, with his petition for the writ of error or appeal, an assignment of errors, which shall set out separately and particularly each error asserted and intended to be urged. * * * When this is not done, counsel will not be heard, except at the request of the court; and errors not assigned according to this rule will be disregarded; but the court, at its option, may notice a plain error not assigned."

Rule 24 (31 C. C. A. clxiv., 90 Fed. clxiv.):

"* * * This brief [of counsel for the plaintiff in error or appellant] shall contain, in order here stated: * * * (2) A specification of the errors relied upon, which, in cases brought up by writ of error, shall set out separately and particularly each error asserted and intended to be urged; and in cases brought up by appeal the specification shall state, as particularly as may be, in what the decree is alleged to be erroneous. * * * (4) * * * and errors not specified according to this rule will be disregarded; but the court, at its option, may notice a plain error not assigned or specified."

The "specification of errors relied upon," contained in the brief in this case, under rule 24, was a copy of the assignment of errors made under rule 11, and this was in these words:

"Comes now the defendant (appellant), Sovereign Camp of the Woodmen of the World, by Brome & Burnett, its attorneys, and shows that in the record of the proceedings of the above-entitled matter there is manifest error, in this, to wit: (1) The circuit court of the United States in and for the Southern district of Iowa, Central division, erred in finding and adjudging by its order herein made on the ——— day of August, 1898, that the equities of this cause are with the complainant, and that she is entitled to have and recover of the defendant the sum of $2,600, with 6 per cent. interest thereon from and after the 4th day of February, 1897; (2) the said court erred in holding and adjudging that the proper officers of defendant are ordered and required to make the assessments for the members of the defendant necessary for the payment of said sum; (3) the court erred in holding and adjudging that the testimony in the said cause, and filed therein at the time of the hearing thereof, entitled plaintiff (appellee) to the relief sought; (4) the court erred in holding and adjudging that the testimony taken in the said cause, and filed therein at the time of the hearing thereof, did not entitle the defendant (appellant) to maintain its defense in said cause interposed; (5) the court erred in rendering and entering its decree herein against defendant (appellant), and for complainant (appellee), requiring defendant (appellant) to pay to complainant (appellee) the sum of $2,600, with 6 per cent. interest thereon from and after the 4th day of February, 1897. Wherefore the said Sovereign Camp of the Woodmen of the World, defendant (appellant), prays that the order of said circuit court of the United States in and for the Southern district of Iowa be reversed and set aside, and for such further orders and decree as to this court may seem just and equitable in the premises."

Did this assignment "set out separately and particularly each error asserted and intended to be urged?" Did this specification "state as particularly as may be in what the decree is alleged to be erroneous?" It stated nothing more than that the decree was erroneous because it was for the wrong party,—because it was for the complainant when it should have been for the defendant. Cases may arise in which a declaration that the decree was not for the right party will constitute as particular a statement of the character of the error in the decree as can be made, but it is not believed that they will be numerous, and this case is not one of them. An examination of the argument which is contained in the latter portion of the brief of the counsel for the appellant in this case discloses the fact that they insist that the decree is erroneous for many reasons, and, among others, because it did not adjudge that the certificate was void on account of the failure of the member to pay his monthly dues and assessments; because it did not adjudge that it was void on account of his use of opiates to such an extent as to permanently impair his health; because it, in effect, adjudged that the certificate was valid notwithstanding the failure of Jackson to pay his dues and assessments, because he was sick during the time he failed to pay, and there was a provision of the constitution of the appellant that a member cannot become delinquent for the nonpayment of dues and assessments while he is sick; and because it adjudged, in effect, that the certificate was not void because of the intemperate use of intoxicants and narcotics unless the member was expelled from the order on that account. These reasons why the decree was erroneous are clearly pointed out and exhaustively discussed in the brief of counsel for the appellant. But we search in vain for any suggestion or intimation of them in the assignment or specification of errors. Rule 11 is that each error asserted and intended to be urged shall be separately and particularly

pointed out, not generally averred. None of the errors asserted in the argument, none of the questions of law or of fact there discussed, are pointed out in this assignment particularly or at all. Rule 24 requires the specification in the brief to state as particularly as may be in what the decree is alleged to be erroneous. The statement and discussion in the argument of the questions to which we have referred demonstrate the fact that a more particular statement of the errors in the decree might have been made than that which was contained in the assignment, because such a statement was made in the argument. The assignment and the specification alike utterly fail to comply with the express terms of the rules. Nor are they more fortunate in serving the purpose to accomplish which these rules were made. Assignments and specifications of error were required for the purpose of informing the court and the counsel for the opposing party what questions would be presented for consideration and review in the appellate court. An assignment which fails to point out these questions—one which compels court and counsel to look further and to search the brief in order to discover them—entirely fails to accomplish the purpose of its being, and is utterly futile. The assignment and the specification in the case at bar are apt illustrations of such a failure. They suggest none of the questions of law or of fact which the argument contained in the brief presents for our consideration. City of Lincoln v. Sun Vapor Street-Light Co., 19 U. S. App. 431, 434, 8 C. C. A. 253, 254, and 59 Fed. 756, 758; Oswego Tp. v. Travelers' Ins. Co., 36 U. S. App. 13, 17 C. C. A. 77, and 70 Fed. 225; Van Gunden v. Iron Co., 8 U. S. App. 229, 248, 3 C. C. A. 294, 296, and 52 Fed. 838, 841; Grape Creek Coal Co. v. Farmers' Loan & Trust Co., 24 U. S. App. 38, 45, 12 C. C. A. 350, 353, and 63 Fed. 891, 894; Doe v. Mining Co., 44 U. S. App. 204, 214, 17 C. C. A. 190, 196, and 70 Fed. 455, 461. In the early history of this court the arguments of counsel were considered, although they failed to strictly comply with the rules regarding assignments and specifications of error which we have been considering, because those rules had been recently adopted, and it was feared that some injustice might result if they were rigidly enforced before the attention of counsel had been specially called to them. It is now more than eight years since they were announced. In 1894 attention was sharply called to them in City of Lincoln v. Sun Vapor Street-Light Co., supra, and in 1895 in Oswego Tp. v. Travelers' Ins. Co., supra, and the warning was fairly given that they must be complied with. The disregard of them in this case is so glaring and complete that it cannot be overlooked. The motion to dismiss the appeal is granted.

NORTHMORE v. SIMMONS et al.

(Circuit Court of Appeals, Ninth Circuit. October 16, 1899.)

No. 487.

MINING CLAIMS—DEVELOPMENT WORK REQUIRED—POWER OF MINING DISTRICT TO REGULATE.

Rev. St. § 2324, as amended by Act Jan. 22, 1880 (21 Stat. 61), providing that the miners of a district may make regulations, not in conflict with the laws of the United States, governing the location, manner of recording, and amount of work necessary to hold possession of a mining claim, subject to the requirement that not less than $100 worth of labor shall be performed or improvements made during each year until a patent has been issued, and further providing by the amendment that "the period within which the work required to be done annually on all unpatented mineral claims shall commence on the first day of January succeeding the date of location of such claim," merely fixes the minimum amount of expenditure exacted by the United States, and the maximum limit of time within which it may be made, leaving to the states and mining districts to prescribe such further regulations or requirements within such limits as they may deem advisable; and a mining district has power to make a regulation requiring a prescribed amount of work to be done within 90 days after a location is made, and making the claim subject to relocation in default of such work, notwithstanding the 90 days may expire before the 1st day of January succeeding the date of location.

Ross, Circuit Judge, dissenting.

Appeal from the Circuit Court of the United States for the Southern District of California.

Gardiner, Harris & Rodman and W. A. Harris, for appellant.

Gibbon & Halstead and M. L. Hicks, for respondents.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

GILBERT, Circuit Judge. The appellant was the complainant in a bill in which he alleged that on January 9, 1897, he made a discovery of mineral-bearing quartz in place in the Mojave mining district, in the state of California, and that he duly located the same; that there was a mining regulation in said mining district which provided that, "within ninety days of location, a shaft shall be sunk or a tunnel run to a depth of not less than ten feet from the apex of the ledge of mineral-bearing quartz; otherwise, the claim shall be subject to relocation"; that upon April 10, 1897, the defendants entered upon the complainant's said claim, and took possession thereof and located the same, contending that the complainant's rights were forfeited by reason of his failure to "comply with the said mining regulation." On a demurrer to the bill for want of equity, the bill was dismissed. The sole question presented upon the appeal is whether the regulation of the Mojave mining district requiring certain work to be done within 90 days after location is valid.

Section 2324 of the Revised Statutes provides:

"The miners of each mining-district may make regulations not in conflict with the laws of the United States, or with the laws of the state or territory in which the district is situated, governing the location, manner of recording, amount of work necessary to hold possession of a mining-claim, subject to the following requirements: * * * On each claim located after the tenth of

May, eighteen hundred and seventy-two, and until a patent has been issued therefor, not less than one hundred dollars' worth of labor shall be performed or improvements made during each year."

The statute was amended on January 22, 1880, so as to read as follows:

"That the period within which the work required to be done annually on all unpatented mineral claims shall commence on the first day of January succeeding the date of location of such claim."

Is the regulation of the Mojave mining district above quoted in conflict with the requirement of the statute that work shall be done or improvements made to the extent of $100 upon each claim within one year after the 1st day of January next succeeding the date of the location? It is contended by the appellant that the statute secures to every locator a fixed period of time within which to make the improvements or expend the labor that are or may be prescribed for the preservation of his right, and that by no state statute or mining regulation can the period be abridged. In view of the language of the statute, and the decisions of the supreme court, so far as they afford light upon its meaning, we are of the opinion that section 2324 was intended to prescribe the minimum amount of expenditure in labor or improvements which was exacted by the United States within a maximum period, and to leave to state legislatures or local mining districts the power to make such reasonable regulations as they might deem advisable, within the prescribed limit; such regulations to be always subject to the provision of the statute that at least the expressed yearly amount in work or improvement must be expended upon the claim, and that, at most, the time for expending the same shall not be extended beyond the designated year. This, we think, is clearly implied in the language of the statute. Miners are therein authorized to make regulations governing the "amount of work necessary to hold possession of a mining claim." The amount of work can be regulated only by increasing or diminishing it. The diminution of it is expressly prohibited. There shall be "not less than one hundred dollars' worth" per annum. It follows that the miners may regulate the amount by increasing it. If the amount may be increased above that which is required by the statute of the United States, no reason is perceived why the time may not be abridged within which a portion of it is to be done, or why any other reasonable regulation may not be required to be complied with within a shorter time than a year. The statute of the United States exacts no discovery shaft, nor any work, as a condition to the location of a claim, or the initiation of the right of a locator. The right of a state legislature to impose such additional work has uniformly been recognized. No difference in principle is discernible between the requirement that such discovery work shall be made as an incident to the location, and the requirement that after location it shall be made as a condition to the subsistence of the same. In either case burdens are imposed upon the locator in addition to the "requirements" of the United States statute. In neither case is the requirement that a shaft be sunk, whether it be denominated a "discovery shaft," or whether it be known by any other name, in conflict with the express

provisions of that statute. The statute was not intended to interfere with the rights of the states or of the local mining districts. It was intended to express the most liberal terms on which the United States would part with its right in mining claims. No state legislature nor local mining regulation may grant more favorable terms than those which are demanded by the statute. It contains the full extent of the "requirements" of the United States. There shall be expended upon the claim at least $100 per annum. No limit is placed upon the amount of work above $100 which may by local mining rule be required from the locator. To provide that the assessment work shall be $200 per annum is not in conflict with the statute; neither is there a conflict if one-half of that amount of work be required within one-half of the time. In Erhardt v. Boaro, 113 U. S. 527, 5 Sup. Ct. 560, the supreme court recognized the validity of a statute of Colorado (Gen. Laws Colo. 1877, p. 630) declaring that one of the essential acts of locating a claim should consist in sinking a discovery shaft upon the lode. Said the court in that case:

"Before 1866, mining claims upon the public lands were held under regulations adopted by the miners themselves in different localities. These regulations were framed with such just regard for the rights of all seekers of the precious metals, and afforded such complete protection, that they soon received the sanction of the local legislatures and tribunals, and when not in conflict with the laws of the United States, or of the state or territory in which the mining ground was situated, were appealed to for the protection of miners in their respective claims, and the settlement of their controversies. And although since 1866 congress has to some extent legislated on the subject, prescribing the limits of location and appropriation, and the extent of mining ground which one may thus acquire, miners are still permitted, in their respective districts, to make rules and regulations not in conflict with the laws of the United States, or of the state or territory in which the districts are situated, governing the location, manner of recording, and the amount of work necessary to hold possession of a claim. * * * It does not appear in this case that there were any mining regulations in the vicinity of the Hawk lode which affect in any respect the questions involved here. Had such regulations existed, they should have been proved as facts in the case. We are therefore left entirely to the laws of the United States and the laws of Colorado on the subject."

Section 2320, Rev. St., concedes to mining districts the power to diminish the surface width of mining claims from 300 feet on each side of the middle of the vein to 25 feet on each side thereof. In Mining Co. v. Kerr, 130 U. S. 256, 9 Sup. Ct. 511, the supreme court, through Mr. Justice Field, declared that the effect of such a mining regulation "could not be doubted."

A decision directly in point is that of the supreme court of Nevada in the recent case of Sissons v. Sommers, 55 Pac. 829, in which the court had under consideration the provisions of the act of the legislature of that state (Laws 1897, p. 103). The first section of the act prescribed the method of locating a mining claim. It declared that it should consist (1) in "defining the boundaries of the claim in the manner hereinafter described," and (2) "posting a notice of such location at the point of discovery." The second section provided that before the expiration of 90 days from the posting of the notice "the locator must sink a discovery-shaft upon the claim located to the depth of at least ten feet from the lowest part

of the rim of such shaft at the surface, or deeper if necessary, to show by such work a lode deposit in place." It was a provision identical with the regulation of the Mojave mining district which is involved in this case, in that it required the act to be done within 90 days after location. The court, in a carefully considered opinion, said:

"We think the legislature may require a reasonable additional amount of work to be done annually, and a reasonable amount of work to complete the location, or, after location, a reasonable additional amount of work within a reasonable time, less than the time named by congress for the annual expenditure, as a condition to the continuance of the right acquired by the location of the mine."

The appellant relies upon Sweet v. Webber, 7 Colo. 443, 4 Pac. 752, and Original Co. of W. & K. v. Winthrop Min. Co., 60 Cal. 631. The first case goes no further than to hold that neither by a rule of miners nor by a state statute can a location be maintained upon the expenditure of less than $100 per annum, as required by the United States statutes,—a proposition that is not disputed and is not involved in this case. The second case holds that a local regulation providing for forfeiture of a claim upon the failure of the locator to perform some work upon it every 60 days was in conflict with the law of congress, and therefore void. The reasoning upon which this conclusion is reached is not stated in the opinion. It is opposed, not only to what we conceive to be the plain meaning of the statute, but to the weight of authority. Certain decisions are also cited, such as Belk v. Meagher, 3 Mont. 65, which sustain the proposition that a mining claim may not be forfeited until the expiration of the period which congress has fixed for the performance of the annual assessment work, but they are all cases in which the law of the United States alone was involved. In none of them was there a question of rights under a state law or a miners' regulation, and in none of them was the question which is now before the court even remotely involved. Their inapplicability to the present discussion is too apparent to require further comment. We find no error in the ruling of the circuit court, and the decree will be affirmed.

ROSS, Circuit Judge (dissenting). Prior to July 26, 1866, there was no congressional legislation authorizing the location or purchase of any of the mineral lands of the United States. Up to that time the location, working, and holding of mining claims upon the public lands was governed exclusively by the local rules and regulations of the respective mining districts, and such state legislation as was enacted with respect thereto by the states in which the lands were located. Jennison v. Kirk, 98 U. S. 453, 457. On the 26th of July, 1866, congress passed an act entitled "An act granting the right of way to ditch and canal owners through the public lands, and for other purposes," the first section of which declares:

"That the mineral lands of the public domain, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and occupation by all citizens of the United States and those who have declared their intention to

become citizens, subject to such regulations as may be prescribed by law, and subject also to the local customs or rules of miners in the several mining districts, so far as the same may not be in conflict with the laws of the United States." 14 Stat. 253.

That act was followed by that of May 10, 1872 (17 Stat. 91), the fifth section of which enacted, among other things:

"That the miners of each mining district may make rules and regulations not in conflict with the laws of the United States, or with the laws of the state or territory in which the district is situated, governing the location, manner of recording, amount of work necessary to hold possession of a mining claim, subject to the following requirements: The location must be distinctly marked on the ground so that its boundaries can be readily traced. All records of mining claims hereafter made shall contain the name or names of the locators, the date of the location, and such a description of the claim or claims located by reference to some natural object or permanent monument as will identify the claim. On each claim located after the passage of this act, and until a patent shall have been issued therefor, not less than one hundred dollars' worth of labor shall be performed or improvements made during each year. On all claims located prior to the passage of this act, ten dollars' worth of labor shall be performed or improvements made each year for each one hundred feet in length along the vein until a patent shall have been issued therefor; but where such claims are held in common, such expenditure may be made upon any one claim; and upon a failure to comply with these conditions, the claim or mine upon which such failure occurred shall be open to relocation in the same manner as if no location of the same had ever been made; provided, that the original locators, their heirs, assigns, or legal representatives, have not resumed work upon the claim after such failure and before such location."

By an amendment of the latter act made on the 22d day of January, 1880, it was declared:

"That the period within which the work required to be done annually on all unpatented mineral claims shall commence on the 1st day of January succeeding the date of location of such claim." 21 Stat. 61.

It will be thus seen that under the act of May 10, 1872, the time within which the annual work or improvements to the amount of $100 in value was required to be performed or made ran from the date of the location of the claim, which period of commencement was by the act of January 22, 1880, changed to the 1st day of January succeeding the date of location. The purpose of that change was to establish a uniform period for the commencement of such work or the making of such improvements, and was made to correspond with the calendar year. 2 Lindl. Mines, § 626; Barringer & A. Mines & M. p. 263; McGinnis v. Egbert, 8 Colo. 41, 5 Pac. 652. The exemption of claims from the performance of labor for a portion of a year in some cases was a necessary result of the amendment of January 22, 1880. McGinnis v. Egbert, supra; Hall v. Hale, 8 Colo. 351, 8 Pac. 580; 2 Lindl. Mines, § 623; Waite, Am. Min. Law, § 29; Sickles, Min. Dec. p. 393. It has been held that the annual expenditure thus required by the act of congress must be made during the calendar year, and, unless so made, cannot be counted, even if the full amount of work be performed between the date of the location of the mining claim and the beginning of the calendar year succeeding it. Copp, Min. Lands (1880) 295. The reason of this is that congress saw proper to prescribe a uniform

time for the performance of the annual assessment work, to the extent of $100 in value, as a condition to the keeping alive of the rights of the locator; and as the property belongs to the government, and is subject to the exclusive control and disposition of congress, its provisions upon the subject are binding and controlling. That all local rules and regulations of any mining district, and all state legislation, in respect to the disposition of the minerals in or upon any of the public lands of the United States, in any way conflicting or inconsistent with the congressional legislation, is invalid, is manifest, not only from the foregoing consideration, but because the statute itself, in effect, so declares, and the authorities so hold. It is safe to say that not one decision can be found to the contrary. Jennison v. Kirk, 98 U. S. 457; Barringer & A. Mines & M. pp. 267, 282; 1 Lindl. Mines, §§ 310, 626; Eberle v. Carmichael (N. M.) 42 Pac. 98; Du Prat v. James, 65 Cal. 555, 557, 4 Pac. 562.

In the case at bar the bill shows that the complainant on the 9th day of January, 1897, discovered a vein of mineral-bearing quartz in place, situate in Mojave mining district, in Kern county, Cal., and that after making such discovery he on the same day located, claimed, and took possession of 1,500 feet in length along said mineral vein of rock in place by 500 feet in width, being 250 feet on each side of the middle of the vein, and did mark the boundaries, erect monuments, and post and record a notice of the location, as required by the laws and by the local rules and regulations of the district, and continued in possession of the claim so located until the 10th day of April, 1897, at which time, it is alleged, the defendants, with knowledge of the complainant's rights, but disregarding them, entered upon the premises and dispossessed the complainant; basing their action upon the ground that the complainant had forfeited his rights to the premises by failing to comply with the requirements of a rule of the mining district within which the claim is situated, which declares that:

"Within ninety days of location a shaft shall be sunk or a tunnel run to a depth of not less than ten (10) feet from the apex of the ledge of mineral-bearing quartz; otherwise, the claim shall be subject to relocation."

The validity of this local rule is the sole question in the case. It is conceded in the opinion of the majority of this court that a similar rule was held invalid by the supreme court of California in the case of Original Co. of W. & K. v. Winthrop Min. Co., 60 Cal. 631; but the prevailing opinion disapproves that decision, and declares it to be not only contrary to "the plain meaning of the statute [of the United States], but to the weight of authority." In my judgment, the exact reverse is true. The decision of the supreme court of California thus criticised and disapproved gives force and effect to the federal statute, and holds invalid a local rule of a mining district inconsistent therewith. This is not only in accord with the express language of the United States statute itself, and with the text writers, but with every decision of the courts that has come under my observation. Not a single decision cited and relied upon in the prevailing opinion, in my judgment, at all supports the conclusion therein announced; and with the ex-

ception of some dicta taken from the latter portion of the opinion of the supreme court of Nevada in the case of Sissons v. Sommers, 55 Pac. 829, there is nothing in the language of any of them that gives any support to the conclusion reached by the majority of this court. The federal statute, as has been shown, fixes the 1st day of January succeeding the date of the location as the commencement of the year within which the required work shall be done. The location here in question having been made on the 9th day of January, 1897, the time thus fixed by the legislation of congress within which the locator was required to perform at least $100 worth of work or make $100 worth of improvements commenced on the 1st day of January, 1898, and extended for the period of one year. Yet the local rule of the mining district in question declares forfeited the rights of the locator unless within 90 days after making his location a shaft be sunk or a tunnel run to a depth of not less than 10 feet from the apex of the ledge of mineral-bearing quartz; and this forfeiture the defendants to the present suit asserted, and it is now sustained by this court. Thus, by a local rule of the mining district, the locator's rights to the claim that he located in all respects in accordance with the law is declared forfeited before the commencement of the period fixed by the act of congress within which the annual assessment work is required to be done. It is difficult to see how there could be any greater inconsistency between two rules than is here shown. That there can be no forfeiture of a locator's rights to a claim properly located until the expiration of the full time allowed by the United States statute for the doing of the annual work or the making of the annual improvements has been many times decided. Belk v. Meagher, 3 Mont. 65, affirmed in 104 U. S. 279; Original Co. of W. & K. v. Winthrop Min. Co., 60 Cal. 631; Mills v. Fletcher, 100 Cal. 142, 34 Pac. 637; McGinnis v. Egbert, 8 Colo. 41, 5 Pac. 652; Hall v. Hale, 8 Colo. 351, 8 Pac. 580; Atkins v. Hendree, 1 Idaho, 95; Mining Co. v. Perasich, 7 Sawy. 217, 7 Fed. 331; Barringer & A. Mines & M. pp. 264, 267, 282; 2 Lindl. Mines, p. 777, § 624. Yet the majority of this court holds that this can be done by a local rule of the mining district within which the claim is situated. Nothing can be plainer, in my opinion, than that the time fixed by congress for the performance of the work and improvements it requires cannot be taken away, shortened, or in any way modified by any state legislation, or by any local rule or regulation of a mining district. To the extent that congress legislates on the subject, its act is binding and controlling. The acts of congress, however, in express terms authorize state legislation and the making of local rules and regulations by the various mining districts not inconsistent with its own act. For example, congress not having declared what should constitute a "discovery" of a mineral-bearing vein or lode, or the character or extent of the work necessary to be done to disclose such vein or lode in place, it is entirely competent for the states to legislate upon that subject, and for the various mining districts to make rules and regulations in respect thereto not inconsistent with federal or state law. Many

of them have done so; and as pointed out in 1 Lindl. Mines, p. 447 et seq., these state acts have almost always, if not universally, been sustained, because not inconsistent with any of the provisions of the acts of congress on the subject. In Wight v. Tabor, 2 Land Dec. Dep. Int. 738, 742, 743, however, Secretary Teller expressed a doubt whether a state legislature has the right to attach this condition to the appropriation of mineral lands. The first state act of that character was that of Colorado. Mills' Ann. St. 3152, 3154, 3155. In all vein and lode locations, discovery of mineral-bearing rock in place is the source of title. Without it there can be no valid location. Book v. Mining Co. (C. C.) 58 Fed. 106, 120. In 1 Lindl. Mines, § 343, will be found a synopsis of the legislation of Colorado, Arizona, Idaho, Montana, New Mexico, Wyoming, and North and South Dakota, requiring certain development work as a prerequisite to the completion of a valid location. The state of Nevada has since passed a similar act, which was the subject of consideration by the supreme court of Nevada in Sissons v. Sommers, 55 Pac. 829. The object of such legislation, says Mr. Lindley (section 344), is twofold:

"(1) To demonstrate to a reasonable degree of certainty that the deposit sought to be located as a lode is in fact a vein of quartz or other rock in place; (2) to compel the discoverer to manifest his intention to claim the ground in good faith under the mining laws."

The discovery shaft and the various equivalents provided for by the several state enactments constitute a part of the process of location (Morr. Min. Rights [8th Ed.] p. 27; 1 Lindl. Mines, supra), and, being consistent with the acts of congress, are valid, for the reason already stated. It was such an act that was the subject of consideration in Erhardt v. Boaro, 113 U. S. 527, 5 Sup. Ct. 560. In the other case cited in the prevailing opinion from the supreme court of the United States,—that of Mining Co. v. Kerr, 130 U. S. 256, 9 Sup. Ct. 511,—the local mining rule under which the location was made, and about which the court was speaking in the quotation made, was adopted prior to any congressional legislation upon the subject.

In California there is no statute, nor was there any rule or regulation of the Mojave mining district, requiring any development work prior to, and as a condition of, a valid location. The bill in the present case shows that the complainant perfected his location. The annual work necessary to maintain and hold that location is an altogether different thing. This distinction is recognized and clearly pointed out by Mr. Lindley in sections 623 and 626, and the failure to observe it constitutes, in my judgment, the error in the opinion and judgment from which I dissent. The performance of this annual assessment work is called by the miners a "representation" of the mine, and, when performed for a given period, the mine is said to be "represented." Belk v. Meagher, 3 Mont. 65, 77; 2 Lindl. Mines, p. 775; Barringer & A. Mines & M., supra. Congress having legislated in respect to that annual assessment work, its provisions are paramount, and any and every thing that conflicts with them is void, be it a rule or regulation

of a mining district or a statute of a state. For the reasons here given, I respectfully dissent from the opinion and judgment of the majority of the court.

TYLER MIN. CO. v. LAST CHANCE MIN. CO.

(Circuit Court of Appeals, Ninth Circuit. October 2, 1899.)

No. 530.

APPEAL—DECREE ENTERED ON MANDATE.

A decree entered in accordance with the mandate of the appellate court issued on appeal from a former decree is not appealable.

Appeal from the Circuit Court of the United States for the Northern Division of the District of Idaho.

John R. McBride, for appellant.

W. B. Heyburn, for appellee.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

ROSS, Circuit Judge. The present appeal is from a decree entered in the court below in accordance with the mandate of this court issued on a former appeal of the cause. 71 Fed. 848. The decree appealed from, being in accordance with the mandate of this court, is not appealable. The present appeal is accordingly dismissed.

SAN DIEGO LAND & TOWN CO. OF MAINE v. SHARP.

(Circuit Court of Appeals, Ninth Circuit. October 19, 1899.)

No. 525.

1. IRRIGATION—RIGHT OF CONSUMER TO CONTINUED USE OF WATER—CALIFORNIA STATUTE.

Under Civ. Code Cal. § 552, which gives to any owner who is cultivating land within the flow of any ditch owned by a corporation engaged in supplying water, and who has been furnished water by such corporation to irrigate his land, the right to the continued use of such water at such rates and terms as may be established by the corporation in pursuance of law, the fact that such a landowner entered into a contract with the corporation by which he agreed to pay a higher rental than was charged others for water, to be supplied to his land for a term of years, and also agreed to waive all his rights under the statute, does not deprive him of the right to the continued use of such water after the contract has expired, or entitle the corporation to demand a renewal of the contract as a condition to furnishing it. Under the statute as construed by the supreme court of the state, the rights of the landowner are not dependent on the means by which the supply was originally obtained, but the water, once supplied, is appropriated to public use, subject to regulation by law, and the covenants of the contract, whether valid or not, were not binding after its expiration.

2. SAME.

A consumer whose land is situated within the flow of the distributing system of an irrigation company, and who has, by means of water thereby supplied to him, made valuable improvements on his land, cannot be

thereafter lawfully deprived of such water, in order that the distributor may supply later comers, even though a larger area, by reason of more favorable conditions, may thus be brought under cultivation.

Appeal from the Circuit Court of the United States for the Southern District of California.

John D. Works and Lewis R. Works, for appellant.

A. Haines and L. Ward, for appellee.

Before GILBERT and MORROW, Circuit Judges, and HAWLEY, District Judge.

HAWLEY, District Judge. It appears from the record in this case that a suit was brought by the bondholders of the San Diego Land & Town Company of Kansas, a corporation, and Charles D. Lanning, receiver of that company, to foreclose a trust deed securing the payment of its bonds; that the trust deed was foreclosed, and the property sold to appellant herein. Pending the proceedings, James M. Sharp, appellee herein, was permitted to intervene for the purpose of protecting his rights to water from the San Diego Land & Town Company of Kansas. The circuit court rendered a decree confirming appellee's right to the perpetual use of water from the water system of appellant, and granted an injunction to prevent appellant from shutting off the water from the land owned by appellee, as it contended it had the right to do. Mandell v. Town Co. (C. C.) 89 Fed. 295. The Kansas corporation, under the constitution and laws of California, had acquired certain waters and water rights for sale and distribution, and had constructed a costly reservoir and extensive distributing system of pipes for the purpose of supplying water for irrigation and domestic uses to the inhabitants of National City and adjacent territory within the county of San Diego. A large portion of this territory was owned by the corporation. It subdivided and sold a portion of its land, and furnished purchasers thereof with water for the purposes aforesaid, through and by means of its pipe system. It also furnished water for similar purposes to the owners of neighboring lands not owned or sold by the corporation. Appellee owned 15 acres of land situate below and within 1,400 feet of one of the company's mains. On March 26, 1892, he entered into a written contract with the company, which reads as follows:

"Water Contract.

"This agreement, made by and between the San Diego Land & Town Company (a corporation), party of the first part, and J. M. Sharp, of the county of San Diego, state of California, party of the second part, witnesseth: That, for and in consideration of the payments and agreements hereinafter set forth, the party of the first part agrees to furnish to the party of the second part, subject to the general rules and regulations of the party of the first part relative to furnishing water for irrigation and other purposes which now are or shall or may be in force at any time during the existence of this contract, excepting so far as said rules and regulations may be affected and controlled by provisions of this contract, water for the irrigation of any number of acres of land, not exceeding fifteen [specifically described], for the term of five years, or any less number of years, from and after this date, at the option of the party of the second part. And, in consideration and as payment therefor, the party of the second part agrees to pay to the party of the first part, its

successors or assigns, at its office in National City, California, * * * the sum of eleven and fifty one-hundredths dollars per acre annually for each and every acre or part of an acre irrigated under this contract; provided, however, that at least seven and one-half acres must be paid for at the rate per acre above specified each and every year during the continuance of this contract. And in consideration of the furnishing to him for use upon said above mentioned and described real estate the water hereinbefore mentioned and provided for, for the period aforesaid and at the price aforesaid, the party of the second part agrees to furnish, connect, lay, and maintain in good order, at his own cost and expense, pipes of sufficient capacity and quality to conduct such water from the nearest main of the party of the first part, at such point as may be designated by the party of the first part, to said above-described tract of land, * * * during the continuance of this contract, and at the termination of this contract either to surrender and convey said connecting pipes to the party of the first part, or to remove the connection, and properly close the main of the party of the first part. And in consideration of the premises, and as a material and irrevocable part of this contract, the said party of the second part, his heirs, grantees, and assigns, hereby expressly waives and relinquishes all right and benefit under and by virtue of the provisions of section 552 of the Code of Civil Procedure of the state of California, and also hereby expressly agrees, as a contract and covenant running against said above-described real estate, that all duty, liability, and obligation of the party of the first part to furnish water for said above mentioned and described tract of land, or any part or parcel thereof, shall be governed and determined entirely by this contract, and that, at the expiration thereof, that all right, claim, and demand against the party of the first part, its successors or assigns, shall terminate and cease as absolutely as if this contract had never been executed, and said party of the first part had never furnished any water for use upon said tract of land."

At the time this contract was made the regular rates of the company for furnishing water to consumers for irrigation purposes was $3.50 an acre per annum. This rate continued up to January 1, 1896, and was then raised to $7 per acre per annum. The contract, by its terms, expired March 26, 1897, but the company supplied appellee with water up to April 9, 1897. On May 12, 1897, Sharp delivered to the company a written communication, as follows:

"I, * * * J. M. Sharp, hereby tender to you the sum of $27.25, as and for the water rents for the quarter beginning April 1, 1897, at the rate for irrigation of land demanded by your corporation. This tender is for the continuance of the water supply for said quarter for the irrigation of the following land [describing it]; and I hereby demand that the flow of water heretofore supplied from your system to said land be restored to it. * * *"

The company and the receiver refused the said tender of money, and in reply to Sharp's communication, on May 15, 1897, among other things, said:

"We are willing to extend the contract under which you have heretofore received water, and will, so far as we are able without further increasing our system, continue to supply water for the term of two years; you to be bound in every way by the contract under which you have heretofore taken water."

Sharp declined to extend the contract, and claims that he is entitled to the continuance of the supply of water, under the constitution and laws of California, on paying the rates prescribed by law. The personal conversations had between Sharp and the agents of the water company with reference to procuring the water, in the first instance, should be considered as having reference only to the period of time expressed in the contract. Sharp com-

plied with the terms of the contract during its existence. He waived the provisions of the statute, and paid the full amount he agreed to pay for the water up to April 1, 1897, which was a few days beyond the period of time mentioned in the contract. It will be noticed that the contract does not contain any covenant or agreement between the parties as to what rate he should pay for the water after the expiration of the contract, or whether he should or should not be entitled to the water after that time. It cannot, therefore, consistently be said that Sharp acted in bad faith in endeavoring to procure the water at the regular established rates thereafter. This he had the unquestioned right to do. The fact that, at the time of the execution of the contract, he expected to procure water from other sources, and had the option, by the terms of the contract, to make such change, does not in any manner affect the legal status of the parties. He did not avail himself of this option. The objection urged, that Sharp made no regular application for the water, as required by the rules of the company, is purely technical. He did make a written demand for the water, and agreed to pay the highest uniform rate established therefor, which, under the facts in this case, should be considered as the equivalent of a regular application filled out on the company's blanks. Moreover, the written communication of the agent of the receiver was in effect a denial of his right to the water except upon rates specified in the contract.

There is a controversy between the parties as to whether or not the land of appellee is within or outside of appellant's water system or irrigation field, and also as to whether the same could be irrigated without loss to the company and detriment to other consumers, and as to whether there is sufficient water to irrigate the lands admitted to be within the system. The court below found—and there is ample evidence to sustain it—that the land of appellee is within the territory covered by the company's distributing system. The record shows, as stated by the court, that:

"Lands almost immediately adjoining the land of Sharp, and, like his, outside of National ranch, are, and have been for years, supplied with water for irrigation by the company through the same main with which it has supplied Sharp, and those lands have been, and now are being, so supplied at the company's regular established rates."

The land of appellee is upon higher ground than some of the others, and, if the supply of water diminishes, it may be that the company might not be able, if compelled to supply such land with water, to furnish others of later date, on lower ground, with a sufficient supply of water to irrigate their lands. The record does not show that appellee ever made any application for water upon his lands, or that the water was ever supplied to him, otherwise than under the terms of the contract, except as hereinbefore stated. The contention of appellant is that, under the constitution and laws of California, a water company can legally contract to supply any one owning land within its system, at a point difficult to supply water for the irrigation of such lands, for a limited time, without attaching to the land a perpetual right to the use of water thereon,

as provided for by section 552 of the Civil Code, and that this must be true in a case like the present, where the appellee at the time of making the contract expressly waived all claims that he might otherwise have to the provisions of said section. The contention of the appellee is that, after the expiration of the contract, he could not be compelled to make any extension of it as a condition precedent to having the water again turned on; that by the use of the water during the period of the contract, and for a few days thereafter, he, as one of the public, became entitled to share in the supply of water devoted by the company to the public use, upon the same terms and conditions as all other consumers under the system, without reference to any provision contained in the expired contract.

Section 552 of the Civil Code of California reads as follows:

"Whenever any corporation, organized under the laws of this state, furnishes water to irrigate lands which said corporation has sold, the right to the flow and use of said water is and shall remain a perpetual easement to the land so sold, at such rates and terms as may be established by said corporation in pursuance of law. And whenever any person who is cultivating land on the line and within the flow of any ditch owned by such corporation, has been furnished water by it with which to irrigate his land, such person shall be entitled to the continued use of said water, upon the same terms as those who have purchased their land of the corporation."

In construing this section of the Code, the court, in Merrill v. Irrigation Co., 112 Cal. 426, 435, 44 Pac. 720, said:

"The object of the statute is quite evident. Water for irrigation is, in many pursuits, essential to the productiveness of land; and if, when it has been once furnished, the company so supplying it for such purpose may at will refuse such supply, the owner of irrigated land is at the mercy of the corporation, who may ruthlessly destroy the crops of the season, or, in case of orchards and vineyards, the result of many seasons' industry, by refusing to continue the supply of water. The use being a public use, the legislature may regulate it so as to promote the interests of the public, and, at the same time, do no injustice to the water company. The defendant, having supplied plaintiff with water for irrigation, and having sufficient on hand to continue such supply, was not at liberty, without good cause, to refuse to supply her, while she, on her part, was ready and willing to pay the established price therefor."

It is unnecessary to quote the various provisions of the constitution of California, or of the statute of 1885, relied upon by appellee. It is enough to say in regard thereto that the supreme court of California, in construing the same, has uniformly held that the various provisions with reference to water and water rights for distribution and sale must be read together, and given a practical, common-sense construction, and be considered with reference to the prior state of the law, and the mischiefs intended to be remedied by the change in the organic law in relation thereto; that the use of all water theretofore or thereafter appropriated for sale, rental, or distribution is, by the constitution, expressly declared to be a public use, subject to the regulation and control of the state, subject to certain provisions in respect to the rates or compensation to be collected (which has no application to water furnished by municipalities); that the constitution expressly declares that such rates or compensation shall be fixed in a certain specified manner, at a certain time, and by a certain body; that

the right to collect the rates or compensation so established is declared to be a franchise, and cannot be exercised, except by authority and in the manner prescribed by the statute. People v. Stephens, 62 Cal. 209, 231–237; McCrary v. Beaudry, 67 Cal. 120, 7 Pac. 264; Fresno v. Irrigation Co., 98 Cal. 179, 183, 32 Pac. 943; Merrill v. Irrigation Co., supra. It necessarily follows from the principles announced in these decisions that when water from any system is designated, set apart, and devoted to purpose of sale, rental, or distribution, it is appropriated to public uses, and becomes subject to the public use declared by the constitution, without reference to the mode of its acquisition by either party. The right of appellee to the continued use of the water does not, therefore, depend upon any of the covenants expressed in the written contract, and it is wholly immaterial whether that contract was void or valid. If void for any reason, it was without force, and might have been abrogated and annulled at any time. If valid, it could only be of binding force and vitality during its life. Such is the natural construction to be given to the contract. The contract has expired. It is functus officio. All its covenants expired with it.

In Ditch Co. v. Marfell, 15 Colo. 302–307, 25 Pac. 504, the court had under consideration a contract by which the water company agreed to furnish the consumer with water, "year after year, so long as he shall pay the annual rental therefor." The court held that this provision was a mere option, which might be terminated by the consumer at the end of any year; and further held that the provision in the contract that upon failure to pay the annual rental the consumer "forfeits and relinquishes all rights and claims whatsoever, both against the said company, and in and to the use of said water from said ditch," applied only to the rights given by the contract, and did not waive the consumer's statutory right to obtain water from the company's ditch under an order of the county commissioners. In the course of the opinion the court said:

"We deem it unnecessary to consider in the present opinion the question of public policy argued in this connection by counsel for appellees. Whether appellees could, by contract, forever relinquish rights relating to water, conferred upon them by the constitution and statutes, we need not determine. The instrument itself, in our judgment, does not indicate any such intent. It contains no declaration that, upon a failure to accept the annual proposition and make the annual contract, the consumer abandons all right to obtain in any manner water from the carrier's canal. In the absence of an express declaration or clear implication to the effect that such omission or failure should produce a forfeiture of constitutional and statutory rights existing, collateral to those provided for in the agreement, such collateral rights would in any event, unquestionably, remain undisturbed. The simple and obvious meaning of the provision is that the 'rights and claims' intended to be forfeited are those mentioned by the instrument itself, viz. the consideration advanced, and the privileges therein expressly enumerated."

From the facts contained in the record, it is manifest that appellee had acquired a public use to the water necessary to irrigate his lands, and he was and is entitled to avail himself of the privileges and rights guarantied to him by the constitution, laws, and decisions of the courts of the state of California. The company

was not justified in shutting off the water, or in demanding from appellee a renewal of the former contract as a condition precedent to his right to a continued use of the water upon paying the legal rate fixed for supplying it. The fact that the lands of appellee are upon a higher level than other lands supplied by the company cannot be urged as a reason for not supplying water to him unless he pays a higher rate than others taking water from the same system. We agree with the views expressed by the circuit court, that:

"A consumer whose land is situated within the flow of such a distributing system as that of this company, and who has, by means of water thereby supplied to him, made valuable improvements on his land, cannot be thereafter lawfully deprived of such water, in order that the distributer may supply later comers, ever though a larger area, by reason of more favorable conditions, may thus be brought under cultivation. Such a rule would manifestly work destruction to the just and well-established rule that in cases like this the first in time is the first in right."

The decree of the circuit court is affirmed, with costs.

MATTHEWS v. BOARD OF CORPORATION COM'RS OF NORTH CAROLINA et al.

(Circuit Court, E. D. North Carolina. October 31, 1899.)

1. CORPORATIONS—SPECIAL PRIVILEGES GIVEN BY CHARTER—RIGHTS OF SUCCESSOR.
   A provision of the special charter of a railroad corporation authorizing its directors to fix the rates for transportation of passengers and freight on its road, if construed as a contract which would prevent the state from regulating such rates, is in derogation of its sovereign powers, and to be strictly construed and limited to the immediate parties; and the immunity granted does not pass by a sale of the company's property on foreclosure to its successor, although by statute or by its charter the purchaser succeeds generally to "all the franchises, rights, privileges and immunities" of the mortgagor.
2. SAME—POWER OF LEGISLATURE TO ALTER CHARTER—CONSTITUTIONAL PROVISIONS.
   Under the North Carolina constitution of 1868 (article 8, § 1), providing for the formation of corporations under general laws, and in certain cases by special act, and that "all general laws and special acts passed pursuant to this section may be altered from time to time or repealed," the charter of a railroad corporation, whether organized under a general law or by a special act passed pursuant to said section, is subject to alteration or repeal by the legislature, and such alteration or repeal does not impair the obligation of a contract.
3. RAILROADS—REPEAL OF CHARTER PROVISIONS—EFFECT OF ACT TO REGULATE RATES.
   The North Carolina act of 1899 creating a state corporation commission, and giving it the right to regulate the rates of railroads, operates as an alteration and a repeal, pro tanto, of the charter of any railroad company of the state which vests such company with the exclusive right to fix its rates.

In Equity. This was a suit by Virginia B. Matthews against the board of corporation commissioners of North Carolina, the Carolina Central Railroad Company, and others, to restrain the enforcement of an order of the commissioners reducing rates.

J. A. Johnson, L. R. Watts, and MacRae & Day, for complainant.
Shepherd & Busbee, Battle & Mordecai, and Simmons, Pou & Ward, for defendants.

SIMONTON, Circuit Judge. The complainant is the holder of bonds of the Carolina Central Railroad Company, secured by a mortgage of its property and franchises. She comes into court complaining of the board of corporation commissioners of the state of North Carolina, in that the said board have so far reduced the rates of freight on fertilizers that the income of the railroad company is seriously impaired, and its interest-earning capacity is destroyed. The bill makes two federal questions: (1) That by the charter of this railroad company the exclusive right of fixing charges on passengers and freight carried by said company is vested in its board of directors, and that this interference by the corporation commission is invalid, as the act authorizing it impairs the contract of the charter; (2) because the rate imposed by the corporation commission is so unreasonable that it amounts to the taking of private property for public purposes without compensation. These two grounds will be examined.

On February 15, 1855, the general assembly of North Carolina incorporated the Wilmington & Charlotte Railroad Company. On the next day, by a supplemental act, the name of the company was changed into the Wilmington, Charlotte & Rutherford Railroad Company. The seventeenth section of the charter of this company provided:

"Be it further enacted, that the said company shall have the exclusive right of conveyance or transportation of persons, goods, merchandise and produce on said railroad to be constructed, at such charges as may be fixed upon by the board of directors."

Under a decree for foreclosure of the superior court of Hanover county, entered at January term, 1873, the property and franchises of the Wilmington, Charlotte & Rutherford Railroad Company were sold at public auction, and conveyed to one Timothy H. Porter. The conveyance was of "all the railroad known as the Wilmington, Charlotte and Rutherford Railroad, and also, all and singular, the corporate franchises, rights, and privileges of said corporation." On February 20, 1873, a little over two months before this sale, the general assembly of North Carolina had incorporated the Carolina Central Railway Company. The fifteenth section of this charter authorizes the company to purchase the Wilmington, Charlotte & Rutherford Railroad at any sale thereof, "and all its contracts, franchises, rights, privileges and immunities." Under the authority of this act the said railroad was conveyed by Porter to the Carolina Central Railway, and, among other things, all the franchises, rights, and privileges belonging or in any way appertaining to said corporation (the Wilmington, Charlotte & Rutherford Railroad) and to said railroad. A mortgage on the Carolina Central Railway was foreclosed on March 15, 1880, and a sale had thereunder. On June 25, 1880, under said sale, a conveyance was made of all the property, rights, and franchises of the debtor company to the Carolina Central

Railroad Company. This last-named corporation was organized under a general law of North Carolina regulating mortgages by corporations and sales thereunder, ratified March 1, 1873. All this was confirmed by an act of the general assembly of North Carolina, ratified January 18, 1881, entitled "An act to perfect the organization of the Carolina Central Railroad Company." This act declares this company a lawfully organized corporation, succeeding to, and legally possessed of, all the rights, powers, privileges, and franchises which were owned or possessed by the Carolina Central Railway Company prior to the sale.

In 1868 North Carolina adopted a constitution, and in article 8, § 1, provided as follows:

"Corporations may be formed under general laws, but shall not be created by special act, except for municipal purposes, and in cases where, in the judgment of the legislature, the object of the corporation cannot be obtained under general laws. All general laws and special acts passed pursuant to this section may be altered from time to time, or repealed."

The corporation commission was created by an act of the general assembly passed in 1899.

The complainant contends that the Carolina Central Railway Company is the successor of the Wilmington, Charlotte & Rutherford Railroad Company, and entitled to all its rights, privileges, and immunities by charter; that by the charter contract with the state, as above quoted, the directors had the exclusive right to fix rates for passengers and freight; that the present company is entitled to set up this contract; and that any action of the state of North Carolina taking away this right to fix rates violates the obligation of a contract, and is void. Assuming that this is a contract between the state of North Carolina and the Wilmington, Charlotte & Rutherford Railroad Company, did it pass with the property, and inure to each purchaser? The right of a state to legislate regarding railroads, regulating their charges, is sustained as an exercise of the police power. But it must be exercised in subordination to the provisions of the constitution of the United States. Railway Co. v. Smith, 173 U. S. 684, 19 Sup. Ct. 567. "Usually," says the court in Chicago, B. & Q. R. Co. v. Nebraska, 170 U. S. 72, 18 Sup. Ct. 519: "Where a contract, not contrary to public policy, has been entered into between parties competent to contract, it is not within the power of either party to withdraw from its terms without the consent of the other, and the obligation of such a contract is constitutionally protected from hostile legislation. Where, however, the respective parties are not private persons dealing with matters and things in which the public has no concern, but are persons or corporations whose rights and powers were created for public purposes, by legislative acts, and where the subject-matter of the contract is one which affects the safety and welfare of the public, other principles apply. Contracts of the latter description are held to be within the supervising power and control of the legislature, when exercised to protect the public safety, health, and morals, and that clause of the federal constitution which protects contracts from legislative action cannot in every case be successfully invoked. The presumption is that, when such

contracts are entered into, it is with the knowledge that parties cannot, by making agreements on subjects involving the rights of the public, withdraw such subjects from the police power of the legislature." Following out this principle, the courts have been loath to extend an immunity granted to a corporation beyond itself. They treat this as a personal privilege, not transmissible to its successors in any way. In Picard v. Railroad Co., 130 U. S., at page 641, 9 Sup. Ct. 642, the court says:

"Yielding to the doctrine that immunity from taxation may be granted, that point being already adjudged, it must be considered as a personal privilege, not extending beyond the immediate grantee, unless otherwise so declared in express terms. * * * It will not pass merely by a conveyance of the property and franchises of a railroad company, although such company may hold its property exempt from taxation."

In Railway Co. v. Miller, 114 U. S. 176, 5 Sup. Ct. 813, it was decided that an immunity from taxation enjoyed by one railroad company did not pass to a purchaser under foreclosure, although the act provided that the purchaser should forthwith become a corporation, and should succeed to all such franchises, rights, and privileges as would have been had by the original company but for such sale and conveyance. The reasoning of this opinion has peculiar application to the case at bar. The language of the clause which contains the exemption is explicit. It is, "No taxation shall be imposed by the state until the profits of the company shall amount to ten per cent. on the capital of the company." But one company is spoken of, and that is the company to be incorporated under that act. The property to be exempt is the property of that company, and no other, and while it continues to be the property of that company, and no longer. In Road Co. v. Sandford, 164 U. S. 579, 17 Sup. Ct. 202, the court say:

"It is as vital that the state should retain its control of tolls upon public highways as it is that it should not surrender or fetter its power of taxation. The right to regulate the rate is a power of the same character, and, in the construction of language said to confer such, the same principle should be applied."

In Railroad Co. v. Pendleton, 156 U. S. 667, 15 Sup. Ct. 413, quoted and affirmed in Road Co. v. Sandford, 164 U. S. 587, 17 Sup. Ct. 201:

"In the absence of express statutory direction, or of an equivalent implication by necessary construction, provisions in restriction of the right of the state to tax the property or to regulate the affairs of its corporations do not pass to new corporations succeeding by consolidation, or by purchase under foreclosure, to the property and ordinary franchises of the first grantee. * * * This is a salutary rule of interpretation, founded on an obvious public policy, which regards such exemptions as in derogation of the sovereign authority and of common right, and therefore not to be extended beyond the exact and express requirements of the grant, construed strictissimi juris."

Several cases are quoted which sustain the conclusion "that a special statutory exemption or privilege, such as immunity from taxation, or a right to fix and determine rates of fare, does not accompany the property in its transfer to a purchaser, in the absence of express direction to that effect in the statute." Railway Co. v. Gill, 156 U. S. 656, 15 Sup. Ct. 484; Railroad Co. v. Pendleton, 156 U. S. 673, 15 Sup. Ct. 413. See, also, Banking Co. v. Smith, 128 U. S. 174, 9 Sup. Ct. 47. It would seem under these authorities, that this right in

the directors to fix rates did not pass, with the other property of the Wilmington, Charlotte & Rutherford Railroad Company, to the successive purchasers at judicial sales. See Railroad Commission Cases, 116 U. S. 324, 6 Sup. Ct. 334.

But, apart from this, as has been seen, the constitution of North Carolina provides:

"Corporations may be formed under general laws, but shall not be created by special act, except for municipal purposes, and in cases where, in the judgment of the legislature, the object of the corporations cannot be obtained under general laws. All general laws and special acts passed pursuant to this section may be altered from time to time, or repealed."

The corporation of the Carolina Central Railroad, defendant herein, owes its existence, and the possession and the right to the enjoyment of all its franchises, entirely to the act of assembly "to regulate mortgages by corporations and sales under the same,"—Code N. C. §§ 697, 698 (a general act),—and to the special act of January, 1881, to perfect the organization of the Central Railroad Company. And these two acts owe their validity entirely to the constitution of 1868. The general act provides that, upon conveyance to the purchasers at foreclosure sale, the said company whose mortgage is foreclosed shall ipso facto be dissolved, and said purchasers shall forthwith be a corporation by any name which may be set forth in the conveyance. This being so, the corporation thus organized was a new corporation, and it is controlled by the principle established in Shields v. Ohio, 95 U. S. 319, and Railroad Co. v. Maine, 96 U. S. 499; and its charter may be altered, amended, or repealed at the will of the legislature, under the constitutional provision. If, then, it be admitted that this right to regulate rate charges was a part of the charter of this company, and is as if it were repeated in ipsissimis verbis, it was subject to the control of the general assembly, and could be altered or repealed at its pleasure. This being so, the act creating the corporation commission, and giving it the right to regulate the rates for railroads, is an alteration of, and a repeal pro tanto of, this charter. Railroad Co. v. Pendleton, supra; Hoge v. Railroad Co., 99 U. S. 348; Railroad Co. v. Gibbes, 142 U. S. 390, 12 Sup. Ct. 255; New York & N. E. R. Co. v. Town of Bristol, 151 U. S. 556, 14 Sup. Ct. 437. This action upon the part of the state does not impair the obligation of a contract.

This leads to the second federal question: Are the rates fixed by the corporation commission unreasonable? If so, this court can declare them invalid. Smyth v. Ames, 169 U. S. 526, 18 Sup. Ct. 418. There are many affidavits in this record bearing upon this question. No issue can be decided by affidavit with any degree of satisfaction. Before coming to any conclusion, the court needs the aid of a reference. Let an order be entered referring it to E. S. Martin, Esq., as special master (the standing master being in this behalf disqualified), instructing him to inquire into the rates prescribed for the carriage of fertilizers, and all facts bearing thereon, and specially as to their reasonableness, with leave to report any special matter.

SPRINGS v. BROWN et al.

(Circuit Court, D. South Carolina. November 7, 1899.)

1. INDEMNITY—BOND TO INDEMNIFY SURETY—EXTENT OF LIABILITY THEREON.
   Where a bond is given to a surety for the expressed purpose of counter security against the liability assumed by him, the liability of the maker thereon is commensurate with the liability of the surety, although, by its terms, the bond expires before the contract on which the surety is bound fully matures.
2. SAME—CONTRIBUTION BETWEEN INDEMNITORS.
   Where two persons each deposit securities for the indemnification of a surety, and the liability is paid from the securities furnished by one alone, he may enforce contribution from the other; the liability of each being in proportion to the relative amount of the securities furnished by him.
3. SUBROGATION—USE OF BORROWED MONEY—RIGHTS OF LENDER.
   One who loaned securities to another personally, with no agreement as to their use, acquires no equity in property of a third person by reason of the fact that the borrower voluntarily paid off an incumbrance thereon from the proceeds of such securities.

This was a suit in equity to enforce contribution between two indemnitors of a surety and for other relief.

J. E. Burke and A. D. Cohen, for complainant.
G. M. Trenholm and J. P. K. Bryan, for defendants.

SIMONTON, Circuit Judge. The exhaustive argument of this case by the counsel on both sides has materially aided the court in reaching its conclusion. Mike Brown, the husband of the defendant Mrs. Jennie Brown, desired to construct an extension of the Carolina Midland Railroad. He negotiated with the company for a lease of this road, and secured the lease, provided he could give satisfactory security for the performance of the covenants thereof. To this end he applied to the Baltimore Banking & Trust Company, now known as the American Bonding & Trust Company of Baltimore City, to guaranty him in such performance. This last-named company undertook to do this, provided it was furnished with satisfactory counter security. Brown tendered the bond of his wife in the penal sum of $20,000, secured by a mortgage of a tract of land in and near the town of Barnwell, S. C. This was not deemed sufficient. Just at this time Brown formed the acquaintance of J. L. Villalonga, a young man who had recently entered into a moderate fortune, and who desired to enter into some business. In an interview with Villalonga in New York, in which he stated the outline of his project, and of the necessity for counter security to the bonding company, Villalonga then agreed to give the necessary security. Carrying out this agreement, he went with Brown to Charleston, and there met Mr. Mordecai, who was the attorney in fact of the bonding company. Villalonga produced before Mr. Mordecai five registered bonds of the state of Georgia,—Nos. 1, 2, 3, 4, and 5, respectively,—each for $5,000. These were then and there transferred to Brown. Brown used three of them—Nos. 1, 2, and 3—for the security of the bonding company, adding thereto the bond and mortgage of Mrs. Jennie Brown, above spoken of,

making in all $25,000. This was on January 11, 1896. At the same time was produced the lease of the Carolina Midland Company to the corporation obtained by Brown, known as the Greenwood, Anderson & Western Railway, which was the proposed extension of the Carolina Midland Railroad. Mr. Mordecai, as attorney in fact of the bonding company, signed its bond to the Carolina Midland Company, securing the performance of the covenants in the lease. All the papers produced that day bore the same date, January 11, 1896,—Mrs. Brown's bond and mortgage, the lease, the power of attorney to Brown by Villalonga allowing the use of the bonds, and the guaranty of the bonding company. But counsel for the Carolina Midland Company preferred that the obligation of the bonding company should be executed by its president and secretary; so all the papers were put in escrow until such signatures could be obtained. They were obtained, and the papers were duly delivered.

It will be noted that, although Villalonga produced and transferred to Brown five registered bonds of the state of Georgia for $5,000 each, Brown used only three of them for this purpose. The two others he used for his own purposes,—as he says, borrowed them from Villalonga. Counsel for complainant speak of this as a forced loan. Still it was a loan, and Villalonga apparently acquiesced in it. Brown promised to pay them, and also promised to give a bond and mortgage of his wife and secure the loan. These were never performed. Still it does not change the character of the transaction; it remained a loan. It is said that Villalonga promised and agreed with Brown that his three bonds so given as security to the bonding company should be first exhausted to the exoneration of his wife's bond. This Villalonga denies. The question here is as between Villalonga and Mrs. Brown. He certainly never made any such agreement with her personally; and if Brown, acting as her general agent, received such a promise, it was wholly without consideration, and is void. The securities being thus deposited with the bonding company were Mrs. Brown's bond and mortgage and the three Georgia bonds of Villalonga. They were all hypothecated, and the property of the bonding company in them was qualified. The coupons of his bonds were regularly given to Villalonga, and he was recognized as their owner. The bonds of Villalonga were used by the bonding company. They were sold, and the proceeds were applied to the account of the bonding company with the Greenwood, Anderson & Western Railway. Mrs. Brown's bond is intact. Villalonga, before this suit began, made a full and complete assignment of all his interests and equities growing out of this transaction to the complainant. The complainant now seeks contribution from Mrs. Brown.

There can be no doubt that the bonding company held the Brown bond and the Villalonga bonds as security for the same liability,—the performance of all the covenants in the lease. The covenants alleged to have been broken were to pay one year's rent and the interest and taxes. The rent was payable in two semiannual installments; one on the 15th of July, the other on the 15th of Jan-

uary. It is said that the bond and mortgage of Mrs. Brown bore date January 11, 1896, and was for one year; that only one installment of rent was due in that year,—that is, the installment of July 15th,—and that she is not responsible for the installment payable January 15th. This position is not reconcilable with the contract made by her with the bonding company. She expressly covenants to counter secure them in their contract with the Carolina Midland Company, and that bound them to pay one year's rent. By the terms of the lease that year was up on January 11th. The last installment of rent for it was earned, although it was payable on January 15th. These two classes of securities being both held for the same liability, there necessarily arises between them the equity of contribution. McDonald v. Magruder, 3 Pet. 470. The dealing of the bonding company makes inquiry into this matter a little intricate. In addition to these securities, the bonding company had an agreement with the Greenwood, Anderson & Western Railway that it would pay into the hands of the bonding company $1,000 per month, and this was done for eleven months. When the first installment of rent became due, on July 15, 1896, the railway company had paid to the bonding company, and it had in hand, $6,000 of the $10,000 due. The difference—$4,000—was paid by the bonding company, and on one of the exhibits it is called an advance. Counsel for complainant say this was an advance, to be repaid by the following monthly installments. But in October, 1896, Villalonga executed another power of attorney to Mike Brown, authorizing him to use his three bonds, then with the bonding company. And he also executed another instrument authorizing these three bonds to be used as security for a loan or debt of the Greenwood, Anderson & Western Railway Company to the bonding company. There can be no doubt of the purposes of those papers. Mr. Stone, the secretary of the bonding company, says that they were intended to cover this $4,000 transaction, and also a proposed loan of $8,000, which never was consummated. So it clearly appears that this was not an advance to be repaid out of monthly-installment payments, but a loan. It also appears from this fact: When the October transaction took place, the bonding company had already received in monthly installments from the railway $1,000 for the months of August, September, and October; in all, $3,000. Yet in October the amount of $4,000 was treated as a still existing debt. So, also, that $4,000, with $79.32 interest, was paid January 4, 1897. This interest—$79.32—is a little more than three months' interest; that is to say, from October, 1896. As has been seen, the railway company paid the first installment of rent out of its advances and the money borrowed from the bonding company. So there was no default. In January, 1897, on the 5th, 8th, and 11th, the bonding company paid the taxes on the railway property under the terms of its guaranty,—$371.52, $2,293.19, $983.14; in all, $3,647.85. It had, however, in hand cash advanced by the railway company, $1,000 each month for August, September, October, November, and December,—five months,—$5,000. These taxes were paid from this mon-

ey, leaving a balance to credit of the railway company of $1,352.15. On January 4th they sold one of Villalonga's bonds, evidently under the authority of October, 1896, and received $5,500. This met the $4,000 loan, with interest, leaving to credit $1,470.67. On the 13th of January the bonding company sold the other two bonds of Villalonga for $11,100, and on January 15th paid the installment of rent due, $10,000, leaving to credit $1,000. Now, the bonding company, having been supplied with money of the railway company to pay taxes, incurred no liability on that account. On the contrary, it had on hand a remainder of $1,352.25. When the rent was to be paid,—$10,000,—it could apply to this the $1,352.15, leaving of its entire liability $8,647.85. This is the amount which the bonding company paid on its obligation for which Mrs. Brown and Villalonga were sureties,—$8,647.85,—and for which Mrs. Brown must make contribution, as Villalonga's bonds paid it. When the contract was made in January, 1896, Mrs. Brown deposited $10,000 of security and Villalonga $15,000. This fixed the relative proportion of their liability. Although afterwards the bonding company and Villalonga diverted the purpose of these securities, and so one of the bonds was used to secure the loan, still this cannot affect her rights or increase her responsibility. The loss must be borne between them in the proportion of 15 to 10,—Villalonga 60 per cent., she 40 per cent. A decree can be entered in favor of complainant against Mrs. Jennie Brown for 40 per cent. of $8,647.85, with interest.

There is another question: When Brown borrowed the two other Georgia bonds from Villalonga, he used one of them in paying off a mortgage upon his wife's property which she was offering as security to the bonding company. When he borrowed the bonds, he did not declare his purpose to Villalonga. The conclusion of fact expressed above is that this was a loan to Brown personally. If this be so, Villalonga has no equity growing out of the use of the money. Besides this, there is no direct evidence that Brown was the agent of his wife in the transaction. She had executed and delivered to him her bond and mortgage to the bonding company. By this act she constituted him her agent for the purpose of delivering them to the bonding company as the property stood. We cannot, by implication, extend the authority further. Villalonga never discussed the matter of the mortgage with Mrs. Brown. He owed no duty—was under no obligation—with regard to the property. If he had, as his own voluntary act, paid off the mortgage, he would not have been entitled to be subrogated to its security. A fortiori, if Brown, his donee, did so, that would give him no equity. Nor was there any implied trust, as between him and Brown, that this incumbrance be removed. Brown took or borrowed the bonds saying nothing of his purpose, if he had any purpose. After he had used the bonds, he told what he had done with them, and promised to make them good. That created no trust. No relief can be given in this suit for the bonds Nos. 4 and 5.

Let a decree be drawn in accordance with this opinion, defendants to pay the costs.

TRUST & DEPOSIT CO. OF ONONDAGA v. SPARTANBURG WATERWORKS CO.

(Circuit Court, D. South Carolina. November 7, 1899.)

1. INSOLVENT CORPORATIONS — SALE OF PROPERTY ON FORECLOSURE — CLAIMS PAYABLE FROM PROCEEDS.
   A claim for services rendered in behalf of bondholders of an insolvent corporation in relation to the foreclosure of a mortgage securing the bonds cannot be allowed and paid from the proceeds of the mortgaged property, especially where there is no proof of a contract for such services with all the bondholders interested in the fund.
2. SAME.
   The president of an insolvent mortgagor corporation, who, in the discharge of his duty, cares for the property pending foreclosure, a receiver having been refused, is entitled to payment for the services rendered from its proceeds when sold.
3. SAME—COUNSEL FEES.
   Where the proceeds of the property of an insolvent corporation, sold in proceedings for winding up its affairs, are insufficient to pay creditors, fees of the attorneys representing the corporation cannot be allowed and paid therefrom.
4. SAME.
   The fees of the counsel who file the bill under which the affairs of an insolvent corporation are wound up are allowable and payable from the proceeds of the property, the amount to be measured by the results.

On settlement of allowances against the fund produced by the sale of the property of defendant, an insolvent corporation, on foreclosure.

Carlisle & Carlisle, for complainant.
Hydrick & Wilson, for defendant.

SIMONTON, Circuit Judge. The property of the defendant corporation has been sold under decree of foreclosure of the second mortgage, subject to the lien of the first mortgage. It brought a nominal sum of $2,800. The case now comes up for final settlement. Various claims have been presented.

1. George W. Hannah. His claim is in these words:

"To services and expenses incurred for and in behalf of the second mortgage bondholders. In October, 1898, was appointed chairman of bondholders' protective committee, and from that time to present date have been in active correspondence with the bondholders, and have sent out a great many letters and telegrams. Have been to New York twice to attend meetings, and to Syracuse, N. Y., once, and to other points, to see bondholders. Also went to Spartanburg on the day of sale, in the interest of the bondholders. In all, think my services, including expenses, well worth $200."

This claim against the second mortgage bondholders is one outside the scope of these proceedings. It is a matter strictly between the party doing the service and the parties benefited. The claim must be based on contract. We have no evidence that there was any contract, express or implied, between him and the second mortgage bondholders as a whole; for, if he acted of his own motion, or by contract with a part of the bondholders, he has no claim upon the fund, which belongs to all the second mortgage bondholders.

2. The next is the claim of A. M. Whitney, president from October 2, 1898, to October, 1899. As the appointment of a receiver was refused, the claimant was in the discharge of his duty. His claim for $150 is allowed.

3. Claim of Messrs. Hydrick & Wilson for further counsel fee. This point has been frequently adjudicated in this court. In winding up the affairs of an insolvent corporation, when the proceeds of sale are insufficient to pay the claims of creditors, moneys belonging to creditors cannot be encroached upon to pay fees of the attorneys of the insolvent corporation. Phinizy v. Railroad Co. (C. C.) 98 Fed. ——; Bound v. Railway Co. (C. C.) 59 Fed. 509. This claim is disallowed.

4. Fees of complainant's solicitors. The universal rule is to allow fees to the counsel who file the bill under which the estate is administered. The amount of the compensation is measured by the result. In this case, although no very elaborate arguments were made, counsel were employed in their services to the case, and they have brought it to a very successful end. They are allowed $1,500.

Let the fee of the standing master be fixed at $300.

EARLE v. COYLE.

(Circuit Court of Appeals, Third Circuit. November 14, 1899.)

No. 9.

BANK STOCK—TRANSFER—ASSESSMENT.

Title of C. to stock in a bank is devested, so as to relieve him of liability for an assessment levied four years thereafter, on the bank becoming insolvent, where he employed auctioneers to sell it, and put into their hands his stock certificate, having indorsed thereon an assignment in blank, and a power of attorney in blank to transfer the stock, duly executed by him, and they knocked down the stock to S., who was cashier of the bank, and took the certificate to the banking house, and delivered it to S., "as cashier" of the bank, and requested him to transfer the shares to the purchaser thereof; and this, notwithstanding a by-law of the bank that "no officer * * * shall, without permission of the directors, hold stock in the bank,"—the inference from the payment of semi-annual dividends to S. for the four years being that the bank had accepted him as a stockholder.

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

Asa W. Waters, for plaintiff in error.

Rudolph M. Schick, for defendant in error.

Before ACHESON, DALLAS, and GRAY, Circuit Judges.

ACHESON, Circuit Judge. This was an action brought, pursuant to an order of the comptroller of the currency, by George H. Earle, Jr., receiver of the Chestnut Street National Bank, against Caroline Coyle, executrix of D. Lynn Coyle, deceased, to recover an assessment of 100 per centum upon the par value of five shares of the capital

stock of the bank, of which shares, it was alleged, the defendant, as said executrix, was the owner for the purpose of the assessment. The facts upon which the question of the defendant's liability as executrix to pay this assessment is to be determined appear in a case stated, submitted to the court below. Upon the agreed facts, that court, following the decision of the supreme court in Whitney v. Butler, 118 U. S. 655, 7 Sup. Ct. 61, gave judgment for the defendant. (C. C.) 95 Fed. 99.

It appears that on February 13, 1894, D. Lynn Coyle was the owner of five shares (of the par value of $100 each) of the stock of the said bank, for which he held the usual certificate. He employed Barnes & Lofland, auctioneers in the city of Philadelphia, to sell this stock at public auction, and he put into their hands his stock certificate, having indorsed thereon an assignment in blank, and a power of attorney in blank to transfer the stock, duly executed by him. The bank was then in good credit, and Coyle had no reason to doubt its continued solvency. On the named day (February 13, 1894), the stock was put up at public sale by the named auctioneers, and was knocked down at the price of $100 a share, its par value, to William Steele, who paid the purchase price in hand. William Steele was then the cashier of the bank, and the auctioneers supposed he was purchasing for William M. Singerly, the president of the bank. The case stated sets forth that "Barnes & Lofland, on the said 13th day of February, 1894, took the said certificate, indorsed as aforesaid, to the banking house of the said bank, delivered it to the said William Steele, as cashier thereof, and then and there requested him to transfer the said five shares of stock to the purchaser thereof, and left the said certificate with him." On the same day the auctioneers paid the amount for which the stock had sold, less their charges, to Coyle, who never knew who had bought the stock, and supposed from that time on that it was duly transferred to the purchaser on the books of the bank. He died on February 17, 1897. The bank suspended payment of its obligations and failed on December 23, 1897, and thereupon, by order of the comptroller of the currency, was declared insolvent, and a receiver appointed. The case stated sets forth that "the said bank declared dividends semiannually to the said five shares of stock after the said 13th day of February, 1894, and paid the same to William Steele." It appears from the case stated that William Steele bought this stock for himself, but made no transfer thereof to himself on the books of the bank, and that the stock remained in the name of D. Lynn Coyle on the stock ledger.

A by-law of the bank provided that "no officer of the bank, except the president and vice president, shall, without the permission of the directors, hold stock in the bank." The court below, we think, was right in holding that the facts of this case bring it directly within the ruling of the supreme court of the United States in Whitney v. Butler, supra. The essential facts of that case are all present here. The conduct of D. Lynn Coyle and his auctioneers seems to have been "that of careful, prudent, business men," within the definition of the supreme court in Whitney v. Butler, where a like course

of action by the vendors of national bank stock was held to relieve them from future liability to assessment. Here the auctioneers took the certificate of stock, with the indorsed assignment in blank, and power of attorney for transfer in blank, to the banking house of the bank, and there "delivered it to the said William Steele, as the cashier thereof," with the express request that he transfer the stock to the purchaser. Thus, upon the agreed facts, it appears that the auctioneers dealt directly with the bank, at its place of business, its cashier being in charge, and admittedly acting in his official capacity in accepting the surrender of the certificate of stock. Furthermore, the bank was not only in good credit at the time of this transaction, but its failure did not occur until nearly four years afterwards. During the interval the bank declared dividends semiannually on this stock, and the case stated shows that these dividends were paid by the bank to Steele.

As to the controlling facts, this case differs as much from Richmond v. Irons, 121 U. S. 27, 58, 7 Sup. Ct. 802, as that case differs from Whitney v. Butler. The difference between these two cited cases appears in the following quotation from the opinion of the supreme court in Richmond v. Irons, where, speaking of that case, the court said:

"The case is not within the rule laid down in Whitney v. Butler, 118 U. S. 655, 7 Sup. Ct. 61. Here there is no proof, as there was in that case, of the delivery of the certificates to the bank, and a power of attorney authorizing its transfer, with a request to do so, made at the time of the transaction. The delivery was to Holmes, not as president, but as vendee."

Here it is conceded that the delivery was to Steele, "as cashier."

We think that the court below was right in holding that the by-law above cited did not take this case out of the decision in Whitney v. Butler, even if the knowledge of the auctioneers as to who bid off the stock is imputable to Coyle, and he is also to be regarded as visited with constructive notice of the by-law. It will be perceived that the by-law did not forbid the cashier to purchase stock, and it did not absolutely prohibit him to hold stock, but only forbade his holding stock without the permission of the directors. Now, under the circumstances attending this transaction, it might well have been assumed that the cashier was acting in conformity with the rules of the bank, and not in violation of them. There was nothing to excite a suspicion of irregularity, if any existed. Moreover, the payment by the bank to Steele of the semiannual dividends for a period of over three years justifies the inference that the directors had given Steele permission to hold this stock. Snyder v. Foster, 19 C. C. A. 406, 73 Fed. 136. It is a perfectly legitimate conclusion, from the agreed facts, that the bank had accepted Steele as stockholder in respect to these five shares.

We need only add that our decision in this case accords with the views and ruling of the circuit court of appeals for the Fifth circuit in the case of Snyder v. Foster, supra. The judgment of the circuit court is affirmed.

GOLDEN REWARD MIN. CO. v. BUXTON MIN. CO.

(Circuit Court of Appeals, Eighth Circuit. October 23, 1899.)

No. 1,173.

1. EVIDENCE—MATERIALITY—TENDENCY TO CONFUSE JURY.
The general rule that testimony which is relevant to an issue will be admitted, without regard to its weight, is subject to the qualification that testimony, although it has some tendency to establish a material fact, may be and should be rejected when its admission will have a tendency to divert the attention of the jury from the precise issues involved in the case, and, by raising collateral issues, protract the trial beyond reasonable limits.

2. SAME.
In an action against a mining company for trespassing upon and extracting ore from a claim owned by plaintiff, the principal issues litigated being as to the quantity and value of the ore taken by defendant from plaintiff's claim, defendant offered testimony to show the total number of miners engaged in working in its mines, including several on its own claims, the number working on plaintiff's claim, the total production from all the mines, and that each man took out about the same quantity of ore per day, on an average, in all the workings, as tending to show the quantity taken from plaintiff's claim; also, the assays made of each shipment of ore at the mill, for the purpose of showing the value of plaintiff's ore. *Held*, that such testimony was properly rejected, as its admission would have involved the trial of extensive collateral issues, as to the comparative facility with which the ore could be mined in the different workings, and its comparative richness.

3. SAME—OPINION OF EXPERT—VALUE OF ORE.
In an action to recover the value of ore wrongfully extracted by defendant from plaintiff's claim, where plaintiff had no knowledge of the trespass until after the work had ceased, a mining engineer, shown to be familiar with the ore deposits in the locality, may be permitted, as a witness for plaintiff, to state his opinion, based upon the assay of samples taken by him from the side walls of the abandoned workings, and upon the testimony of the miners who worked therein as to the character of the ore taken therefrom, as to the average value of the body of ore removed.

4. SAME—RELEVANCY.
On such a trial evidence is admissible of the average assay value of samples of ore taken from the side walls of the workings and from drifts immediately adjacent, and shown to have been of the same general character as the body of ore removed; the weight and value of such evidence to be determined by the jury in view of all the evidence.

5. DAMAGES—REMOVAL AND CONVERSION OF ORE FROM MINING CLAIM—STATE STATUTE.
The provision of the Code of South Dakota (Comp. Laws Dak. 1887, § 4603) fixing the measure of the damages recoverable for wrongful conversion of personal property as the value of the property at the time of conversion, with interest, or, where the action has been prosecuted with reasonable diligence, the highest market value of the property at any time between the conversion and the verdict, without interest, at the option of plaintiff, governs in actions in the federal courts within the state, and is applicable to an action for trespass upon a mining claim, where the only damage claimed or litigated is the value of the ore removed therefrom and converted by defendant; the action being in effect, though not in form, one for the conversion of personal property.

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

The Buxton Mining Company, an Iowa corporation, brought this action against the Golden Reward Mining Company, a corporation of South Dakota, to recover damages for a wrongful entry upon its property, situated in the state of South Dakota, known as the "Bonanza Lode Mining Claim," and for the removal therefrom and conversion to its own use of a large amount of gold and silver-bearing ore, alleged to be of the value of $200,000. The Golden Reward Mining Company, the defendant below, and the plaintiff in error here (which will be referred to hereafter as the defendant), filed a general denial, which merely put in issue the commission of the alleged trespass, and did not seek to justify it. There was a lengthy trial before a court and a jury, lasting from February 9, 1898, until March 18, 1898, when the jury returned a verdict against the defendant below in the sum of $61,500, on which verdict a judgment was subsequently entered in favor of the plaintiff below. The proceedings at the trial are brought before us for review by a writ of error.

William L. McLaughlin and William R. Steele, for plaintiff in error.

Eben W. Martin (Norman T. Mason, on the brief), for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

THAYER, Circuit Judge, after stating the case as above, delivered the opinion of the court.

Preliminary to any discussion of the numerous errors that have been assigned, it will be advantageous to state certain facts which are practically undisputed. The parties to the suit are the owners of adjoining mining claims in the state of South Dakota. It will suffice to say generally concerning the location of the claims that the Bonanza claim, which belonged to the plaintiff below, and on which the trespass was committed, lay immediately to the west and south of two claims, the Silver Case and the Tilton, which belonged to the defendant company. Prior to August, 1891, the defendant had done a great amount of mining, not only on the Silver Case claim, which lay to the east of the Bonanza claim, but also on another claim which it owned, known as the "Golden Reward Claim," which latter lay immediately to the east of the Silver Case, and on certain other claims not necessary to be mentioned. It had extensive underground workings on both of the last-mentioned claims, consisting of tunnels, stopes, and levels, whereas the Bonanza claim was at that time practically undeveloped, no work of importance having been done thereon or thereunder. Subsequent to July, 1891, the defendant company extended two of the drifts or tunnels on its own property across the boundary line, and underneath the Bonanza claim, and there excavated two stopes, known as "Stope No. 2 West and Stope No. 3 West," from which it extracted a large amount of mineral-bearing ore between the months of August, 1891, and August, 1892. The trespass so committed was not discovered by the plaintiff company until shortly prior to November 20, 1895, when the present action was brought; and the discovery at that time was due to the fact that the excavation of the aforesaid stopes ultimately caused the superimposed earth to settle, making depressions on the surface. As soon as the depressions became visible, the plaintiff company set on foot an investigation, which speedily developed the extent of the trespass. While the defendant company by its answer

denied the trespass, yet on the trial such defense was practically abandoned, and the trial resolved itself into a consideration of three issues of fact: First, what was the quantity of the mineral taken from stopes Nos. 2 and 3 west, underneath the Bonanza claim? second, what was the value of the mineral so abstracted? and, third, was the trespass committed knowingly and willfully? A large amount of testimony was taken on these issues, very little of which has been preserved in the bill of exceptions. Errors to the number of 66 have been assigned by the defendant company, many of which are of little moment, and for that reason they will not be noticed in detail, although they have been duly considered. Counsel, in the elaborate briefs which have been filed, have themselves found it impossible to consider each of the assignments separately, but have grouped them and argued them by groups. We may well follow their example. Whether the judgment should be affirmed or reversed is a question which must depend for its answer on a few exceptions taken during the progress of the trial, that were principally discussed in the argument, which we will now proceed to consider, though not in the exact order adopted by counsel.

During the progress of the trial, counsel for the defendant company inquired of a witness how many men were employed by the defendant in its mines upon the Golden Reward and the Silver Case claims at the time when ore was being extracted from stopes Nos. 2 and 3 west, underneath the Bonanza claim. This question was objected to, whereupon counsel for the defendant made the following statement, in substance: That they proposed to show that during the period in question, from September 1, 1891, to August 1, 1892, the defendant kept an accurate account of the number of men employed in all of its mines located within the territory which it was then working, and that they were all worked together, as constituting one property; that the conditions under which mining was done in its own territory were the same as the conditions in stopes 2 and 3 west, and that the same number of men would break approximately the same amount of ore in the said stopes as in the stopes on its own claims; that during the period inquired about the total output from all the mines, including stopes 2 and 3 west, was from 25 to 40 tons per day; and that by dividing the whole output from all the mines by the total number of men employed, and thus ascertaining the average output per man, and by multiplying the average output per man by the number of men whom the jury might find were employed in stopes Nos. 2 and 3 west, while they were being worked, the jury could thus ascertain the number of tons of ore taken from said stopes Nos. 2 and 3 west, within the plaintiff's territory. This offer of proof was rejected, and an exception was saved. At another stage of the trial the defendant also offered in evidence a book kept by it, which was known as its milling or assay book, first having supplemented the offer by testimony to the following effect: That, during the period covered by the alleged trespass (that is to say, from about September 1, 1891, to about August 1, 1892), ores were received by the defendant by rail at its mill, which was some distance from the mines, in a mixed state, which came

from different localities on the Golden Reward and Silver Case claims and from stopes Nos. 2 and 3 west, underneath the Bonanza claim; that these ores were first crushed and roasted, and by that means were prepared for the chlorination barrels; that the ore was sampled and assayed immediately before it was placed in the chlorination barrels, and that it was also sampled and assayed after it had undergone the process of chlorination, the result of the two assays showing what amount of the precious metals therein contained was saved by the process and what amount was lost; and that a faithful record of these assays was kept in its milling or assay book during the entire period aforesaid. The cross-examination of witnesses in connection with the offer of the assay book developed the fact, however, that the ores thus mixed and assayed came from all parts of the defendant's territory which it was then engaged in working, as well as from stopes Nos. 2 and 3 west, underneath the plaintiff's claim, that some of the ores thus assayed came from a locality three-fourths of a mile distant from stopes Nos. 2 and 3 west, and that 1,000 feet intervened between those stopes and other localities from which ore was drawn which entered into the aforesaid assays. Besides, there was other evidence introduced which tended to show that while the trespass was in progress the defendant company failed to keep a daily record of the number of cars of ore taken from its mines, and the locality from whence it was derived, as it had done prior to the commission of the trespass, and that it had also filled up stope No. 3 west, and had closed the entrance thereto, and had blasted out the timbers after the stope was exhausted, which was an unusual proceeding among miners. The assay or milling book was rejected when the same was offered, and an exception was likewise saved. The two exceptions thus noted have been argued at considerable length in this court, and, as the merits thereof involve an application of the same general rules of evidence, it has been deemed most convenient to consider them together.

As a general rule, any evidence is admissible which has a reasonable tendency to establish a material fact in controversy, provided the evidence is not of a hearsay character or otherwise incompetent. Insurance Co. v. Weide, 11 Wall. 438, 440. If testimony is relevant to an issue, it is generally admissible, and the courts will not ordinarily consider its weight, but will leave that question to be determined by the jury. This general rule, however, is subject to the important qualification that testimony which does have some tendency to establish a material fact may be rejected by a trial judge, and should be rejected, when its admission will have a tendency to divert the attention of the jury from the precise issues involved in the case, and protract the trial beyond reasonable limits. This limitation of the general rule requiring all relevant testimony to be admitted, to which we have last alluded, is not only reasonable in itself, but it is well supported by the authorities. Schradsky v. Stimson, 40 U. S. App. 455, 22 C. C. A. 515, and 76 Fed. 730; Wentworth v. Smith, 44 N. H. 419; Lincoln v. Manufacturing Co., 9 Allen, 181, 187; Phillips v. Town of Willow, 70 Wis. 6, 34 N. W. 731; Parker v. Publishing Co., 69 Me. 173; Thomp-

son v. Bowie, 4 Wall. 463, 471; 1 Greenl. Ev. § 62, and cases there cited. The professed object which the defendant had in view in tendering proof of the total number of men who were employed in its mines during the period of the trespass, and in offering its milling or assay book, was to show by the first item of proof the total amount of ore taken from stopes Nos. 2 and 3 west, and by the second item, or by the assay book, the richness or assay value of such ore. It is obvious that the probative value of the testimony which was thus offered depended altogether upon the assumption made in the one instance that a miner could extract the same quantity of ore each day whether he worked in stopes Nos. 2 and 3 west, or in any of the numerous stopes and drifts where ore was being mined within the defendant's claims, and upon an assumption made in the other instance that all the ores which were mixed and assayed during the period in controversy were of about the same value, no matter from what source the same were derived. If the testimony in question had been admitted, therefore, it is clear that the plaintiff would have been entitled to show the fallacy of each of these assumptions, namely, that the character of the rock in which the ore was imbedded, or the facilities for getting at it and extracting it, were such that more ore could be obtained in a single day from stopes Nos. 2 and 3 west than from other stopes within the defendant's territory, and that the ores taken from stopes 2 and 3 west were of much greater value than the other ores that were mined on the defendant's claims, with which they had been mixed. In other words, if the objectionable testimony had been admitted, it would have led necessarily to a lengthy inquiry before the jury as to the quantity and value of the ore found in all of the defendant's workings within the Golden Reward and Silver Case claims, and as to the character of the rock in which the ore within said claims was imbedded, and as to the facilities which existed during the period of the trespass for extracting it. As nearly six weeks were consumed in ascertaining the amount and value of the ore extracted from the two stopes on the plaintiff's claim, which were the principal issues involved, it is apparent that the trial would have been interminable, and that the attention of the jury would have been unduly distracted, had the trial court admitted evidence which would have permitted such issues to be raised with respect to the ore mined on the defendant's claims during the period of the trespass. Besides, it would have been not only unfair but extremely prejudicial to the plaintiff, if, after the defendant had opened its case and made considerable progress therein, a class of testimony had then been admitted which would have compelled the plaintiff, for its own protection, to make a careful examination of the stopes, levels, and drifts within the defendant's territory, even if such an examination was then possible, for the purpose of showing in rebuttal what was the amount and value of the ore which the defendant had obtained within its own claims while stopes Nos. 2 and 3 on the plaintiff's claim were being worked. The answer of the defendant was simply a general denial of the trespass, and the plaintiff had no reason to anticipate the produc-

tion of such proof as was tendered by the defendant for the purpose of establishing the quantity and value of the ore that had been taken from the plaintiff's territory; nor was the plaintiff under any obligation to make preparations in advance to meet and rebut such evidence. Rules of evidence will sometimes be relaxed on the ground of necessity,—that is to say, because of the impossibility of obtaining proof which has a more direct bearing on the issue involved than that which is tendered; but in the present instance the evidence which was offered by the defendant company could not have been admitted with any propriety on the ground of necessity. The record shows that there was an abundance of direct evidence to establish both the quantity of the ore, and the richness of the same, that had been taken from stopes Nos. 2 and 3 west. The defendant offered direct testimony (being that of its superintendent, and that of its miners who had worked in the two stopes on the plaintiff's claim) showing the quantity of ore taken from those stopes. It also introduced a record of assays, which were made by its own superintendent, of the ores in stopes Nos. 2 and 3 west while it was working the same. The quantity of ore contained in these stopes could also be computed with reasonable accuracy by reference to their dimensions. Moreover, both parties entered these stopes after the present suit was instituted, and selected samples from the side walls, and had them assayed, and in this way were able to establish with great certainty the richness of the ore which the stopes had contained. Having such direct evidence at its command, the defendant company had no right to fortify it by evidence of the kind above indicated, which would have introduced numerous collateral issues, and lengthened the trial indefinitely. We are of opinion, therefore, that the trial court properly excluded the testimony to which the foregoing discussion relates.

Several exceptions were taken by the defendant during the trial to the admission of expert testimony, and, as considerable prominence is given in the brief to these exceptions, they will be here noticed. The evidence to which the exceptions are addressed is of the following character, and it was admitted under the following circumstances: Prof. Walter P. Jenney, a mining engineer and geologist who had had large experience in that capacity in the Black Hills of South Dakota since the year 1875, was called as a witness by the plaintiff company. He stated in a general way his familiarity with the ore deposits that are found in the locality where the Bonanza, Golden Reward, and Silver Case claims are located, and that he had examined stopes Nos. 2 and 3 west, in the Bonanza claim, since they had been excavated, and had computed the number of cubic feet of rock that had been removed from the stopes, and that in the course of such examination he had taken samples of the mineral-bearing ore which he found in the side walls of said stopes and in the drifts leading thereto, and had had the samples assayed. Other witnesses, it seems, had preceded him, who had worked in stope No. 3 while it was being excavated by the defendant, and who had described the character of the ore found therein;

classifying it, in miners' language, as "brown ore," and in some instances as "kidney ore," and in other instances as "blue ore." Prof. Jenney's attention was called to this testimony which had been adduced, and, on the assumption that the character of the ore extracted had been correctly described by the miners, he was asked if he was able to form a judgment as to the general character of the ore body that had been removed from stope No. 3. To this question an objection was interposed, but it was overruled by the court, and an exception was saved. Other questions of a like character were also asked, and the witness was permitted to answer the same. In reply to such questions Prof. Jenney expressed the opinion, in view of his own examination of the stope and the testimony of the miners, that the ore that had been taken from stope No. 3 "was a clean body of ore, and of high grade." He further testified in the same connection that in his opinion the value of the ore that had been extracted from stope No. 3 would average in value 75 per cent. of the average assay value of that ore which he had himself taken from the side walls of the stope and caused to be assayed. He placed a lower value on the ore body found in the stope, because the samples selected by himself, in his judgment, were of a better grade than the whole ore body would average. The witness from whom this evidence was elicited was certainly competent, by reason of his training and experience, to form an opinion on the subject to which the inquiries were addressed which would be more reliable than an opinion formed by a person who lacked his special knowledge, training, and experience. Moreover, we think that the testimony of the miners concerning the kind of ore that had actually been extracted from the stope, coupled with the knowledge which the witness had acquired by a personal examination of the locality and by the selection of samples from the side walls, removed the opinion, which was expressed, from the field of speculation and conjecture, and entitled it to great weight as a scientific deduction from known facts. The plaintiff had no means of producing better evidence of the richness and value of the ore that had been mined on its claim, because it was taken without its knowledge or consent, and without any opportunity on its part to have the same assayed, and it might well object to having the value of the ore assessed according to assays that had been made by the defendant company. We think, therefore, that the testimony in question was clearly admissible, within the rule applicable to the introduction of expert testimony which has heretofore been recognized and applied by this court and by many other courts. Railway Co. v. Edwards, 49 U. S. App. 52, 24 C. C. A. 300, and 78 Fed. 745, and cases there cited; Railway Co. v. Hall, 32 U. S. App. 60, 14 C. C. A. 153, and 66 Fed. 868; Edward P. Allis Co. v. Columbia Mill Co., 27 U. S. App. 583, 12 C. C. A. 511, and 65 Fed. 52; Hardy v. Merrill, 56 N. H. 227; Mercer v. Vose, 67 N. Y. 56.

Another exception was saved by the defendant to the introduction of certain evidence, which deserves a brief notice. The plaintiff company was allowed to show the average assay value, as made by a competent assayer, of certain samples of ore that had been taken,

as it seems, by Prof. Jenney and some other persons from the side walls of stope No. 3 west, and adjoining drifts in the Bonanza claim, after the trespass was discovered. The proof was offered, evidently, to establish the value of the ore body that had been removed by the defendant from stope No. 3, but its admissibility for that purpose is challenged by the defendant. It is insisted, in substance, that the admission of evidence showing that the average value of samples of ore taken from the inside of stope No. 3 was $41.75 per ton, and that the average assay value of other samples taken from places immediately adjoining the stope was $48.69 per ton, was an error prejudicial to the defendant, which warrants a reversal. The record recites, however, that, before the average assay value of these samples was proven, it was shown that all the samples of ore taken from outside of the stope were taken immediately adjacent thereto, as it had been worked out by the defendant, and that the ore bodies from which said samples were derived were of the same general character as the ore mined out of said stope, and a continuation of the same ore body. The record also shows that, when the average assay value of the several samples was admitted in evidence, the trial judge cautioned the jury that the average assay value was not to be taken as an absolute mathematical demonstration of what the value of the ore body in stope No. 3 was, but that the proof was admitted simply for their consideration, and that they should give it such weight as they thought it ought to receive; first considering whether the samples were fairly representative of the body of the ore that had been extracted from the stope. In view of the locality from which the ore samples were taken, and its proximity to the stope, and in view of the caution administered by the court when the objectionable testimony was admitted, it cannot be successfully claimed that an error was committed. The testimony certainly had a marked tendency to establish the grade of the ore which the defendant company had appropriated.

This brings us to a consideration of the most important contention of the defendant company, namely, that the action was tried throughout by the lower court under an erroneous view of the measure of damages which was applicable to the case. The Code of South Dakota provides (Comp. Laws Dak. 1887, § 4603) that:

"The detriment caused by the wrongful conversion of personal property is presumed to be: (1) The value of the property at the time of the conversion with interest from that time; or, (2) where the action has been prosecuted with reasonable diligence, the highest market value of the property at any time between the conversion and the verdict, without interest, at the option of the injured party; and, (3) a fair compensation for the time and money properly expended in pursuit of the property."

The trial court held, in substance, that the aforesaid statute gave the plaintiff the right to elect to take the value of the ore when the suit was instituted; and it accordingly instructed the jury to assess the value of the ores that had been wrongfully appropriated by the defendant company "as of the month of November, 1895," and to award the value of the same at the mouth of the mine, without interest, and without deducting the cost of breaking and ele-

vating the ore, if they found the trespass to have been committed willfully and intentionally, but to deduct such expenses from the value of the ore at the mouth of the mine if they were satisfied that the trespass was committed unintentionally while the defendant supposed that it was within its own territory. The court declined to instruct the jury, as it was requested to do by the defendant, that the value of the ores should be assessed as of the date of their conversion, "with interest from that time to the date of the trial"; the conversion having taken place between September 1, 1891, and August 1, 1892. In this connection it should also be stated that the amended complaint on which the case was tried was filed on September 22, 1896, and the original complaint on November 20, 1895. In the amended complaint the plaintiff claimed damages in the sum of $220,000, "and interest at the rate of seven per cent. per annum from November 20, 1895." During the progress of the trial, and before the plaintiff's case was concluded, it asked and obtained leave to strike out the aforesaid claim for interest which was contained in the amended complaint; thus leaving a prayer for damages in the sum of $220,000. The defendant objected to the amendment, and saved an exception. Before the amendment was allowed, the trial court gave the defendant leave, however, to make a showing that the amendment would take it by surprise, but the record recites that it failed to make such a showing. Moreover, before the amendment was allowed, the plaintiff made a showing, at considerable length, that, after the discovery of the depressions on the surface of its claim, it had taken prompt action to discover the trespass, and had brought the necessary legal proceedings to maintain its rights, and had prosecuted the suit at bar, after it was brought, with all reasonable diligence. The showing of diligence so made was satisfactory to the trial court, and induced it to allow the claim for interest to be expunged from the amended complaint. The showing made in this behalf, as disclosed by the record, has also served to convince this court that from the time the trespass was discovered the plaintiff exercised commendable diligence in the assertion of its rights, and is not chargeable with negligence or any unnecessary delay. It is manifest, we think, that the trial court, in permitting the interest claim to be expunged from the amended complaint under the circumstances aforesaid, was not guilty of an abuse of its discretionary powers, and further discussion of that point is unnecessary. The substantial question to be considered is whether the statutory rule for the assessment of damages for the conversion of personal property which prevails in South Dakota is fairly applicable to the case at bar. If it is, then we perceive no error in the various proceedings above detailed. This court has twice decided, as a proposition of general law, and, as we think, in accordance with the decided weight of authority on that point, that a person who invades another's property, and appropriates and removes therefrom valuable ore or timber, and does so in the honest belief that it belongs to him, or that he has the right to appropriate it, can only be held liable to the true owner of the converted property, if it is ore, for its value as it was in place (that is to say, in

the mine before it was broken down), whereas, if the trespass was committed willfully and intentionally, or if the trespasser was so far negligent as to justify an inference that he acted knowingly and intentionally, then he may be held liable for the value of the ore taken, with interest thereon from the date of the conversion; such value to be estimated at the mouth of the mine, without any allowance for the expenses which the trespasser may have incurred in breaking and raising it. Mining Co. v. Turck, 36 U. S. App. 208, 220, 221, 17 C. C. A. 128, and 70 Fed. 294; Durant Min. Co. v. Percy Consol. Min. Co., 35 C. C. A. 252, 93 Fed. 166. See, also, E. E. Bolles Wooden-Ware Co. v. U. S., 106 U. S. 432, 1 Sup. Ct. 398; Benson Min. Co. v. Alta Min. Co., 145 U. S. 428, 12 Sup. Ct. 877. It must be conceded, however, that it is competent for a state to change any of the common-law rules for the assessment of damages for an injury done to either real or personal property situated within its borders, or for the wrongful conversion of personal property there located, and that when such rules are modified by state legislation the local law must be enforced both by the state and the federal courts. Railroad Co. v. Hogan, 27 U. S. App. 184, 11 C. C. A. 51, and 63 Fed. 102; Gregor v. Hyde, 27 U. S. App. 75, 10 C. C. A. 290, and 62 Fed. 107; Bank v. Basuier, 27 U. S. App. 541, 12 C. C. A. 517, and 65 Fed. 58. While it must be conceded that the suit at bar is in form an action for trespass upon real property, yet we are persuaded that this fact is not a conclusive reason why the state statute relative to the assessment of damages for the wrongful conversion of personal property should be held inapplicable. In an action for trespass on realty, it is permissible, both under the Code of Procedure and at common law, to recover damages for the wrongful conversion of personal property, as well as for an injury done to the realty, when the taking and conversion of personal property are coincident with the injury done to the realty, or are the result of the same act or a continuous series of acts. In such cases the two kinds of damage may be recovered under one and the same count, where both species of damage are properly alleged and claimed. Coke Co. v. Reitz, 14 Ind. App. 478, 39 N. E. 541, and 43 N. E. 46. In the case at bar the trial, as we have before stated, resolved itself into an inquiry as to the amount and value of ore that had been broken down in two stopes, which the defendant company subsequently removed and converted to its own use. It was not claimed that an injury had been done to the realty, except by the conversion of the ore; nor was any such damage assessed by the jury, or authorized to be assessed, under the instructions which were given by the trial court. The wrong complained of, for which compensation was demanded, was the unlawful conversion of the mineral-bearing ores after they had been broken down and converted into personalty. The action, therefore, was in its essence a suit for the wrongful conversion of personal property, notwithstanding the fact that the complaint also charged a trespass upon real property. In view of these considerations, we are of opinion that the statutory rule for the assessment of damages which entitles a plaintiff in the state of South Dakota, whose property has been there wrongfully taken and con-

verted, to demand "the highest market value of the property at any time between the conversion and the verdict, without interest," provided the action has been prosecuted with reasonable diligence, was properly applied in the case now in hand. We can conceive of no sufficient reason why the form of the action should deprive a plaintiff of the benefit of the rule, when, as in the present instance, it transpires that the action is essentially one for the wrongful conversion of personal property, and when no other kind of damage is recovered.

It is claimed by the defendant company that as improvements in the method of extracting the precious metals from such ores as are involved in the present controversy had reduced the cost of reduction between September 1, 1891, when the trespasses began, and November 20, 1895, when the suit was instituted, thereby making the ore more valuable in the market at the later date, the rule for the assessment of damages which was applied, giving the plaintiff the value of the ore on November 20, 1895, operated to its prejudice. This is doubtless true; but, on the other hand, it may be said that by electing to take the value at the later date the plaintiff thereby sacrificed a large sum, amounting to several thousand dollars, on account of interest which he would have been entitled to recover had he thought proper to take the value of the ores at the time of their conversion. These considerations, however, are unimportant, if the plaintiff has received no greater compensation for the wrong committed than he is entitled to demand under the laws of the state where it was committed; and we feel confident that such is the fact, when the local statute above quoted is properly construed and applied.

This action, as we have before intimated, was tried at unusual length, and doubtless at great expense to both parties. It seems to have been fairly and thoroughly tried, each party producing all the relevant testimony which it could obtain by the utmost diligence and research. We find no sufficient cause for doubting the substantial accuracy of the verdict which was rendered by the jury, or for believing that a more just result would be obtained by another trial. It would have been a misfortune, we think, if an error had crept into the record of such importance as to require a reversal of the judgment, but we are satisfied that no such error was committed. The judgment below is therefore affirmed.

CHICAGO G. W. RY. CO. v. PRICE.

(Circuit Court of Appeals, Eighth Circuit. October 9, 1899.)

No. 1,162.

1. EVIDENCE—EXPERT TESTIMONY.

The question whether the rough and uneven condition of a railroad track would be likely to cause a coupling pin to be thrown out while a train was going down grade over such track, and thus part the train, is a proper one for expert testimony; and the opinion of an experienced railroad engineer, shown to have been familiar with the track at the time, may be received as that of one better qualified to form an opinion than the members of the jury.

2. TRIAL—RECEPTION OF EVIDENCE—DISCRETION OF COURT—EVIDENCE.
The admission in rebuttal of cumulative testimony, in support of testimony in rebuttal that had been received without objection and was not contradicted, was largely discretionary; and, if it was error, it was error without prejudice, and constitutes no ground for a reversal.

3. SAME—DIRECTION OF VERDICT.
While there is always a preliminary question for the judge, before a case can be properly submitted to the jury, as to whether or not there is any substantial evidence upon which the jury can properly render a verdict in favor of the party producing it, and, if there is no such evidence, it is the duty of the court to direct a verdict against such party, it is only when the evidence leaves the material facts admitted or undisputed, and only when these facts are such that reasonable men, in the exercise of an honest and impartial judgment, can fairly draw but one conclusion from them, that the court may properly withdraw the case from the jury.

4. REVIEW ON APPEAL—FINDING OF JURY—PROXIMATE CAUSE OF INJURY.
The proximate cause of an injury is the primary moving cause, without which it would not have been inflicted, but which, in the natural and probable sequence of events, and without the interposition of any new or independent cause, produces the injury; but what constituted the primary cause of an injury, within such definition, in a particular case, is ordinarily a question for the jury, and when they have determined it from evidence which is either conflicting, or from which reasonable men might draw different conclusions, an appellate court cannot reverse their finding because it might draw a different conclusion from the same evidence.

5. RAILROADS—ACTION FOR INJURY OF EMPLOYE—FINDINGS OF JURY.
A freight train, while going down a grade approaching a station, parted, and when the engine stopped at the station there was a collision between the two sections, in which a tank of gasoline was burst, and the oil ran out over the ground and across the tracks. It was in the night, and when the conductor came forward with his lantern there was an explosion, in which he was killed. In an action against the railroad company to recover for his death there was evidence tending to show that the track was in bad condition, which might have caused the parting of the train, but such evidence was contradicted. There was also conflicting evidence as to whether the explosion was caused by the conductor's lantern or otherwise, and upon other material questions. *Held*, that a finding by the jury that the bad condition of the track was the proximate cause of the injury could not be disturbed by an appellate court.

6. CONTRIBUTORY NEGLIGENCE—BURDEN OF PROOF—RULE IN FEDERAL COURTS.
The rule of the federal courts is settled and uniform that contributory negligence is an affirmative defense, which must be established by a preponderance of evidence, and this requirement is not changed by the fact that a different rule prevails in the courts of the state where the cause of action arose.

7. MASTER AND SERVANT—ASSUMPTION OF RISK.
The dangers from a defective railroad track must have been so obvious and threatening to a servant engaged in the operation of trains thereon that a reasonably prudent man in his situation would have avoided them, in order to charge him with having assumed the risk by continuing in the service.

8. TRIAL—QUESTIONS FOR JURY.
Although the testimony of a witness upon an issue is not contradicted, where the only person who could have contradicted him is dead, and it is shown that the witness gave inconsistent testimony on a previous occasion, it is proper to submit the issue to the jury.

9. APPEAL—QUESTIONS PRESENTED BY RECORD—BILL OF EXCEPTIONS.
The correctness of the ruling of the trial court in refusing to direct a verdict or of instructions given or refused cannot be reviewed where all the evidence contained in the record is given in narrative form, and the certificate thereto is limited to the statement that "the foregoing is substantially all the evidence."

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

On the night of May 4, 1896, L. C. Price was a conductor in charge of a freight train of the Chicago Great Western Railway Company which was running from Chicago, in the state of Illinois, to Dubuque, in the state of Iowa. The train consisted of 22 loaded cars. Sycamore is a city in Illinois, on this railroad, about 57 miles west of Chicago. There is a hill about two miles east of this city, so that the railroad is on a descending grade nearly all the way from the top of this hill to the water tank at Sycamore. As the train came over or down this hill and into Sycamore, it parted, and when the engine and the forward section of the train stopped at the water tank in Sycamore the rear section crashed into it. There were some large dimension stones on the rear car of the forward section when the collision occurred which perforated a tank in the forward end of the rear section, and gasoline or some other inflammable liquid poured forth from the opening. On a spur track opposite this tank, and about eight feet south of it, was a dining car. The liquid flowed out upon the ground, ran across the spur track under the dining car, and spread over the ground on the south side of it. When the collision occurred, the conductor, Price, was on the caboose at the rear end of the train. He took his lighted lantern, and went forward to attend to the train. The inflammable fluid took fire, there was an explosion, and when the fire was extinguished the dead body of Price was found lying on the ground south of the dining car. Annie M. Price, the administratrix of the conductor's estate, and the defendant in error, brought this action for his death in behalf of his widow and next of kin, pursuant to the provisions of the statutes of Illinois, which permit the maintenance of such actions when death has resulted from the wrongful act or omission of a party. She alleged in her complaint that the death of Price was caused by the failure of the plaintiff in error, the Chicago Great Western Railway Company, to use ordinary care to keep its roadbed and railroad track in proper condition, and by its negligence in other respects. The company denied these allegations of the complaint, and averred that the death of Price was the result of his own carelessness. The case was tried, and a verdict was returned and a judgment was rendered against the railway company for $3,500. The writ of error challenges this judgment on various grounds, which will be considered in the opinion.

D. J. Lenehan and D. E. Lyon (D. W. Lawler, on the brief), for plaintiff in error.

J. W. Jamison (William Smyth, Henry Rickel, and E. H. Crocker, on the brief), for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

SANBORN, Circuit Judge, after stating the case as above, delivered the opinion of the court.

After several witnesses had testified that the roadbed and the railroad track of the plaintiff in error from the top of the hill east of Sycamore to the water tank in that city, where the collision occurred, were in a poor condition; that some of the ties were rotten, and that many of the spikes were loose or lost; and after Charles A. Field had testified that he was a locomotive engineer, that he had been in the employment of the plaintiff in error for 11 years, that he was running a suburban train from Chicago to Sycamore at and before the time of the accident, that he knew the condition of the road from the top of the hill to the water tank, that it was in bad condition, and would sway a train as it passed over it,—the trial court permitted him to testify, over the objection of the company, that the rough and uneven condition of the track was liable

to throw a pin out, and thus to part a train, and this ruling is assigned as error. This declaration was not the statement of any fact, but the communication of the opinion of the witness as to the effect of the roughness of the road. The rule undoubtedly is that a witness must state facts, and not opinions, but there is an exception which arises out of the necessity of the case that is as firmly established and as well known as the rule. It is that the opinions of witnesses possessing peculiar skill or knowledge of the subject-matter may be received in evidence whenever the facts are such that inexperienced persons are likely to prove incapable of forming a correct judgment without such assistance. The trial court was of the opinion that the testimony of this witness fell under the exception to the rule, and we are not convinced that there was any error in this view. The line of demarcation between competent and incompetent expert testimony is not always clear and definite, and judgments ought not to be reversed on account of the reception or rejection of such testimony unless there was a clear violation of the rule. It is not probable that the farmers, mechanics, and business men who composed the jury in this case were as capable of forming a judgment upon the effect of a rough railroad upon the links and pins with which the cars of a freight train are fastened together as a locomotive engineer who had been operating a railroad train for years. Motey v. Granite Co., 36 U. S. App. 682, 689, 20 C. C. A. 366, 370, 371, and 74 Fed. 155, 159; Railway Co. v. Edwards, 49 U. S. App. 52, 56, 24 C. C. A. 300, 302, and 78 Fed. 745, 747; Fireman's Ins. Co. v. J. H. Mohlman Co., 62 U. S. App. 287, 291, 33 C. C. A. 347, 349, and 91 Fed. 85, 87; Clifford v. Richardson, 18 Vt. 620, 627. There were like objections to similar testimony of other witnesses, but for the reasons stated above we have reached the conclusion that they were properly overruled, and that the evidence of these witnesses was properly received.

The theory of the defendant in error at the trial was that the fire was communicated to the flowing liquid, and that the explosion was caused, by fire from the dining car which stood on the spur track about eight feet south from the tank from which the inflammable fluid escaped. The theory of the plaintiff in error was that the fire was set to the liquid by Price's lighted lantern, and that it was his negligence in approaching the fluid with this light in his lantern that caused the fatal result. In order to prove that the theory of the defendant in error was unfounded, the railroad company introduced evidence to the effect that no fire and no coals were taken or escaped from the dining car. The plaintiff in error complains that the court subsequently permitted the administratrix to prove by one Hibbard, who was a locomotive engineer, that he had pulled tanks of gasoline with his engine, that brakemen with lighted lanterns had inspected leaking tanks, and that he never knew of a case in which the light from a brakeman's lantern caused the liquid to take fire. The objection to this testimony was that it was not proper testimony in rebuttal. But the record shows that the testimony of another witness to the same effect had already been received in rebuttal, without challenge, before this objection was presented, and

that this testimony was not contradicted; so that no prejudice could have resulted from the cumulative evidence of the subsequent witness. If the admission of his testimony was error, it was error without prejudice, and no ground for reversal.

It is assigned as error that witnesses were permitted to testify in rebuttal that they saw a danger signal—a red flag—between Sycamore and the top of the hill a month or more before the accident occurred. But the entire question of the condition of the railroad at this place, of the repairs that had been made upon it during many months prior to the accident, and of the daily work of the section men upon it was before the jury, and the testimony upon every phase of it was in conflict. This testimony would have been competent if it had been introduced in chief, and in this state of the case a trial court has much discretion in the admission of rebutting testimony. It was guilty of no such abuse of this discretion here as would warrant a reversal of this judgment.

There are other assignments of error regarding the admission and rejection of evidence. They have all been carefully examined, and found to be untenable. They are either disposed of by the views which we have already expressed, or they are of insufficient importance to warrant their statement and discussion.

The chief reliance of counsel for the plaintiff in error is not upon their objections to the testimony. It is upon their contention that the court below should have instructed the jury to return a verdict in favor of the railway company. They insist that there were many questions presented by the evidence and submitted to the jury which it was error for the court to refuse to decide, and that, if it had decided any one of them, the logical and unavoidable result would have been a peremptory instruction in favor of the company. The assignments of error which refer to this matter are numerous and voluminous. They assail various portions of the charge of the court, its refusal to grant numerous requests for instructions, and its failure to peremptorily instruct the jury in favor of the company. But, when they are carefully analyzed, they all come to this: that for one reason or another the court erred because it did not direct a verdict for the railway company. Before entering upon a discussion of the questions which these assignments present, it is well to call to mind the established rules by which they must be determined. It is conceded that at the close of the evidence there is always a preliminary question for the judge before the case can be properly submitted to the jury, and that is whether or not there is any substantial evidence upon which the jury can properly render a verdict in favor of the party who produces it, and that, if there is no such evidence, it is the duty of the court to direct the jury to return a verdict against him. Commissioners v. Clark, 94 U. S. 278, 284; North Pennsylvania R. Co. v. Commercial Nat. Bank, 123 U. S. 727, 733, 8 Sup. Ct. 266; Railroad Co. v. Converse, 139 U. S. 469, 11 Sup. Ct. 569; Laclede Fire-Brick Mfg. Co. v. Hartford Steam-Boiler Inspection & Insurance Co., 19 U. S. App. 510, 515, 9 C. C. A. 1, 4, and 60 Fed. 351, 354; Gowen v. Harley, 12 U. S. App. 574, 585, 6 C. C. A. 190, and 56 Fed. 973; Motey v. Granite Co., 36 U. S. App. 682, 686, 20

C. C. A. 366, 368, and 74 Fed. 155, 157; Railway Co. v. Belliwith, 55 U. S. App. 113, 121, 28 C. C. A. 358, 362, and 83 Fed. 437, 441. But it is equally well settled that it is only when the evidence leaves the material facts admitted or undisputed, and only when these facts are such that reasonable men, in the exercise of an honest and impartial judgment, can fairly draw but one conclusion from them, that the court may properly withdraw the case from the jury. If the evidence relative to the material facts is contradictory, or if, from the admitted or established facts, the unprejudiced minds of reasonable men may well draw different conclusions, it is the duty of the court to submit the issues to the jury. Railway Co. v. Jarvi, 10 U. S. App. 439, 451, 3 C. C. A. 433, 438, and 53 Fed. 65, 70; Fuel Co. v. Danielson, 12 U. S. App. 688, 696, 6 C. C. A. 636, 640, and 57 Fed. 915, 920; Drake v. Stewart, 40 U. S. App. 173, 178, 22 C. C. A. 104, 107, and 76 Fed. 140, 143; Railway Co. v. Ives, 144 U. S. 408, 417, 12 Sup. Ct. 679; Railroad Co. v. Converse, 139 U. S. 469, 11 Sup. Ct. 569; Railroad Co. v. Pollard, 22 Wall. 341. Bearing these familiar rules in mind, let us consider the claims of the plaintiff in error.

It is claimed that the court was wrong in submitting to the jury the questions whether or not the railroad track was in bad condition where the train parted, between the top of the hill east of Sycamore and the water tank in that city, whether or not the poor condition of the track caused the train to part, and whether or not the negligence of the company in the care of this track was the proximate cause of the fire, the explosion, and the death of Price. The charge of error in submitting the first two questions is refuted by the fact that five witnesses testified that in portions of this track many of the ties were rotten, and that many of the spikes which should have held the rails to them were loose, or entirely out, so that, as some of them said, the rails would sink into the ties and roadbed as trains passed over them; and four witnesses testified that the roughness and unevenness of this track, produced by the rotten ties and loose rails, had a tendency either to throw pins or break couplings as heavy freight trains passed over it. All this testimony was contradicted, it is true, but, after all, it was ample to raise a dispute over these issues, and to make it the imperative duty of the court to submit them to the jury. The third question —the question whether or not the roughness of the road was the proximate cause of the fire, the explosion, and the death—must be considered in the light of the finding which the jury must have made that the company was negligent in the care of this portion of its railroad. The proximate cause of an injury is the primary, moving cause, without which it would not have been inflicted, but which, in the natural and probable sequence of events, and without the interposition of any new or independent cause, produces the injury. The nature of this cause, its relation to its effect, and the difficulty and perplexity which often condition its discovery, have been so frequently and exhaustively considered and illustrated by this court that a mere reference to some of the opinions which treat of these subjects will amply elucidate the brief definition we have

given, and will render its further consideration here both unnecessary and unprofitable. Railway Co. v. Elliott, 12 U. S. App. 381, 386, 5 C. C. A. 347, 349, and 55 Fed. 949; Insurance Co. v. Melick, 27 U. S. App. 547, 552, 553, 12 C. C. A. 544, 547. and 65 Fed. 178, 181; Railway Co. v. Callaghan, 12 U. S. App. 541, 547, 6 C. C. A. 205, 208, and 56 Fed. 988, 991. The question here is not whether or not, in our opinion, the roughness of the track was the proximate cause of the explosion and the death, but whether or not all reasonable men of unprejudiced minds would draw that conclusion from the facts of this case; for, if they would not, the question was properly submitted to the jury. In Railway Co. v. Kellogg, 94 U. S. 469, 474, 476, Mr. Justice Strong, who delivered the opinion of the court, said:

"The true rule is that what is the proximate cause of an injury is ordinarily a question for the jury. It is not a question of science or of legal knowledge. * * * In the nature of things, there is in every transaction a succession of events more or less dependent upon those preceding, and it is the province of a jury to look at this succession of events or facts, and ascertain whether they are naturally and probably connected with each other by a continuous sequence, or are dissevered by new and independent agencies; and this must be determined in view of the circumstances existing at the time."

To the same effect are Insurance Co. v. Melick and Railway Co. v. Callaghan, supra. Now, it is common knowledge that the burning of cars, the ignition and explosion of inflammable liquids carried upon them, and the death of men who ride in or on them are sometimes caused by the collision of engines or of the cars which compose the trains which they draw. In the case at bar the railroad was found by the jury to have been rough and uneven. There was evidence that this roughness tended to break a coupling or throw a pin in a heavy train as it passed over it. Such a train parted as it was running over this rough track. The separated sections collided, and tore open a tank of inflammable fluid which the train carried, and the liquid flowed out. There was a rule of the company which required the rear brakeman to be on the top of his train as it came down the hill to the place of this collision, and another rule which made it the duty of the conductor to enforce the former rule. The rear brakeman testified once that he was in his place on the top of the train, and he afterwards testified that he was not there, and that these rules were violated by the conductor's direction. There was testimony that the conductor was warned of the danger of approaching the flowing liquid with his lantern after the collision, and that the witness who gave this testimony had stated that he gave him no such warning. It was night. Engines carry fire to draw their loads, and trainmen carry lights in their lanterns to see their trains. The conductor walked along the side of the train with his lighted lantern in his hand, as is customary in the night, for the purpose of discharging his duty of watching and attending to the property in his charge. The inflammable liquid which had spread over the ground took fire, exploded, and killed him. There was testimony that fire could not have been communicated to it from the dining car. There was testimony that it could not have been communicated from the lantern.

In this state of the case, can any one say that all reasonable men would draw the conclusion that the roughness of the railroad was not the primary moving cause which produced this fatal result; that the final explosion and death would have occurred if the railroad had been sound, solid and smooth; or that the fire, explosion, and death were produced by some new and independent cause, which was not itself brought about by the roughness of the road, but which turned aside the natural sequence of events, and produced the terrible disaster? A studious and careful examination of this question in the light of the evidence in this record has forced us to the conclusion, whatever might have been our opinion upon the original issue of cause and effect, that it cannot be truthfully answered in the affirmative. The proximity of the uneven road, the rotten ties, and loose rails, and the negligence which permitted their existence, to the explosion and the death, is too close, their probable connection in the relation of cause and effect is too great, and there is too much doubt whether there was any act or negligence of the conductor which affected the natural sequence of events between them, and constituted a new and independent cause of the fatal result, to warrant any other conclusion. The question whether or not the negligence of the company was the proximate cause of the death of Price was rightfully submitted to the jury.

It is said that this is a transitory action, that its cause arose in the state of Illinois, that the rule in that state is that the complainant must allege and prove that the party injured was without fault on his part, and that the court below was in error because it did not charge the jury in this case to return a verdict for the company on the ground that the defendant in error did not plead or prove that the deceased was not guilty of negligence which contributed to his death. But the rule of the national courts is settled and uniform that contributory negligence is an affirmative defense, which must be established by a preponderance of evidence. It may appear from the testimony introduced by the plaintiff, or from that presented by the defendant, but, in the absence of all evidence on the subject, it is no fault or defect of the plaintiff's case that he fails to plead or prove that the defense of contributory negligence does not exist. In the jurisprudence of the national courts he is not called upon to establish the negative. Railroad Co. v. Gladmon, 15 Wall. 401, 406; Railroad Co. v. Horst, 93 U. S. 291, 299; Eddy v. Wallace, 4 U. S. App. 264, 273, 1 C. C. A. 435, 440, and 49 Fed. 801, 804.

Another claim is that, if the ties were rotten, if the spikes were loose or lost, and if the railroad was rough and uneven, and therefore dangerous, Price must have known it, and must have assumed the risk and danger of its condition, and that the court erred because it did not so instruct the jury, and because it left the question of his assumption of the risk for their determination. It was the duty of the railroad company to exercise ordinary care to furnish a reasonably safe railroad, and to use ordinary care to inspect and to keep it in a reasonably safe condition for the operation of

trains upon it. When the conductor, Price, entered upon or continued in the employment of the company he assumed all the risks and dangers of his occupation which were known to him, and all which a reasonably prudent man in his situation would have known. But the degrees of care on account of a defective railroad which the law required of the railway company and of the conductor were different. It was the duty of the former to inspect and care for it. It was the duty of the latter to operate his train over it carefully. In the conduct of his train, and in the absence of knowledge, or of reasonable means of knowledge or notice, to the contrary, he had the right to assume that the company had discharged, and would continue to discharge, its duty in the care of the track. Moreover, the opportunities of the two parties to know the decayed condition of the ties and the looseness of the rails were not the same. The company, through its section men, passed slowly over these ties and rails daily for the express purpose of examining and repairing this railroad. The conductor rode rapidly over the road, with his mind and care directed to the operation of his train. His lips are closed. What he knew and what he ought to have known of the defects of this railroad must be inferred from the facts and circumstances which are established by the testimony of others. Again, there was evidence tending to show that repairs were being made upon the road just east of Sycamore shortly before the accident, and, even if the conductor knew that the road was rough and dangerous, he may have assumed that it was being repaired, and that it would be in a safe condition before he passed over it again. There were other conductors operating trains over this defective portion of the railroad, and they continued in their employment. The rule is that the danger from the defects of the railroad or machinery furnished the employé must have been so obvious and threatening that a reasonably prudent man in his situation would have avoided them, in order to charge the injured servant with contributory negligence because he continued in the discharge of his duty, and thereby assumed the risks. Railway Co. v. Jarvi, 10 U. S. App. 439, 450, 3 C. C. A. 433, 437, and 53 Fed. 65, 69; Kane v. Railway Co., 128 U. S. 91, 94, 9 Sup. Ct. 16; Railroad Co. v. McDade, 135 U. S. 554, 570, 573, 10 Sup. Ct. 1044; Cook v. Railway Co., 34 Minn. 45, 24 N. W. 311; Myers v. Iron Co., 150 Mass. 125, 22 N. E. 631. In the light of the legal principles to which we have referred, the evidence in this case left the extent of the knowledge of the decayed ties, the loose rails, and the defective road, and of the risks and dangers therefrom, with which Price was chargeable under the law, in a state too uncertain and indefinite to warrant the trial court in withdrawing the question of his assumption of these risks from the jury.

There was a rule of the company which required the brakemen to be on the top of their train as it came down the hill into Sycamore, and which directed the conductors to see that their brakemen complied with this rule. There were on this train an engineer, a head brakeman, a rear brakeman, and the conductor, Price. The rear brakeman testified that Price told him not to go out on the top of the train as it came down into Sycamore, and that he and

Price remained on the rear platform of the caboose until the collision occurred. On cross-examination he did not deny that he had testified before the coroner's jury that he was on the top of the train about two miles east of Sycamore, and that he was out there all the time until he arrived at Sycamore; nor that he had also testified that he was on the platform of the caboose during this time. There was uncontradicted testimony that, if he had been in his proper place on the top of the train, and if he had discovered that the train had parted, he could have set the brakes on the rear section, and could have prevented the collision. None of the trainmen discovered the parting of the train until the collision occurred. The court instructed the jury that, if Price told the rear brakeman not to go on the top of the train, if he did not go, and if he would have been able to stop the rear section of the train, and prevent the collision, if he had been there, then they would be justified in finding negligence on the part of Price. He charged them that, if the accident was caused or aided by the failure of the rear brakeman to be on the top of the train, and if his failure to be there was due to the instructions of Price, those facts would be a defense to this action, and their verdict must be for the railway company. He added:

"If, however, the evidence fails to satisfy you that Mr. Price told Mr. Stewart [who was the rear brakeman] not to go on top of the train, even if Stewart did not go on the top of the train, if the fact was not due to the negligence of Price, but of Stewart acting without the direction or contrary to the direction of Price, that would be negligence of Mr. Stewart, and not chargeable to Mr. Price, as contributory to the accident."

This portion of the charge is assigned as error, and it is insisted that the evidence here conclusively shows that Price was guilty of contributory negligence, and that the court should have instructed the jury to that effect. There are two reasons why we are unable to sustain this assignment. One is that the testimony of the rear brakeman as to his position was so contradictory, and the motive for him to excuse his own delinquency, by laying the fault on one whose lips were closed forever, so strong, that we are by no means convinced that all reasonable men would conclude from this evidence that Price told him not to obey the rules of the company. He testified at one time that he was on the top of the train all the way from a point two miles east of Sycamore until he reached the city, and at another time that he was on the rear platform of the caboose during all this time. Both of these statements were not true, and, if he testified falsely on one material issue, the jury and the court were permitted to disbelieve his testimony upon another. The credibility of such a witness, and the effect that should be given to his testimony, were questions peculiarly within the province of the jury. Another reason why the assignment cannot be sustained is that, if it were conceded that it was Price's negligence which prevented the rear brakeman from occupying his place on the top of the train, it is so doubtful, under the evidence, whether or not he would have discovered the parting of the train before the collision, if he had been on the top of it, so that he would have stopped the rear section; in other words, it is so doubtful whether or not the neg-

ligence of Price contributed to the accident and death that the court could not properly have taken that question from the jury. The evidence does not disclose where the head brakeman was as the train came down the hill into Sycamore; but his place was on the top of the train, and on the forward end of the train, and the presumption is that he was in that place, and was there discharging his duty. The train contained 22 cars, and it parted 7 cars from the engine. Yet neither the head brakeman nor the engineer discovered the break until the collision occurred. In this state of the case it is at least as probable that the rear brakeman would not as that he would have discovered the break in season to have prevented the collision if he had been on the top of the train. In other words, if Price was guilty of negligence here, there is as much ground for reasonable men to conclude that his negligence did not as that it did contribute to the injury, and the question of his contributory negligence was, therefore, for the jury, and not for the court.

After the collision occurred, Price took his lantern, and went forward on the south side of the train, to learn what had happened, and to care for the property in his charge. The engineer of the waterworks at Sycamore testified that, as the conductor was walking along the side of the train towards the escaping liquid, whose flowing was audible, he said to him, "You had better not take your lantern if you are going up there; you might set it on fire;" but that the conductor went on with his lighted lantern, and was killed. This witness had testified to the same facts before the coroner's jury. Two witnesses came, who said that between the time when this engineer gave his testimony before the coroner's jury and the time of the trial he had told them that he was mistaken in his testimony before the coroner's jury, and that he did not warn Price not to approach the flowing liquid with his lighted lantern. There were also two witnesses who testified to the effect that a fire in a lighted lantern such as the conductor carried would not ignite gasoline or a like inflammable fluid which had leaked out of a tank upon the ground if the lantern was supplied with a globe, and was in good order. The court submitted the question to the jury whether or not Price received the warning, and whether or not, under all the circumstances of the case, he was guilty of contributory negligence in going forward with his lighted lantern to the place where the liquid had flowed out over the ground. It is insisted that this was error, and that the court should have instructed the jury that his act in approaching the flowing liquid with his lantern was negligence which contributed to his death, and which entitled the railway company to a verdict. But when the collision occurred it was the duty of Price to go forward along his train, to find out what damage had been done, to prevent more injury, and to protect and preserve the contents of the tank, and the other property on his train. It was night. He could not see clearly without his lighted lantern. Whether or not he was warned of the danger of approaching the escaping fluid was a disputed question under the evidence. There was testimony that the gasoline could not have been ignited from the dining car, and that it could not

have been fired from the lantern, and yet it burned. The disputed questions of fact were for the jury. In this medley of contradictions and uncertainties, how could the court say that all reasonable men must conclude that this conductor, who walked forward by the side of the train with his lighted lantern in the usual way, in the discharge of his duty, exposed himself without ordinary care to dangers which a reasonably prudent man would have perceived, and that he thereby contributed to his own death? It could not rightfully say so, and it did not say so. There was too much doubt what facts reasonable men would find existed under this conflicting testimony, and what deductions they would draw from the facts which they did find, to allow a court to pursue any other course.

The discussion and decision of the questions which were presented in this case are now concluded. Their consideration has led to repeated readings of the evidence and of the charge of the court, and our conclusion is that the trial was full and fair, that there was no error in the admission or rejection of evidence, and that the charge of the court was not only a correct declaration of the principles of law involved, but a clear, terse, and logical presentation and application of them to the salient issues of the case. If, however, we had been led to doubt the correctness of any of those portions of the charge of the court which have been challenged, or of its refusal to direct a verdict for the defendant, or to give any of the refused requests for instructions presented to it on account of any of the reasons alleged by the counsel for the plaintiff in error, the judgment could not have been reversed upon the record before us. The correctness of all these rulings depends upon the evidence before the trial court. The record discloses the fact that only a portion of this evidence has been returned to us. That which is found in the bill of exceptions and in the record is in narrative form, and the certificate is limited to the statement that "the foregoing is substantially all the evidence." A certificate that the substance of the evidence is returned is not sufficient to warrant the appellate court in reversing a judgment on the ground that the trial court refused to direct a verdict. Railroad Co. v. Washington, 4 U. S. App. 121, 131, 1 C. C. A. 286, 292, and 49 Fed. 347, 353; Railway Co. v. Harris, 27 U. S. App. 450, 457, 12 C. C. A. 598, 603, and 63 Fed. 800, 805; Taylor-Craig Corp. v. Hage, 32 U. S. App. 548, 16 C. C. A. 339, 340, and 69 Fed. 581, 582; Association v. Shryock, 36 U. S. App. 658, 664, 20 C. C. A. 3, 6, and 73 Fed. 774, 777. "The burden of proof to show that there was no evidence to warrant a charge is on him who asserts an error of that character; and, if he would maintain his claim, he must either present all the evidence to the appellate court, so that the reviewing court can see for itself what the evidence was, or he must present a bill of exceptions which has the certificate of the trial court that no evidence of the character in question was presented to it." U. S. v. Patrick, 36 U. S. App. 645, 656, 20 C. C. A. 11, 17, and 73 Fed. 800, 806.

The judgment below is affirmed.

GEER v. BOARD OF COM'RS OF OURAY COUNTY.

BOARD OF COM'RS OF OURAY COUNTY v. GEER.

(Circuit Court of Appeals, Eighth Circuit. October 9, 1899.)

Nos. 1,193, 1,194.

1. MUNICIPAL BONDS—CONSTITUTIONALITY OF STATUTE—REFUNDING BONDS.
   Const. Colo. art. 11, § 6, as amended in 1888, which prohibits the creation of indebtedness by counties without a favorable vote of the electors, does not apply to the refunding of debts; and the act of April 17, 1889 (Sess. Laws Colo. 1889, pp. 31, 32, § 2), authorizing counties to refund their judgment and bonded debts, was not unconstitutional because it failed to make a favorable vote of electors a condition precedent to the issue of refunding bonds.
2. SAME—SUBJECT OF STATUTE.
   Such act, which is entitled "An act to enable the several counties of the state to refund their bonded debt which was matured or may hereafter mature and to issue bonds in satisfaction of judgments and matured bonds," is not in violation of the provision of the constitution of Colorado (article 5, § 21), that no bill shall contain more than one subject, which shall be clearly expressed in its title; the subject being the refunding of county debts, which includes both judgments and bonds.
3. SAME—REFERENCE TO PRIOR STATUTE.
   Neither is the provision of section 4 of the act, which requires the taxes for the payment of bonds issued to be levied as provided in a former act, the title of which is given, void, under Const. Colo. art. 5, § 24, providing that "no law shall be revived or amended, or the provisions thereof extended or conferred, by reference to its title only, but so much thereof as is revived, amended, extended or conferred shall be re-enacted and published at length."
4. SAME—ACT FOR RAISING REVENUE.
   Such act is not one for raising revenue, within the meaning of Const. Colo. art. 5, § 31, requiring that such bills shall originate in the house of representatives; and the fact that it originated in the senate does not, therefore, affect its validity.
5. SAME—DEFENSES—JUDGMENT AS ESTOPPEL.
   In an action against a county on its bonds issued in satisfaction of a judgment against it, such judgment conclusively estops the county from making the defense that the original indebtedness upon which the judgment was rendered was in excess of the amount which it could legally incur under the limitations imposed by the constitution of the state.
6. SAME—EFFECT OF RECITALS.
   As against a bona fide purchaser before maturity of negotiable bonds of a county, containing recitals that they were issued, by virtue of a statute, in satisfaction of judgments which had been rendered against the county in courts of record, the county cannot deny the existence of such judgments.
7. PLEADING—UNNECESSARY AVERMENTS IN COMPLAINT.
   Unnecessary averments in a complaint require proof that would not have been essential if the pleading had been confined to the indispensable allegations only, when such averments constitute an essential part of the cause of action as stated. If the cause is well stated without them, they may be disregarded as surplusage, and do not affect the issues.

Caldwell, Circuit Judge, dissenting.

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

The writs of error in this case challenge a judgment in favor of the board of county commissioners of the county of Ouray which was rendered in an action brought by Robert C. Geer to enforce the collection of overdue coupons

cut from certain refunding bonds issued by that county. The plaintiff, Geer, in his complaint alleged that prior to May 1, 1890, the defendant, the county of Ouray, was indebted to various persons, who had brought actions and had recovered judgments against it in courts of competent jurisdiction for the aggregate amount of $200,000; that for the purpose of paying these judgments the county issued and delivered to its judgment creditors its bonds and coupons in compliance with the terms of an act of the legislature of the state of Colorado approved April 17, 1889 (1 Mills' Ann. St. 1891, §§ 945–948); that the creditors accepted these bonds in payment of their judgments; that the bonds contained this recital: "This bond is issued by the board of county commissioners of said Ouray county, under and by virtue of an act of the general assembly of the state of Colorado entitled 'An act to enable the several counties of the state to refund their bonded debt which has matured, or may hereafter mature, and to issue bonds in satisfaction of judgments and matured bonds,' approved April 17th, A. D. 1889, in satisfaction at par of judgments and accrued interest thereon which have been rendered in the courts of record in this state against Ouray county aforesaid;" and that he had become the owner for value of that part of this issue of bonds to which the coupons in suit were attached. The county answered this complaint. In its answer it pleaded eight separate defenses. The court sustained a demurrer to the entire answer. Thereupon the defendant amended the sixth and seventh defenses, the plaintiff demurred to them as amended, the court overruled that demurrer, the plaintiff filed a replication, the defendant demurred to the replication, and the court overruled the demurrer to the replication and rendered judgment for the county. Each party has sued out a writ of error. The plaintiff, Geer, assigns the overruling of his demurrer to the amended sixth and seventh defenses, and the sustaining of the demurrer to his replication, as error; and the county insists that the court erred when it sustained the demurrer to its second, third, fourth, and fifth defenses. These defenses are stated and treated in the opinion.

A. E. Pattison (William Story, on the briefs), for Robert C. Geer.

C. S. Sigfrid and Thomas C. Brown (Lyman I. Henry, on the briefs), for the county of Ouray.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

SANBORN, Circuit Judge, after stating the case as above, delivered the opinion of the court.

The first error alleged by the county is that the court below did not sustain the second defense pleaded in its answer. That defense was that the act of April 17, 1889, which provided that "the board of county commissioners of any county in this state, against which a judgment has been or may be rendered in any of the courts of record in this state, may issue its bonds in satisfaction of such judgment and accrued interest thereon, dollar for dollar; such bonds to draw interest at not to exceed eight per centum per annum" (Sess. Laws, Colo. 1889, pp. 31, 32, § 2), was void, and did not authorize the issue of the bonds in question, because section 6 of article 11 of the constitution of Colorado, as amended in 1888, prohibited the creation of the debt evidenced by these refunding bonds without a favorable vote of the electors of the county. The question has already been determined in this court. The answer to the proposition is that the prohibition of the constitution of Colorado is against the creation of a debt by loan, and the mere exchange of the judgments against a county for its refunding bonds creates no debt by loan, or in any other way. The debts existed before as well as after the exchange. The judgments and the bonds are nothing but the legal

evidences of the existence of these debts, and the exchange of the one for the other merely changes the form of the obligations. In Board v. Platt, 49 U. S. App. 216, 220, 25 C. C. A. 87, 89, and 79 Fed. 567, 569, the question of the validity of refunding bonds issued under this very act of 1889 was presented to this court, considered, and decided. The statement which precedes that opinion contains a complete copy of section 6, art. 11, of the constitution of Colorado as it was amended in 1888. A careful consideration of that section after exhaustive argument forced us to the conclusion that the constitution of Colorado imposed no limitation or prohibition upon the power of the legislature to authorize municipal or quasi municipal corporations to refund their debts. It is sufficient to say now, without again reciting at length the section of the constitution in question, or enlarging upon what seems to us its evident meaning, that the briefs and arguments in this case have only served to strengthen and deepen the conviction of the correctness of the ruling in the Platt Case, which in the meantime has been repeatedly affirmed and applied to other cases of the same character. E. H. Rollins & Sons v. Board of Com'rs of Gunnison Co., 49 U. S. App. 399, 411, 26 C. C. A. 91, 98, and 80 Fed. 692, 698; City of Huron v. Second Ward Sav. Bank, 57 U. S. App. 593, 604, 30 C. C. A. 38, 44, and 86 Fed. 272, 278. The result is that section 6, art. 11, of the constitution of Colorado, as amended in 1888, does not limit the power of the legislature of that state to empower municipal and quasimunicipal corporations to refund their debts without a vote of the people; and the act of the general assembly of Colorado of April 17, 1889, which empowered counties to refund their judgment and bonded debts was not unconstitutional because it failed to make a favorable vote of the electors a condition precedent to the issue of the refunding bonds.

The third defense of the county was that the act of 1889 was void because it violated section 21, art. 5, of the constitution of Colorado, which reads:

"No bill except general appropriation bills shall be passed containing more than one subject, which shall be clearly expressed in its title; but if any subject shall be embraced in any act which shall not be expressed in the title, such act shall be void only as to so much thereof as shall not be so expressed."

The title of the bill in question was:

"An act to enable the several counties of the state to refund their bonded debt which has matured, or may hereafter mature, and to issue bonds in satisfaction of judgments and matured bonds."

The alleged vice of the act is that it contained more than one subject, in that it embraced the subject of refunding county debts evidenced by bonds, and the subject of refunding county debts evidenced by judgments. If this is a vice, it is not perceived why a bill to enable the counties of the state to refund their debts evidenced by bonds alone would not be equally obnoxious to the prohibition of the constitution; for the debt evidenced by each bond is a different debt and a different subject from that evidenced by every other bond, in the same sense that a county debt evidenced by a judgment is a different subject from one evidenced by a bond.

The deliberate enactments of legislatures cannot be whistled down the wind on such frivolous pin points as this. The object of this constitutional provision was twofold. It was to prevent surreptitious legislation, the insertion of enactments in bills which were not indicated by their titles, and to forbid the treatment of incongruous subjects in the same act. It never was intended to prevent the legislature from treating all the various branches of the same general subject in one law, or from inserting in a single act all the legislation germane to its principal subject. Travelers' Ins. Co. v. Oswego Tp., 19 U. S. App. 321, 332, 7 C. C. A. 669, 676, and 59 Fed. 58, 64; City of Omaha v. Union Pac. Ry. Co., 36 U. S. App. 615, 623, 20 C. C. A. 219, 223, and 73 Fed. 1013, 1017; City of South St. Paul v. Lamprecht Bros. Co., 31 C. C. A. 585, 587, 88 Fed. 449, 451; Clare v. People, 9 Colo. 122, 125, 10 Pac. 799; Canal Co. v. Bright, 8 Colo. 144, 149, 6 Pac. 142; People v. Goddard, 8 Colo. 432, 436, 7 Pac. 301; Tabor v. Bank, 27 U. S. App. 111, 10 C. C. A. 429, and 62 Fed. 383; Johnson v. Harrison, 47 Minn. 575, 577, 50 N. W. 923; Montclair v. Ramsdell, 107 U. S. 147, 2 Sup. Ct. 391; Cooley, Const. Lim. (6th Ed.) pp. 169–172, and cases there cited. The general subject of the act of 1889 was the refunding of county debts. Judgments, bonds, and warrants are different forms of such debts; and the refunding of any or all county debts is but one general subject, and may well be embraced in a single act. The fact that but two branches of this general subject—the refunding of judgments and bonds—are treated in this act does not render it obnoxious to the inhibition of the constitution. It is not a valid objection to the act of 1889, under section 21, art. 5, of the constitution, that it treats of refunding both judgments and bonds, because the refunding of judgments against counties and the refunding of their bonds are but branches of a single subject,—the general subject of refunding county debts.

The fourth defense was that section 4 of the act of 1889 was void because it was in conflict with section 24 of article 5 of the constitution of Colorado, which reads:

"No law shall be revived, or amended, or the provisions thereof extended or conferred by reference to its title only, but so much thereof as is revived, amended, extended or conferred, shall be re-enacted and published at length."

Section 4 of the act of 1889 provided that the necessary taxes to pay the bonds and coupons issued under that act should be levied at the proper time, and then contained this provision, which, it is claimed, is obnoxious to the section of the constitution we have quoted:

"And such tax shall be levied as provided for the levy and collection of taxes in the act entitled 'An act to enable the several counties of the state to fund their floating indebtedness,' approved February 21, 1881."

There is more than one reason why this contention cannot be successfully maintained. If it were conceded that the clause quoted from section 4 violates the section of the constitution here in question, the only effect of that concession would be that the provisions of the act of 1881 with reference to the levy of the taxes to pay the bonds and coupons issued under the act of 1889 would

not be extended so as to authorize that levy. Now, the only essential provision of the act of 1881 on this subject is that the "taxes shall be levied and collected as other taxes." 1 Mills' Ann. St. Colo. p. 797, § 941. But the provisions of section 4 are ample to warrant the levy and collection of the taxes to pay these bonds and coupons in the same way that other taxes are levied without the extension of the act of 1881. They require the necessary levies to be made, and fix the times when they shall be made, and the general statutes of the state impose upon the board of county commissioners the duty "to apportion and order the levying of taxes as provided by law." Id. p. 750, § 791. So that the act of 1889 is valid and operative if the claim of the county here is conceded. Moreover, the position of counsel for the county leads to a result so unreasonable and absurd that courts should hesitate long before adopting it. If the clause of the act of 1889 which refers to the act of 1881 for the method of levying and collecting the taxes which it authorizes is void because that part of the act of 1881 referred to was not re-enacted and published at length, then the portion of the act of 1881 relating to this subject is unconstitutional and void because that act provides that the taxes named in it shall be levied and collected as other taxes, and it does not re-enact and publish at length the general laws of the state which prescribe the method of the levy and collection of other taxes. Constitutions and statutes should be reasonably interpreted, and a reasonable construction of section 24 of article 5 will hardly lead to a result so absurd. We are, however, spared the discussion and decision of this question, because the federal courts uniformly follow the construction given by the highest judicial tribunal of the state to the constitution and statutes of that state, where no question of general or commercial law, and no question of right under the constitution and laws of the nation, is involved (Madden v. Lancaster Co., 27 U. S. App. 528, 535, 12 C. C. A. 566, 570, and 65 Fed. 188, 192); and, under the construction repeatedly given by the supreme court of Colorado to the section of the constitution under consideration, the obnoxious clause of section 4 of the act of 1889 was not in conflict with it. The act of 1889 was a general law of the state of Colorado on the subject of refunding county indebtedness, and the supreme court of Colorado holds that it was not the purpose or effect of this constitutional provision to require a re-enactment or republication of the provisions of the general laws of the state when reference is made to them in later statutes for a definition of rights, or for a specification of the lawful method of procedure under the subsequent laws. Railroad Co. v. Nestor, 10 Colo. 403, 408, 414, 15 Pac. 714; Edwards v. Railroad Co., 13 Colo. 59, 66–69, 21 Pac. 1011; People v. Banks, 67 N. Y. 568; People v. Mahaney, 13 Mich. 481, 496. The demurrer to the fourth defense was properly sustained.

The fifth defense was that the act of 1889 was void because it was a bill for raising revenue, and it originated in the senate, in violation of section 31, art. 5, of the constitution of Colorado, which reads, "All bills for raising revenue shall originate in the

house of representatives; but the senate may propose amendments, as in case of other bills." But a bill for raising revenue, within the meaning of this provision of the constitution, is one which provides for the levy and collection of taxes for the purpose of paying the officers and of defraying the expenses of the government. This act was not of that character. Its main purpose was to authorize certain quasi municipal corporations to refund their debts. The provisions for the levy and collection of taxes which it contained were mere incidents to the general refunding legislation which it carried. The probability is that they did not even increase the taxes which the counties were required to levy, for they were bound to lay taxes to pay their debts and the interest upon them before as well as after they were refunded. These provisions raise no revenue for the government, but, on the other hand, the act expressly provided that the moneys derived from the levies made under it should not be appropriated to pay the officers of the state or of the county, or to defray the expenses of governing the people, but should be set apart and applied exclusively to pay the bonds and coupons issued under it for the purpose of refunding the debts of the counties. There was no merit in this defense.

The sixth defense was that the debts upon which the judgments which were paid by the refunding bonds were rendered were invalid because the county had reached the constitutional limit of its indebtedness before those debts were incurred, and this fact was not presented to, nor its legal effect adjudicated by, the court in the actions in which the judgments were entered. But the plaintiff, Geer, holds bonds and coupons issued in payment of these judgments. He stands in privity with the plaintiffs in those judgments, to the extent that he may invoke and rely upon every presumption and estoppel of which they might have availed themselves; and in an action between the same parties, or those in privity with them, upon the same claim or demand, a judgment upon the merits is conclusive, not only of every matter offered, but of every admissible matter which might have been offered, to sustain or defeat the claim or demand. "A judgment by default is just as conclusive an adjudication between the parties of whatever is essential to support the judgment as one rendered after answer and contest" (Last Chance Min. Co. v. Tyler Min. Co., 157 U. S. 683, 691, 15 Sup. Ct. 733); and in rendering these judgments against this county the courts necessarily determined that the debts upon which they are based were not in excess of the constitutional limitation; that the board of county commissioners had lawful authority to, and that it did in fact, incur them; and that they constituted lawful obligations of the county. All these questions were considered, the authorities which treat of them were examined and reviewed, and this whole matter was disposed of, in the opinion of this court in Board v. Platt, 49 U. S. App. 216, 224, 25 C. C. A. 87, 92, and 79 Fed. 567, 572, where the reasoning which led to the decision, and a citation of the authorities upon which it rests, may be found. The conclusion at which we arrived in that case, and to which we still adhere, was expressed in these words:

"In an action to enforce the collection of a judgment or the collection of bonds or coupons issued in payment of a judgment against a municipal or quasi municipal corporation, the judgment conclusively estops the corporation from making the defense that the original indebtedness evidenced by it was in excess of the amount which the corporation had the power to create, under the limitations of the constitution of the state in which it was incorporated."

The seventh defense was that there never were any judgments in payment or satisfaction of which the bonds were issued. This is a good defense against the bonds in the hands of the original creditor who accepted them in exchange for the indebtedness of the county to him, upon which he had obtained no judgments. The plaintiff replied to this defense, however, that he had acquired the bonds and coupons for value, before maturity, without notice of any defect in them, and that he paid the consideration for his purchase in reliance upon the recital which was contained in each bond, that it was issued, by virtue of the act of 1889, "in satisfaction at par of judgments and accrued interest thereon which have been rendered in the courts of record in this state against Ouray county aforesaid." The act of 1889 empowered the board of county commissioners to issue these bonds in satisfaction of judgments against the county. The board could not do this until it had first ascertained and decided what judgments there were against the county. Thus the law, by its very terms, necessarily vested the power in, and imposed the duty upon, this board to determine whether or not the judgments existed, in satisfaction of which it issued the bonds. The entry of the judgments was a condition precedent to the exercise of the power to issue the bonds,—a condition whose existence it was the duty of the board to ascertain before it issued them. It discharged this duty. It searched and found that the judgments existed. It issued the bonds in payment of the judgments, and it certified on the face of each bond that it was issued in satisfaction of judgments against the county "by virtue of" the act of 1889. A bona fide purchaser has bought and paid for these obligations in reliance upon this certificate. It is now too late for this county to prove its falsity, to defeat the bonds. As against an innocent purchaser, a quasi municipal corporation cannot deny the certificate of its authorized officers that its bonds were issued by virtue of an act to refund its indebtedness, and prove that it had no indebtedness to refund, and that the bonds were issued to build a sugar factory (West Plains Tp. v. Sage, 32 U. S. App. 725, 736, 16 C. C. A. 553, 558, and 69 Fed. 943, 946), or that the alleged indebtedness which they were issued to pay was void or fictitious, or did not exist (City of Huron v. Second Ward Sav. Bank, 57 U. S. App. 593, 604, 30 C. C. A. 38, 43, and 86 Fed. 272, 277). Nor can a county which was empowered to issue bonds to satisfy judgments against it deny the certificate of the officers empowered to emit them, that they were issued in satisfaction of those judgments, and prove that there never were any judgments to satisfy, in order to defeat the bonds in the hands of an innocent purchaser. The recitals of officers who are invested with authority to determine when conditions precedent to the issue of negotiable bonds are

complied with, and with power to issue them upon the fulfillment of such conditions, that they have been sent forth "in pursuance of," or "in conformity with," or "by virtue of" the statute which authorizes their issue under the prescribed conditions, preclude inquiry, as against innocent purchasers for value, as to whether or not the precedent conditions had been performed when the bonds were issued. City of Huron v. Second Ward Sav. Bank, 57 U. S. App. 593, 606, 30 C. C. A. 38, 45, and 86 Fed. 272, 279; National Life Ins. Co. of Montpelier v. Board of Education of City of Huron, 27 U. S. App. 244, 266, 268, 10 C. C. A. 637, 651, 652, and 62 Fed. 778, 792, 793, and cases there cited; West Plains Tp. v. Sage, 32 U. S. App. 725, 736, 16 C. C. A. 553, 558, and 69 Fed. 943, 948; E. H. Rollins & Sons v. Board of Com'rs, 49 U. S. App. 399, 412, 26 C. C. A. 91, 98, and 80 Fed. 692, 699; Brown's Ex'x v. Ingalls Tp., 57 U. S. App. 611, 615, 616, 30 C. C. A. 27, 29, and 86 Fed. 261, 263; City of South St. Paul v. Lamprecht Bros. Co., 60 U. S. App. 78, 85, 31 C. C. A. 585, 589, and 88 Fed. 449, 453; Rathbone v. Board, 49 U. S. App. 577, 589, 27 C. C. A. 477, 483, and 83 Fed. 125, 131; Wesson v. Saline Co., 34 U. S. App. 680, 684, 20 C. C. A. 227, 229, and 73 Fed. 917, 919; City of Evansville v. Dennett, 161 U. S. 434, 439, 443, 16 Sup. Ct. 613.

An attempt is made to escape from the effect of the estoppels of the judgments and of the recitals in the bonds on the ground that the plaintiff pleaded the original debts and the judgments upon them, and thereby waived the estoppels. The complaint comprises 14 paragraphs. The first three contain jurisdictional allegations. The fourth and fifth allege the indebtedness of the county to divers persons, and the recovery by them of judgments against it upon these debts. The remainder of the complaint sets forth the issue and delivery of the bonds in satisfaction of the judgments, the recitals which the bonds contained, their purchase for value by the plaintiff, and the default in the payment of the coupons. If the fourth and fifth paragraphs were stricken from the complaint, it would still state a perfect cause of action upon the coupons, and would contain a statement of all the facts from which the estoppels arise. Moreover, the replication restates the facts constituting the estoppels, and expressly avers that the county is concluded thereby. In this state of the case, the claim that the estoppels were waived because the original debts and the judgments were pleaded cannot prevail. It is, indeed, sometimes the case that unnecessary averments require proof that would not have been essential if the pleading had been confined to allegations indispensable to a statement of the cause of action. But this is true only when immaterial averments constitute an essential part of the cause of action as it is pleaded. If the cause is well stated without them,—if their removal from the complaint would still leave averments sufficient to constitute a cause of action,—they are mere surplusage, and may be disregarded. 1 Estee, Pl. (4th Ed.) § 191; Bliss, Code Pl. § 215. That is the condition of this complaint, and the restatement in the replication of the judgments, the recitals in the bonds, and their purchase by the plaintiff in reliance

upon the judgments and recitals leave no doubt that the plaintiff did not intend to waive, and that he did not waive, the estoppels which these facts raised, and that the defendant could not have been misled by the pleadings into the mistaken belief that he had done so..

The result of the whole matter is that none of the errors alleged by the county exist; that the demurrers to the second, third, fourth, and fifth defenses were properly sustained; that the demurrer to the sixth defense was well taken, and the demurrer to the replication to the seventh defense should have been overruled. The judgment below is accordingly reversed, with costs to the plaintiff in error, Geer, and the case is remanded to the court below for further proceedings in accordance with the views expressed in this opinion.

CALDWELL, Circuit Judge. I dissent from the reasoning and conclusion of the court on the "seventh defense," and, in support of my dissent, refer to my dissenting opinion in West Plains Tp. v. Sage, 32 U. S. App. 725, 16 C. C. A. 553, 562, and 69 Fed. 943, 946, and the cases there cited.

SWIFT & CO. v. RUSSELL.

(Circuit Court of Appeals, Eighth Circuit. October 16, 1899.)

No. 1,234.

ATTACHMENT—CLAIMANT OF PROPERTY—PROCEEDING ON INTERPLEA.

Under Mansf. Dig. Ark. §§ 356, 358, in force in the Indian Territory, which permit any person claiming title to or any interest in or lien upon property attached in an action against another to file an interplea in such action at any time before the sale of the property, or the payment of the proceeds to the plaintiff, the proceeding authorized on such interplea is merely one to determine the ownership of property or its proceeds in the hands of the court, and to obtain a delivery of such property or proceeds to the true owner; and an interpleader cannot lawfully prove or recover from the plaintiff in that suit the value of the attached property.

In Error to the United States Court of Appeals in the Indian Territory.

Harrison O. Shepard, for plaintiff in error.

W. E. Rogers (W. L. Stephens, on the brief), for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

SANBORN, Circuit Judge. In an action in the United States court in the Indian Territory which the plaintiff in error, Swift & Co., a corporation, had brought against one Guy, and in which the plaintiff had caused a writ of attachment to be levied upon certain property, the defendant in error, G. S. Russell, filed an interplea, in which he claimed the attached property as its owner. The plaintiff denied his claim, and at the trial of the issue between the plaintiff and the interpleader the court permitted the latter to prove and to recover a judgment for the value of the attached property which had

been previously sold by the marshal. This judgment has been affirmed by the United States court of appeals for the Indian Territory, and the question which the case presents here is whether or not an interpleader in an attachment suit under the statutes of Arkansas in force in the Indian Territory may prove, and, if successful, may recover of the plaintiff in the attachment, the value of the attached property. The statutes under which this interplea is permitted and tried are sections 356 and 358 of Mansfield's Digest of the Laws of Arkansas, and they read in this way:

"Sec. 356. Any person may, before the sale of any attached property, or before the payment to the plaintiff of the proceeds thereof, or of any attached debt, present his complaint, verified by oath, to the court disputing the validity of the attachment, or stating a claim to the property, or an interest in or lien on it under any other attachment or otherwise, and setting forth the facts upon which such claim is founded, and his claim shall be investigated."

"Sec. 358. The court may hear the proof, or may order a reference to a commissioner, or may impanel a jury to inquire into the facts. If it is found that the claimant has a title to, a lien on or any interest in such property, the court shall make such order as may be necessary to protect his rights. The cost of this proceeding shall be paid by either party at the discretion of the court."

In the absence of the statutes, one whose property is attached under a writ against another has no right or remedy in the attachment suit. He may maintain an action against the marshal for the taking and conversion of his property, and he can recover in that action its value and any other damages he sustains from its seizure, but he cannot be heard in an action between others in which the writ of attachment is issued. Consequently the nature of the proceeding by interplea is fixed, and the extent of the remedy granted must be determined, by these sections of the statutes. When these are carefully read, the attention is sharply challenged by the facts that the interplea may be interposed before the sale of the attached property, or before its proceeds are paid over to the plaintiff, but not after such payment; that the claimant must set forth the facts on which his claim to the property or its proceeds is founded, but nothing more; that the court may find whether or not the claimant has a title to, a lien upon, or an interest in the property, but nothing else; and that it may make such order as may be necessary to protect his rights in the property or its proceeds, and may direct which party to the proceeding shall pay the costs, but it may grant no other relief. There is no provision in these sections for an assessment of damages for the appraisal of the property, or for the recovery of its value. The proceeding authorized by them is not an action for the value of the property or for damages for its taking. It is not an action for the recovery of the property. Indeed, it is not an action at all. It is more in the nature of a proceeding in rem. The extent of the adjudication which it authorizes is a determination of the rights and interests of the plaintiff and the interpleader in the attached property or its proceeds in the hands of the marshal, and the limit of the remedy it provides is the delivery of that property, or the payment of its proceeds, to the party whom the court finds to be entitled to them, and the assessment of the costs. "Expressio unius est exclusio

alterius," and a finding and recovery of the value of the property attached are not mentioned, and are therefore excluded from the adjudication and from the remedy which these sections of the statutes permit.

It is suggested that the right of the court to find the value of the attached property, and to render judgment against the plaintiff therefor, may be found in sections 5145 and 5180 of Mansfield's Digest; but these sections authorize such a finding and recovery in actions to recover personal property or its possession only, and this proceeding is not such an action. It is, as we have shown, a simple proceeding to determine the ownership of property or money in the custody of the court, and to obtain a delivery of that property or a payment of that money to the true owner. It is a proceeding for a disposition of property or money in the custody of the court, and not for the recovery of either from any person or party. Sections 5145 and 5180 neither apply to nor govern this proceeding. Our conclusion is that an interpleader in an attachment suit under sections 356 and 358 of Mansfield's Digest of the Statutes of Arkansas cannot lawfully prove or recover from the plaintiff in that suit the value of the attached property, but the extreme limit of the relief he may obtain in that proceeding is the property itself, or its proceeds, if it has been sold by the marshal, and the costs of the proceeding. Jefferson v. Dunavant, 53 Ark. 133, 134, 13 S. W. 701; Fly v. Grieb's Adm'r, 62 Ark. 209, 212, 35 S. W. 214.

There is another reason why testimony of the value of the attached property should not have been received in this case, and that is that there was no plea nor issue concerning it, and no demand for its recovery, and hence no notice to the plaintiff that it would be considered. The statement of the claim of the interpleader was a mere averment of ownership of the property in question, and the answer to it was a simple denial of that allegation. There was no suggestion of any claim to recover the value of the property until the testimony on that subject was offered in the midst of the trial, when the plaintiff had no opportunity to meet it. The evidence on this subject was incompetent and immaterial, and the recovery which the interpleader can secure in this proceeding, if he ultimately succeeds, must be limited to the proceeds of the sale of the attached property and the costs of the proceeding. The judgments of the United States court of appeals in the Indian Territory and of the United States court in the Indian Territory are reversed, and this case is remanded to the latter court, with directions to grant a new trial.

BROWN v. PARKER.

(Circuit Court of Appeals, Eighth Circuit. October 16, 1899.)

No. 1,220.

1. ASSIGNMENTS FOR BENEFIT OF CREDITORS—TIME OF TAKING EFFECT—FAILURE OF ASSIGNEE TO QUALIFY.
   Under McClain's Ann. Code Iowa, § 3307, providing that, in case an assignee for the benefit of creditors shall fail to file an inventory and valuation and give bond within 20 days after the making of the assignment, the district court, or any judge thereof, may appoint a person to execute the trust, and that such person, on giving bond, shall possess all the powers conferred upon such assignee, where the assignee accepts and records the assignment, but fails or refuses to qualify within the required time, and a substituted assignee is appointed, the assignment takes effect from the date of its execution, as it would have done had the original assignee qualified.

2. APPEAL—APPEALABLE JUDGMENT—LEGAL EFFECT.
   In an action by an assignee for the benefit of creditors for the conversion of property claimed to have passed under the assignment, the fact that the judgment rendered is merely against the plaintiff for costs in a blank amount, where it recites that it is entered on a verdict for defendant returned by direction of the court, does not deprive the plaintiff of the right to prosecute error for the reversal of such judgment; its practical and legal effect being to determine adversely his right to the property.

3. ASSIGNMENTS FOR BENEFIT OF CREDITORS—VALIDITY—ACKNOWLEDGMENT BEFORE ATTORNEY.
   The fact that a deed of general assignment was acknowledged before the attorney of the assignor does not render it invalid.

4. SAME—ACTION BY ASSIGNEE—EFFECT OF HIS REMOVAL FROM STATE.
   The right of an assignee, appointed by a court to succeed to the trust of the original assignee, to maintain an action as such, cannot be questioned on the ground that he has removed from the state of his appointment, so long as his appointment remains unrevoked by the court which made it.

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

T. S. Stevens (George J. Dobbs and George E. Stoker, on the brief), for plaintiff in error.

Webb McNall (A. B. Quinton and E. S. Quinton, on the brief), for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

SANBORN, Circuit Judge. This is a controversy between an assignee for the benefit of creditors and a mortgagee of personal property of the assignors. The mortgaged property was situated in the state of Kansas, and the mortgage to the defendant in error, George R. Parker, was made, and the property in Kansas was delivered to him, on July 19, 1893, by the junior member of the firm of John H. Engle & Son, the assignors. The firm had property in the state of Iowa and in the state of Kansas, and on July 18, 1893, the senior member of the partnership made a general assignment of the firm property to Edward Sudendorf for the benefit of their creditors. Sudendorf accepted the trust, filed the assignment in Fremont county, in the state of Iowa, on July 18, 1893,

and on July 22, 1893, filed it in Smith county, in Kansas, and demanded the possession of the mortgaged property from the defendant in error. But Sudendorf gave no bond as assignee, and on August 2, 1893, he refused to qualify as such; and the district court of Fremont county appointed the plaintiff in error, George H. Brown, in his stead, and the latter qualified, and is still acting as assignee. There was evidence that, before and at the time Parker took his mortgage, he knew that the assignment had been made.

It is assigned as error that upon this state of facts the court below instructed the jury to return a verdict for the mortgagee upon the ground that no right or title to the assigned property passed to the assignee before Brown was appointed, on August 2, 1893, because the first assignee failed to give his bond. This assignment is well founded. The statute of Iowa on this subject reads:

"In case any assignee shall die before the closing of his trust, or in case any assignee shall fail or neglect for the period of twenty days after the making of any assignment, to file the inventory and valuation, and give bonds as required by this chapter, the district court, or any judge thereof, of the county where such assignment may be recorded, on the application of any party interested, shall appoint some person to execute the trust embraced in such assignment; and such person, on giving bond with sureties as required above of the assignee, shall possess all the powers conferred upon such assignee, and shall be subject to all the duties hereby imposed as fully as though named in the assignment. * * *" McClain's Ann. Code Iowa, § 3307.

The assignment was made to and accepted by Sudendorf on July 18, 1893. The statute allowed him 20 days in which to give his bond. If he had qualified within that time, his right and title to the property would have dated from the execution and acceptance of the assignment; for it is not the filing of the bond, but it is the delivery and acceptance of the deed, that creates the trust. Within the 20 days he refused to qualify, and the proper court appointed the plaintiff in error, in the words of the statute, "to execute the trust embraced in the assignment"; and the statute declares that this appointee "shall possess all the powers conferred upon such assignee, and shall be subject to all the duties hereby imposed." The plain terms of the statute, and the familiar rule that equity will not permit a trust to fail for want of a trustee, point alike to the inevitable conclusion that the rights of the appointee under the law were the same as those of the appointee under the deed. The assignment vested the title and the right of possession of the assigned property in the first trustee on July 18, 1893, when he accepted it, and this right and title passed unimpaired to his successor. Mark's Appeal, 85 Pa. St. 231, 233, 234; Rendlemann v. Willard, 15 Mo. App. 375; Holtoquist v. Clark, 59 Minn. 59, 69, 60 N. W. 1077; Price v. Parker, 11 Iowa, 144; Brennan v. Willson, 71 N. Y. 502, 505; Bostwick v. Burnett, 74 N. Y. 317, 320.

Counsel for the defendant in error made no motion to dismiss this writ, but in their brief they insist that the judgment below should be affirmed, because it is a judgment for a blank amount of costs; because the assignor's acknowledgment of the execution of the assignment was taken and certified by his attorney; and be-

cause, since his appointment, the plaintiff in error, Brown, has ceased to be a resident of the state of Iowa. It is true that the judgment is for "$——— costs," but it is also true that it recites the fact that the court instructed the jury to return, and that they did bring in, a verdict for the defendant in error; and we are of the opinion that the practical and probably the legal effect of the judgment is a dismissal of the action. The plaintiff in error can hardly proceed to recover damages for the conversion of the property in suit, in the face of this recorded judgment.

Nor are we persuaded that the fact that the attorney who took the acknowledgment of the assignor to the assignment was retained by him to prepare the instrument or to advise him in the premises avoided the deed. It is the pecuniary interest of the officer in the execution of the instrument which disqualifies him. This attorney had no such interest here, and the act of taking and certifying the acknowledgment was not of such a high judicial character that the relation of attorney and client disqualified him from taking the latter's acknowledgment. Bierer v. Fretz, 32 Kan. 329, 336, 4 Pac. 284; Brereton v. Bennett, 15 Colo. 255, 256, 25 Pac. 310; Penn v. Garvin, 56 Ark. 511, 513, 20 S. W. 410.

The fact that after his appointment the plaintiff in error changed his place of residence from the state of Iowa to the state of Missouri is not a valid objection to his maintenance of this suit. He is the trustee appointed by the proper court to carry on this litigation, and until that court removes him, or he dies or resigns, his right to do so is unassailable in any other forum. If there is any cogency in the objection, it must be first presented to the district court of Fremont county.

The assignment in hand is a general assignment, without preferences. It is a good voluntary assignment at common law, and it is not obnoxious to the laws, decisions, or public policy of either Iowa or Kansas. It therefore had the effect, as we have already had occasion to hold in this case, to convey to the assignee on July 18, 1893, the personal property of the assignors in the state of Kansas, as against all subsequent purchasers and mortgagees who had actual notice of its existence. Parker v. Brown, 29 C. C. A. 357, 361, 85 Fed. 595; Brown v. Parker, 19 C. C. A. 675, 73 Fed. 762. Since the defendant in error took his mortgage after the assignment was made and filed in Iowa, and as there was testimony that he was informed of its existence before he obtained his mortgage, the evidence did not warrant a peremptory instruction for a verdict in his favor. The judgment must accordingly be reversed, and the case must be remanded to the court below, with directions to grant a new trial, and it is so ordered.

WATSON v. CITY OF HURON.

(Circuit Court of Appeals, Eighth Circuit. October 16, 1899.)

No. 1,085.

1. MUNICIPAL CORPORATIONS—POWER TO ISSUE NEGOTIABLE INSTRUMENTS.
Municipal corporations possess no power to incur debts, and issue negotiable instruments therefor, unless specially authorized to do so by their charters or by statute, or the power to do so can be clearly implied from some power expressly given, which cannot be fairly exercised without it.

2. SAME—WARRANTS—EXTENT OF NEGOTIABILITY.
Warrants on a city treasurer, directing him to pay to the payee named, or order, a sum of money out of funds in the treasury, while so far negotiable that when indorsed they are transferable by delivery, and the holder may maintain an action thereon in his own name, are not negotiable instruments in the sense of the law merchant, so that, when held by a bona fide purchaser, evidence of their invalidity, or defenses available against the original payee, though in contradiction of their recitals, will be excluded.

3. SAME—WARRANTS ISSUED FOR ILLEGAL PURPOSE.
Warrants, negotiable in form, issued by the officers of a city for the purpose of raising funds to be used in securing the location of the capital of the state at such city, for which purpose the city had no authority to create an indebtedness, and negotiated by a committee to one having knowledge of the facts, the proceeds being used by such committee for the purpose intended, are void in the hands of any holder, although they contain recitals that they were issued for a legitimate and authorized purpose.

4. SAME—RIGHTS OF HOLDERS OF VOID WARRANTS.
A purchaser of void city warrants cannot recover from the city the amount paid therefor, as for money had and received, unless it is proved that the city rightfully received the money, and actually used it for legitimate purposes.

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

Bert A. Watson, the plaintiff in error, brought this action against the city of Huron, the defendant in error, to recover $40,000, on 40 warrants issued by the city, for $1,000 each. The form of each of the warrants is as follows:

"No. 3,784. Huron, South Dakota, Aug. 16, 1890.

"The treasurer of the city of Huron will pay to the order of N. D. Walling one thousand dollars ($1,000.00), out of the general fund of the city treasury not otherwise appropriated, from the taxes of 1890 levied therefor, with interest at the rate of seven per cent. per annum, payable semiannually. Account of public improvements. H. J. Rice, Mayor.

"Attest: B. M. Rowley, Clerk. [Seal.]"

On the day of their issuance the payee indorsed them, and presented them to the city treasurer for payment, who placed this indorsement upon them: "Presented. No funds. Aug. 16, 1890. J. C. Klemme, City Treas." The warrants were issued to the payee therein without consideration, and for the mere convenience of the defendant, and to enable it to negotiate the same. On or about August 20, 1890, the defendant sold the warrants to the firm of Farson, Leach & Co., of Chicago, Ill., for the sum of $1,000 each, and they subsequently assigned them to other parties, and the plaintiff in error is now the legal holder of them. Among other defenses, the city set up this one: That the warrants were issued for the purpose of raising funds to enable a committee of citizens of the city to carry on a campaign for the purpose of having the capital of the state of South Dakota located in the city of Huron by popular vote of the electors of the state, and that the city never received any consideration for the warrants, and that it possessed no authority to issue any war-

rants or incur any other indebtedness for such a purpose. There was a trial by the court, a jury having been waived by the parties, and the court made the following special findings as to this part of the defense: "Fifth. That the warrants were issued to the payee without any claim being presented to, and audited and allowed by, the city council. Sixth. That during the year 1890 the city of Huron was a candidate for state capital of South Dakota, to be voted for in November, 1890; and the said warrants were issued to obtain money with which to carry on the Huron capital campaign, and the city council of the city of Huron issued said warrants, by the request of the Huron capital committee, for that purpose. And the Huron capital committee negotiated said warrants, and received and paid out the money obtained by the sale thereof for capital purposes. Seventh. That the said warrants were sold to Farson, Leach & Co., of Chicago, for ninety-four (94) cents on the dollar, and two years' interest in advance being retained by them, making the payment therefor the sum of thirty-two thousand dollars ($32,000); that no part of the said warrants had been paid by the city of Huron; that at the time Farson, Leach & Co. purchased said warrants said firm knew the purpose for which they were issued, and that they were issued without consideration." "Tenth. That the charter of the city of Huron, among other provisions, contains the following: 'Sec. 7. The city council shall have power * * * Part 28. To audit and allow all just claims against the city and direct the payment of such as are allowed. Part 29. To appropriate money and provide for the payment and expenses and indebtedness of the corporation. * * * Part 31. To levy and collect taxes, not exceeding five mills on the dollar, for the purpose of providing a sinking fund with which to pay any future bonded indebtedness of the corporation, and not exceeding ten mills on the dollar for all municipal purposes, in any one year, on all the property, real and personal within the city limits, taxable according to the laws of the territory, and to levy and collect special assessments for sidewalks and street improvements, as hereinafter provided. And the city council are prohibited from incurring a greater indebtedness than three thousand dollars in any one year over and above the amount of taxes levied for that year unless directed so to do by the vote of the people at an election duly called and held for that purpose.'" "Sixteenth. That, at or before the plaintiff's warrants were issued, no election was called to authorize the city council to issue the said warrants, or to create an indebtedness to be represented by them; and, prior to the date on which the plaintiff's warrants were issued, the city council of the city of Huron had issued, during the fiscal year in which the plaintiff's warrants were issued, the sum of $80,000, which sum was in excess of $3,000 more than the taxes levied for that fiscal year, together with all moneys received from other sources." On these findings the circuit court rendered judgment for the defendant.

John C. Power and Edward H. Aplin, for plaintiff in error.
John Wood, for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

CALDWELL, Circuit Judge (after stating the facts as above). Municipal corporations possess no power to incur debts, and issue negotiable instruments therefor, unless specially authorized to do so by their charter or statutes, or the power to do so can be clearly implied from some power expressly given, which cannot be fairly exercised without it. Dill. Mun. Corp. § 406; Wells v. Supervisors, 102 U. S. 625; Claiborne Co. v. Brooks, 111 U. S. 400, 4 Sup. Ct. 489; Concord v. Robinson, 121 U. S. 165, 7 Sup. Ct. 937. The warrants in this case were issued "for the purpose of obtaining money with which to carry on the Huron capital campaign." It is not claimed in behalf of the plaintiff in error that any such power was granted to the city, either expressly or by implication; but it is urged that the warrants reciting on their face, as they did, that they were issued for public

improvements, and the resolution authorizing their issuance stating that they were intended for public improvements, the city is estopped from showing the truth, and that this resolution was a mere subterfuge, and false in fact. To sustain this contention we are referred to a large number of decisions in which it has been held that when a municipal corporation is authorized by law to issue negotiable bonds, and certain of its officers are constituted as the authority to determine whether the conditions precedent have been complied with, their certificate that all conditions prescribed by law have been carried out is conclusive, and the municipality is thereafter estopped from showing the falsity of its certificate after the bonds have been issued, and sold to innocent purchasers. But the certificates of indebtedness issued in this case are not negotiable bonds, but mere warrants or orders of the city treasurer, directing him to pay to the holder thereof the sum of money out of funds in the treasury. Such instruments are not subject to the rules of the law merchant, or in any manner to be treated like negotiable bonds. Whatever differences of opinion may have existed among the courts 50 years ago as to the negotiability of such warrants, the courts are now unanimous that while such warrants establish, prima facie, the validity of the claims allowed, and authorize their payment, they have no other effect; that they are in form negotiable, and transferable by delivery, so far as to authorize the holder to maintain in his own name an action on them, but they are not negotiable instruments, in the sense of the law merchant, so that, when held by a bona fide purchaser, evidence of their invalidity or defenses available against the original payee would be excluded. Shirk v. Pulaski Co., 4 Dill. 209, Fed. Cas. No. 12,794; Mayor, etc., v. Ray, 19 Wall. 468; Wall v. Monroe Co., 103 U. S. 74; Ouachita Co. v. Wolcott, 103 U. S. 559. The rule established by these decisions is now universally recognized, and it has ceased to be an open question. The purpose for which these warrants were issued was to influence the people of the state to vote for the city of Huron as the capital of the state, or, in other words, as a corruption fund for the purpose of locating the capital in the city of Huron. It is not claimed that there was any authority from the legislature to borrow money or issue certificates of indebtedness for any such purpose. The fact that the resolution ordering these warrants to be issued falsely and fraudulently recited that they were intended for public improvements cannot aid the plaintiff in error, because he occupies no better position than the original payee, who had full notice of the object for which the warrants were issued.

But it is urged that, even if the warrants are void and were fraudulent, the plaintiff in error is entitled to recover the amount paid for these warrants, as for money had and received by the city. Whether there could be such a recovery if the money had been paid into the city treasury, and by the city used for legitimate purposes, it is unnecessary to determine in this case, as the trial judge, in his sixth finding of fact, specially found, "And the Huron capital commissioners negotiated said warrants, and received and paid out said money obtained by the sale thereof for capital purposes." This finding brings the case directly within the ruling of the supreme court of the

state in the case of Huron Waterworks Co. v. City of Huron, 7 S. D. 9, 62 N. W. 981, 30 L. R. A. 848, which holds, in substance, that the city is not liable for money received by its treasurer unless he had a right to receive it, and it was used for legitimate corporate purposes.

Upon the facts found by the circuit court, these warrants are absolutely void in the hands of all persons, and the judgment of the circuit court is affirmed.

HARVEY v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. October 9, 1899.)

No. 474.

UNITED STATES MARSHAL—ACTION ON BOND—TRANSCRIPT OF ACCOUNT AS EVIDENCE.

A fragmentary and incomplete transcript from the books of the treasury department containing the accounts of a former United States marshal, which covers only a portion of his term, and contains no item of his accounts during the last two years of his incumbency, is insufficient to warrant a judgment against his sureties in an action brought 33 years after his term expired, and long after his death, for the items of expenditure shown thereby to have been claimed by him and rejected or suspended by the department.

Gilbert, Circuit Judge, dissenting.

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

White & Monroe, for plaintiff in error.
F. P. Flint, for the United States.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

ROSS, Circuit Judge. By this action, which was commenced in the court below on the 1st day of September, 1892, the United States sought to recover upon the official bond of one Edward Hunter, given as United States marshal for the Southern district of California. The bond was executed and approved on the 23d day of May, 1855, in the penal sum of $20,000, for the faithful performance of the official duties of the principal obligor. B. D. Wilson and John G. Downey were the sureties on the bond, and the action as brought was against them as well as the principal, Hunter. It is alleged in the complaint among other things, that Hunter was the marshal of the United States in and for the Southern district of California from and including the 23d day of May, 1855, to and including the 4th day of August, 1858, during which time he received into his possession and custody as such marshal sundry large sums of money belonging to the United States, appropriated from its treasury for the expenses of the courts of the United States, and part of which was not disbursed or returned to the United States as required by law; that the official accounts of Hunter as such marshal were at various and stated times prior to September 13, 1859, adjusted by the treasury department of the United States in conformity with the laws and the rules and regulations of the department, and that on the day last

mentioned, to wit, September 13, 1859, it was ascertained by the treasury department that there was then due from the said Hunter to the United States, on account of the moneys received by him in his official capacity as marshal, the sum of $7,614.02, which he failed and refused to pay over, by reason of which alleged breach the government asked for judgment on the bond against the defendants in the suit for the said sum of $7,614.02, together with the further sum of $66.29, alleged forfeited commissions theretofore allowed the said Hunter, with interest on the first-named sum from December 4, 1855. Although Hunter and Wilson were both made parties defendant to the suit, it was stipulated at the trial that each of them died long prior to its institution. Downey, however, was then alive, and service of summons was made upon him. He appeared in the action, and answered the complaint. Subsequently he died, and on July 26, 1895, letters of administration on his estate were issued to J. Downey Harvey, who is the plaintiff in error here. Upon the subsequent discovery of the last will and testament of John G. Downey, the plaintiff in error became administrator of his estate, with the will annexed. The original answer of Downey admitted the execution of the bond sued on, but denied the alleged indebtedness, and the alleged failure on the part of the principal in the bond to pay over any public moneys that came into his hands as required by law, and also alleged that the co-surety, B. D. Wilson, died testate in the county of Los Angeles, state of California, on the 11th day of March, 1878, and that on the 1st day of April, 1878, his last will and testament was regularly admitted to probate by the probate court of that county, and that letters testamentary were on April 3d of the same year duly issued to his executors; that at that time, and during all the times involved in this action, the laws of California required every executor and administrator, immediately after his appointment, to cause to be published in some newspaper of the county, if there be one, and, if not, then in such newspaper as may be designated by the probate court, a notice to the creditors of the decedent, requiring all persons having claims against him to exhibit them, with the necessary vouchers, to the executor or administrator at his place of residence or business, to be specified in the notice, with certain other provisions not necessary to be stated, and also declared that "no holder of any claim against an estate shall maintain any action thereon, unless the claim is first presented to the executor or administrator," with an exception not pertinent to the present case; that the executors of the estate of the said Wilson duly gave the notice to creditors required by the laws of California, and that no claim was ever presented against the said estate by the United States by reason of the bond sued on, and that the defendant Downey had no notice of any claim upon the part of the government of the United States, and no knowledge that any such claim would or could be made, until more than 10 years after the expiration of the time within which claims might have been presented against the said estate of the said Wilson; that at the time of the death of the said Wilson, and for more than 20 years prior thereto, he was entirely solvent, and fully able to meet any liability growing out of the bond sued on; that the plaintiff,

without the consent of the defendant, Downey, released the said Wilson and his estate from all obligation upon the bond sued upon, and thereby exonerated the defendant Downey. By supplemental answer the plaintiff in error, as administrator with the will annexed of the estate of John G. Downey, deceased, set forth the giving of notice to the creditors of the estate of Downey in accordance with the laws of the state of California, and the failure of the United States to comply with the statutes of that state regarding the presentation of claims against the deceased. Notice to the creditors of the estate of Downey was published March 20, 1894. No claim was ever presented by the defendant in error to the administrator or the administrator with the will annexed of that estate. The estate of B. D. Wilson was settled and distributed March 14, 1893. The only proof of any defalcation on the part of Hunter is found in a document from the treasury department of the United States, which was stipulated by the respective parties at the trial to be a correct transcript of the entries referred to, from which it appears that on September 8, 1859, the first auditor of the treasury certified that there was then a balance due from Hunter, as late marshal for the Southern district of California, to the United States, of $7,680.31, as appeared from the statement and vouchers which he therewith transmitted for the decision of the comptroller of the treasury thereon, and that on the 13th day of September, 1859, the comptroller admitted and certified that balance. The items of the account and vouchers, however, upon which these certificates were based, were introduced in evidence in connection with and as a part of them; and from them it appears that for no part of Hunter's incumbency of the office of marshal do they purport to be a full statement of the items of his account, and do not purport to cover a single item of his account as such officer subsequent to the December, 1856, term of the court, whereas he continued to be marshal until the 4th of August, 1858,—nearly two years longer. Moreover, it appears from the fragmentary and incomplete accounts appearing in the certified transcript that many of the items for which the marshal claimed credit were not actually rejected by the treasury officials, but merely suspended. The first two of these suspended items aggregate $3,112.95. They are:

Vou. No. 1. Amt. paid Ira Gilchrist for repairs of court room, susp's for want of authority from the sec. of the interior.....	$ 500 00
Vou. No. 4. Amt. paid Sanford & Carson for books, stationery, and furniture. There is no authority for the purchase of the furniture from the interior department. Before an allowance can be made for books and stationery, the items must be specifically detailed. Suspended	2,612 95

There are other suspended items of considerable amounts, to wit, one of $150, another of $112, another of $233.40, and various others of smaller amounts. Whether these suspended items were allowed during the remainder of Hunter's term of office, extending nearly two years, in no way appears from the record. The certified transcript introduced in evidence does not pretend to embrace any of his accounts for that period of time. On such a fragmentary and incomplete statement of accounts, for only a portion of the term of office

of the principal obligor, for whose faithful performance of duties the sureties obligated themselves, judgment was entered in the court below in favor of the plaintiff and against the surviving surety for $7,680.31, with interest thereon at the rate of 6 per cent. per annum from December 4, 1865, on the sum of $7,614.02, making the total amount of the judgment $27,155.70, with legal interest thereon from the date of judgment, and with costs of suit.

No one denies that the transcript from the books and proceedings of the treasury department is competent evidence. The statute makes it evidence; that is to say, prima facie evidence. Rev. St. § 866; Bruce v. U. S., 17 How. 437, 439; Smith v. U. S., 5 Pet. 300; U. S. v. Pinson, 102 U. S. 548; Moses v. U. S., 166 U. S. 597, 17 Sup. Ct. 682. But the transcript from the books and proceedings of the treasury department so made evidence is, as declared by Chief Justice Taney in Bruce v. U. S., supra, "a copy of the entire account as it stands on the books (which must include debits as well as credits)." In U. S. v. Gaussen, 19 Wall. 198, 211, the court, in speaking of a similar provision of the act of March 3, 1797 (1 Stat. 512), said:

"A transcript or a transcribing is substantially a copy. A copy from the books, and not of the books, shall be admissible in evidence. An extract from the books, a portion of the books, when authenticated to be a copy, may be given in evidence. While a garbled statement is not evidence, or a mutilated statement, wherein the debits shall be presented and the credits suppressed, or perhaps a statement of results only, it still seems to be clear that it is not necessary that every account with an individual, and all of every account, shall be transcribed, as a condition of the admissibility of any one account. The statement presented should be complete in itself, perfect for what it purports to represent, and give both sides of the account as the same stands upon the books."

In the case from which this quotation is taken the accounts were returned and certified quarterly, and were eight in number. The objection having been made in that case that they were fragmentary and incomplete, the court declared that the objection was not sustained by the facts. "As presented in the record," said the court, "each report is complete and perfect in itself. Each report contains all upon the subject during the time that it purports to represent. In the aggregate, they cover the whole period of Barrett's service." 19 Wall. 212. In U. S. v. Jones, 8 Pet. 375, 383, the court said:

"The act of congress, in making a transcript from the books and proceedings of the treasury evidence, does not mean the statement of an account in gross, but a statement of the items, both of the debits and credits, as they were acted upon by the accounting officers of the department."

To the same effect are the cases of U. S. v. Edwards, 25 Fed. Cas. 977, and U. S. v. Patterson, 27 Fed. Cas. 462, 463.

A judgment based upon fragmentary and incomplete accounts of a portion only of the official term of an officer does not, we think, find any support in anything decided in either of the cases of U. S. v. Pinson, 102 U. S. 554; U. S. v. Gaussen, 19 Wall. 211; U. S. v. Stone, 106 U. S. 530, 1 Sup. Ct. 287; U. S. v. Hunt, 105 U. S. 187; U. S. v. Dumas, 149 U. S. 285, 13 Sup. Ct. 872; Soule v. U. S., 100 U. S. 11; Smith v. U. S., 5 Pet. 292; or U. S. v. Smith (C. C.) 35 Fed. 490. The transcript from the books and proceedings of the treasury

department upon which the judgment appealed from is based, contains not one single item of account subsequent to the December, 1856, term of the court of which the principal obligator was marshal, —not a single item of the accounts of the marshal for the nearly 2 years that he remained in office thereafter. The period covered by the accounts contained in the transcript from the books and proceedings of the treasury department in evidence expired more than 33 years before the present action was commenced. It is entirely true that the statute of limitations does not run against the government; but certainly the government cannot, any more than an individual, recover from the sureties in a bond, without proving the breach thereof by the principal obligor. In this case the United States has recovered judgment against the estate of one of the sureties in the bond sued upon, for large sums of money, in respect to which the evidence does not show that the principal obligor was in default. Nearly one-half of the amount claimed on the part of the government to be due from Hunter was, as shown by the transcript of the treasury department introduced in evidence, paid out by the marshal for repairs to, and for furniture, stationary, and books for, the court room. Whether or not he ever furnished the treasury officials the authority for the making of those expenditures does not appear; nor does it anywhere appear in what way those suspended items, if finally rejected, or any of the balances shown by the accounts that were introduced in evidence, were affected by the accounts of the marshal for that portion of his term of office extending from the close of the December, 1856, term of the court, to August 4, 1858, when his term of office expired. The proper presumption to be drawn from the government's delay of more than 33 years, during which long period the marshal and one of his bondsmen died, and the other bondsman, for aught that appears, remained in ignorance of any demand against the principal obligor, we are not called upon to decide. In the case of Dox v. Postmaster General, 1 Pet. 317, 326, which was an action upon a postmaster's bond executed on January 1, 1816, and conditioned for the faithful performance of his duties, a suit for the breach of which was instituted July 1, 1821, one of the questions certified to the supreme court was whether the bond could, upon the facts of the case, be considered, in judgment of law, as paid and satisfied, or otherwise discharged. In disposing of that question, the court, speaking through Chief Justice Marshall, said:

"If this question was founded on the time which was permitted to elapse before the institution of the suit, the answer must be in the negative. The bond was executed on the 1st day of January, 1816; the postmaster was removed from office on the 1st day of July in the same year; and this suit was instituted in August, 1821. But little more than five years intervened between the time when the sum due from the principal in the bond was ascertained, and the institution of the suit. The presumption of payment has never been supposed to arise from length of time, in such a case, even between individuals; much less in the case of the United States, where all payments are placed on that record which must be kept by the officers of government."

The court found an additional reason against the presumption in the case cited, growing out of the fact that the pleas in the case did not allege payment, but presupposed that payment had been

made. The court said, however, that "length of time is evidence to be laid before the jury on the plea of payment."

Whether the long period of more than 33 years that intervened between the action of the treasury officials in the case at bar and the institution of the present suit would be sufficient to sustain a plea of payment, we are not called upon to decide, because there was no such plea in the court below, and, of course, no finding upon any such issue. In the court below, and here, the defense of the action, apart from the alleged lack of evidence of the alleged indebtedness, has been rested chiefly upon the failure of the government to present its claim to the administrator of the estate of Downey for allowance, and upon the act of congress of August 8, 1888 (25 Stat. 387). That act is entitled "An act requiring notice of deficiency in accounts of principals to be given to sureties upon bonds of United States officials, and fixing a limitation of time within which suit shall be brought against said sureties upon said bonds," the first section of which declares:

"That hereafter, whenever any deficiency shall be discovered in the accounts of any official of the United States, or of any officer disbursing or chargeable with public money, it shall be the duty of the accounting officers making such discovery to at once notify the head of the department having control over the affairs of said officer, of the nature and amount of said deficiency, and it shall be the immediate duty of said head of department to at once notify all obligors upon the bond or bonds of such official of the nature of such deficiency, and the amount thereof. Said notification shall be deemed sufficient if mailed at the post-office in the city of Washington, District of Columbia, addressed to said sureties respectively, and directed to the respective post-offices where said obligors may reside, if known; but a failure to give or mail such notice shall not discharge the surety or sureties upon such bond."

The second and last section of the act provides:

"That if, upon the statement of the account of any official of the United States, or of any officer disbursing or chargeable with public money, by the accounting officers of the treasury, it shall thereby appear that he is indebted to the United States, and suit therefor shall not be instituted within five years after such statement of said account, the sureties on his bond shall not be liable for such indebtedness."

This act clearly manifests the intention of congress that, upon the adjustment by the treasury officials of the accounts of the various officers, all indebtedness to the United States thereby shown shall, if not paid, be sued for by the government within a reasonable time; otherwise, the sureties upon such official bonds shall not be liable for such indebtedness. The act, however, shows upon its face that it applies to the future only. The improbability that congress, in prescribing the period of 5 years as a limitation to such suits, would, if its attention had been called to the matter, have excluded from its provisions indebtedness evidenced by accounts adjusted more than 30 years theretofore, does not justify the court in giving to the act a retrospective effect, when such intention cannot be derived from the act itself.

As, upon a new trial, which must be directed for the reason already given, the cause may be disposed of on other grounds, we need not now decide whether the presentation of the government's claim, in accordance with the law of the state of California, to the

administrator of the estate of Downey for allowance, was essential to its maintenance of the action. The judgment is reversed, and cause remanded to the court below for a new trial.

GILBERT, Circuit Judge (dissenting). The majority of the court have reached the conclusion that the trial court should have granted a nonsuit at the close of the plaintiff's evidence, upon the ground that the marshal's account was not complete, for the reason that it covered only a portion of his term of office. It is true that the transcript, upon its face, does not contain all of the accounts between the United States and the marshal during the whole of the marshal's term of office. It does contain, however, the matters in dispute which are the subject of the controversy. It contains, upon the one hand, all the items with which the marshal was charged, —the drafts whereby funds were sent him during his term. The evidence of these was properly authenticated. Accompanying them was "a copy of a transcript from the books and proceedings of the treasury department," dated July 5, 1892, and properly certified. It began with the certificate of the first auditor, as follows:

"No. 11,250. Treasury Department. First Auditor's Office.

"September 8, 1859.

"I hereby certify that I have examined and adjusted an account between the United States and Edward Hunter, late U. S. marshal for the Southern district of California, and find that he is chargeable as follows:

To balance due from him, per report No. 8,542		7,614 02
To commission heretofore allowed, nonchargeable to him under the 1st section of the act 3d March, 1797, viz.:		
Per report No. 6,600	55 03	
" " " 8,542	11 26	
Dollars		7,680 31

"I also find that the balance due from him to the United States is 7,680.31 dollars, as appears from the statement and vouchers herewith transmitted for the decision of the comptroller of the treasury thereon. $7,680.31.

"T. L. Smith, First Auditor."

Then follows the certification of the comptroller that that balance is due, and a statement of the items with which the marshal is chargeable, arising from "suspensions and disallowances, per report No. 6,600, still outstanding and unaccounted for," the sum total of which is the amount which was found by the first auditor to be due the United States. It is true that the items so disallowed and suspended are not distributed through the whole term of the marshal's office. The last of them is of no later date than January, 1857, whereas his term of office expired on August 4, 1858. But the adjustment of the account was made, as we have seen, on September 8, 1859, and the only inference to be drawn from the fact that no disallowances or suspensions were made during the last 18 months is that the accounts of disbursements during that period were made according to law. The only items that are omitted from the transcript as it was presented to the court below are the items of the marshal's account of disbursements which were

found satisfactory and were allowed, and for which he has been given credit. I am unable to see how the absence of those items renders the account which was presented so fatally defective that a judgment of nonsuit should have been rendered upon its submission in evidence. What purpose would have been served by the presence of that portion of the marshal's account which was found satisfactory, and which was not objected to? In what way would the evidence of those items of his account have aided the court in arriving at a conclusion concerning the marshal's liability for the items which were disallowed and suspended? The controversy involved only the latter. No fault was found with the remainder of the accounts. The transcript from the books and proceedings of the treasury department contained all that was necessary to apprise the marshal or his bondsmen of the nature of the claim and demand of the United States. It contained the whole of the case of the government against the bondsmen. The fact that the marshal's account for the last year and a half of his term of office was approved and was satisfactory has no bearing upon the preceding items which were disallowed and suspended. The question which the treasury department had to determine was whether the marshal had properly accounted for all funds that had come into his hands. It was found that he had not. All the items of his default were clearly set forth in detail, accompanied with the reasons for which they were suspended and disallowed. The record shows that the plaintiff in error deemed the omitted portion of the account immaterial to his defense. He waived its absence. He interposed no objection to the transcript on the ground that it was incomplete, or that the items which had been duly credited to the marshal's account were omitted. His motion for a nonsuit was based on no such ground. Neither his assignments of error nor his brief in this court contains the remotest reference to it. The point is made for the first time in the opinion of the majority of this court, and the conclusion which has been reached can be based on no other theory than that the judgment was void for want of any evidence whatever to sustain it,—a position which I submit is unsustained by authority. The only defect in the transcript on which the plaintiff in error relied in the court below and in this court was that certain items of the differences were "suspended" only, and had not finally been passed upon by the department,—a position which, under the authority of Bruce v. U. S., 17 How. 437, and Smith v. U. S., 5 Pet. 295, was clearly untenable. After the account was adjusted, the burden was undoubtedly upon the marshal or his sureties to show that credit should have been given for the items which were suspended. So far as the evidence shows, they took no steps to do so. When the cause came on for trial the account stated constituted prima facie evidence of the amount which had not properly been accounted for, and with which the marshal was chargeable. Said the court in U. S. v. Hunt, 105 U. S. 187:

"The certificate has the legal effect of making the transcript prima facie evidence of the fact of indebtedness which it certifies, unless, upon the face of the account, it necessarily appears to be otherwise."

The plaintiff in error rested his case and went to trial upon the account as it stood and as it was stated, and offered no evidence to contradict it. I think that, in the absence of other evidence, the circuit court did not err in denying the motion for nonsuit, and in rendering judgment for the United States upon the account as stated.

UNITED STATES v. KELLY.

(Circuit Court of Appeals, Ninth Circuit. October 3, 1899.)

No. 425.

COURTS—ACT DECREASING JURISDICTION—EFFECT ON PENDING SUITS.

Act June 27, 1898, amending Act March 3, 1887, § 2, which gave circuit and district courts jurisdiction concurrent with the court of claims of actions on claims against the United States, by adding thereto a proviso that such jurisdiction should not extend to cases brought to recover fees, salary, or compensation for official services of officers of the United States, in effect repealed, without a saving clause, the grant of jurisdiction in such cases contained in the original act, and operated to deprive circuit and district courts of jurisdiction in pending cases, and the circuit courts of appeals of power to proceed further in proceedings pending therein for the review of judgments previously rendered in such cases.

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

Marshall B. Woodworth, for the United States.
J. N. Teal, for defendant in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

GILBERT, Circuit Judge. The judgment of the circuit court in this case was reversed on writ of error from this court, and the cause was remanded for a new trial. 89 Fed. 946. After the mandate had issued, it was discovered that before this court had rendered its decision congress had passed the act of June 27, 1898, abridging the jurisdiction of the circuit and district courts in certain classes of cases brought against the United States. A motion is now made on behalf of the defendant in error for an order recalling the mandate, upon the ground that this court was, by the said act, deprived of its jurisdiction over the case. The act referred to is entitled "An act to amend sections one and two of the act of March third, eighteen hundred and eighty-seven, Twenty-Fourth Statutes at Large, chapter three hundred and fifty-nine." Section 2 of the act reads as follows:

"That section two of the act aforesaid, approved March third, eighteen hundred and eighty-seven, be, and the same is hereby, amended by adding thereto at the end thereof the following: 'The jurisdiction hereby conferred upon the said circuit and district 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.' "

The question arises whether the act deprives the courts of the United States of jurisdiction of causes which were pending at the time of its enactment. The plaintiff in error invokes the well-set-

tled rule that a prospective operation of a statute is presumed to be intended unless the legislative intent to the contrary is declared, or necessarily implied, either from the words of the statute or from the circumstances which attended its enactment. In the circuit court of appeals for the Fifth circuit, in U. S. v. McCrory, 33 C. C. A. 515, 91 Fed. 295, it was held that the effect of the statute was to deprive the courts of the United States of jurisdiction to entertain pending cases. The same view of the statute was taken by Kirkpatrick, district judge, in Fairchild v. U. S. (C. C.) 91 Fed. 297; but in Strong v. U. S. (C. C.) 93 Fed. 257, it was held by Townsend, district judge, that the act was not intended to affect pending cases. The supreme court in a series of decisions has recognized the doctrine that, when jurisdiction of a cause depends upon a statute, the repeal of the statute without a reservation as to pending cases deprives the court of all the jurisdiction which the act conferred. Insurance Co. v. Ritchie, 5 Wall. 541; Ex parte McCardle, 7 Wall. 506; Ex parte Yerger, 8 Wall. 85; Railroad Co. v. Grant, 98 U. S. 398; Sherman v. Grinnell, 123 U. S. 679, 8 Sup. Ct. 260; In re Hall, 167 U. S. 38, 17 Sup. Ct. 723. In Railroad Co. v. Grant it was held that the jurisdiction conferred upon the supreme court by section 847 of the Revised Statutes, which enacted that no cause should be removed from the supreme court of the District of Columbia to the supreme court of the United States by appeal or writ of error, unless the matter in dispute should be of the value of $1,000 or upwards, was taken away by the act of February 25, 1879, which enacted that a judgment or decree of the supreme court of the District might be re-examined in the supreme court of the United States "where the matter in dispute, exclusive of costs, exceeds the value of $2,500," and repealed all prior laws inconsistent with the act. The court dismissed the writ of error, which had been sued out on December 6, 1875, to reverse a final judgment of the supreme court of the District where the matter in dispute was $2,250. In Sherman v. Grinnell the question presented to the court was whether or not the jurisdiction of the supreme court to entertain an appeal from an order of a circuit court remanding to the state court a case which had been removed therefrom was repealed by the act of March 3, 1887, which declared that no appeal or writ of error from the decision of the circuit court so remanding such cause should be allowed. It was held that an order remanding the cause under the act of March 3, 1875, made and entered before the act of March 3, 1887, went into effect, was not appealable to the supreme court. The court said, referring to the act of 1875:

"The provision of that act giving the jurisdiction was repealed by the act of 1887 without any reservation as to pending cases. * * * As a consequence of this, the repeal operated to take away jurisdiction in cases where the order to remand had been made, but no appeal or writ of error taken, because, 'if a law conferring jurisdiction is repealed without a reservation as to pending cases, all such cases fall within the law.'"

The doctrine was reaffirmed by the court in Re Hall, supra, where the court said:

"The effect of the passage of the repealing act was to take away the jurisdiction of the court of claims to proceed further in those cases which were founded upon the act thus repealed. This the congress had power to do."

We are unable to discover how a law which amends the act whereby jurisdiction was conferred differs from a repealing act such as the acts considered in the decisions above referred to. Such an amendment is, in effect, a repeal. It repeals pro tanto the grant of jurisdiction. It revokes a portion of the jurisdiction which was conferred. There is nothing in the language of the act in question to indicate a purpose to except from its operation cases which were then pending. In the absence of such a reservation, the intention of congress is clear. It is that the statute shall read as amended, and as if it had been so enacted in the first instance. As amended, the statute expresses the measure of the court's power over pending cases. The right to sue the United States upon a claim such as that which is involved in this case was conceded for the first time by the act of 1887. The United States, by that act, consented to be sued in certain specified classes of cases involving a limited amount. The power to retract its consent to be sued is not disputed. The amendment of June 27, 1898, does not, in terms, affect the jurisdiction of the United States circuit courts of appeals. It relates only to the jurisdiction which had been conferred by the act of March 3, 1887, upon the district and the circuit courts, but its effects extend to all of the courts of the United States. This court has no power to review the judgment of the circuit court in a matter of which the latter has been devested of its jurisdiction. This court can act upon the circuit court only through its mandate. It will not issue its mandate to a court which has no power to enforce it. Hunt v. Palao, 4 How. 589; McNulty v. Batty, 10 How. 72; Preston v. Bracken, Id. 81; U. S. v. McCrory, 33 C. C. A. 515, 91 Fed. 295. The argument that the construction which we place upon the act will in some cases lead to harsh results is one that would have persuasive force if the language of the act left its meaning doubtful. In view of the settled construction which has been placed upon similar legislation, it must be presumed that, in omitting a saving clause as to pending suits, congress intended all the results of its act, and that it had in view the possible exercise of its own power to grant relief in cases in which the dismissal of pending causes and the intervention of the statute of limitation might result in hardship. The motion for an order recalling mandate will be allowed, the judgment of this court set aside, and the writ of error dismissed.

CROWN POINT MIN. CO. v. BUCK.

BUCK v. CROWN POINT MIN. CO.

(Circuit Court of Appeals, Eighth Circuit. October 9, 1899.)

Nos. 1,156, 1,164.

1. TRIAL—DIRECTING VERDICT.
   It is error to stop the trial of a case, and direct a verdict, before competent evidence offered upon material issues has been received.
2. MINING CLAIMS—OVERLAPPING LOCATIONS.
   A mineral discovery made on free public land, and a claim located thereon, vest in the locators all the free public land within its limits, and every

vein whose apex is found within such free public land, within the surface lines of the claim extended downward vertically, whether the surface thus secured is all or only part of the tract within the boundary lines of the claim.

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

W. H. Bryant (C. S. Thomas and H. H. Lee, on the brief), for the Crown Point Mining Company.

George L. Hodges and Bruce Glidden, for William M. Buck.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

SANBORN, Circuit Judge. There was a conflict between the lode mining claim Louisa, which was owned by William M. Buck, who will be called the "defendant" in this opinion, and the lode mining claim Crown Point, which was owned by the Crown Point Mining Company, which will be called the "plaintiff." The defendant, Buck, applied for a patent for his claim; and the Crown Point Company filed an adverse claim, and then brought this action in the court below, under sections 6 and 7 of the act of congress of May 10, 1872 (now sections 2325 and 2326 of the Revised Statutes), to determine who was entitled to the area in conflict between the two claims. While the trial of this action was in progress, and while the defendant was presenting his evidence, the court below stopped the introduction of evidence, and instructed the jury to return a verdict that neither party was entitled to any of the property in controversy. Both parties complain of this ruling, and each of them has sued out a writ of error to reverse the judgment which is founded upon it. The course of the proceedings to the time this ruling was made was in this way: In its complaint the plaintiff alleged that A. J. Ray and J. P. Wilcox discovered a vein or ledge of mineral-bearing matter containing gold on November 25, A. D. 1896, upon an unappropriated part of the public domain; that on December 7, 1896, they located the Crown Point lode mining claim, which was 1,500 feet in length and 300 feet in width, upon it; that they marked the boundaries of this claim and in all things complied with the requirements of the laws and with the customs of miners, so that they secured a legal mining claim; and that the title and possession of this claim had been vested in the plaintiff by various mesne conveyances. The Crown Point Company then alleged that about December 17, 1896, the defendant wrongfully entered upon that portion of the Crown Point claim which is within the exterior lines of the Louisa lode mining claim, and subsequently applied for a patent for it, and withheld the possession of it from the Crown Point Company. It also averred that the discovery and location of the Louisa claim were fraudulent and void. The defendant, Buck, in his answer, denied all the allegations of the complaint with reference to the discovery, location, and possession of the Crown Point claim, and alleged that on November 19, 1896, John McConaghy discovered a gold-bearing lode within the limits of the Louisa claim, and duly located and marked the boundaries of that claim, and complied with the requirements of the laws and with the customs of the miners, so that by

prior discovery he acquired a valid mining claim, and that the title and the right to the possession thereof had passed by various mesne conveyances to the defendant. On the trial the plaintiff introduced evidence to the effect that Ray and Wilcox discovered a gold-bearing lode or vein within the limits of the Crown Point claim on November 25, 1896, and that they thereupon located that claim, marked its boundaries, and complied with the necessary requirements of law and custom to vest in them a legal right to a valid mining claim; that this title and right to the possession of this claim had passed to the plaintiff; and that the Louisa lode mining claim contained within its boundaries a portion of the Crown Point claim, including the land on which Ray and Wilcox made their discovery and sunk their shaft. Thereupon the plaintiff rested, and the defendant introduced evidence to the effect that nearly all, if not all, the land within the boundaries of the Crown Point claim, except a small wedge-shaped fraction of that claim in which the discovery was made and in which its discovery shaft was sunk, was covered by valid prior locations, which were held by corporations that were either owned or controlled by a corporation called the Woods Investment Company, and that the little tract on which the discovery shaft of the Crown Point was sunk was covered by the Sierra Nevada mining claim at the time when the discovery upon which the plaintiff relies was made. He also introduced evidence that the Gold Coin Mining & Leasing Company was one of the corporations controlled by the Woods Company, and that the Columbine-Victor Tunnel Company, which owned the Bonanza lode mining claim, was another; that one John McConaghy, the superintendent of the Gold Coin Mining Company, while working for that company within the boundaries of the Bonanza claim on November 12, 1896, discovered the lode or vein on which the Louisa claim was located; that thereupon the Columbine-Victor Tunnel Company, on November 18, 1896, relinquished to the United States $^{28}/_{1000}$ of an acre of land within the limits of the Bonanza claim, upon which the discovery shaft of the Louisa claim was subsequently located; and that thereafter, on November 19, 1896, McConaghy posted the location notice of the Louisa claim over the point where he had discovered this vein in the Bonanza claim. The defendant also proved that the corporations controlled by the Woods Investment Company relinquished several other small tracts of land within the boundaries of the Louisa claim; that McConaghy marked the boundaries of that claim, and complied with all the formal requirements of the law and the customs of miners in order to establish a valid mining claim; and that he afterwards conveyed his right and title thereto to the defendant. As the defendant was proceeding with the introduction of his evidence relative to the Louisa claim, the court inquired of one of his counsel what evidence he had in reserve; and the latter answered that he had more evidence of the same character, and evidence that the Bonanza Mining Company had undisputed title to that part of the Bonanza claim on which the Louisa discovery shaft was located before that tract was relinquished; that the same situation existed relative to the title of the other claims whose owners had relinquished small tracts within the limits of the Louisa; and that he proposed

to show the acts of the officers of these companies which evidenced the abandonment of these tracts to the government, and the formal acts and records of the corporations whereby the latter subsequently ratified the acts of their officers, and various proceedings in the government land office. The court then turned to one of the counsel for the plaintiff, and asked him if he intended to offer evidence in rebuttal, and, if so, to what effect. He replied that he offered to show the invalidity of the Louisa location; that the relinquishments upon which that claim rested were all made after the discovery and location of the Crown Point claim; that they were fraudulent and void; that the parties that made them subsequently filed claims for the relinquished tracts adverse to that of the defendant; that the Sierra Nevada mining claim, which was the only prior claim that included within its boundaries the small tract of land in which the discovery of the Crown Point lode was made, and in which the discovery shaft of the Crown Point claim was located, had been abandoned before that discovery; and that this tract was unappropriated public land of the United States when the locators of the Crown Point discovered the vein and sunk their shaft within it. The court refused to receive any of the evidence, and instructed the jury to return a verdict that neither of the parties to the action was entitled to the title or to the possession of the property in controversy.

We are unable to perceive why the facts which the plaintiff offered to prove, if established to the satisfaction of the jury, would not have sustained its claim, at least to the extent of the small wedge-shaped tract of land on which its discovery shaft was located. This tract was not within the boundaries of any other mining claim, except the Sierra Nevada; and if, as the plaintiff offered to show, the Sierra Nevada claim had been abandoned before Ray and Wilcox made their discovery and located their claim, and if, as the Crown Point Company also proposed to prove, the Louisa claim was fraudulent and void because the relinquishments on which it rested were not made until after the discovery and location of the Crown Point claim, so that the discovery and discovery shaft of the Louisa were within the Bonanza claim, and hence void, because not upon unappropriated public land at the time the discovery of the Crown Point lode was made (Erwin v. Perego, 35 C. C. A. 482, 93 Fed. 608, 612; Belk v. Meagher, 104 U. S. 279, 284; Gwillim v. Donnellan, 115 U. S. 45, 51, 5 Sup. Ct. 1110), then the discovery of the Crown Point was on unappropriated public land, and its discovery and location vested in its locators all the unappropriated public land within its limits, and every vein whose apex was found in that free public land within the surface lines of the claim extended downward vertically, whether the surface thus secured was all or only a part of the tract within the boundary lines of the claim. Rev. St. § 2326; Del Monte Mining & Milling Co. v. Last Chance Mining & Milling Co., 171 U. S. 55, 77–80, 18 Sup. Ct. 895. On the other hand, if the owners of the Bonanza mining claim relinquished the tract on which the discovery shaft of the Louisa claim was sunk before the Louisa vein or lode was discovered, and if the Louisa vein was discovered within this free tract of public land, and duly located, before the discovery of the Crown

Point, the Louisa claim must take the wedge-shaped tract on which the discovery shaft of the Crown Point was located. The rejection of the evidence upon these issues necessitates another trial of the case, and it is useless to consider it further until all the competent testimony has been adduced, so that we can perceive what questions of law the facts of the case present, and what they eliminate. The judgment below is reversed, and the case is remanded to the court below, with directions to grant a new trial. The costs in this court will be equally divided between the parties.

FRANK WATERHOUSE, Limited, et al. v. ROCK ISLAND ALASKA MIN. CO.

(Circuit Court of Appeals, Ninth Circuit. October 19, 1899.)

No. 534.

1. APPEAL—REVIEW—HARMLESS ERROR—ADMISSION OF EVIDENCE.
An erroneous admission in evidence of an instrument which, because not properly stamped, was inadmissible under the provisions of the war revenue act of 1898, was harmless, where the instrument was set out in the complaint, and its terms were not in dispute; the only issue thereon made by the pleadings being as to the authority of the agent executing the same on behalf of the defendant.

2. SHIPPING—POWERS OF MASTER—CHARTER OF VESSEL TO COMPLETE VOYAGE.
Defendant, a corporation which was the owner of an ocean steamship, contracted to transport passengers and freight from London, England, to Dawson City, on the Yukon river. On the arrival of the ship at St. Michaels, which was the end of her voyage, and where defendant had arranged to transship her passengers and cargo to other vessels for the remainder of the transportation, such other vessels had not arrived. *Held*, that it was within the powers and was the duty of the master of the steamship to take such reasonable measures as were necessary to carry out the contract of his employer, and earn for it the passage money and freight, by delivering his passengers and cargo at the point of destination, and that a charter of another vessel for that purpose, executed by him in good faith, and in the exercise of a reasonable discretion, was binding on the defendant.

3. SAME—ACTION FOR CHARTER HIRE—DAMAGES FOR DEFECTS IN VESSEL.
Where the undisputed evidence showed that a vessel was examined by a charterer, and accepted by him with full knowledge of the condition of her machinery and appliances, it was not error to instruct the jury, in an action to recover her hire under the charter, that claims set up by defendant on account of damages and delays alleged to have resulted from the defective condition of such machinery and appliances should not be considered unless the defects complained of were latent and unknown to defendant.

4. EVIDENCE—PRESUMPTION FROM FAILURE TO CALL WITNESS.
A jury is authorized to infer from the absence of a person, shown to have particular knowledge of the matters in controversy, beyond the reach of a subpœna, and from the fact that his absence was facilitated by one of the parties, that his testimony would not have been more favorable to such party than that of the witnesses who testified.

5. APPEAL—MATTERS REVIEWABLE—FEDERAL PRACTICE.
The overruling of a motion for a new trial is not assignable as error, under the practice established in the courts of the United States.

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

This action was brought in the circuit court for the district of Washington by the Rock Island Alaska Mining Company, the appellee, against the corporation styled Frank Waterhouse, Limited, appellant, to recover the sum of $21,055.19, with interest, alleged to be due on a certain charter party, and for merchandise furnished and services rendered to the said appellant by the appellee. The cause was tried by the court and a jury, resulting in a verdict for the appellee (plaintiff below) in the sum of $18,919.19, with interest and costs of suit, and is brought to this court on a writ of error sued out by the defendant in the court below, and its surety on a bond given to secure the release of attached property.

The litigation arose from the following transactions and circumstances:

The Rock Island Alaska Mining Company (hereafter referred to as the "Rock Island Company") is an Iowa corporation, and in July of 1898 was the owner of two steamers, the Rock Island and Rock Island No. 2, which were lying in the harbor of St. Michaels, Alaska. This corporation was at that time represented at St Michaels by H. U. Crockett, its vice president, E. L. Kahlke, its secretary, and William C. Knaack, its general manager. Frank Waterhouse, Limited (hereafter referred to as the "Waterhouse Corporation"), is a British corporation, organized early in 1898, and from the time of its organization has had its chief office in America at Seattle, Wash.; Frank Waterhouse being the American manager of said corporation, in charge of its Pacific Coast business, and residing at Tacoma, Wash. This corporation was the owner of the British steamship Garonne, which sailed from London, England, on April 2, 1898, with a partial cargo and a number of passengers bound for St. Michaels, via Victoria and Vancouver, British Columbia. In June, 1898, the ship left Victoria with a full cargo and full list of passengers, arriving in St. Michaels harbor about July 4th; Capt. C. G. Conradi being the master in charge thereof. To nearly all of the passengers tickets had been sold by the Waterhouse Corporation beyond St. Michaels to various points on the Yukon; the tickets issued on the prepayment of fare being two-coupon transportation tickets, one coupon calling for passage on the Garonne to St. Michaels, and the other being an order on "Agent Connecting Line, St. Michaels, Alaska," for one ticket from St. Michaels to Dawson, to be charged to the account of the Waterhouse Corporation. The Garonne also carried to St. Michaels 177½ tons of freight, including 43½ tons belonging to the Waterhouse Corporation, consisting of clothing, blankets, hardware, and drugs, all of which was consigned to Dawson. The Waterhouse Corporation had received in advance as freight upon the cargo a sum exceeding $16,000, and a further sum of about $8,000 was to be collected upon delivery of the consigned goods at Dawson by an employé of the corporation who was proceeding to Dawson on the Garonne. It appears that it was the intention of the Waterhouse Corporation to transfer the passengers and cargo of the Garonne to a river steamer at St. Michaels, the Robert Kerr, which was to be operated by F. W., Limited, a corporation organized to engage in river transportation on the Yukon in connection with the ocean transportation of the first-named corporation. Frank Waterhouse, manager of both corporations in this country, had contracted with a firm in Seattle to construct the steamer Robert Kerr and send it to St Michaels in time for the opening of navigation on the Yukon river. The Waterhouse Corporation had also contracted with the Milwaukee-Alaska Gold-Dredge Mining Company for exchange of business with the latter's river steamer Milwaukee. It was expected by the Waterhouse Corporation that both of these steamers would be at St. Michaels upon the arrival there of the Garonne, and it sent by the Garonne a master, purser, and pilot, under contract of employment for the season on the Yukon river upon the Robert Kerr, or any other river boat selected by the Waterhouse Corporation. When the Garonne arrived at St. Michaels on July 4, 1898, neither of the expected river steamers, the Robert Kerr or Milwaukee, had arrived. Capt. Conradi looked around for other means of sending his passengers and cargo up the river, and in the course of a few days (neither of said river steamers having then reached St. Michaels) completed negotiations with the officers of the Rock Island Company for the use of the steamer Rock Island, and entered into the charter party upon which this litigation is based; assuming to do so on behalf of the Waterhouse Corporation. This charter party was

written in duplicate, each party retaining one of the original documents, and reads as follows:

"This indenture of charter party made and executed this fifth day of July, 1898, by and between Rock Island Alaska Mining Company, owners of the steamer Rock Island, party of the first part, and the Frank Waterhouse, Limited, of London, the party of the second part, witnesseth as follows: The party of the first part, for the considerations hereinafter mentioned, and the covenants on the part of the party of the second part to be kept and performed, does hereby lease and charter to the party of the second part that certain stern-wheel steamboat called 'Rock Island,' now lying at the port of St. Michaels, Alaska, to have, use, and operate upon the Yukon river so long as said party of the second part shall wish, not extending beyond the season of 1898. Said party of the second part shall have absolute and complete control and management of said steamer while they shall retain her, and shall provide said steamer with officers and crew for the operation thereof, with the exception of two engineers, pilot, and secretary of the Rock Island Alaska Mining Company, which party of the first part agree to provide and pay for; and, further, the party of the second part shall maintain said engineers, pilot, and secretary in like as their own crew until steamer is returned to party of the first part. Said steamer to be delivered upon demand to party of the second part alongside of the British steamship Garonne, in the harbor of St. Michaels, and upon such delivery in good condition this charter party shall begin. For the use of said steamer aforesaid, party of the second part agrees to pay the party of the first part the sum of five hundred dollars per day during the period of their use thereof, and until said steamer be delivered to the party of the first part as hereinafter provided; first payment to be made at Dawson City upon arrival of the steamer, to cover number of days consumed, and in like manner upon the arrival of steamer at St. Michaels. Said party of second part may surrender said steamer to party of the first part, and cancel and annul this charter party, at any time after expiration of one month from date of charter, by delivery of steamer Rock Island to party of the first part, either at St. Michaels or Dawson City, in like condition as received, except ordinary wear and tear. In witness whereof, the respective parties hereto have caused these presents to be signed this fifth day of July, 1898, by the Rock Island Alaska Mining Company, by its vice president and general manager, duly authorized, and the Frank Waterhouse, Limited, by C. G. Conradi, Captain S. S. Garonne, its authorized agent, on the date first above mentioned.

"The Rock Island Alaska Mining Co.,
"By Wm. C. Knaack, Gen. Mgr.,
"By H. U. Crockett, Vice President.
"Frank Waterhouse, Ltd.,
"By C. G. Conradi, Capt. S. S. Garonne.

"Attest: E. L. Kahlke, Sec'y.
"Witness: Jno. C. Hayden.
"[Corporate Seal of Rock Island Alaska Mining Co.]"

At the time the charter party was entered into, Capt. Conradi, assuming to act on behalf of the Waterhouse Corporation, also entered into an agreement with the Rock Island Company to furnish transportation on the steamer Rock Island to Forty-Mile Post, on the Yukon river, to two passengers, and for 15 tons of machinery and supplies then stored on said steamer, and to render all assistance possible with the crew of the steamer Rock Island in unloading said machinery and supplies at destination. The consideration for this transportation was the sum of $500, the receipt of which was acknowledged by Conradi in the agreement.

In accordance with the terms of the charter party, the steamer Rock Island was delivered alongside the Garonne, and receipted for by Capt. Conradi, on behalf of the Waterhouse Corporation, on July 7, 1898, at noon. Capt. Conradi also receipted in the same way for a quantity of coal then on board the Rock Island, agreeing to return an equal amount to the defendant in error upon surrender to it of the steamer. The officers and crew employed by the Waterhouse Corporation at once took possession of the Rock Island, with two

engineers, pilot, and secretary provided by the Rock Island Company, and proceeded to stow away so much of the cargo of the Garonne as the Rock Island was able to take, including a portion of the cargo owned by the Waterhouse Corporation. The loading consumed four days, at the expiration of which time the Rock Island started up the Yukon river. The steamer Rock Island No. 2, in command of the officers of the Rock Island Company, started up the river at about the same time. Considerable delays were experienced by the Rock Island through stopping at river points, cleaning boilers, and loading wood for fuel, and when about 1,300 miles from the mouth of the river she grounded on the Ft. Yukon bar. Assistance was asked of the Rock Island No. 2, which steamer spent about six days in trying to pull the Rock Island from the bar and in unloading and reloading her cargo, but finally abandoned the effort and continued up the river to her destination. Later the Rock Island was pulled off the bar by another steamer, the officer in charge of the vessel paying $1,000 for the service. After still further delays by breakage of machinery, trouble with the steam capstan in making landings, etc., she finally reached Dawson at 7:30 a. m. of August 23d. Upon the arrival of the Rock Island at Dawson, demand was at once made by the Rock Island Company for the amount due under the charter party. Capt. Jordison, in command of the Rock Island for the Waterhouse Corporation, had not the money with which to pay it, and entered into an agreement with the representative of the Rock Island Company that the money collected as freight charges should be paid into the Bank of British North America at Dawson, to the credit of H. U. Crockett, vice president of the Rock Island Company, from which should first be paid the wages due the crew, and the port and customs charges; the balance to be retained by the Rock Island Company on account of the hire of the steamer. The Waterhouse Corporation received the portion of the cargo belonging to it, and through its agent, Longmire, obtained a storeroom in Dawson, and exposed the goods for sale. The remaining cargo was delivered to the several consignees; the freight thereon collected and paid into the bank. The steamer Rock Island was then, on August 26, 1898, surrendered to the Rock Island Company; Capt. Jordison and the purser, Gilkison, giving the company a receipt acknowledging having had the steamer under charter from July 7, 1898, until August 26, 1898, at noon. A few minor transactions were subsequently had in Dawson: The Rock Island Company purchased certain goods of the Waterhouse Corporation at its store, and agreed to take a part of the equipment which had been supplied the steamer Rock Island by the Waterhouse Corporation at St. Michaels; the price to be fixed in Seattle upon arrival of the representatives of the respective parties. The Rock Island Company also transported to St. Michaels from Dawson three passengers, under agreement with Capt. Jordison, the fare charged being $50 each.

In the meantime the Garonne had returned to Vancouver. Upon her arrival there, Capt. Conradi reported the making of the charter party to Waterhouse, manager of the Waterhouse Corporation, delivering to him one of the duplicates of the document. This took place at some time between July 22d and 25th. Some eight or ten days later, on August 2d, Waterhouse wrote a letter to the Rock Island Company, stating that Capt. Conradi had exceeded his authority as master of the vessel in entering into the charter party for the steamer Rock Island, and that he had no authority, as agent of the corporation, to make such a charter; that, as manager of the corporation, he (Waterhouse) had no right to confirm the action of Capt. Conradi without referring the same to the trustees of the corporation,—and therefore gave notice that the charter party was not ratified, but that the matter was referred to the trustees for such action as they might see fit to take. Upon the return to Seattle of H. U. Crockett, vice president of the Rock Island Company, and as soon as he recovered from an illness contracted en route, he called upon Waterhouse at the Seattle office of the Waterhouse Corporation, and asked for a settlement of the account between that corporation and the Rock Island Company. Waterhouse then and there notified Crockett, as the representative of the Rock Island Company, of the intention of the Waterhouse Corporation to repudiate the charter party. Thereupon this suit was brought

by the Rock Island Company against the Waterhouse Corporation, in the circuit court of the United States for the district of Washington, for the hire of the steamer Rock Island under the charter party; for the value of the coal used on the said steamer, and not returned as per agreement; for the services of the steamer Rock Island No. 2 on the Ft. Yukon bar; and for the transportation of three passengers for the Waterhouse Corporation from Dawson to St. Michaels on the return of the Rock Island. Certain credits were allowed by the Rock Island Company for transportation of goods on the Rock Island up the Yukon, for cash received at Dawson, for goods purchased at Dawson from the Waterhouse Corporation, and for goods on board the Rock Island taken by the Rock Island Company at Dawson under agreement, which, with $500 disallowed by the court upon demurrer, left the amount claimed at the trial $20,565.19. The Waterhouse Corporation denied, in its answer, that Conradi was at any time its authorized agent for the purpose of entering into or executing the alleged charter party, or in any way authorized to enter into or execute the same in behalf of the corporation. It also denied that the steamer Rock Island, in good condition or otherwise, was delivered to the Waterhouse Corporation in St. Michaels harbor on July 7, 1898, and accepted by it, or that the Rock Island Company duly performed the contract on its part to be performed, or that the Waterhouse Corporation kept the steamer under said charter for 50 days, until August 26, 1898, and used it during that time in the transportation of freight and passengers between St. Michaels and Dawson. By way of affirmative defense, the Waterhouse Corporation, while not admitting that it entered into the charter party, or that the same was entered into or executed in its behalf by any person authorized so to do, or that it had in any way ratified or accepted said charter party, alleged that if, for any reason, it was liable to the Rock Island Company in any sum whatever upon said charter party, it was entitled to sundry abatements from the total amount of the hire of said steamer Rock Island called for by the terms of said charter party, and to sundry set-offs against the claims of the Rock Island Company, by reason of the following facts, and in the following amounts: (1) In the sum of $12,500 for 25 days' prolongation of the trip of the steamer under the charter party by reason of the steamer's unsound and bad condition, having a weak and defective capstan, and boilers and engines of weak construction, and inadequate strength and power for the exigencies of navigation upon the Yukon, with leaky steam pipes and fittings, and not having the necessary equipment of ringbolts, spars, and stout cables for use in getting afloat when grounded on sand bars or shoals, all contrary to representations alleged to have been made by the officers of the Rock Island Company, and for other reasons (not, however, supported by any proof); (2) in the sum of $7,010.60 for expenses of operating the steamer, and maintaining its crew and passengers thereon, during said 25 days' unnecessary prolongation of her trip; (3) in the sum of $1,000 for extra expense in getting the said steamer towed off by a passing steamer from a shoal in the Yukon river, on which she was grounded in the course of the said trip,—this expense necessitated by reason of the disregarding of a verbal agreement by the Rock Island Company, alleged to have been made between it and the persons representing the Waterhouse Corporation when said charter party was entered into, to the effect that the chartered steamer and the steamer Rock Island No. 2 should render mutual assistance, without charge, in getting each other afloat in case either of them grounded; (4) in the sum of $478 for damage to merchandise of the Waterhouse Corporation forming a part of the cargo of said steamer, by reason of steam escaping from leaky pipes and fittings into the hold where the merchandise was stowed, wetting and otherwise injuring it.

Bogle & Richardson and Burke, Shepard & McGilvra, for plaintiffs in error.

Harold Preston, E. M. Carr, and L. C. Gilman, for defendant in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

MORROW, Circuit Judge, after stating the facts as above, delivered the opinion of the court.

The appellee has interposed a motion to strike from the record the document purporting to be a bill of exceptions, appearing therein, on the ground that it does not constitute a proper, sufficient, or legal bill of exceptions. The appellee also objects to the consideration by the court of the alleged errors assigned by the appellant, on the ground that no proper, sufficient, or legal assignment of errors was filed in the circuit court, and no proper, legal, or sufficient assignment of errors appears in the record. The bill of exceptions covers 156 pages of the printed record. It contains the usual formal introductory matter, and then follows a transcript of the testimony of witnesses in narrative form, with the objections by counsel to the admission of testimony, and the rulings of the court with respect to such objections; a report in full of the charge of the court to the jury; the exceptions taken by counsel to certain portions of the charge, and to the refusal of the court to give certain instructions requested; and the exhibits in the case, including, also, the proceedings on a motion for a new trial. The certificate of the trial judge to this bill of exceptions recites that in "order that all the motions, offers, rulings, exceptions, and other proceedings had, and all the testimony, exhibits, and other evidence adduced, received, or offered, in said cause, and not already a part of the record, may be by this bill of exceptions made a part of the record therein," the judge has set his hand and seal to the same, and certifies that the bill of exceptions, together with the sundry exhibits therein mentioned, "contains all the motions, offers, rulings, exceptions, and other proceedings had, and all the material testimony exhibits, and other evidence adduced, received, or offered, in said cause, from the beginning of said cause down to the date of this certificate, and contains all the material facts, matters, and proceedings in said cause not already a part of the record therein, including the charge of said judge to said jury in full." The record thus made up appears to be a report of the trial of the case in such fullness of detail as to incumber the record with much useless matter, and impose upon this court the difficult task of determining the precise relation of scattered testimony to the principles of law declared by the court in the instructions given to the jury, and to the propositions of law contended for by counsel, and rejected by the circuit court in the instructions refused. This method of presenting a case to the appellate court has been repeatedly condemned by the supreme court of the United States. Insurance Co. v. Raddin, 120 U. S. 183, 193, 7 Sup. Ct. 500; Hanna v. Maas, 122 U. S. 24, 26, 7 Sup. Ct. 1055.

The assignments of error are 32 in number, 11 of which relate to exceptions taken by the appellant to the action of the court in admitting certain testimony offered by the appellee; 2 to the refusal of the court to admit testimony offered by the appellant; 2 to the denial of motions made by the appellant, one of which was the denial of a motion for a new trial; 9 to instructions given by

the court to the jury; and 8 to the refusal of the court to give instructions requested by the appellant.

In the view we take of this case, there are but few questions properly presented by the record for our consideration. The first and controlling question to be determined is as to the validity of the charter party executed at St. Michaels, Alaska, on July 5, 1898, on the part of the Rock Island Alaska Mining Company, by W. C. Knaack, general manager, and on the part of Frank Waterhouse, Limited, by C. G. Conradi, captain of the steamship Garonne, for the lease and charter of the steamboat Rock Island, to operate on the Yukon river between St. Michaels and Dawson City during the season of 1898. Was this charter party, under the circumstances connected with its execution, a lawful contract, binding upon the appellant?

The first objection urged against it by the appellant is that it was incompetent evidence, by reason of the fact that it did not have affixed to it an internal revenue stamp, as required by the act of June 13, 1898 (30 Stat. 448, 460), commonly known as the "War Revenue Law." Schedule A of this act went into effect on July 1, 1898; but it is a well-known fact that the government was not prepared at that date to supply the public with internal revenue stamps throughout the United States, and particularly was this failure an established fact of general public notoriety in the distant territory of Alaska. It is true, however, that this condition of affairs did not relieve the parties interested in the charter party from the duty of having it subsequently stamped as provided by law, if they desired to use the document as an instrument of evidence. But the ruling of the court in admitting the charter party in evidence without being properly stamped, though erroneous, was without prejudice in this case. The language of section 14 of the act of June 13, 1898, is:

"That hereafter, no instrument, paper, or document required by law to be stamped, which has been signed or issued without being duly stamped, or with a deficient stamp, nor any copy thereof, shall be recorded or admitted, or used as evidence in any court until a legal stamp or stamps, denoting the amount of tax, shall have been affixed thereto, as prescribed by law."

The original contract is unaffected by this statute, and, if otherwise valid, it remains valid, notwithstanding the absence of a stamp, from the written evidence of its terms. The charter party was set out in full in the complaint. The answer of the defendant (appellant here) denies the allegations of the paragraphs of the complaint containing the charter party, but immediately qualifies the denial by alleging that Conradi, who executed the charter party, was not at the time of the execution of the instrument, or at any time, the authorized agent of the defendant for the purpose of entering into or executing the instrument; and, as an affirmative defense, defendant alleges that "if, for any reason, it is liable to the plaintiff in any sum whatever upon said charter party," it is entitled to sundry abatements from the total amount of the hire of said steamer Rock Island called for by the terms of said charter party, "and to sundry set-offs against the plaintiff's claim

for said total amount, by reason of the following facts." The defendant then proceeds to allege and set up certain counterclaims as a set-off against the amount claimed by the plaintiff under the charter party. The questions placed in issue by the answer were: (1) Was Conradi the authorized agent of the defendant in executing the contract of charter party? (2) If so, what counterclaims was the defendant entitled to have allowed, as against plaintiff's claim for the hire of the vessel under the terms of the contract? The validity of the contract was only in issue with respect to Conradi's agency, and that was a question of authority, to be determined by facts outside of the document itself. The written evidence of the contract was not, therefore, necessary to establish plaintiff's case upon this issue. The ruling of the court was accordingly without prejudice to any right of the appellant involved in any question submitted to the court for determination.

It is next contended by the appellant that there is no general power vested in the master of a ship to bind the owner of a ship or cargo beyond the limits of the ship's own voyage, by chartering another vessel to perform the connecting transportation; and, further, that no such power arises, whatever the necessities or emergencies of the situation, in case of the failure of expected means of performing the connecting transportation to complete through contracts made by the owner. Undoubtedly the main duty resting upon the master of a vessel is to take his ship safely to its destination, and thus accomplish the purpose of the voyage. This purpose in the case at bar was the earning of carriage money. It is well settled that, if an exigency arises on the high seas which threatens to interfere with the success of such an undertaking, the master is clothed with authority to act as the agent of the shipowner and shipper. This rule, it would seem, should apply to any emergency occurring while the responsibility of the master continues, and the authorities are to the effect that this responsibility extends to the delivery of the cargo. In 1 Pars. Ship. & Adm. 233, the duty of a master is extended to transshipment of the cargo, when unable to transport the goods to their port of destination himself. The supreme court of the United States expresses the same opinion in The Maggie Hammond, 9 Wall. 458, and further says:

"Shipments are made that the goods may be transported to the place of delivery, and the master should always bear in mind that it is his duty to accomplish that object."

The early authority on maritime law, Emerigon, specifically declares, with reference to the agency of a captain of a ship:

"His quality of captain makes him master, and confers upon him the care of all that which concerns the ship and the cargo."

He further states it as a general rule that the owner is bound by the acts of the master.

The case of Lemont v. Lord, 52 Me. 365, cited by counsel for each of the parties herein, is in point; and, while it deals largely with the question of the master's agency for the shipper, the court also

considers generally the powers and duties of the master of a ship in an emergency. It declares the American law to be that stated by Chancellor Kent in his Commentaries, as follows:

"In this country we have followed the doctrine of Emerigon, and the spirit of the English cases, and hold it to be the duty of the master, from his character of agent of the owners of the cargo, which is cast upon him from the necessity of the case, to act in the port of necessity for the best interest of all concerned; and he has powers and discretion adequate to the trust, and requisite for the safe delivery of the cargo at the port of destination. If there be another vessel in the same or in a contiguous port, which can be had, the duty is clear and imperative upon the master to hire it; but still he is to exercise a sound discretion, adapted to the case."

And, after citing other authorities, the court says:

"When a master stands upon the deck of his ship, as he sails out of his port of departure, he is primarily, and as he then stands, the representative and agent of the owners of the ship. If his voyage is prosperous and free from disaster, he has no right, as we have seen, to intermeddle with the cargo on the voyage, or on its safe termination. But he has, so to speak, within himself a latent potentiality, existing in possibility and not in act, of other and distinct powers and agencies, which subsequent events may call into exercise. From a simple captain of the ship, and of that alone, he may, in case of disaster, peril, or stress of weather, become an absolute master over the cargo. He may cast it overboard, if the safety of the vessel requires the sacrifice. He may, in case of absolute necessity, sell a part of the cargo. He may, when not forbidden by a positive statute of his country, ransom both ship and cargo. He may be, as he often is, placed in such circumstances that he is, from necessity, chiefly by reason of the absence of all other parties, the agent of each and all persons interested in the vessel, the cargo, the freight, and the insurance."

And again:

"When a master finds himself in this position of responsibility, and called upon to act, he is to remember that the owners of his ship will lose all their freight, if the goods are not forwarded, and that he, on their behalf, as master, has a right to retain possession, for the purpose of transshipping in order to earn the original freight, or a part at least. Mason v. Lickbarrow, 1 H. Bl. 359. If this can be done, it answers all the purposes of the original contract, so far as the principal object of the voyage is concerned. If, then, the master can find in the port, or in one within a reasonable distance, another ship, the master of which will agree to carry on the cargo at a rate at which something may be saved to the owners of the ship out of both freights, it would be his right and his duty to employ the new ship, for the benefit of his owners, and acting on their behalf; for, although there is no legal obligation under the original contract, yet the owners of the vessel may, if they find it for their interest, forward the cargo in another vessel. It is therefore the right and duty of the master to make all reasonable efforts to obtain another vessel, on such terms as will eventually save something to the owners of the ship. Hugg v. Insurance Co., 7 How. 595. In doing this, he acts as master of the vessel, still having in his possession the cargo for the owners of the ship, and has not any occasion, nor is there any necessity for him, to assume the character of supercargo or agent for the merchant. This latent and dormant office still remains in abeyance."

Are these principles of law applicable to the case at bar? In addition to the facts contained in the record, the court is justified in judicially knowing the current history of the times, and the fact that the transactions in this case took place at the time of, and were connected with, the extraordinary rush of adventurers to the newly-discovered gold fields on the Yukon river, popularly known as the "Klondike." The situation presented emergencies to those en-

gaged in transportation, which had to be met promptly, and with due regard to all the attending circumstances. It appears that Conradi, as master of the ship Garonne, was employed by the appellant; that said ship arrived at St. Michaels, Alaska, on July 4, 1898, with passengers and a cargo bound for and consigned to Dawson and other Yukon river points; that arrangements had been made by the Waterhouse Corporation to transport the passengers and freight of the Garonne from St. Michaels to their respective destinations by a river steamer to be furnished by F. W., Limited, a corporation having the same American manager as the Waterhouse Corporation; and that upon the arrival of the Garonne at St. Michaels the river steamer did not appear. It further appears that Capt. Conradi was confronted with the alternative of returning to Vancouver with passengers and freight, thereby losing to the Waterhouse Corporation the entire earnings of the trip, as well as subjecting it to liability for breaches of contract, or of providing other means of transportation for said passengers and freight; there being no conveniences at St. Michaels for caring for either on shore. Conradi, as master of the ship, was the only person in a position to look after the interests of all parties concerned. It was clearly not only within the scope of his employment, but his duty, in the emergency, to do that which the owner would do for himself if personally present. The situation required action upon his part in order to carry out his employer's contracts, and it is plain that the duty rested upon him, as master, to make any reasonable arrangement to that end. This duty vested in him a power equal to the emergency and suitable to the occasion. It is not contended that the terms of the contract which he entered into under these circumstances were unreasonable. It may be observed, also, that the evidence shows the total freight and passenger earnings of the expedition, from shippers other than the Waterhouse Corporation, to have exceeded the total sum due under the charter party. It follows that there was evidence sufficient to establish the fact that Capt. Conradi was, under the circumstances, authorized to make the charter party; that the instrument was a lawful contract between the parties, and binding upon the appellant. Questions of this nature are to a large degree dependent for their solution upon the facts and circumstances of the case, and in a common-law court are properly submitted to the consideration of a jury, with suitable instructions as to the law of the case; and this is what the court did with respect to this contract of charter party. The same observations are applicable to the other agreements entered into between the parties.

Error is assigned upon the court's instruction with regard to the ratification of the charter party by the appellant, and upon the exclusion of certain evidence relative thereto. It having been determined, however, that there was evidence sufficient to establish the fact that Capt. Conradi had the power, under the circumstances, to make the charter party, the question of ratification becomes immaterial.

It is next contended by appellant that the Rock Island was not in a fit and proper condition for navigation of the Yukon at the time

the steamboat was chartered, and that by reason thereof delays were caused in the trip up the river which entailed an extra expense to said appellant of about $8,600, and an addition to the amount which would otherwise have been due to the appellee under the charter party of $12,500; and error is assigned upon the instructions of the court to the jury to disregard the claim of appellant for right of deduction, so far as it related to the absence of certain appliances from the Rock Island, and the working of the capstan, if the jury believed that the representatives of the appellant accepted the steamer in the condition in which she was when they took her, and that, in order to entitle the appellant to deduction on account of delays from machinery breakages or defective capstan, the same must have arisen from inherent defects unknown to the appellant, or which subsequently arose through incompetency of the engineers. Error is also assigned upon the refusal of the court to instruct the jury that the owner of a vessel is answerable for any defects, whether known or unknown, visible or patent, which impair her usefulness to the hirer. The following statement appears in the bill of exceptions with respect to the condition of the steamer Rock Island immediately preceding the charter, and the cause of her grounding in the Yukon river:

"The undisputed evidence in the case showed that, before taking the steamer Rock Island at St. Michaels harbor, Capt. Conradi and Capt. Jordison made an examination of the boat and of her machinery and appliances, and discovered the full details of her equipment, and the absence of spars, ringbolts, and tackle therefor. There was also evidence introduced by the plaintiff on rebuttal tending to show that the capstan of the steamer Rock Island was a new machine, of a standard manufacture, and was in good working order at the time the steamer was accepted by Captain Conradi and Captain Jordison for the defendant. The undisputed evidence showed that the grounding of steamers was an ordinary mishap or peril of navigation of the Yukon river."

There is no evidence that the representatives of the appellant made any demand upon the appellee for any further appliances than were then upon the boat, nor that they complained of their absence. And, after accepting the boat with the knowledge of such absence, appellant could not afterwards complain of it. We find no error in the court's instruction in this regard, or upon the question of inherent defects in machinery. It is well established that there is an implied warranty by a shipowner that the vessel he furnishes to another party shall be reasonably fit for the purposes of the contemplated voyage at the time he delivers her to the hirer, and that the owner is responsible for damage caused by latent defects existing at the time of hiring. And the court so stated the law to the jury.

Appellant lays considerable stress upon the alleged error of the court in admitting in evidence the subpœna requiring the attendance of Capt. Conradi, with the marshal's return thereon showing inability to serve the same, and in instructing the jury that they had the right to infer that Conradi would have given testimony which would not be more favorable to appellant than the testimony given by the other witnesses, if they determined as a fact that appellant facilitated the absence of Conradi from the trial by grant-

ing him leave of absence. The facts connected with the making of the charter party in suit were particularly within the knowledge of Capt. Conradi, and the presumption would ordinarily arise that the appellant had it in its power to show those facts by producing him as a witness. As stated in Railway Co. v. Ellis, 4 C. C. A. 454, 54 Fed. 481:

"It is a well-settled rule of evidence that when the circumstances in proof tend to fix a liability on a party who has it in his power to offer evidence of all the facts as they existed, and rebut the inferences which the circumstances in proof tend to establish, and he fails to offer such proof, the natural conclusion is that the proof, if produced, instead of rebutting, would support, the inferences against him, and the jury is justified in acting upon that conclusion. 'It is certainly a maxim,' said Lord Mansfield, 'that all evidence is to be weighed according to the proof which it was in the power of one side to have produced, and in the power of the other side to have contradicted.' Blatch v. Archer, Cowp. 63, 65,"—citing, also, 1 Stark. Ev. p. 54.

See, also, Clifton v. U. S., 4 How. 242; Frick v. Barbour, 64 Pa. St. 120.

This rule applies even in criminal cases (Graves v. U. S., 150 U. S. 118, 14 Sup. Ct. 40; People v. Hovey, 92 N. Y. 554; Rice v. Com., 102 Pa. St. 408), and justified the court's action on the trial below.

The overruling of a motion for a new trial is not assignable as error, under the practice established in the courts of the United States. This has been repeatedly held by the supreme court and by the circuit court of appeals. Moore v. U. S., 150 U. S. 57, 14 Sup. Ct. 26; Holder v. U. S., 150 U. S. 91, 14 Sup. Ct. 10; Blitz v. U. S., 153 U. S. 308, 14 Sup. Ct. 924; Wheeler v. U. S., 159 U. S. 523, 524, 16 Sup. Ct. 93; Sigafus v. Porter, 51 U. S. App. 693, 28 C. C. A. 443, 84 Fed. 430; Railway Co. v. Charless, 7 U. S. App. 359, 2 C. C. A. 380, 51 Fed. 562.

We are satisfied that no errors were committed which would justify a retrial. The judgment of the circuit court is therefore affirmed.

CAMPBELL et al. v. MORAN BROS. CO.

(Circuit Court of Appeals, Ninth Circuit. October 3, 1899.)

No. 533.

1. CONTRACTS—CONSTRUCTION—PLACE OF PAYMENT.

A contract for the building at Seattle, Wash., of certain steamers to be used in navigating the Yukon river made the final payment therefor payable on delivery of the vessels, which was to be made at St. Michaels, Alaska, between which place and Seattle the only means of communication was by ship, requiring several weeks. The contract contained the further provision: "All payments to be made at Seattle, Washington, or with exchange." *Held*, that the latter provision did not govern as to the place of final payment, which, under the circumstances, as well as by a fair construction of the entire contract, was required to be made at St. Michaels, on delivery there of the vessels, with exchange on Seattle.

2. SAME—ACTION FOR BREACH—ISSUES AND PROOF.

A party contracting for vessels to be delivered to him at a certain time and place, and to be paid for on delivery, cannot maintain an action against the other party for damages for failure to deliver at the time agreed upon, without alleging and proving that he was able and ready to perform by paying the price at the time and place of delivery.

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

Ballinger, Ronald & Battle and Henry Hudson, for plaintiffs in error.

Harold Preston, E. M. Carr, L. C. Gilman, and S. H. Piles, for defendant in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

GILBERT, Circuit Judge. The plaintiffs in error instituted an action in the circuit court to recover damages against the defendant in error for breach of contract. It was alleged in the complaint: That on November 22, 1897, the defendant, Moran Bros. Company, a corporation, entered into a contract with James P. Light by which the former agreed to construct two stern-wheel steamers, one stern-wheel towing steamer, and three barges, each of dimensions and according to specifications attached to the contract, and to deliver the same to said Light at St. Michaels, Alaska, or at the mouth of the Yukon river, "on or before the opening of navigation at the mouth of the river in the early summer of 1898," delays "incident to the elements, or conditions over which the defendant had no control, alone excepted." The payment for said vessels was to be made in the sum of $116,500 in installments as follows: First, $6,000 upon execution of the contract; second, $20,000 within 60 days after date of signing the contract; third, $20,000 within 120 days after the signing of the contract; the fourth and final payment of $70,500 "payable upon the delivery of the vessels as herein specified; all payments to be made at Seattle, Washington, or with exchange." That on January 14, 1898, the said Light transferred and assigned to the Seattle & Yukon Steamship Company, a corporation, all his right, title, and interest in and to the said contract. That on February 22, 1898, the said steamship company and the defendant modified the contract, and agreed that the stern-wheel towing steamer be eliminated from the contract, and that another river steamer of the same dimensions and specifications as those provided for in the original contract be added at an additional cost of $20,500, making the total contract price $137,000, of which additional price $10,250 was to be paid on April 22, 1898; "the balance of total contract price, as modified above, to be paid on delivery of vessels at St. Michaels, as provided in original contract." That thereafter the said Seattle & Yukon Steamship Company entered into a contract with D. R. Campbell & Sons, the plaintiffs, whereby it was agreed that the latter should loan the said steamship company $50,000, a portion of which was to be paid to the defendant on account of the building of said steamers and barges, and a portion to the Progresso Steamship Company, a corporation, on account of a charter party whereby said Progresso Company chartered to the Seattle & Yukon Steamship Company the steamship Progresso. That said sum of $50,000 was to be advanced by plaintiffs at such times as the same might be necessary to meet the payments due or to become due to the defendant and the said Progresso Steamship Company. That to secure payment of said loan

the Seattle & Yukon Steamship Company, on January 14, 1898, sold and assigned to the plaintiffs all its right, title, and interest in and to its said contract with the said James P. Light. That the contract between said Light and the defendant was made with the intention of operating the boats and barges so to be constructed in the transportation of freight and passengers from St. Michaels, Alaska, to Dawson City, and to commence at the opening of navigation at the mouth of said river in the early summer of 1898, and that said river steamers and barges were to be used in connection with the boats and steamers to be operated at the same time by Light or his successors between Seattle, Wash., and St. Michaels, which the defendant well knew. The complaint then alleged that damages were sustained by reason of the failure to deliver the said steamers at the mouth of the Yukon river on or before the opening of navigation in 1898, or at any time prior to August 4, 1898, in the sum of $5,000 for loss in expenses and demurrage, the sum of $5,000 for the loss of the use of said steamers and barges for that season, and the sum of $51,000, the moneys paid to the defendant on the contract. Issue was taken by the defendant upon the allegation that it had failed to comply with the contract or that plaintiff had sustained damage thereby. Upon the trial of the cause upon the close of the plaintiffs' testimony the court instructed the jury to return a verdict for the defendant. It is assigned that this instruction was error.

The facts of the case, as they appear in the bill of exceptions, are substantially these: After the contract had been entered into, and after it was modified by the agreement of February 22, 1898, the Seattle & Yukon Steamship Company, at some time in February or March, 1898, notified the defendant that it would not require the three barges which were provided for in the contract, and wrote that it did not know what it would take in their place. Subsequently the defendant promised the steamship company that it would construct three smaller barges "if ten days' notice were given," the price to depend upon the size and tonnage. On May 4, 1898, the notice was given, but the smaller barges were never constructed, for the reason that the notice came late in the season, and the defendant was very busy. The correspondence showed that the price of the three large barges originally contracted for was $16,500. With the exception of the barges, the defendant constructed all the vessels provided for by the contract. The steamship company made its payments under the contract until the installment of $10,250, payable on April 22, 1898, fell due. That payment was not made, but shortly afterwards $5,000 was paid upon account. At about this time the Seattle & Yukon Steamship Company became financially involved, and probably insolvent. It informed the defendant that, unless some modification were made in the terms of payment provided for in the contract, it would be unable to comply therewith. Upon the trial of the action the steamship company admitted that at the time of the completion of the contract it was not in a position to accept and pay for the boats except upon the condition either that it be allowed to use the boats at St. Michaels on a trip from there to Dawson, and earn freight thereby, or that the plaintiffs Campbell & Sons would pay the

balance. The defendant in error refused to modify the terms of payment. About June 15, 1898, the Yukon river became open for navigation. At that time the defendant did not have the steamers at St. Michaels, ready for delivery, nor had the Seattle & Yukon Steamship Company any representative there to receive them. Its representative did not arrive until July 13, 1898. He heard there a report that the vessels had been lost. He remained there 24 hours, and thereupon returned to Seattle. On July 26th the steamers arrived at St. Michaels, and were ready for delivery. The steamship company had no representative to receive them, and delivery was never made. It is admitted that neither the steamship company nor its representative who went to St. Michaels had available cash funds exceeding $5,000 with which to meet the $69,000 payment which was due on delivery of the steamers. Up to this time the defendant had no information or notice of the assignment from the steamship company to the plaintiffs. When the steamship company's representative went to St. Michaels, he took with him two letters of instruction; one from the steamship company, the other from the attorney of the plaintiffs. The first was addressed to Robert Moran, an officer of the defendant corporation, and is as follows:

"In view of the possibility of your refusal to deliver to us at St. Michaels, or the mouth of the Yukon river, our three river steamers the Gustin, Light, and Campbell unless you are paid whatever sum you may claim to be still due from us under the terms of our contract as purchase money,—although such refusal would be a breach of contract on your part,—in order that there may be no delay in transfer of freight and passengers from the steamship Progresso, we have authorized our general manager, Geo. W. Grayson, Jr., to pay over to you certain drafts and cash amounting to about fifty thousand dollars ($50,000). Some of said drafts are payable at sight upon the arrival of our steamers at Dawson City. Should you not be willing to accept said drafts as cash, then we have authorized our said general manager to authorize and allow you to remain in general possession or control of steamers until their arrival at Dawson, and until the full amount which may be due upon the purchase price shall have been paid to you."

The second letter contained instructions for the representative. It rehearsed the terms of the contract and the assignment to the defendant. It contained the following:

"It might be that, when you arrive at St. Michaels, Moran Bros. Co. would insist upon the payment in full for all three river steamers upon their delivery, which I apprehend you will not be in a position to do." (Then follows instruction to charge Moran Bros. Company $16,500 for the nondelivery of the barges, and to release all equity and claim on the third river steamer, the contract price of which was $38,500.) "Then you could offer to pay him $5,000 cash at St. Michaels, and $26,000 at Dawson City, making $31,000 in all, which would amount to the sum, all told, including $51,000 paid at Seattle, to $82,000, which would be in payment of two river steamers, should Mr. Moran deliver them to you, and would be entirely satisfactory to D. R. Campbell & Sons. * * * Should he decline to do anything, say to him that D. R. Campbell & Sons will, of course, hold him to a strict accountability under the terms of their contract, and that you will proceed to Dawson City, collect the freight money, and return to Seattle, and there pay the same, holding Mr. Moran or Moran Bros. Co. accountable for all damages by reason of any failure on his part in any particular required by the written contracts."

The navigation of the Yukon river did not close until October 15, 1898. Each of the boats during the season made the trip to Dawson. One of them returned to St. Michaels.

The question which first presents itself is, where was the final payment on the contracts to be made? In the absence of an express provision in the contract, the final payment would have become due at the time and place of the completion of the undertaking by the other party to the agreement; that is, at the time and place of the delivery of the vessels. But both the original contract and the modification of it contain express provisions concerning the time and place of payment. In the first contract it was stipulated that the final installment was "payable upon delivery of the vessels as herein specified," and that the vessels were to be delivered "at St. Michaels, Alaska, or near the mouth of the Yukon river." The second agreement contained the following: "The balance of total contract price, as modified above, to be paid on delivery of the vessels at St. Michaels, as provided in the original contract." It is contended by the plaintiffs in error that these provisions are controlled by the express agreement contained in the first writing, but not in the second, which provides as follows: "All payments to be made at Seattle, Washington, or with exchange," and that thereby the contracting parties stipulated for the final payment at Seattle. But that provision does not positively call for the payment of all installments at Seattle. Payments are to be made at Seattle, "or with exchange"; that is to say, payments are to be made in such a way that the full amount thereof shall be net to Moran Bros. Company at Seattle. The reason for the provision is obvious. The first contract was made with J. P. Light, a citizen of Chicago, and the second was made with the Seattle & Yukon Steamship Company, a corporation of Arizona. There is no doubt that it was to the interest of Moran Bros. Company to save the exchange on all payments, and the stipulation was made for that purpose, and not for the purpose of prescribing a place of payment. No difficulty is found in so construing the three provisions as to payments as to give force to all, and there is nothing necessarily repugnant in them. It was evidently the intention of the contracting parties that the first payments might be made either at Seattle or elsewhere, as might be found convenient to the steamship company, but, if elsewhere, exchange to Seattle should be added, but that the final payment was to be made upon the delivery of the vessels. It was the largest payment of all. In the ordinary course of business such a payment would be simultaneous with the delivery. Not only do the contracts themselves contain clear evidence that this was the intention, but, if they had been ambiguous in their terms, the attending circumstances would clearly indicate such a construction. The delivery was required to be made at a distant port, with which there was no communication by telegraph, and from which no news could arrive at Seattle except by way of a sea voyage of several weeks' duration. It is not to be supposed that the defendant in error was to deliver the possession of the vessels without payment or security, and to await the final payment until the receipt of the news at Seattle that the delivery had been made. The contract specified in plain terms that the final payment was to be made "upon delivery of the vessels." The de-

livery was to be made at St. Michaels. Consequently there was the place of the final payment.

Had the plaintiffs a cause of action for damages from the defendant's failure to carry out its contract and deliver the vessels at the stipulated time? The delivery of the vessels to the steamship company, and the final payment by the latter, were, as we have seen, concurrent acts. Neither party to the contract was required to trust the other. The delivery could not be demanded without the payment, nor could the payment be demanded without the delivery. Before the plaintiffs, or their assignor, the steamship company, could recover damages for a failure of the defendant to deliver the vessels at the time and place stipulated, it was necessary for them to allege and to prove that the steamship company was able and ready to make the final payment, which was a condition of the delivery. The elements of the damage must be certain. The plaintiffs could sustain no damage if neither the steamship company nor its assignee were ready upon their part to carry out the contract. Am. & Eng. Enc. Law (2d Ed.) 121; Hammond v. Gilmore's Adm'r, 14 Conn. 479; Dunham v. Pettee, 8 N. Y. 508; Hoyt v. Hudson, 12 Johns. 209; Dana v. King, 2 Pick. 155; Irwin v. Lee, 34 Ind. 319; Cole v. Swanston, 1 Cal. 51. The evidence, upon the plaintiffs' own showing, was that they were not ready. They had not the means to make the final payment. They sent an agent to St. Michaels to receive the vessels, but they provided him with only a small proportion of the funds necessary to close the transaction. He was instructed to solicit a compromise, to offer substitutes for a cash payment, and to obtain, if possible, the consent of the defendant to the elimination of one of the vessels from the contract, and to thereby reduce the final payment by more than one-half. It is contended that the plaintiffs themselves stood ready to furnish the steamship company the funds wherewith to make the final payment. The evidence leaves this doubtful, but, if it be true, it can have no bearing upon the present question. The defendant was entitled to payment upon the delivery of the vessels. The payment through the plaintiffs could not have been made at St. Michaels. They had made no preparation to meet such a payment there or elsewhere. If the plaintiffs contemplated making such a payment at all, it was only to be made after news should have reached them by course of mail from St. Michaels advising them that the defendant had refused the offers of compromise which the steamship company's representative was authorized to submit. It is not contended that the defendant was ever proffered payment through the plaintiffs, or that up to the time of the arrival of the vessels at St. Michaels it had ever been informed of the assignment of the contract to the plaintiffs. The plaintiffs, having failed to aver and prove a readiness upon their part or upon the part of the steamship company to comply with the terms of the contract, are in no position to demand damages for the nondelivery of the vessels. It becomes unnecessary, therefore, to consider whether the defendant's delay in producing the vessels at St. Michaels at the opening of navigation on the Yukon,

or prior to July 26, 1898, was a breach of the contract, or whether the time of the delivery was made of the essence of the contract. The other party to the agreement was not thereby excused from averring and proving its readiness to perform. Upon the case as presented the circuit court properly directed the jury to return a verdict for the defendant. The judgment will be affirmed.

CUSTER COUNTY v. WESTERN RANCHES, Limited.

(Circuit Court of Appeals, Ninth Circuit. October 5, 1899.)

No. 537.

ACTION TO RECOVER TAXES PAID—JUDGMENT ON PLEADINGS—EFFECT OF GENERAL DENIAL.

In an action to recover taxes alleged to have been illegally demanded, and to have been paid under protest, a judgment for plaintiff on the pleadings is not authorized where the answer contains a general denial, and no admission of the allegation of payment.

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

T. J. Porter, for plaintiff in error.

Clayberg, Corbett & Gunn, for defendant in error.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

GILBERT, Circuit Judge. The judgment of the circuit court in this case (89 Fed. 577) was rendered upon the pleadings in favor of the plaintiff in a case in which the Western Ranches, Limited, sued the county of Custer, in the state of Montana, for taxes which had been paid under protest. In the answer the defendant denied "each and all of the allegations of plaintiff's complaint not herein specifically admitted or denied." Among other allegations not admitted or elsewhere denied was the averment that the taxes had been paid, and that they had been paid under protest. In the face of the denial of these allegations, it was error to enter a judgment for the plaintiff upon the pleadings. The defendant in error, by its counsel, so admits, and now moves this court that the judgment be reversed, and the cause remanded for a new trial. The plaintiff in error makes no opposition to the motion. The motion will be allowed. The judgment will be reversed, and the cause remanded for a new trial.

SCHWALBACH v. SHINKLE, WILSON & KREIS CO. et al.

(Circuit Court, S. D. Ohio, W. D. April 1, 1899.)

No. 5,279.

1. LANDLORD AND TENANT—UNSAFE PREMISES—LIABILITY FOR INJURY TO THIRD PERSONS.

Where leased premises are insufficient and unsafe for the purpose for which they are leased, and such fact is known to the lessee when the lease is made, or is apparent on reasonable inspection, the lessor is not liable to one injured by reason of the using of the premises by the lessee in their unsafe condition.

2. SAME—ACTION FOR INJURIES—JOINDER OF DEFENDANTS.

A petition, however, alleging such facts, in an action brought against the lessor and lessee jointly to recover for such an injury, is not demurrable on the ground that it joins separate causes of action against the several defendants, as, if the lessor were liable at all, he would be liable jointly with the lessee.[1]

This is an action to recover for the wrongful killing of plaintiff's intestate. Heard on demurrer to petition for misjoinder of causes of action.

Cohen & Mack, for plaintiff.

Bromwell & Bruce and Maxwell & Ramsey, for defendants.

THOMPSON, District Judge. This case is submitted on demurrer to the petition for misjoinder of causes of action.

With reference to the liability of lessor and lessee for injuries to persons caused by defective and unsafe buildings, the following propositions, some of which are, and some of which are not, applicable to the case at bar, can, I think, be regarded as settled law: (1) If, when let, the premises are in a condition which is dangerous to the public, or with a nuisance thereon, the lessor may be liable to strangers for injuries resulting from such condition or nuisance; for, by letting them and receiving rent therefor, he is to be regarded as authorizing the continuance of the condition or nuisance. (2) If the tenant occupying the premises permits the condition or nuisance to remain, he is jointly as well as severally liable for injuries occasioned thereby. (3) In the absence of express warranty, there is no implied warranty on the part of the lessor that the demised premises are safe or reasonably fit for occupation, and the lessor is not answerable to the lessee, or those in privity with him, for defects in the building which the lessee could, by reasonable inspection, have discovered at the time of the letting. (4) But if the lessor fraudulently conceals such defects, or if he fails to disclose latent defects known to him and not known to the lessee, nor discoverable by reasonable inspection of the building, he is liable, as for negligence, for injuries resulting from such defects. (5) If such defects are not known, nor by the exercise of reasonable care could have been known, either by the lessor or by the lessee, then any injury resulting therefrom must be regarded as caused by inevitable ac-

[1] Where premises are leased in a ruinous or defective condition, the owner is jointly liable with the tenant for injuries resulting to third persons. Joyce v. Martin (R. I.) 10 Atl. 620; Stenberg v. Wilcox (Tenn. Sup.) 33 S. W. 917, 34 L. R. A. 615; House v. Metcalf, 27 Conn. 631; Knauss v. Brua, 107 Pa. St. 85. And where landlord leases premises with a defective coal hole in the sidewalk in front of such premises, both landlord and tenant, as well as the city, are liable individually or jointly to one injured by such negligence. Mancuso v. Kansas City, 74 Mo. App. 138, 1 Mo. App. Rep'r, 218; Irvine v. Wood, 51 N. Y. 224; Davenport v. Ruckman, 37 N. Y. 568, affirming 10 Bosw. 20. The burden of proof, however, in cases where the tenant has covenanted to repair, is upon the person injured to show knowledge on the part of the owner of the defective condition. Manufacturing Co. v. Lindsay, 10 Ill. App. 583. The rule is the same whether the action be for nuisance or negligence. See Timlin v. Oil Co., 126 N. Y. 514, 27 N. E. 786.

cident, for which neither lessor nor lessee is liable. Timlin v. Oil Co., 126 N. Y. 514, 27 N. E. 786; Ahern v. Steele, 115 N. Y. 203, 22 N. E. 193; Godley v. Hagerty, 20 Pa. St. 387; Whart. Neg. § 817; 2 Shear. & R. Neg. (5th Ed.) p. 1231, § 709a; Burdick v. Cheadle, 26 Ohio St. 393; Jaffe v. Harteau, 56 N. Y. 398; Edwards v. Railroad Co., 98 N. Y. 245; Thomp. Neg. 323; Doyle v. Railway Co., 147 U. S. 413–423, 13 Sup. Ct. 333; Tayl. Landl. & Ten. § 382; Bowe v. Hunking, 135 Mass. 380; Commissioners v. Orfila, 15 App. Cas. 413; Whart. Neg. §§ 825, 835, pp. 645, 649; Franklin v. Brown, 118 N. Y. 110, 23 N. E. 126; Francis v. Cockrell, L. R. 5 Q. B. 506; Hill v. Woodman, 14 Me. 38, 42; Gregor v. Cady, 82 Me. 131, 19 Atl. 108; Keates v. Earl of Cadogan, 10 C. B. 591; Arden v. Pullen, 10 Mees. & W. 321; Sutton v. Temple, 12 Mees. & W. 52; Hart v. Windsor, Id. 68, 85; Libbey v. Tolford, 48 Me. 316; Foster v. Peyser, 9 Cush. 242; Welles v. Castles, 3 Gray, 323; Tuttle v. Manufacturing Co., 145 Mass. 169–175, 13 N. E. 465; Cowen v. Sunderland, 145 Mass. 363, 14 N. E. 117; Scott v. Simons, 54 N. H. 431; Walden v. Finch, 70 Pa. St. 460; Minor v. Sharon, 112 Mass. 477; Cesar v. Karutz, 60 N. Y. 229; Wallace v. Lent, 1 Daly, 481; Robbins v. Jones, 15 C. B. (N. S.) 221; McKenzie v. Cheetham, 83 Me. 543, 22 Atl. 469.

In this case the petition states that large quantities of sugar and other merchandise were stored in a warehouse, and that the floors of the building broke and fell, with the contents thereof, killing the plaintiff's intestate, Joseph Schwalbach; that the "warehouse and premises were defective, insufficient, and insecure for the purposes for which the same were let"; that "all the defendants did in fact well know from the time said lease was made that said warehouse and said premises were insufficient, unsafe, and insecure for the purposes for which the same were let," and by reason of their negligence in using the warehouse while in this condition Schwalbach was killed. It does not appear that the "insufficient, unsafe, and insecure" condition of the warehouse was due to any latent or concealed defect, or that the lessors, Burney & Seymour, fraudulently concealed this condition, or made any false representation as to the real condition of the premises, or that the condition was one which the lessees, the Shinkle, Wilson & Kreis Company, could not, on reasonable inspection at the time of the letting, have discovered; but, on the contrary, it does appear from the allegations of the petition that the lessee at the time of the letting did know that the premises were "insufficient, unsafe, and insecure," and the facts as stated would indicate that the condition of unsafety was such as would be apparent upon proper inspection. It would follow, therefore, upon the averments of the petition, that the lessors were not liable for the injury complained of; but that question is not presented by the demurrer. The question presented by the demurrer is as to whether there is a misjoinder of separate causes of action against the several defendants. There is no attempt in this petition to state separate causes of action against the several defendants. It is sought to charge the several defendants jointly, and, if the lessors were liable at all, they would be jointly liable with the lessee. There is no relation of master and servant between the

lessors and the lessee, out of which distinct liabilities could arise from the same transaction, as where the engineer of a railroad train is directly liable in trespass for injuring another by the negligent operation of the train, and where the railroad company is indirectly liable on the case for the negligence of its servant. Here the lessors, if liable at all, would be liable for causing the injury, or failing to disclose the unsafe condition, and the lessee would be jointly liable for continuing that condition, thereby both contributing to the injury. The petition is not open to the objection presented by this demurrer, and it will therefore be overruled.

In re LENTZ et al.

(District Court, D. South Dakota. November 13, 1899.)

1. BANKRUPTCY—EXEMPTIONS—CLOTHING AND PROVISIONS.
   Where the state law exempts "wearing apparel and clothing of the debtor and his family" and "provisions for the debtor and his family necessary for one year's supply, either provided or growing or both," a bankrupt cannot claim to have set apart to him as exempt any portion of a stock of clothing and groceries owned and kept for sale in their store by a mercantile firm of which he is a member.
2. SAME—PARTNERSHIP EXEMPTIONS.
   A partnership cannot be a "head of a family," or a "single person not the head of a family," within the meaning of a state law (Sess. Laws S. D. 1890, c. 86) allowing property of a certain value to be selected and claimed as exempt from execution by persons answering these descriptions; and therefore, when a partnership becomes bankrupt, the firm, as such, cannot claim to have any portion of the partnership property set apart to it as exempt.
3. SAME.
   Independently of the limitations of such statute, a bankrupt partnership cannot claim any exemptions out of the partnership property, for the reason that the adjudication in bankruptcy dissolves the firm absolutely and for every purpose, and thereafter there is no firm in existence to claim or receive the exemption.
4. SAME—INDIVIDUAL EXEMPTIONS OUT OF FIRM ASSETS.
   In South Dakota, in case of the bankruptcy of a partnership, neither member of the firm can claim any portion of the firm property to be set apart to him as his individual exemption.

In Bankruptcy. On questions certified by referee.

John C. Jenkins, for bankrupts.
John H. Gates, for creditors.

CARLAND, District Judge. The firm of Lentz & Odegard has been adjudged bankrupt. The referee having charge of the case, on the 9th day of November, 1899, made an order allowing the trustee to set aside a partnership exemption of $1,500, and also certain absolute exemptions from the partnership property. To the granting of this order the creditors excepted, and the questions as to whether said firm of Lentz & Odegard is entitled to any exemption from the firm property, and as to whether the members of said firm are entitled to individual exemptions out of said property, are before me for decision. Prior to 1890, the law of the state of South Da-

kota, so far as applicable to the question certified, was as follows: Section 323, Code Civ. Proc., provided, among other things, that "all wearing apparel and clothing of the debtor and his family, the provisions for the debtor and his family necessary for one year's supply, either provided or growing or both, and fuel necessary for one year," should be absolutely exempt. Section 324, Id., provided: "In addition to the property mentioned in the preceding section the debtor may by himself or his agent select from all other of his personal property not absolutely exempt, goods, chattels, merchandise, money, or other personal property, not to exceed in the aggregate fifteen hundred dollars in value which is also exempt." Section 333, Id., provided: "A partnership firm can claim but one exemption of fifteen hundred dollars in value out of the partnership property and not a several exemption for each partner." It is clear from an examination of sections 323 and 324 that a partnership firm was included in the word "debtor" in section 324, and was limited in its exemption rights to the personal property mentioned in section 333, or the alternative exemption provided in a section not quoted. The law in regard to absolute exemptions above quoted still remains the law of this state. The partnership property in the hands of the trustee consists of a general mercantile stock, such as is carried in country stores, and is composed of groceries, dry goods, clothing, boots and shoes, etc. None of the articles mentioned as absolutely exempt could, from their very nature, be taken from or included in this general mercantile stock. "Wearing apparel and clothing" of the debtor and his family means the wearing apparel and clothing worn and used, or to be used, by the debtor and his family; not clothing purchased by a firm of which the debtor is a member, and held by said firm for sale. "Provisions" mean articles of food stored at home, or growing in the fields for home consumption; not canned beans, peas, tomatoes, corn beef, sardines, or red herring kept for sale by a mercantile firm of which the debtor is a member.

November 2, 1889, the state of South Dakota was admitted to the Union, with a constitution which went into effect on that day. Section 4 of article 21 of that constitution reads as follows: "The right of the debtor to enjoy the comforts and necessaries of life shall be recognized by wholesome laws exempting from forced sale a homestead the value of which shall be limited and defined by law, to all heads of families and a reasonable amount of personal property, the kind and value of which to be fixed by general laws." In 1890 the legislature, in pursuance to this declaration of the constitution, passed a law known as "Chapter 86, Sess. Laws 1890." By this law, section 324, hereinbefore quoted, was amended to read as follows: "In addition to the property mentioned in the preceding section the debtor, if the head of a family, may, by himself or his agent or attorney, select from all other of his personal property not absolutely exempt goods, chattels, merchandise, money or other personal property, not to exceed in the aggregate seven hundred and fifty dollars in value; and if a single person, not the head of a family, property as aforesaid of the value of three hundred dollars,

which is also exempt." The law of 1890 said nothing in express terms as to section 333, hereinbefore quoted, but contained a repealing clause to the effect that all acts and parts of acts in conflict with said act were thereby repealed. In construing the law of 1890 we must remember that the old territorial law was repugnant to both the letter and spirit of the new constitution, and that the law of 1890 was designed to be and was a law covering the whole subject of exemptions, in order to bring the exemption law of the state into harmony with the constitution. Section 324, Code Civ. Proc., as amended, gives the exemptions therein mentioned to two classes of persons; not to a debtor generally, as the old law read, but to the head of a family, and to a single person not the head of a family. This certainly excludes a partnership firm, and is absolutely inconsistent and in conflict with any law that would allow an exemption to a partnership firm. The language quoted from section 333 does not itself give a partnership firm exemption, but was simply meant to limit the construction that might be placed upon the word "debtor" in section 324 before it was amended. When section 324 was amended so as to bring it into harmony with the constitution, and specifically named the persons who should be entitled to the exemptions therein mentioned, the language quoted from section 333 became wholly meaningless, and of no force, and inconsistent with section 324 as amended. In my opinion, the exemptions allowed by the laws of South Dakota can be claimed only by the head of a family, or a single person not the head of a family.

There is another reason why the firm of Lentz & Odegard can claim no exemption as a firm, and that is the fact that, immediately upon the adjudication of the firm bankrupt, the firm was absolutely dissolved for every purpose; hence there is no firm to claim or receive firm exemptions, and there are no partners to consent that each have an individual exemption. This brings us to the only remaining question, and that is, can the individual partners composing the firm of Lentz & Odegard claim an individual exemption out of the partnership property? If the supreme court of the state had decided this question, it would be my duty, as well as pleasure, to follow it. In the absence of such decision, the question must be decided upon principle and authority. The state law says the debtor may select from his property certain property which shall be exempt. The partnership property of an insolvent firm is not the property of either partner. It is a trust fund for the payment of the firm's creditors, and the clear weight of authority is in support of the proposition that individual partners cannot claim an exemption from the partnership property of an insolvent firm against the protest of the firm's creditors. There are a few authorities that have held that, if the partners all consent, then an individual partner can claim his individual exemption from the firm property; but in a bankruptcy proceeding there are no partners to consent after adjudication in bankruptcy, and such a holding violates the conceded law that the partnership property is a trust fund for creditors, and not for the partners of an insolvent partnership. In the

case of In re Handlin, 3 Dill. 290, Fed. Cas. No. 6,018, Judge Dillon, then circuit judge of this circuit, sustains the view here taken; and I should feel constrained to follow this decision even were it contrary to my own opinion. It is true, he is deciding a case under the Arkansas statute, but he decides upon principle and authority. The following decisions are to the same effect: In re Blodgett, 10 N. B. R. 145, Fed. Cas. No. 1,555; In re Hafer, 1 N. B. R. 547, Fed. Cas. No. 5,896; In re Price, 6 N. B. R. 400, Fed. Cas. No. 11,410; In re Stewart, 13 N. B. R. 295, Fed. Cas. No. 13,420; In re Tonne, 13 N. B. R. 170, Fed. Cas. No. 14,095; In re Boothroyd, 14 N. B. R. 223, Fed. Cas. No. 1,652; In re Corbett, 5 Sawy. 206, Fed. Cas. No. 3,220; In re Croft, 8 Biss. 188, Fed. Cas. No. 3,404; In re Jackson, 2 N. B. R. 508, Fed. Cas. No. 7,127; In re Smith, 2 Hughes, 307, Fed. Cas. No. 12,979; In re Hughes, 8 Biss. 107, Fed. Cas. No. 6,842. It results from the foregoing that the firm of Lentz & Odegard, either as a firm or as individuals, have no claim for exemptions upon the partnership property in the hands of the trustee.

In re BAKER-RICKETSON CO.

(District Court, D. Massachusetts. November 7, 1899.)

No. 1,659.

1. BANKRUPTCY—ACTS OF BANKRUPTCY—ADMISSION OF INSOLVENCY BY CORPORATION.

   Under Bankr. Act 1898, § 3a, cl. 5, providing that it shall be an act of bankruptcy if a debtor shall have "admitted in writing his inability to pay his debts, and his willingness to be adjudged a bankrupt on that ground," where a corporation, by the unanimous vote of its stockholders, authorizes one of its officers to appear on behalf of the company in the federal court, and make the admission of insolvency contemplated by the statute, "in the event of an involuntary petition in bankruptcy being filed against said company," this is not in itself such an unqualified admission as is required by the act, and is, therefore, not an act of bankruptcy on the part of the corporation.

2. SAME.

   Where an officer of a corporation, in pursuance of authority previously given by a vote of the corporation, makes a written admission that the company is unable to pay its debts, and is willing to be adjudged a bankrupt on that ground, but this writing is not executed until after the filing of a petition in involuntary bankruptcy against the corporation, it constitutes no ground for an adjudication of bankruptcy on that petition.

3. SAME—TRANSFER OF PROPERTY—RECEIVERSHIP.

   Where a bill in equity asking for the appointment of a receiver is brought in a state court against a corporation, and the defendant makes no opposition to the suit, but tacitly permits the receiver to be appointed, and to take charge of its property, this is not a conveyance or transfer of the property, within the meaning of Bankr. Act 1898, § 3a, cl. 1, providing that it shall be an act of bankruptcy if a person shall have "conveyed or transferred any part of his property with intent to hinder, delay, or defraud his creditors."

4. SAME—SUFFERING PREFERENCE—RECEIVERSHIP.

   Under Bankr. Act 1898, § 3a, cl. 3, providing that it shall be an act of bankruptcy if a person shall have "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," where a corporation makes no defense to a bill in equity against it in a state court, and tacitly permits the appointment of a receiver, and the vesting of its property in him, it is not an act of bankruptcy by the corporation, although certain classes of persons may be entitled to larger dividends under the receivership proceedings than they would obtain in bankruptcy, if it does not appear that any such persons are concerned, or that any sale or final disposition of the property affected by the receivership has been made.

5. SAME—ASSIGNMENT FOR CREDITORS—RECEIVERSHIP.

Where a corporation, being made defendant to a bill in equity in a state court asking for a receivership, fails to oppose the action, and tacitly permits the appointment of a receiver, and the vesting of its property in him, this does not constitute an assignment for the benefit of its creditors, within the meaning of the bankruptcy law, and is not an act of bankruptcy.

In Bankruptcy. On petition for adjudication in involuntary bankruptcy.

John H. Appleton, for petitioning creditors.
George S. Taft, for respondent.
T. H. Gage, Jr., for certain creditors.

LOWELL, District Judge. The amended involuntary petition in this case alleged as acts of bankruptcy committed by the respondent, a Massachusetts corporation:

(1) That it had admitted in writing its inability to pay its debts, and its willingness to be adjudged a bankrupt on that ground, by the following vote:

"Voted, that E. B. Ricketson be authorized in behalf of the Baker-Ricketson Company to appear on behalf of said company in the U. S. court in Boston in the event of an involuntary petition in bankruptcy being filed against said company, and on behalf of the company to admit in writing its inability to pay its debts, and its willingness to be adjudged a bankrupt on that ground."

(2) That it had permitted its property to be removed and taken possession of by a receiver with intent to hinder and delay its creditors in the collection of their claims.

To prove the first act of bankruptcy alleged it was shown that the vote set forth in the petition was passed without dissent at a meeting of the corporation at which all its stockholders were present. It was further shown that, after the petition was filed, Mr. Ricketson, on behalf of the corporation, did admit in writing the corporation's inability to pay its debts, and its willingness to be adjudged a bankrupt on that ground. The vote of the corporation was not an act of bankruptcy, within the meaning of the statute, because it was not in itself a written admission, but merely authorized one of its officers to make that admission if a petition in bankruptcy was filed. This is not such an unqualified admission as is required by the statute. The paper signed by Mr. Ricketson does not support the allegations of the petition. Even if the petition be again amended so as to include this paper, it is hard to see how an admission, made after the petition has been filed, constitutes an act of bankruptcy of which the petitioner can avail himself.

To prove the second act of bankruptcy alleged, the petitioners showed that a bill in equity for the appointment of a receiver of the respondent corporation was filed in the superior court for the county of Worcester. The corporation authorized Mr. Ricketson to take such steps in the matter on its behalf as to him should appear proper. He employed counsel, who, after some negotiation, verbally agreed to make no opposition to the prayer of the bill, though they never entered a formal appearance on behalf of the corporation. The receiver was thereupon appointed. That the respondent "permitted" the creation of the receivership with the intent that the usual consequences should follow such receivership there is no doubt, and the court has to determine only if the creation of a receivership with the passive permission of the respondent is in and of itself an act of bankruptcy, within the meaning of section 3a of the bankrupt act. Under the act of 1867 it was held that the procurement of a receivership was an act of bankruptcy (In re Bininger, Fed. Cas. No. 1420), and, in general, the law is so stated in the text-books (Lowell, Bankr. p. 25; Bump, Bankr. [11th Ed.] p. 254). To determine if it be an act of bankruptcy under the act of 1898 to permit the creation of a receivership, it is necessary to examine carefully the provisions of that act, and to compare them with the provisions of the act of 1867. In Re Bininger the provisions relied upon were contained in section 39 of the act of 1867, and read substantially as follows: "Procure or suffer his property to be taken on legal process with intent to defeat or delay the operation of this act." The court there held that the appointment of a receiver was legal process, and that the effect of a receivership was to defeat or delay the operation of the bankrupt act. The act of 1898 does not contain the language just quoted from the act of 1867, but the petitioners contend that an equivalent provision is to be found in section 3a. By section 3a, cl. 1, it is made an act of bankruptcy by the respondent to have "conveyed, transferred, concealed or removed or permitted to be concealed or removed, any part of his property with intent to hinder, delay or defraud his creditors or any part of them." The failure to resist a bill for a receivership is not a conveyance or transfer of property by the respondent, for two reasons: First. By section 1, cl. 25, a transfer is made to "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." This definition of a transfer indicates plainly that the word was not intended by congress to include the creation of a receivership by a court of equity. Second. The act in many places, and in this very clause, discriminates between the actual deed of the respondent and a deed which he "permits" or "suffers" to be done. Even if it were held that the appointment of a receiver by a court of equity would be a transfer of property within the meaning of the bankrupt act, plainly it would be a transfer permitted, rather than made, by the respondent, when he failed to oppose the bill in equity which prayed for it. But section 3a, cl. 1, does not make it an act of bankruptcy on the respondent's part to per-

mit his property to be transferred. The provision concerning permission applies only to concealment and removal. That a receivership is the concealment, secretion, falsification, or mutilation of property (see section 1, cl. 22), the petitioners do not contend. They have not shown that in this case the receiver has removed anything, and the phrase "removal of property" is a totally inapt definition or description of ordinary receivership proceedings. Moreover, the phrase is not a new one, and its meaning may be judged from its use in other bankrupt acts. See section 1 of the act of 1841; Rev. St. §§ 5021, 5110. It follows, therefore, that the conduct of the respondent is not an act of bankruptcy, within clause 1 of section 3a. Inasmuch as the petition does not allege that the respondent has committed one of the acts of bankruptcy defined in section 3a, cls. 2–4, there may be no need to consider those clauses, but, as it was urged in argument that the creation of this receivership was an act of bankruptcy by virtue of some clause not referred to in the petition; and as the petition might, perhaps, be amended to allege this, it is well to consider if an amendment would help the petitioners. They did not contend that the respondent had committed an act of bankruptcy under clause 2. Plainly, he had not. He had not transferred his property, as has been said. It did not appear that the receiver was his creditor, or that there was an intent to prefer the receiver. The counsel for the petitioners urged in argument that acquiescence in the receivership proceedings was an act of bankruptcy under clause 3, because in receivership proceedings certain classes of persons, to wit, laborers and physicians, are in some cases entitled by statute to larger payments than they would receive under the bankrupt act. But in this case it did not appear that any laborers or physicians were concerned, or that any sale or final disposition of the property affected by the receivership had been made. That the appointment of a receiver is not a general assignment for the benefit of creditors under clause 4 seems to me clear, and has been expressly decided in Re Empire Metallic Bedstead Co. (D. C.) 95 Fed. 957. To hold otherwise would be a severe torture of language.

None of the cases cited by the petitioners are opposed to the conclusions just stated. In Blake v. Francis-Valentine Co. (D. C.) 89 Fed. 691, a creditor had levied upon the property of the respondent, and, as was said by the learned judge, this levy might result in giving a preference to the judgment creditor over the respondent's other creditors. No such preference is shown in this case. In Re Bruss-Ritter Co. (D. C.) 90 Fed. 651, it was contended by the respondent that the petition was inoperative because receivership proceedings were pending in the state courts. This contention the court held inadmissible,—that is to say, it held that receivership proceedings in the state courts are not a bar to proceedings in bankruptcy,—but the court nowhere intimated that receivership proceedings in a state court are in themselves an act of bankruptcy. In Re Gutwillig (D. C.) 90 Fed. 475, same case on appeal, 34 C. C. A. 377, 92 Fed. 337, it was said that a general assignment, with or without preferences, is an assignment with intent to hinder or delay creditors. If this be true, it would seem

to follow that clause 4 is a needless specification of an act of bankruptcy already covered by clause 1; but this conclusion, even if sound, does not affect the case at bar. It is not enough to establish that a receivership delays or hinders the respondent's creditors. To permit creditors to be delayed is nowhere made an act of bankruptcy, but only a transfer of property by the respondent with that intent. In Mather v. Coe (D. C.) 92 Fed. 333, the petition was informal, but the learned judge evidently considered that it sufficiently alleged that the effect of the receivership proceedings would be to prefer certain specified creditors. Under these circumstances he held that an acquiescence in the receivership proceedings was an act of bankruptcy under section 3a, cl. 3. As has been said, it was alleged neither in the petition nor in the argument that in this case any specific creditors had been or would be preferred. In Re Cliffe (D. C.) 94 Fed. 354, and in Re Arnold (D. C.) 94 Fed. 1001, the court was dealing with liens created in favor of particular creditors. Upon the whole, though the respondent's conduct is considerably analogous to some of the statutory acts of bankruptcy, yet it is not fairly covered by any statutory definition. Petition dismissed.

In re BLACK.

(District Court, N. D. California. November 1, 1899.)

No. 2,936.

BANKRUPTCY—GROUNDS OF OPPOSITION TO DISCHARGE—FRAUD.

It is no ground for refusing a bankrupt's application for discharge that the debt of the creditor opposing such application was created by the fraud and false representations of the bankrupt. The effect of the discharge, if granted, upon any particular claim cannot be determined upon the petition for discharge, but only in an action for the enforcement of such claim, to which the discharge is pleaded in bar.

In Bankruptcy. On opposition to bankrupt's application for discharge.

Fisher Ames, for bankrupt.

Rosenthal & Wise, for opposing creditors.

DE HAVEN, District Judge. The bankrupt's application for discharge is opposed by Bier & Regensburger, creditors, upon the ground that her indebtedness to them was fraudulently contracted; the specific charge being that such indebtedness is for money loaned, and that such loan was obtained from them by means of certain false and fraudulent representations upon the part of the bankrupt.

The matters thus alleged in opposition to the discharge are not sufficient in law. The fraudulent contracting of a debt is not made, by section 14 of the bankruptcy act of 1898, a ground for refusing the bankrupt's application for a discharge. That section provides that the application shall be granted, unless the bankrupt has "(1) committed an offense punishable by imprisonment, as herein pro-

vided; or (2) 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." This language is plain, and there is no escape from the conclusion that the court is not authorized to deny the application for discharge upon a ground not set forth in this section; and it is equally plain that fraud in the creation of a debt is not made by this section one of the causes for which a discharge shall be denied. The bankruptcy act provides (section 17) that a discharge shall not affect any debt created by the fraud of the bankrupt, but the question whether there was fraud in the creation of any particular debt is one which the court of bankruptcy is not authorized to adjudicate in passing upon the bankrupt's application for discharge. That question is one which can only be determined in an action by the creditor for the recovery of such debt when the discharge in bankruptcy is pleaded in bar. In such an action, and in answer to such plea, the creditor would have the right to show that the debt sued for was created by fraud, and therefore not affected by the discharge. In re Thomas (D. C.) 92 Fed. 912.

The petition for discharge is granted, the opposing creditors to pay the costs incident to the opposition filed.

UNITED STATES v. AH WON.

(Circuit Court, D. Oregon. November 1, 1899.)

No. 2,589.

COUNTERFEITING—BLANK FORM.

The making of a blank form of a certificate of residence, such as when filled are issued by the United States to Chinese entitled to remain in the country, is not within Rev. St. § 5418, making it a crime to counterfeit any writing for the purpose of defrauding the United States.

John H. Hall, U. S. Atty.
Chester V. Dolph, for defendant.

BELLINGER, District Judge. This is an indictment under section 5418 of the Revised Statutes. It charges that the defendant, with the intent to defraud the United States, knowingly and unlawfully made and counterfeited a certain blank form in writing, in resemblance and similitude of the true and genuine thereof, theretofore made and issued by and under the authority of the United States; that is to say, a certain blank form of certificate of residence issued by the United States to Chinese persons lawfully entitled to remain therein as evidence of such right, said false and counterfeited blank form being of the tenor following, to wit:

No. ——. Original. United States of America. Certificate of Residence. Issued to Chinese ——, under the provisions of the act of May 5, 1892. This is to certify that ——, a Chinese person, has made application No. —— to me for a certificate of residence, under the provisions of the act of congress approved May 5, 1892; and I certify that it appears from the affidavits of witnesses submitted with said application that said —— was within the limits of the United States at the time of the passage of said act, and was then re-

siding at ——, and that he was at that time lawfully entitled to remain in the United States, and that the following is a descriptive list of said Chinese ——, viz.: Name, ——; age, ——; local residence, ——; occupation, ——; height, ——; color of eyes, ——; complexion, ——; physical marks or peculiarities for identification, ——.

And, as a further means of identification, I have affixed hereto a photographic likeness of said ——.

[Photograph to be affixed here.]

Given under my hand and seal this —— day of ——, 189—, at ——, state of ——.

[Collector's Seal.]

——, Collector Internal Revenue, District of ——.

The second count of this indictment is not materially different from the first; the charge in the one count being that the writing of which the blank is in resemblance and similitude was made and issued by and under the authority of the United States, and in the other that it was made and issued by the United States collector of internal revenue under the authority of the United States.

Section 5418 makes it a crime to falsely make, alter, forge, or counterfeit any bid, proposal, guaranty, official bond, public record, affidavit, or other writing, for the purpose of defrauding the United States, or to utter or publish as true any such false, forged, altered, or counterfeited bid, proposal, guaranty, official bond, public record, affidavit, or other writing, for such purpose, knowing the same to be false, forged, altered, or counterfeited.

The making or having in his possession by the defendant of the blank form in question is not, in my opinion, an offense, under section 5418. It is settled that it is no offense to have in one's possession, with the intent to use, an obligation that is unsigned. This blank does not represent anything nor convey anything. It is a meaningless document, not capable of imposing upon anybody or of effecting anything. The most that can be said of it is that it is a step towards the preparation of such a document as it is claimed to be by the government upon the argument of this demurrer. It is admitted by the attorney for the United States in the argument on this demurrer that this is not such a document as is described in section 8 of the Chinese exclusion act of May 5, 1892, which provides that "any person who shall knowingly and falsely alter or substitute any name for the name written in such certificate, or forge such certificate, or knowingly utter any forged or fraudulent certificate, or falsely personate any person named in such certificate, shall be guilty of a misdemeanor," etc. If this so-called "instrument" is not described by this act because it does not constitute a certificate, for the like reason it is not within the provisions of section 5418. In other words, this mere blank is not a writing, and it is not capable of performing the functions of one, within the meaning of this section. The demurrer to the indictment is sustained.

In re CARTER.

(Circuit Court, S. D. New York. October 20, 1899.)

1. ARMY AND NAVY—COURTS-MARTIAL—DISMISSAL FROM SERVICE.
The same conduct, constituting an offense elsewhere provided for in the articles of war, may also warrant a finding of guilty by a court-martial, under the sixty-first article, providing that "any officer who shall be convicted of conduct unbecoming an officer and a gentleman shall be dismissed from the service."

2. SAME—PUNISHMENT—PUBLICATION OF SENTENCE.
Under the one hundredth article of war, providing that, "when an officer is dismissed for cowardice or fraud, the sentence shall further direct the crime, punishment, name and place of abode of the delinquent shall be published in the newspapers," etc., where an officer has been convicted of fraud by a court-martial it is bound to cause the special publication of sentence to be made.

3. SAME—JURISDICTION.
Where an offense is specifically provided for in any of the articles of war prior to the sixty-second, the grant of jurisdiction to a court-martial to try and punish such offense is conferred by the particular article which mentions it, and not by the general language of the sixty-second article, providing for the trial and punishment of all offenses not capital, and all disorders, though not mentioned in the preceding articles.

4. SAME—JURISDICTION.
Under the grant of jurisdiction to a court-martial conferred by the sixtieth article of war, providing that any person in the military service who misappropriates any money of the United States, "furnished or intended for the military service thereof," shall be punished, etc., such a court has no power to convict an officer of the army for misappropriating money appropriated by congress for the improvement of rivers and harbors.

5. SAME—PUNISHMENT—FINE AND IMPRISONMENT.
Under the sixty-second article, providing that all crimes not capital, which officers and soldiers may be guilty of, not mentioned in the foregoing articles, are to be taken cognizance of by a court-martial, and "punished at the discretion of the court"; and Rev. St. § 5488, providing that every disbursing officer, who, for any purpose not prescribed by law, transfers or applies any money intrusted to him, is deemed guilty of an embezzlement, and may be punished both by "fine and imprisonment,"—where an officer of the army has been found guilty by a court-martial of willfully misappropriating money appropriated by congress for the improvement of rivers and harbors, the court has authority to impose a penalty, both by fine and imprisonment.

In the Matter of a Habeas Corpus on the Relation of Oberlin M. Carter. Writ dismissed.

A. J. Rose, for relator.
Col. John W. Claus, U. S. Army, and Henry L. Burnett, U. S. Atty.

LACOMBE, Circuit Judge. The sentence of the court-martial, duly approved and confirmed, reads: "To be dismissed from the service of the United States; to suffer a fine of five thousand dollars; to be confined at hard labor, at such place as the proper authority may direct, for five years; and the crime, punishment, name, and place of abode of the accused to be published in and about the station and in the state from which the accused came or where he usually resides." The contention of the relator is that, conceding that the court-martial had jurisdiction of the per-

son of the accused and of the offenses charged, and conceding, further, the regularity of its proceedings and the propriety of its findings, it was without power to impose the four separate punishments of dismissal, fine, imprisonment, and degradation (special publication of sentence), although it might have imposed either one of them. When application was made for the writ, it appeared that the first punishment (dismissal from the service of the United States) and the fourth (publication of sentence) had been carried out; and the relator contended that, having thus paid a penalty which the court had power to inflict, he could not be held to submit to another penalty, which the court had no power to add to the one already by it selected. Since the return was made the relator has also paid the fine, and, although that fact does not appear upon the face of the original papers, it has been discussed in the briefs of both sides, and is now embodied in a stipulation, thus completing the case.

If the relator's premises be sound, viz. that punishments have been imposed in the aggregate, when the statute authorized their imposition only in the alternative, his conclusion is supported by high authority. Ex parte Lange, 18 Wall. 163. In that case it was held that when a court has imposed fine and imprisonment, where the statute only conferred power to punish by fine or imprisonment, and the fine has been paid, and the judgment of the court thus executed so as to be a full satisfaction of one of the alternative penalties of the law, the power of the court as to that offense is at an end. The important question in the case, therefore, is whether, under the statutes of the United States, the court-martial had the power, under its findings, to impose a sentence inflicting these four penalties.

The relator was tried upon four separate charges, namely: (1) Conspiring to defraud the United States, in violation of the sixtieth article of war. (2) Causing false and fraudulent claims to be made against the United States, in violation of the sixtieth article of war. (3) Conduct unbecoming an officer and a gentleman, in violation of the sixty-first article of war. (4) Embezzlement, as defined in section 5488, Rev. St. U. S., in violation of the sixty-second article of war. He was found guilty of each of the four charges.

The sixty-first article of war provides that "any officer who shall be convicted of conduct unbecoming an officer and a gentleman shall be dismissed from the service." This is a provision wholly independent of the other definitions of offenses in the statute. The same course of conduct may constitute an offense elsewhere provided for, and also may warrant a finding of guilty under the sixty-first. The one hundreth article of war provides that, "when an officer is dismissed from the service for cowardice or fraud, the sentence shall further direct that the crime, punishment, name and place of abode of the delinquent shall be published in the newspapers," etc. This is a specific statutory penalty, which must inevitably follow the conviction, the court-martial being given no option as to its infliction. It is plainly additional to the punish-

ment imposed for the "cowardice or fraud" per se. It is understood that the relator does not now contend that his dismissal, and the publication of it, is sufficient ground for his discharge. What the relator does contend is that, having paid the fine, he is entitled to invoke the principle established in the Lange Case, on the theory that the court-martial had authority, under the sixtieth article, to impose only a fine or imprisonment, not to impose both. It is manifest that he is in no position to press this argument, unless he can dispose of the conviction and sentence under the fourth charge. That charge is "embezzlement, as defined by section 5488, Rev. St. U. S., in violation of the sixty-second article of war."

The sixty-second article of war reads as follows:

"Art. 62. All crimes not capital, and all disorders and neglects, which officers and soldiers may be guilty of, to prejudice of good order and military discipline, though not mentioned in the foregoing articles of war, are to be taken cognizance of by a general, or a regimental, garrison, or field-officers court-martial, according to the nature and degree of the offense, and punished at the discretion of such court."

The language, the general structure, and the specific provisions of this article indicate that it is a catch-all clause, intended to cover offenses not already specifically provided for. The framers of the article wisely foresaw that there might be many crimes, disorders, and neglects which could not be classified under any enumeration already contained in the articles, and which, if a court-martial were left without power to deal with them, might operate to the prejudice of good order and military discipline. Therefore, having "mentioned" various offenses which might be cognizable by a court-martial and punished as prescribed, the framers of the articles further provided that "all" offenses of certain specified characters, "though not mentioned," might also be taken cognizance of by a court-martial, and punished, at its discretion. It would seem to follow that, where an offense is found to be specifically provided for in any of the articles prior to the sixty-second, the grant of jurisdiction to try and punish such offense is conferred by the particular article which mentions it, and not by the general language of the sixty-second article. This proposition has commended itself to text writers (Davis, Mil. Law, pp. 70n–71; Winthr. Mil. Law [2d Ed.] pp. 1126, 1127), and is in accord with general principles of statutory construction (U. S. v. Tynen, 11 Wall. 88; U. S. v. Auffmordt, 122 U. S. 197, 7 Sup. Ct. 1182).

Section 5488 of the Revised Statutes reads as follows:

"Sec. 5488. Every disbursing officer of the United States who deposits any public money intrusted to him in any place or in any manner, except as authorized by law, or converts to his own use in any way whatever, or loans with or without interest, or for any purpose not prescribed by law withdraws from the treasurer or any assistant treasurer, or any authorized depository, or for any purpose not prescribed by law transfers or applies any portion of the public money intrusted to him, is, in every such act, deemed guilty of an embezzlement of the money so deposited, converted, loaned, withdrawn, transferred, or applied; and shall be punished by imprisonment with hard labor for a term not less than one year nor more than ten years, or by a

fine of not more than the amount embezzled or less than one thousand dollars, or by both such fine and imprisonment. (See secs. 3620, 5497.)"

The particular clause which is germane to the facts in the cause at bar, as appears from the findings of the court-martial, which sustain the fourth charge upon the first specification alone, is the one reading: "Every disbursing officer of the United States who * * * for any purpose not prescribed by law transfers or applies any portion of the public money intrusted to him is * * * deemed guilty of an embezzlement." Obviously, this is a crime, made so by this very section, and, unless already mentioned in the foregoing articles, would come within the provisions of the sixty-second. The sixtieth article reads as follows (the numbers of the paragraphs being inserted here for convenience of reference):

"Art. 60. Any person in the military service of the United States.

"(1) Who makes or causes to be made any claim against the United States, or any officer thereof, knowing such claim to be false or fraudulent; or

"(2) Who presents or causes to be presented to any person in the civil or military service thereof, for approval or payment, any claim against the United States or any officer thereof, knowing such claim to be false or fraudulent; or

"(3) Who enters into any agreement or conspiracy to defraud the United States by obtaining, or aiding others to obtain, the allowance or payment of any false or fraudulent claim; or

"(4) Who, for the purpose of obtaining or aiding others to obtain, the approval, allowance, or payment of any claim against the United States or against any officer thereof, makes or uses, or procures or advises the making or use of, any writing, or other paper, knowing the same to contain any false or fraudulent statement; or

"(5) Who, for the purpose of obtaining, or aiding others to obtain, the approval, allowance, or payment of any claim against the United States or any officer thereof, makes or procures or advises the making of, any oath to any fact or to any writing or other paper, knowing such oath to be false; or

"(6) Who, for the purpose of obtaining, or aiding others to obtain, the approval, allowance, or payment of any claim against the United States or any officer thereof, forges or counterfeits, or procures or advises the forging or counterfeiting of, any signature upon any writing or other paper, or uses, or procures or advises the use of, any such signature, knowing the same to be forged or counterfeited; or

"(7) Who, having charge, possession, custody or control of any money or other property of the United States, furnished or intended for the military service thereof, knowingly delivers, or causes to be delivered, to any persons having authority to receive the same, any amount thereof less than that for which he receives a certificate or receipt; or

"(8) Who, being authorized to make or deliver any paper certifying the receipt of any property of the United States, furnished or intended for the military service thereof, makes, or delivers to any person, such writing, without having full knowledge of the truth of the statements therein contained, and with intent to defraud the United States; or

"(9) Who steals, embezzles, knowingly and willfully misappropriates, applies to his own use or benefit, or wrongfully or knowingly sells or disposes of any ordinance, arms, equipments, ammunition, clothing, subsistence stores, money, or other property of the United States, furnished or intended for the military service thereof; or

"(10) Who knowingly purchases, or receives in pledge for any obligation or indebtedness, from any soldier, officer, or other person who is a part of or employed in said forces or service, any ordinance, arms, equipments, ammunition, clothing, subsistence stores, or other property of the United States, such soldier, officer, or other person not having lawful right to sell or pledge the same,

—Shall, on conviction thereof, be punished by fine or imprisonment, or by such other punishment as a court-martial may adjudge. And if any person being guilty of any of the offenses aforesaid, while in the military service of the United States, receives his discharge, or is dismissed from the service, he shall continue to be liable to be arrested and held for trial and sentence by a court-martial, in the same manner and to the same extent as if he had not received such discharge nor been dismissed."

When the ninth subdivision of the sixtieth article is compared with the above-quoted subdivision of section 5488, it will be observed that, save in one particular, the former is broad enough to contain the latter. A person who, "for any purpose not prescribed by law, transfers or applies any portion of the public money intrusted to him," certainly "misappropriates" or "wrongfully disposes" of the same. But section 5488 covers such improper disposition of any public money, while the ninth subdivision of article 60 relates only to "money * * * of the United States furnished or intended for the military service thereof." It appears from the specification that the money was part of the sum appropriated by the act of June 3, 1896 (chapter 314, 29 Stat. pp. 202, 208), which is one of the usual "River and Harbor Acts." It enacts that the sums thereby appropriated are to be expended "for the construction, repair and preservation of the public works hereinafter named." The public works enumerated are devised and carried out to facilitate commerce, not for military purposes; and the only argument that is advanced to sustain the proposition contended for is that the secretary of war is charged with the duty of making surveys of rivers and harbors, reporting as to what improvements therein shall best subserve the public interests, and making contracts for the work, and that officers of the engineer corps are employed in taking charge of the execution of such contracts, and disbursing the money appropriated therefor. But, although the trained skill of army officers is thus availed of to superintend the disbursement of money appropriated for the improvement of natural facilities for commercial intercourse, thus saving the expense of engaging such skill elsewhere, it by no means follows that money so appropriated is "furnished or intended for the military service of the United States." The appropriation act for the fiscal year ending June 30, 1898,—which contains a further appropriation for Savannah Harbor,—also contains, under the heading "War Department," various items, to be expended under direction of the secretary of war acting through officers of the army, and dealing with such public works as the care of the "Smithsonian Grounds," the "laying asphalt walks around Judiciary Square, in the city of Washington," the "lighting of public grounds," and the "ordinary care of greenhouses and nursery at the Executive Mansion." Surely, these appropriations are not furnished or intended for "the military service," and appropriations for rivers and harbor improvements are of the same class. It would seem to be a very strained construction of the act which should hold that, because the disbursing officer is himself in the military service of the United States, the money which he disburses must be held to have been "furnished or intended" for the

military service, wholly irrespective of the purpose for which it is appropriated. It follows, therefore, that a court-martial would be without power to convict an officer of the army, under the sixtieth article, for knowingly or willfully misappropriating money of the United States appropriated for—"furnished or intended for" —the improvement of rivers and harbors. Such an offense, however, falls clearly within the language of section 5488, and is therefore covered by the sixty-second article.

It must be held, therefore, that the court-martial, having found the relator guilty of the first specification under the fourth charge, and of that charge, has statutory authority, under article 62 and section 5488, to impose a penalty of both fine and imprisonment. This conclusion leads to a dismissal of the writ. Counsel may attend at the opening of court on Monday, at 10:30 a. m., when the order may be settled and signed, and, in the event of an appeal being taken, the proper instructions upon remand, in conformity to the rules of the supreme court, may be given.

DAVIS v. BURKE, Sheriff.

(Circuit Court of Appeals, Ninth Circuit. October 16, 1899.)

No. 523.

CIRCUIT COURTS OF APPEALS—JURISDICTION—CASES INVOLVING CONSTITUTIONAL QUESTIONS.

A circuit court of appeals is without jurisdiction to entertain an appeal from an order denying a writ of habeas corpus, where the petition therefor is based on the alleged violation of the petitioner's rights under the constitution of the United States.[1]

Appeal from the District Court of the United States for the District of Idaho.

J. H. Hawley, J. W. Dorsey, and A. A. Fraser, for appellant.

S. H. Hays and W. E. Borah, for appellee.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

GILBERT, Circuit Judge. The appeal in this case is taken from an order of the district court of the district of Idaho denying a writ of habeas corpus. It was alleged in the petition that Jack Davis was unlawfully held by the sheriff of Cassia county, Idaho, in the jail of said county, under the judgment and sentence of the district court of the Fourth judicial district of the state of Idaho for Cassia county, sentencing the said Jack Davis to be hanged on February 1, 1899, for the crime of murder, and that he had been deprived of his liberty, and threatened with deprivation of life, without due process of law, and contrary to the fifth and fourteenth amendments of the consti-

[1] As to jurisdiction of federal courts on habeas corpus, see note to In re Huse, 25 C. C. A. 4.

tution of the United States, in that the said district court of the state of Idaho had no jurisdiction to try the said Davis on the charge of murder, for the reason that there was no indictment, presentment, or information presented to the court against him. Upon the argument on the appeal it was contended that the sentence under which the appellant is detained is illegal and void, not only because it was rendered without due process of law, but for the further reason that the sentence imposed by the court, and which the court was authorized to impose under the law which was in force at the time of the sentence, was different from that which was applicable to the crime of murder at the time when the crime was alleged to have been committed, and that it was therefore ex post facto, and upon that ground violative of the constitution of the United States.

The appellee challenges the jurisdiction of this court to entertain an appeal which involves the construction of the constitution of the United States. Section 6 of the act establishing circuit courts of appeals confers appellate jurisdiction to review final decisions of the district and circuit courts "in all cases other than those provided for in the preceding section of this act." The preceding section provides that appeals or writs of error may be taken from the district courts and the circuit courts directly to the supreme court in "any case that involves the construction or application of the constitution of the United States." The circuit courts of appeals, so far as they have construed these provisions, have uniformly denied their own jurisdiction of appeals and writs of error in cases which involved the construction or the application of the federal constitution. City of Macon v. Georgia Packing Co., 9 C. C. A. 262, 60 Fed. 781; Railroad Co. v. Adams, 35 C. C. A. 635, 93 Fed. 852; Wrightman v. Boone Co., 31 C. C. A. 570, 88 Fed. 435; Hastings v. Ames, 15 C. C. A. 628, 68 Fed. 726; Pauley Jail Bldg. & Mfg. Co. v. Crawford Co., 28 C. C. A. 579, 84 Fed. 942; Barr v. City of New Brunswick, 19 C. C. A. 71, 72 Fed. 689. The objection to the jurisdiction of this court must be sustained, and the appeal will be dismissed.

KISINGER-ISON CO. v. BRADFORD BELTING CO.[1]

(Circuit Court of Appeals, Sixth Circuit. October 3, 1899.)

No. 653.

1. PATENTS—ANTICIPATION—WIRE CONNECTIONS.

The Kisinger patent, No. 492,811, for a trolley-wire connection, is void for anticipation by the device for connecting fence wire described in the Morrison patent, No. 428,123.

2. SAME.

The Morrison patent, No. 428,123, for a fence-wire coupling, which consists of a hollow shell with the bore larger at the center, into which there is an opening through which serrated wedges are inserted, which form a lock, preventing the withdrawal of the ends of the wires when they are inserted at either end of the shell, shows an invention not anticipated by anything in the prior art, and is valid.

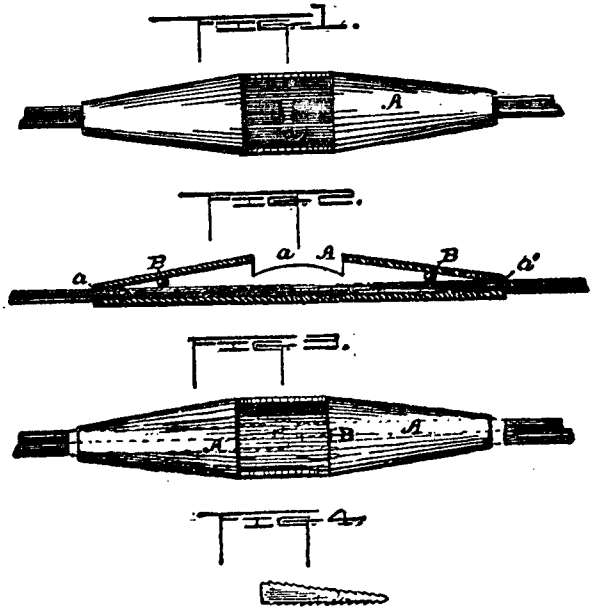
[1] Rehearing denied November 20, 1899.

3. SAME—INFRINGEMENT.

Such patent is infringed by the device shown in the Gerard & Lawrence patent, No. 575,641, which is similar to that described in the Morrison patent, except that, instead of one serrated wedge in each end of the shell, two are used, the larger ends of which are connected by a bow-shaped spring, which renders them self-locking when the end of the wire is forced between them.

Appeal from the Circuit Court of the United States for the Western Division of the Southern District of Ohio.

This is an appeal from a decree dismissing a bill filed by the Kisinger-Ison Company, complainant, against the Bradford Belting Company, to enjoin the infringement of two patents,—one No. 428,123, granted to D. B. Morrison, May 20, 1890, for a fence-wire coupling, and No. 492,811, granted to W. S. Kisinger, March 7, 1893, for a trolley-wire connector. The appellant first owned the Kisinger patent alone, and operated under a license from the owner of the Morrison patent, and finally purchased the Morrison patent. The description of the Morrison patent, with the accompanying drawings, is as follows:



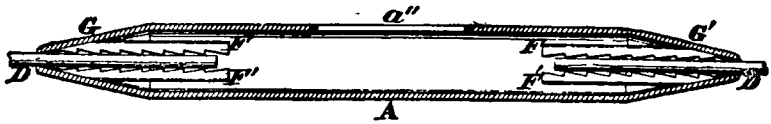
"A represents a hollow shell, larger at its middle portion, and tapering slightly from its central portion towards its opposite ends. It is provided with an opening, a, at its central portion, for the purpose of giving access to its interior. Its opposite ends, as shown at a', are sufficiently large to admit therein, with a free, sliding movement, the end or ends of the single or double or more strands of the wire to be united. Small balls, B, of hard metal, are provided, which serve to form the lock for preventing the withdrawal of the ends of the wire from the casing or shell, A, or wedge-shaped pieces (see Fig. 4), provided with teeth slanting towards the larger portion of the shell, may be employed. The coupling is adjusted as follows: The ends of the wire having been inserted in the opposite ends of the shell, A, and by any suitable purchase or strain having been brought as nearly together as possible or convenient centrally within the shell, one of the small metallic balls or wedge-shaped pieces is slipped within the casing or shell alongside of the ends of the wire towards

each end of the shell, until it begins to wedge between the shell and wire, when the strain is allowed to take effect upon the wire, the result being to crowd the metallic locking device between the shell and wire, and roll or slide it towards the small end of the shell, thereby so effectually jamming it between the wire and shell as to form a positive and effective lock, the effectiveness of which will be increased as the strain upon the wire is increased. In operation the ends of the wire are each inserted through the end openings of the shell, and the locking devices, which are then placed within the shell, may be caused to slightly bind the ends of the wire by forcing said locking devices towards the tapered ends of the shell by a rod, or any other means may be employed for this purpose. After the locking devices have once begun to bind the wires, all strain upon or contraction of the wires will tend to more securely lock their ends to the shell. This simple device requires but a moment's time for its adjustment, and may be readily removed if for any purpose it shall be found desirable, while at the same time it forms a neat finish and can be furnished at a trifling expense. Having thus fully described my invention, what I desire to secure by letters patent is the herein-described wire-coupling device, consisting of a shell having its ends tapered, and formed with openings to receive the ends of the wires, and removable locking devices, each located in the tapered end of said shell to engage the end of each wire, substantially as set forth."

The Kisinger patent is shown in Fig. 4, below:

KISINGER

FIG. 4.



It is the same as the Morrison patent, except that two wedges are used instead of one. The first claim of the patent was for the combination, in a coupling for wires, etc., of a tube having converging ends, and a set of bodily detachable keys, whose outer edges are tapered, and their inner edges provided with teeth, for the purpose described. The infringing device, which is made under a patent to Gerard & Lawrence, No. 575,641, and dated January 19, 1897, may be understood from Fig. 1 of the drawings, and Fig. 6, which shows the two serrated wedges united by a spring.

The second claim of this patent is as follows: "(2) A wire coupling, consisting substantially of a sleeve having two bores, one entering at each end, and both centrally in line with each other, two serrated jaws in each bore held therein prior to their engagement with a wire end, and in proper position for the purpose of enabling such engagement by spring pressure, and openings in the sleeve to permit introduction of these jaws." The openings designated as Fig. 10 are shown in Fig. 2 of the patent.

The usual defenses of invalidity by reason of want of novelty and anticipation, and of noninfringement, were pleaded. The circuit court held that both the Kisinger and Morrison patents were void for want of invention.

George J. Murray, for appellant.

E. E. Wood and Wm. R. Wood, for appellee.

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

TAFT, Circuit Judge (after stating the facts as above). We concur with the circuit court in the view that the Kisinger patent is invalid. It is a mere duplication of the serrated wedge of the Morrison patent, and is an improvement which does not involve any

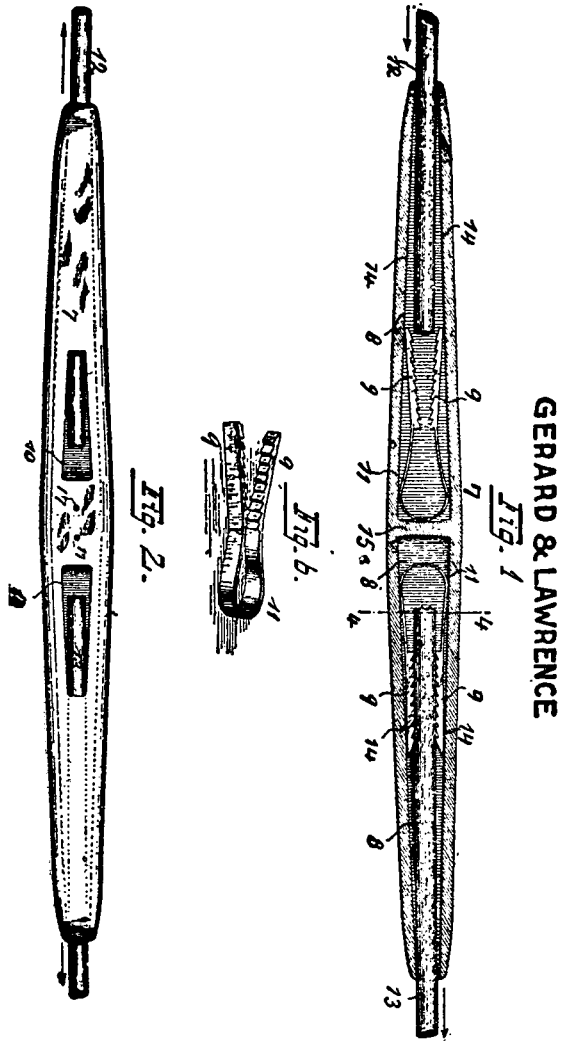


Fig. 2.

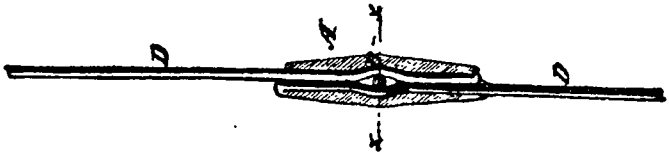
Fig. b.

Fig. 1

patentable invention. The only real questions in the case are as to the validity and infringement of the Morrison patent by the defendant's device. The circuit court thought that the prior art was so full of devices resembling the Morrison patent as to require it to hold that there was no invention in that patent. It is undoubtedly true that there were many patents for uniting the ends of a broken wire which embodied the element of the hollow sleeve, into which the two broken ends were introduced, and were locked into the sleeve by devices either for enlarging the ends of the wire, or for locking the ends of the wire inside the sleeve or outside the opposite end thereof. The earliest of these is the Cary patent, Fig. 2 of which is given below:

CARY

Fig. 2

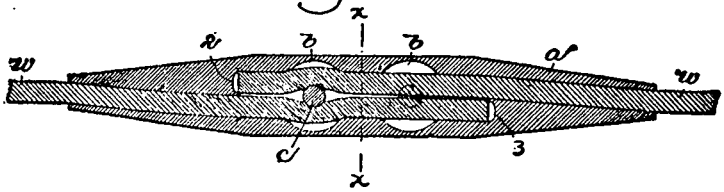


The ends of the wires were there inserted in parallel lines in the sleeve, the end of each being bent around the end of the opposite end of the sleeve, and the wires being further secured by driving a pivot between the two.

The Anderson patent, Fig. 2 of which is below, was like this in principle, except that the wire was not extended to the other end of the sleeve, and was not bent around the end of it:

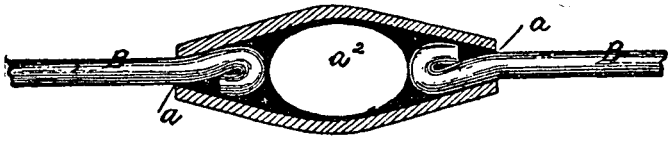
ANDERSON

Fig. 2.



In the Ellis patent the locking device was a bending of the wire itself after it had been inserted in the sleeve, as it may be seen from Fig. 1 in the Ellis patent:

ELLIS FIG. 1



The Bainbridge patent, seen in Fig. 1 below, shows a bending of the wire at right angles in a tube running up from the sleeve, and the insertion of a wedge between the two wires:

BAINBRIDGE

Fig. 1.

The Ball and Lane patents show bending of the wires:

BALL

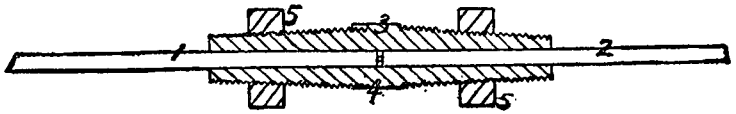
Fig. 2.

LANE

Fig. 3.

Another form was that of G. & E. Woods' English patent, in which the ends of the wire were inserted between two semicircular shaped pieces of metal provided with a screw thread on the outside. The pieces of metal were brought together or clamped by means of nuts or their equivalent. Fig. 1 of this patent will explain its principle:

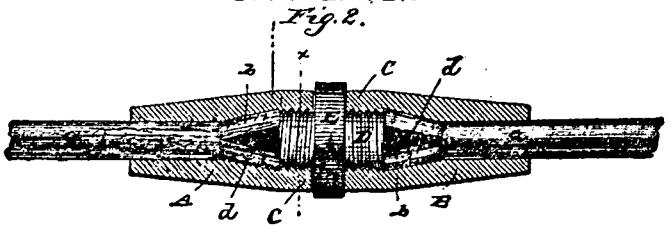
WOODS & WOODS FIG. 1.



The device most relied on by way of anticipation is the Carpenter patent, Fig. 2 of which is given below. In the operation of this device the end of the wire must be split, and after it has been inserted in the sleeve, which is made up of two pieces divided in the middle, a wedge is inserted in the split ends, and then the two parts of the sleeve are united by a right and left hand screw which holds the wedge between the two split ends of the wire:

CARPENTER.

Fig. 2.



The evidence seems to show that the Kisinger patent was the first device practically used for joining broken ends of the trolley wire in which it was not necessary to insert molten metal, like solder, in order to secure the requisite tensile strength. The bending of a thick trolley wire for the purpose of locking the wire into the sleeve

is impracticable. The operation to be performed is one which requires great expedition, and the simpler the tools to be used the better the device. Any device, therefore, which dispenses with the necessity of either splitting the end of the wire or bending the wire and using molten metal to secure strength is a marked improvement. This must be obvious from everyday observation of the repair of the trolley wire upon the street. Most of the devices to which reference has been made, and which are relied on as anticipations of the Morrison patent, require a bending of the wire, with the disadvantage for trolley-wire use already stated. Others of the alleged anticipations require that there should be enough slack in the trolley wire, the broken ends of which are to be united, to permit the ends thereof to be drawn past each other and lie parallel in the sleeve. This requirement necessitates the addition of new wire and the use of two joints. The Morrison device does not require the broken ends to lie parallel to each other. Indeed, they may be separated by at least half of the length of the sleeve. Several of the devices are clearly wanting in tensile strength for trolley-wire purposes. This is true of the Carpenter patent, and probably, also, of the Woods patent. The Woods patent is not adapted for trolley-wire purposes, for the further reason that the bolts used in clamping the wire in the sleeve would interfere with the smooth running of the trolley as it passes along the wire. On the whole, the use of the serrated wedge in the Morrison patent seems to us to be a distinct improvement on all of the devices which went before, both in the tensile strength effected by the biting of the wedge into the wire, the ease with which the locking device is adjusted, and the simplicity of the structure. It is not a pioneer or primary invention, but its successful use proves it to be a step in the art sufficiently meritorious to warrant the monopoly of the patent. It is true that the wedge is a well-known mechanical device, both for splitting and separating material, and for locking, but that fact does not prevent the patenting of everything which involves the application of the wedge principle. It is true, also, that the use of the roughened surface or of the serrated surface to increase the tensile power of this union did not involve great inventive genius. Still, the use of the wedge and the serrated surface in the tapered sleeve formed a combination which was peculiarly adapted to the purpose of holding trolley wires together where there had been a break. The line between mechanical ingenuity and invention is sometimes very hard to draw. It is a question of fact, and one upon which the opinions of men differ. In the present case this court differs from the court below, and holds invention to be present in the Morrison device. As already stated, the Kisinger device is a mere duplication of the serrated wedge in the combination, and did not involve invention.

The remaining question is, does the defendant's device infringe the Morrison patent? We think it does. It consists of a shell having its ends tapered and formed with the openings to receive the ends of the wires, and removable locking devices, each located in the tapered end of said shell to engage the end of each wire. These are the elements set forth in the claim of the Morrison patent. Defendant

uses exactly the same locking device as Morrison, to wit, the serrated wedge. Two of these wedges are used as in Kisinger's patent, and they are united by a spring. This is possibly an improvement, enabling the repairer to adjust the wedges by the mere insertion of the wire, instead of pounding them in, as in the Morrison and Kisinger devices. But the wedges are removable quite as much as in the Morrison patent, in the sense that the wedge is easily removed in the sleeve from the point of union, and will then be available for a second union of the same kind. Moreover, the patent under which the defendant manufactures its device shows a hole through which the double serrated wedge with the spring connection may be entirely removed from the sleeve. In actual operation it is not necessary to remove the wedge from the sleeve, because it is self-adjusting and removes itself when the wire is pushed in, and pushes itself into locking operation when the wire is pulled. The defendant's device, therefore, though it involves additional elements, involves every element present in the Morrison coupling. The decree of the circuit court is in part reversed and in part affirmed, with directions to enter a decree for the complainant, finding that the Morrison patent is infringed by the defendant company, and enjoining future infringement, and for a reference on the question of damages. In so far as the decree of the circuit court found the Kisinger patent invalid and dismissed the bill as to it, the decree is affirmed. The costs of appeal are taxed against the appellee.

THE WILLOWDENE.

(District Court, E. D. Pennsylvania. October 27, 1899.)

No. 30.

1. COSTS—PRINTING.
   Though the customary price for printing in a district is 75 cents a page, $1 a page may be allowed as costs, where the page is proportionally larger than the customary page.
2. SAME—EXPENSE OF SURETIES.
   Fees of corporate sureties cannot be allowed, even in admiralty, without authority of a statute or rule of court.

In Admiralty. Appeal from the taxation of costs.

N. Dubois Miller, for libelants.
Henry R. Edmunds, for respondents.

McPHERSON, District Judge. Several objections were taken to the clerk's taxation, but only two were insisted upon at the argument —First, because he disallowed so much of the cost of printing the record as exceeded the sum of 75 cents per page, this being the customary price in the district; and, second, because he refused to allow an item of $220, which was paid by the claimant to the surety company that joined in the stipulation.

I think the first objection has a fair ground of support. The cost

of printing is charged at $1 per page, and the clerk was right in refusing to allow it without explanation. Upon the argument, however, it was pointed out that the page in controversy was longer than the page for which the customary price is charged, so that the amount of printed matter furnished would cost nearly the same sum, whichever rate and corresponding page are taken. Under the circumstances, therefore, this objection will be sustained.

The second objection must be dismissed. It may be desirable that corporations should take the place of individual sureties, and that the charge for assuming the obligation should become part of the costs of litigation. If desirable, there are two ways by which the result may be properly reached,—either by legislation, such as was adopted by the state of Pennsylvania concerning corporate sureties on the bonds of certain trustees (Laws 1895, P. L. 248); or by a rule of court, if power to make such a rule exists. The district court of the Northern district of Washington has, in one case, allowed this expense as an item of costs (The South Portland, 95 Fed. 295), apparently without the sanction of a previous rule, on the ground that the award of costs in admiralty proceedings is always in the discretion of the court. This is no doubt true in the sense that the costs may be apportioned after the amount has been ascertained; but I do not think that the court has an unrestrained discretion over the amount. It cannot declare that every expense incident to a litigation shall become part of the costs. It may have power so to declare concerning the fees of corporate sureties. I do not decide the point, because I have not examined it with the necessary care; but, at least until the declaration is made by a rule, I believe there is no warrant of law for allowing such fees.

The first objection above stated is sustained. The others are overruled.

THE CLINTON.

THE ALFRED W. BOOTH.

(District Court, S. D. New York. November 3, 1899.)

COLLISION—NEGLIGENCE—RIGHT OF WAY—TWO TOWS—CROSSING BOWS.

The C., a ferryboat, crossing from her New York slip to her Brooklyn slip, where the river was but 1,400 feet wide, and heading nearly directly across, when it had gone one-third the distance, sounded a single blast to the tug W., and a tandem tow, and the tug B., which had a dumper lashed to it, both of which were proceeding down river on the Brooklyn side, against the flood tide, with the C. on their starboard hand, to which the W. replied with one, turned somewhat to the starboard, and passed under the stern of the C. The B. did not answer, nor follow the course of the W. When in midstream, and before the W. had passed under her stern, the C. gave another blast, and then, getting no answer, gave a third signal of one whistle. The C. cleared the W. by a few feet, and immediately stopped, and backed or turned to starboard. *Held*, that the B., which was bound by the rules of the road to stop or turn to starboard, and which could have done so and avoided the accident, was in fault; and that the C. was not in fault, it having had a right, in the first place, to proceed on its course, both tugs having then time and space to keep out

of her way, and it having later been unable to stop sooner than it did, without a collision with the W.

In Admiralty.

Cowen, Wing, Putnam & Burlingham, for libelant.
James J. Macklin, for the Clinton.
Robinson, Biddle & Ward, for the Alfred W. Booth.

BROWN, District Judge. At about 7:30 a. m. of March 12, 1899, as the ferryboat Clinton, of the Catherine ferry, was crossing from her New York slip to her slip in Brooklyn in the strong flood tide, she came in collision off her lower Brooklyn slip, about 100 or 200 feet distant therefrom, with the libelant's dumper No. 7, which was lashed on the starboard side of the tug Alfred W. Booth and proceeding down river about parallel with the New York shore. The above libel was filed to recover the damages to the dumper.

The ordinary course of the ferryboat from the New York slip to the Brooklyn slip on the flood tide, is naturally a nearly straight line, heading about two or three points to port of a line directly across the river; and I have no doubt that this was the general course of the Clinton on this occasion, as her officers state, and that the witnesses from the Booth are in error as to the course of the Clinton. Before the Booth, which was proceeding down near the Brooklyn shore, had got abreast of the Brooklyn slip, the tug Woodruff came out from the dock at the foot of Washington street, two blocks above the ferry on the Brooklyn side, with two barges in a tandem tow on a hawser of about 30 fathoms, and heading a little down river, crossed in front of the Booth, and passing outside of her, turned and headed nearly straight down river. The Clinton, being at that time about one-third the way across from the New York shore, sounded to both tugs a signal of one whistle, to which the Woodruff replied with one, turned somewhat to starboard and passed under the stern of the Clinton. The Booth did not answer, nor follow the course of the Woodruff. When in midriver, and before the Woodruff had passed under her stern, the Clinton gave another signal of one whistle to the Booth, and still getting no answer from the Booth gave her a third signal of one whistle, which she answered with one, followed immediately by an alarm. The Clinton cleared the Woodruff and her tow by only a few feet, the latter passing under her stern; and as soon as she was clear of them the Clinton stopped and backed; but the Booth not having stopped or turned to starboard as the Woodruff had done, collision followed as above stated, about abreast of and near to the lower slip. At the time of the collision the stern of the ferryboat was not more than 20 or 30 feet from the tow of the Woodruff, which was passing under her stern.

The primary fault of this collision undoubtedly rests with the Booth, which had the Clinton on her own starboard hand and was bound by the rules of the road either to stop, in order to allow the Clinton to enter her slip, or else to turn to starboard and go under her stern, as there was nothing in the position of the Woodruff to prevent that course from being taken. Instead of doing either, the

Booth turned somewhat to port, instead of to starboard, and approached nearer the Brooklyn shore. The first signal of the Clinton was heard by the pilot of the Booth, from which he understood, or ought to have understood, that the Clinton intended to go ahead of both boats in accordance with her own right of way. He says he expected to see a collision with the Woodruff. That signal was as much for the Booth as for the Woodruff; and it bound both alike to act in conformity with it, as the Clinton, being on their starboard hand, had the right of way. I see no excuse for the Booth's neglect of her duty in this situation. She was some distance above the ferry slip at the first signal, and in moving against the flood tide would have had no difficulty in keeping out of the way of the ferryboat, as she was bound to do, had she adopted suitable measures in time.

Had not the Woodruff and her tow been present, the other circumstances would, perhaps, have been sufficient to have charged the Clinton with fault in not stopping and backing earlier than she did; because when the Clinton had arrived in midstream, or a little before that, there was obviously great danger of collision with the Booth and doubt whether the Booth could then avoid her, the river being there but 1,400 feet wide from pier to pier. The Fanwood (D. C.) 28 Fed. 373; The Jackson (D. C.) 58 Fed. 607; The Baltimore (D. C.) 56 Fed. 127. But the presence of the Woodruff and her tow totally changed the situation. The latter were then nearly abeam of the Clinton and near, which made it impossible for the Clinton to stop at once, without certain collision with the Woodruff's tow. She was bound, therefore, to do the best she could under such circumstances in the endeavor to clear the Woodruff's tow by keeping on in accordance with her previous signals, and by checking her speed and backing so as not to go too far beyond the Woodruff's tow when cleared, and to give the Booth all the chance that she could in the dangerous situation which the Booth had brought about by her own previous fault and neglect. I am satisfied that the Clinton did all that could be reasonably accomplished in this regard. Nor can I hold the Clinton in fault for giving her first signal of one whistle and shaping her course to go ahead of both tows, for the reason that that was within her right, and was her proper course; and because both the tows had sufficient time and space to keep out of the way, as was their duty to do, and which the Clinton had a right to expect that both alike would do. The John King, 1 C. C. A. 319, 49 Fed. 469.

Decree in favor of the libelant against the Booth with costs, and dismissing the libel as against the Clinton with costs.

SOUTHERN RY. CO. v. NORTH CAROLINA CORP. COMMISSION et al. SEABOARD & R. R. CO. v. SAME. ROANOKE & T. R. R. CO. v. SAME. RALEIGH & G. R. CO. v. SAME. RALEIGH & A. AIR-LINE R. CO. v. SAME. CAROLINA CENT. RY. CO. v. SAME. ATLANTIC COAST LINE RY. CO. OF VIRGINIA v. SAME. WILMINGTON & W. R. CO. v. SAME. NORFOLK & C. R. CO. v. SAME.[1]

(Circuit Court, E. D. North Carolina. November 4, 1899.)

1. JURISDICTION OF FEDERAL COURTS—FEDERAL QUESTION.
A suit by a railroad company to restrain the authorities of a state from collecting a tax levied on its property, on the grounds that the assessment on which such tax was levied was made without authority of law, and that such assessment was discriminative, and intended to impose on railroad property an undue share of the burdens of state taxation, is one which involves the construction and application of the provisions of the constitution of the United States prohibiting the taking of property without due process of law, and securing to all persons the equal protection of the laws, of which a federal court has jurisdiction, without regard to the citizenship of the parties.[2]

2. TAXATION OF RAILROAD PROPERTY — ASSESSMENT — NORTH CAROLINA STATUTES.
The North Carolina act of March 6, 1899, creating the North Carolina corporation commission, and defining their duties and powers, did not clothe such commission with authority to appraise and assess railroad property for taxation, nor was such authority given by any subsequent legislation.

Charles Price, Judge L. R. Watts, John D. Shaw, George Rountree, and R. O. Burton, for complainants.

Simmons, Pou & Ward, J. C. L. Harris, H. G. Connor, John W. Hinsdale, and C. A. Cook, for defendants.

SIMONTON, Circuit Judge. These are nine bills filed by the complainants whose names appear in the caption against the North Carolina corporation commission, its several members and agents, and the officers of the state whose duty it is to enforce the assessment and collection of taxes. The general features of the bills are the same, and their grounds of complaint are similar. They allege that the North Carolina corporation commission has assessed for taxation the value of the property of each of them, and that in so doing they have acted illegally and without warrant of law. There are four grounds upon which this allegation is based: (1) It is denied that the corporation commission had any power to levy the assessment complained of. (2) It is charged that the method adopted for assessing the value of railroad property differs so materially from that provided for assessing other property in the state as to deny the complainants the equal protection of the law. (3) That there has been in the state of North Carolina a systematic and intentional undervaluation of real and personal property, other than railroad property, with the design to discriminate against railroads, and to cast upon them an undue

[1] Rehearing pending.

[2] As to jurisdiction in 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.

share of the burdens of taxation, for the purpose of relieving such other property of its just proportion of state taxation. (4) That there being this systematic and intentional undervaluation of real and personal property, other than railroad property, the property of complainants has been valued higher than that of individuals. The bills each prayed for an injunction. Upon filing the bills, a rule in each case was issued, requiring the defendants to show cause, on a certain day, why an injunction in each case should not issue as prayed for. In the meantime the ordinary restraining order was passed, retaining matters in statu quo; the complainants in each case, however, having been required to tender and pay into the state treasury the amount of the tax, measured by an assessment plainly unquestionable and conceded to be legal. Bank v. Perea, 147 U. S. 87, 13 Sup. Ct. 194; Railroad Co. v. Clark, 153 U. S. 252, 14 Sup. Ct. 809. The returns have all been made; the affidavits filed on each side, numerous beyond example, have been considered; and counsel have been heard in an elaborate and exhaustive discussion.

The first question which arises in these cases, as indeed in every case, is as to the jurisdiction of the court. It is said that the great majority of the complainants are corporations of North Carolina. But the questions raised are federal questions, under the fourteenth amendment. The assessment for taxation is the first, and perhaps the most important, step in the levy and collection of the tax. If the corporation commission have not the power to assess these complainants, then this is the first step in depriving them of their property without due process of law; and if there be discrimination in the assessment, made with a view of casting upon them the burden of taxation, to the exoneration of other real and personal property, each of them is denied the equal protection of the law. Besides, this would be the taxing of private property for public purposes without compensation. So, each of these cases depends upon the construction and application of the constitution of the United States. This fact gives the court jurisdiction, without regard to the citizenship of the parties. 25 Stat. 433; Ames v. Kansas, 111 U. S. 449, 4 Sup. Ct. 437; Cohens v. Virginia, 6 Wheat. 264. And, if the statutes under which the corporation commission act are in conflict with the constitution of the United States, it and the state officers acting under its proceeding may be enjoined. Pennoyer v. McConnaughy, 140 U. S. 1, 11 Sup. Ct. 699.

The next question is, has the North Carolina corporation commission the power to levy assessment on the property of railroads? The discussion of this question will require an examination in detail of some of the acts of assembly of the state of North Carolina. The North Carolina corporation commission was created by an act of assembly ratified March 6, 1899, and made of force from and after April 5, 1899. It provides for three commissioners,—the first board to be elected by the legislature; all subsequent boards to be elected by the people, beginning with the general election in 1900. The corporation commission is given a general supervision over railroads, steamboat, navigation, and canal companies, express, telegraph, and telephone companies, building and loan associations, banks, and sleep-

ing-car companies. In the second section of the act the duties of the commission are minutely set out in 24 subdivisions. It may assist this examination to set them out. They have power to make rates of freight, passenger, and express tariffs; to make reasonable and just rules for corporations handling express or freight; to make rules to prevent discrimination; to make just rates for use of railroad cars carrying freight or passengers; to prevent rebates; to make through rates for transportation of freight, passengers, or express; to make rules for handling freight and baggage at stations; to make rates for transportation of packages by express companies or corporations; to make rules as to contracts entered into by one railroad company or corporation to carry over any of its line cars of any other company or corporation; to make rates for any telegraph or telephone company; to make rates for rental of telephones, this not to apply to telephone lines hereafter constructed, nor to telephone instruments giving interstate connection, until three years after ratification of the act; to require establishment of stations by any corporation or company engaged in transportation of freight or passengers and the erection of depots; to require the change or repair of stations and additions thereto; to require separate waiting rooms for white and colored races; to require construction of side tracks by any railroad company to industries established or to be established; to exercise the power over banks heretofore exercised by the state treasurer; to appoint persons to examine and report; to give all information to the state treasurer as to the solvency of banks; to exercise certain powers over building and loan associations; to appoint suitable persons to examine them; to collect all fees for these purposes heretofore collected by the auditor of the state; to prescribe rules of practice and proceeding in all matters before them; to perform all the duties, and exercise all the powers, imposed or conferred by chapter 320 of the Public Laws of 1891 and the acts amendatory thereto. This chapter (Laws 1891, c. 320) is entitled "An act to provide for the general supervision of railroads, steamboat or canal companies, express and telegraph companies doing business in the state of North Carolina," popularly known as the "Railroad Commission Act." It also goes into minute detail as to the powers and duties of the railroad commissioners,—as minutely as does the corporation commission act. Chapter 320, Acts 1891, was ratified on 5th of March, 1891, and went into effect 1st of April thereafter. There appears but one amendment to this chapter 320 eo nomine. This is chapter 206, Laws 1897, "An act to amend chapter 320, Laws of 1891, establishing a railroad commission." Neither chapter 320, nor chapter 206 of the Laws of 1897, says anything about the assessment of railroad property, nor is any such power apparent in the act of 1899, constituting the corporation commission.

It is said, however, that this chapter 320 has been really amended by acts of the general assembly. At the same session of the general assembly which passed the railroad commission act the legislature passed an act to provide for the assessment and taxation of property. This act was ratified 9th of March, 1891, and went at once into operation. This act is known as the "Machinery Act," and it puts in opera-

tion the levy of taxes. At each session of the general assembly a machinery act is passed almost in totidem verbis with that of the previous session. Each machinery act has a repealing clause in these words: "All acts and parts of acts inconsistent with the provisions of this act are hereby repealed." This machinery act, as it was passed session by session, declared how, when, and by whom various classes of property should be assessed. Among these it is provided that the commissioners elected from time to time under the authority of an act to provide for the general supervision of railroad, steamboat, or canal companies, express and telegraph companies, doing business in the state of North Carolina, shall constitute a board of appraisers and assessors for railroad companies. Did the machinery act of 1891, or any of the machinery acts since that date, operate as an amendment of the railroad commission act?

The machinery act of 1891 went into operation 9th March. The railroad commissioners act went into operation 1st April. It would be somewhat of an anomaly if an amending act should precede the act amended. The railroad commissioners act of 1891 (chapter 320) is entitled "An act for the general supervision of railroads," etc., "doing business in the state of North Carolina." The enactments of the act follow closely its title. The machinery act does not in terms add to the duties of the railroad commission, but it declares that the commissioners elected upon that commission shall constitute a board of appraisers and assessors. The act provides a mode of assessment of all kinds of property, and designates the several classes of persons by whom such assessment shall be made. When it comes to railroad property, it creates a board composed of the individuals elected to the railroad commission for a specific purpose,—the appraisement and assessment of the railroad property.

The general assembly at the same session had before it the bill providing for the supervision of railroads and other corporations, and also the machinery bill. They were ratified on the same day, and must have been considered about the same time. Entering minutely and in detail, and at general length, into the duties of the railroad commission, not one word is said as to the assessment of railroad property for taxation. Nor does the machinery act intimate any intent to amend the railroad act. If that had been the intent of the machinery act of 1891, and if it did in fact amend the railroad commissioners act, why did the general assembly deem it necessary each session thereafter to repeat the same provision in each machinery act?

Chapter 320, Acts 1891, was a permanent act. Once amended, it would remain so until the will of the legislature changed. Yet we see the same provision repeated session after session, in the same words; evidently the mind of the legislature recognizing that the machinery act was a temporary act, making provision for the occasion, and not intended to affect general legislation. This view is strengthened by the course pursued by the legislature when it desired, in terms, to amend the act. In 1897 was passed chapter 206, entitled "An act to amend chapter 320, Laws of 1891, establishing a railroad commission." The title shows the purpose of the act. Its several

sections made important changes in it, and not one word is said of this grave power of appraisement and assessment of railroad property.

The North Carolina corporation commission act goes into an exhaustive declaration of the powers and duties of the commission with respect to railroads. Not satisfied with this declared enumeration of these duties, it in general terms declares that it shall perform all the duties, and exercise all the powers, imposed or conferred by chapter 320 of the Public Laws of 1891 and acts amendatory thereto. This act was ratified 6th of March, 1899. Surely, if the general assembly intended that the corporation commission should act as a board of appraisers and assessors, as well as a board of supervisors of railroad property, it would scarcely have omitted this among the other duties of the commission; and, if it supposed that the provisions of the machinery act had amended chapter 320, it would not have passed, two days after the ratification of the corporation commission act, a machinery act, constituting the commissioners elected from time to time under the authority of an act to provide for the general supervision of railroad, steamboat, or canal companies, express and telegraph companies, doing business in the state of North Carolina, a board of appraisers and assessors for railroad, telegraph, canal, and steamboat companies.

There is another consideration: The act to establish the North Carolina corporation commission, though ratified 6th of March, 1899, did not go into effect until from and after the 5th of April, 1899. By an act ratified the same 6th of March, 1899, the general assembly declared that "chapter 320, Pub. Laws 1891, and all acts amendatory thereof and supplementary thereto, be, and they are hereby, repealed." This act was of force from and after April 4, 1899. It repeals in toto every provision of the act of 1891, and all acts not only amendatory thereof, but supplementary thereto. So, when the corporation commission act speaks as of the day it was of force, subdivision 23, § 2, of the act referred to a law which had been repealed in toto.

It is impossible, after examining the acts of the general assembly of 1899, to escape the conclusion that, in the mind of that body, the special board for the appraisement and assessment of the railroad property was constituted of the three persons who had been elected or appointed railroad commissioners. We have seen the provisions of the machinery act of that year, adopted notwithstanding that the institution of the corporation commission had been determined upon. So, in chapter 11 of that year ("Revenue Act"), in sections 41, 42, 43, and 44, the railroad commissioners alone are instructed with regard to the appraisement and assessment of railroad property. That act was ratified, and was of force March 8, 1899. And, in section 60 of the same act, the power to revise the assessment for taxation of railroad property is given to the railroad commission or any body succeeding to their powers. The act creating the corporation commission had been ratified two days before this act. If the general assembly intended that commission in the words, "any body succeeding to their powers," is it not reasonable to suppose that it would have said so, and would not have left it to inference only?

So, also, chapter 687 of the Laws of 1899 authorizes the railroad commission, the corporation commission, or such board as shall succeed to their duties, to assess property which has escaped taxation. This act was ratified and was of force 8th March, 1899. It recognizes the existence of the railroad commission and of its powers, and leaves to inference entirely the idea that one is substituted for the other. If no other act creates the corporation commission into a board for the appraisement and assessment of railroad property, this act cannot do so by indirection.

It must be borne in mind that the legislation now under discussion is not remedial legislation. In all such cases courts labor to arrive at the beneficent intent of the legislature and seek to secure it full effect. Com. v. Kimball, 24 Pick. 370, and cases collected in 23 Am. & Eng. Enc. Law, 309, 362, and 24 Am. & Eng. Enc. Law, 358. We are construing statutes imposing taxes and burdens on the taxpayer. In all such the rule is changed. "The highest power that a sovereign—the lawmaking power—can confer is the power to tax; and every act conferring that power must express it plainly, and the act so expressing it must be strictly construed." Suth. St. Const. 459 et seq. In every case of doubt, such a statute is construed against the government. U. S. v. Wigglesworth, 2 Story, 369, Fed. Cas. No. 16,690.

Says Lord Chancellor Cairns in Partington v. Attorney General, L. R. 4 H. L. 100, 122:

> "As I understand the principle of all fiscal legislation, it is this: If the person sought to be taxed comes within the letter of the law, he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case might otherwise appear to be. In other words, if there be admissible in any statute what is called an 'equitable construction,' certainly such a construction is not admissible in a taxing statute when you can simply adhere to the words of the statute."

See, also, U. S. v. Wigglesworth, 2 Story, 369, Fed. Cas. No. 16,690; Twine Co. v. Worthington, 141 U. S. 474, 12 Sup. Ct. 55; Rice v. U. S., 4 C. C. A. 104, 53 Fed. 910.

On the whole, the conclusion cannot be resisted that, either intentionally or accidentally, the corporation commission was not clothed with the power of appraising and assessing railroad property, and that their attempted action herein complained of is without authority of law.

It is to be regretted that this conclusion renders unnecessary the discussion of the merits of this case, presented so ably and fully by counsel on both sides. The conclusion reached, while it stops the hand of the court now, simply postpones the decision on the grave questions underlying the cases. This postponement, however, will not operate to excuse the complainants from the payment of taxes. Under Russell v. Ayer, 120 N. C. 180, 189, 27 S. E. 133, the provisions of the revenue act of 1897 are in full force, and the taxes therein provided must be paid. Let the injunctions issue as prayed for in each bill.

PEORIA & E. RY. CO. v. COSTER et al.

(Circuit Court, S. D. New York. August 25, 1899.)

RAILROADS—REORGANIZATION AGREEMENT—ENFORCEMENT BY BONDHOLDERS.

Bondholders of a railroad company, who have exchanged their bonds for those of a reorganized company, which, by the reorganization agreement, were to be made a first lien on the property, have the right to enforce such agreement, and to insist upon the retention by the reorganization committee of all securities placed in its hands to secure the taking up of prior liens until their extinguishment is assured, and an arrangement by which such liens are to be paid off or extended at the option of the holders does not meet the requirements of the agreement.

This was a suit in equity to compel the delivery to complainant of certain securities.

This cause comes here upon pleadings and proofs. There seems to be no dispute as to the facts. The relief sought is the delivery by defendants, Coster and others, of certain securities to complainant. Said defendants are the reorganization committee of the Ohio, Indiana & Western Railway Company. Complainant is the successor railway, created under reorganization agreement in the usual way.

Melville E. Ingalls, Jr., for complainant.

Francis Lynde Stetson, for defendants Coster and others.

Butler, Notman, Joline & Mynderse, for defendants Central Trust Co. and others.

LACOMBE, Circuit Judge. By the terms of the reorganization agreement, there were to be issued $10,000,000 first consolidated mortgage bonds of the plaintiff company. Of these the holders of non-preferred first mortgage bonds of the Ohio, Indiana & Western were to receive $6,500,000, bond for bond. Other distributees were also to receive divers parts of this issue. By the terms of this agreement, the said bonds were to be or become, in the hands of their holders, absolute first mortgage bonds, unincumbered by any prior lien; for it was expressly provided that $1,500,000 of them was to be held by the committee for the purpose of taking up underlying bonds, viz. first mortgage 7 per cent. bonds of the I., B. & W., $1,000,000, and first mortgage 5 per cent. preferred bonds of the Ohio, Indiana & Western, $500,000. The 7 per cent. bonds aforesaid fall due January 1, 1900, and the complainant has provided for the payment thereof at par, in cash, upon that date, or, if desired by the holders thereof, for the extension of such maturing bonds to January 1, 1940, at 4 per cent. To the extent to which the holders of these underlying bonds may elect to receive cash, the provisions of the reorganization agreement will be carried out; but the extension of any of them, as liens prior to the new securities, is not an execution of the terms of the agreement. Neither in letter nor in spirit can the bonds so extended be held to be "taken up." The holders of the new bonds, therefore, who are represented here by the defendants Central Trust Company and Fairbanks, are entitled to insist that the reorganization committee shall retain in its hands whatever securities it may

have which are pledged to the carrying out of such agreement, and to meeting whatever expense may be incurred in so doing.

The particular securities now asked for consist of certain cash, stock of another road, and certain stock and bonds of complainant (other than the $1,500,000 reserved bonds). They were placed in the hands of the committee by the complainant company, and it may well be that, coming thus to the committee, they came impressed with a trust by virtue of the reorganization agreement alone; but it is not necessary now to decide that question. They were turned over under a written agreement between the complainant, the committee, and the Cleveland, Cincinnati, Chicago & St. Louis Railway Company (to which the complainant railway had been leased). By this agreement, which was manifestly intended as ancillary to the reorganization agreement, these securities were "pledged and appropriated as a provision for the premium which may be necessarily allowed in effecting the exchange of the $1,000,000 of first consolidated mortgage bonds of the party of the second part [complainant], reserved under the terms of the mortgage securing the same, for taking up certain prior bonds of like amount of the I., B. & W. Railway Company." As was said before, this trust has not been carried out, nor will it be till the last outstanding underlying bond of the $1,000,000 7 per cent. bonds of the I., B. & W. has been exchanged or extinguished by payment. It is true that the holders of Peoria & Eastern 4 per cent. bonds are not specifically designated as beneficiaries under the agreement, but it is manifest that it was made expressly for their benefit. Incidentally, the holders of the old I., B. & W. bonds might benefit by having some fund provided out of which they might be paid the premium to which they might be entitled if they chose to exchange their 7 per cent. securities for 4 per cent. before maturity; but it is quite apparent that the property, even at the time of reorganization, was worth much more than the $1,500,000 of prior liens, and the holders of the old bonds were abundantly secured. The real beneficiaries under the ancillary agreement were the new 4 per cent. bondholders, who, by means of the premium therein provided for, were to have their nominal first mortgage turned into a real one. The contract was entered into for their benefit. Such benefit would be the direct result of performance, and was manifestly within the contemplation of the parties. The complainant came into being as a result of the reorganization agreement. All that it had it received under such agreement. It was a careful and complete carrying out of the provisions of such agreement, which was to make it a solvent, going concern, with some prospect of betterment in the future; and when it entered into the ancillary agreement, for the purpose of aiding in carrying out the reorganization agreement, it must be understood to have intended that all and any cestuis que trustent, under the reorganization agreement, might insist upon the carrying out of the ancillary agreement, which was made for their benefit. The principle of Lawrence v. Fox, 20 N. Y. 268, seems to apply. See, also, Austin v. Seligman (C. C.) 18 Fed. 519. The bill of complaint is dismissed.

REED et al. v. STANLEY et al.

(Circuit Court of Appeals, Ninth Circuit. October 2, 1899.)

No. 508.

1. BILL OF REVIEW—TIME FOR FILING.
   The rule is well established in courts of equity of the United States that a bill of review must be filed within the time allowed by statute for appeal.
2. SAME.
   Where a party against whom a decree has been entered by a circuit court of equity has no right of appeal therefrom to the supreme court, either because no question appealable to that court was in issue, or because he failed to have a question of jurisdiction involved certified during the term at which the decree was entered, and his right of appeal is therefore limited to an appeal to the circuit court of appeals, the time within which he may file a bill of review is limited, by analogy, to the six months allowed by statute for taking an appeal to that court.

Appeal from the Circuit Court of the United States for the Northern District of California.

Rodgers, Patterson & Slack, for appellants.
Warren Olney, E. S. Pillsbury, and Robt. Y. Hayne, for appellees.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

ROSS, Circuit Judge. On the 23d day of February, 1892, the president and trustees of Bowdoin College, and others, commenced a suit in equity in the court below against James P. Merritt and others, which will be referred to, for convenience, as the case of Bowdoin College v. Merritt. To the bill in that suit a demurrer was interposed upon the ground, among other grounds, that the circuit court of the United States for the Northern district of California had no jurisdiction of the suit, which demurrer was by the court overruled. 54 Fed. 55. Subsequently leave was given the complainants in the suit to file a supplemental bill, which was done; and thereafter a preliminary injunction was granted in the suit, for reasons stated in an opinion reported in 59 Fed. 6. Still later a plea in abatement was interposed to the suit by J. P. Merritt, one of the defendants, upon the ground that the suit was a collusive one, and should therefore be dismissed; but it was adjudged that the plea was not sustained by the evidence, and the motion to dismiss was denied. 63 Fed. 215. The cause was thereafter heard upon its merits, and on June 18, 1896, a decree was entered in favor of the complainants. The term of the circuit court at which the decree was entered expired July 10, 1896,—22 days after the making and entry of the decree. From that decree an appeal was taken on the 16th day of December, 1896, by the defendants directly to the supreme court of the United States, upon the sole ground that the circuit court had no jurisdiction of the suit, which appeal was dismissed by the supreme court on May 24, 1897, for the reason that under the provisions of the act of March 3, 1891, establishing the circuit courts of appeals (26 Stat.

826), no appeal could be taken unless the certificate as to the jurisdiction was granted by the trial judge during the term at which the decree was entered. Merritt v. Bowdoin College, 167 U. S. 745, 17 Sup. Ct. 996. The mandate of dismissal was received by the circuit court June 16, 1897. On the 17th day of June, 1897, a second appeal was taken to the supreme court by the defendants upon the ground that the case involved the "construction or application of the constitution of the United States," which appeal was likewise dismissed by the supreme court. 169 U. S. 551, 18 Sup. Ct. 415. And the mandate certifying the dismissal was received by the circuit court March 28, 1898. Four days thereafter, to wit, on the 1st day of April, 1898, the complainants brought the present bill of review, seeking to review and reverse the decree entered in the original suit on the 18th day of June, 1896. An amendment to the bill of review was filed April 11, 1898, in the court below; and on June 2, 1898, another amendment to the bill of review was filed, in which is stated the time occupied by the two appeals to the supreme court from the decree sought to be reviewed. The court below held that the bill of review was filed too late, and upon that ground sustained the demurrers that were interposed thereto, and dismissed the bill. (C. C.) 89 Fed. 430. Whether or not the court below was correct in its view in that regard, is the first question for consideration.

That there is no statute or rule of court prescribing the time within which a bill of review may be filed is undisputed. But the principles controlling courts of equity in respect to the matter are well settled. A clear statement of them is found in the case of Thomas v. Brockenbrough, 10 Wheat. 148, where the supreme court said:

"It must be admitted that bills of review are not strictly within any act of limitations prescribed by congress; but it is unquestionable that courts of equity, acting upon the principle that laches and neglect ought to be discountenanced, and that in cases of stale demands its aid ought not to be afforded, have always interposed some limitation to suits brought in those courts. It is stated by Lord Camden in the case of Smith v. Clay, Amb. 645, 3 Brown, Ch. 639, note, 'that, as the court of equity has no legislative authority, it could not properly define the time of bar by a positive rule, but that, as often as parliament had limited the time of actions and remedies to a certain period in legal proceedings, the court of chancery adopted that rule, and applied it to similar cases in equity.' Upon this principle it is that an account for rents and profits, in a common case, is not carried beyond six years, or a redemption of mortgaged premises allowed after twenty years' possession by the mortgagee, or a bill of review entertained after twenty years, by analogy to the statute which limits writs of error to that period. These principles seem to apply with peculiar strength to bills of review in the courts of the United States, from the circumstance that congress has thought proper to limit the time within which appeals may be taken in equity causes, thus creating an analogy between the two remedies, by appeal and a bill of review, so apparent that the court is constrained to consider the latter as necessarily comprehended within the equity of the provision respecting the former. For it is obvious that, if a bill of review to reverse a decree on the ground of error apparent on its face may be filed at any period of time beyond the five years limited for an appeal, it will follow that an original decree may, in effect, be brought before the supreme court for re-examination after the period prescribed by law for an immediate appeal from such decree, by appealing from the de-

cree of the circuit court, upon a bill of review. In short, the party complaining of the original decree would in this way be permitted to do indirectly what the act of congress has prohibited him from doing directly."

From this it will be seen that an original decree cannot be brought before an appellate court for re-examination, by means of a bill of review, after the expiration of the period prescribed by statute for an immediate appeal from such decree; otherwise, as said by the court in the case cited, the party complaining of the original decree would by such means be permitted to do indirectly what the act of congress has prohibited him from doing directly. There can be no doubt that prior to the passage of the act of congress of March 3, 1891, creating the circuit courts of appeals, the defendants to the suit of Bowdoin College v. Merritt would have had two years from the date of the entry of the final decree in that case in the circuit court within which to file a bill for the review of any error apparent upon the face of the record in that case; for, but for the act of March 3, 1891, an appeal from that decree could only have been taken to the supreme court, and could have been taken at any time within the period of two years. Rev. St. § 1008. But the act of March 3, 1891, entitled "An act to establish circuit courts of appeals, and to define and regulate in certain cases, the jurisdiction of the courts of the United States, and for other purposes," provides, in its fourth section, that "the review by appeal or writ of error, or otherwise, from the existing circuit courts, shall be had only in the supreme court of the United States, or in the circuit courts of appeals hereby established, according to the provisions of this act regulating the same"; and in its fifth section provides, among other things, that appeals or writs of error may be taken from the circuit courts direct to the supreme court in any case in which the jurisdiction of the court is in issue, in which cases the question of jurisdiction alone shall be certified to the supreme court from the court below for decision. By section 6 of the act it is provided, among other things, that the circuit courts of appeals shall exercise appellate jurisdiction in all cases other than those provided for in section 5 of the act, unless otherwise provided by law. By section 11 it is provided that no appeal or writ of error by which any order, judgment, or decree may be reviewed in the circuit courts of appeals under the provisions of the act shall be taken or sued out except within six months after the entry of the order, judgment, or decree sought to be reviewed, with certain provisions not necessary to mention. The act of March 3, 1891, does not prescribe the time within which appeals or writs of error shall be taken from the circuit courts to the supreme court, but leaves in force that provision of the Revised Statutes prescribing the period of two years from the entry of a judgment, decree, or order of the circuit court in any civil action, at law or in equity, for review in the supreme court on writ of error or appeal, where an appeal or writ of error is allowed. Rev. St. § 1008. But the act of March 3, 1891, as construed by the supreme court, does, in effect, provide that there can be no appeal at all to the supreme court on the question of jurisdiction, unless the trial court, during the term

at which the judgment, decree, or order is given, certifies that the question of the jurisdiction of the court to give such judgment, decree, or order is involved. 167 U. S. 745, 17 Sup. Ct. 996; Colvin v. City of Jacksonville, 158 U. S. 456, 15 Sup. Ct. 866; The Bayonne, 159 U. S. 687, 16 Sup. Ct. 185; Chappell v. U. S., 160 U. S. 499, 16 Sup. Ct. 397. Of the act of March 3, 1891, the supreme court, in the case of U. S. v. Jahn, 155 U. S. 109, 114, 15 Sup. Ct. 39, 41, also said:

"Giving the act a reasonable construction, taken as a whole, we conclude: (1) If the jurisdiction of the circuit court is in issue, and decided in favor of the defendant, as that disposes of the case, the plaintiff should have the question certified, and take his appeal or writ of error directly to this court. (2) If the question of jurisdiction is in issue, and the jurisdiction sustained, and then judgment or decree is rendered in favor of the defendant on the merits, the plaintiff, who has maintained the jurisdiction, must appeal to the circuit court of appeals, where, if the question of jurisdiction arises, the circuit court of appeals may certify it. (3) If the question of jurisdiction is in issue, and the jurisdiction sustained, and judgment on the merits is rendered in favor of the plaintiff, then the defendant can elect either to have the question certified, and come directly to this court, or to carry the whole case to the circuit court of appeals, and the question of jurisdiction can be certified by that court. (4) If, in the case last supposed, the plaintiff has ground of complaint in respect of the judgment he has recovered, he may also carry the case to the circuit court of appeals on the merits; and this he may do by way of cross appeal or writ of error if the defendant has taken the case there, or independently if the defendant has carried the case to this court on the question of jurisdiction alone, and in this instance the circuit court of appeals will suspend a decision upon the merits until the question of jurisdiction has been determined. (5) The same observations are applicable where a plaintiff objects to the jurisdiction, and is, or both parties are, dissatisfied with the judgment on the merits."

The record shows that in the case of Bowdoin College v. Merritt the question of jurisdiction was in issue, was sustained by the circuit court, and a decree on the merits rendered in favor of the complainants. The defendants to the suit thereupon had their election either to have the question of jurisdiction certified by the circuit court, and appeal directly to the supreme court, or to carry the whole case, including the question of jurisdiction, to the circuit court of appeals. For the latter purpose the act of congress allowed them six months from the entry of the decree, and also made it an essential condition of a direct appeal to the supreme court that a certificate of the circuit court be procured during the term at which the decree was rendered, to the effect that the question of the jurisdiction of the court to render the decree was in issue. Without the making of such certificate, the right to appeal to the supreme court did not exist at all, as was expressly decided by the supreme court in the cases cited. When, therefore, the term at which the decree in the case of Bowdoin College v. Merritt was entered expired without the procuring of the necessary certificate, the opportunity of the defendants to that suit to avail themselves of an appeal to the supreme court on the question of jurisdiction was gone. The right to such appeal never had come into existence, and never thereafter could do so. The alternative, however, given them by the act of March 3, 1891, to appeal the whole case,

including the question of jurisdiction, to the circuit court of appeals, continued to exist for the period of six months from the time of the entry of the decree complained of. Within the time thus allowed by statute for an appeal from the decree, the defendants thereto were entitled, by analogy, to file a bill of review for the correction of any error apparent upon the face of the record of the case in which the decree was entered. Within that time the present bill of review was not filed. Under the act of March 3, 1891, as construed by the supreme court, there never came into existence any right on the part of the appellants to appeal to the supreme court from the decree in the case of Bowdoin College v. Merritt; that act having declared, in effect, that, unless the circuit court certified during the term at which the decree was rendered that the jurisdiction of the court to render the decree was involved, there could be no appeal to the supreme court. In view of this legislation, to permit the appellants to now bring up the decree complained of for re-examination, by means of a bill of review, would be to permit them to accomplish indirectly what the act of congress has prohibited them from doing directly. Upon the ground that the bill was filed too late, the judgment of the court below is affirmed.

ALLEN v. ALLEN et al.[1]

(Circuit Court of Appeals, Ninth Circuit. October 3, 1899.)

No. 521.

1. JUDGMENTS—RELIEF AGAINST IN EQUITY—FRAUD.
   A judgment cannot be impeached in equity on the ground of fraud practiced by the successful party, where it appears that the fraud, if attempted, was unsuccessful.
2. CONSTITUTIONAL LAW—IMPAIRING OBLIGATION OF CONTRACTS—JUDGMENT OF STATE COURT.
   The constitutional provision against the impairment by a state of the obligation of contracts does not afford basis for a suit in equity in a federal court by a party defeated in an action in a state court to set aside the judgment on the ground that it impaired the obligation of a contract.
3. JUDGMENTS—GROUNDS FOR RELIEF AGAINST IN EQUITY.
   A court of equity cannot set aside a judgment at law, rendered by a court which had jurisdiction, on the ground that it was not warranted by the pleadings.

Appeal from the Circuit Court of the United States for the Northern District of California.

The appellant filed a bill of complaint in the circuit court, in which it was alleged that on December 30, 1869, one J. H. Allen held the legal title to certain lands situated in the city of Eureka, in the state of California, in trust for the complainant, and that the complainant on said date caused the said trustee to convey the lands to the defendants, the appellees herein, who were the complainant's brothers, as security for money to be advanced thereafter to the complainant, which conveyance was accepted by the defendants as a mortgage; that the defendants advanced and paid to the complainant, under said mortgage, $500, and that they paid taxes on said lands, but not on account of said mortgage, in the sum of $1,200; that they received from said

[1] Rehearing denied October 20, 1899.

lands and as proceeds thereof $2,200; that they applied the same to the payment of said $500, in extinguishment of said mortgage, and the balance to the repayment of said taxes; that on July 27, 1889, the defendants, claiming to own said lands, brought an action in ejectment against the complainant to recover the possession thereof; that the complainant answered said action, and filed a cross bill to redeem from said mortgage, upon which issue was taken by said defendants; that upon the hearing of said cause a decree was rendered against the complainant, the court holding that the cross bill of this complainant in said action was barred by a former judgment set forth in the findings in said proceedings. An exhibit attached to the bill sets forth the record of the former suit so referred to, showing that on March 15, 1887, the complainant had instituted a suit in the superior court of California for the purpose of redeeming said land from said mortgage; that in his complaint he had alleged that he had offered to repay to defendants any sum which might be due on said mortgage, and that he had demanded of them the cancellation of their mortgage, which they had refused; that in defense of said suit to redeem the defendants had alleged that they were the owners in fee of said land, and had also pleaded section 361 of the Code of Civil Procedure of California as a bar to the right of the complainant to redeem; that the superior court found that the deed was a mortgage, and that $500, and no more, had been advanced and loaned thereunder, and that the defendants had received $2,200 from the proceeds of said land, but that the suit was barred by section 361, above referred to; that the court adjudged that the complaint therein stated no cause of action. The bill further alleged that the complainant had appealed from said judgment in said action of ejectment to the supreme court of the state of California, and that on February 23, 1895, said judgment was affirmed by said appellate court. The bill then averred that said judgment was made in excess of the court's jurisdiction, and was procured by fraud, and the suppression of the truth, and that it takes from the complainant his property, in violation of law and of the intention of the parties to said mortgage, and without due process of law, and impairs the complainant's contract, and puts a cloud upon his title; that said courts of the state of California erred in disregarding and violating section 260 of the practice act of the state of California, which provides that "a mortgage of real property shall not be deemed a conveyance whatever its terms, so as to enable the owner of the mortgage to recover possession of the real property, without a foreclosure and sale"; and that said courts erred in holding that the plaintiff's equities as set forth in his cross bill were barred by the statute of limitations. Then follows an offer to pay the defendants any sum that may be due them upon said mortgage, or connected therewith, and a prayer that the judgment in the action of ejectment be adjudged to give no title to the defendants, and that they be enjoined from claiming any right thereunder. For a further cause of suit the bill alleged the foregoing facts concerning the conveyance of the real estate to the trustee as a mortgage, the loan of $500 thereupon, and alleged a promise upon the part of the defendants to reconvey said property to the complainant upon the payment of said mortgage; alleged that the mortgage had been paid, but that the defendants refused to comply with their promise to reconvey said property, and that they now fraudulently and without right claim to own the same. The bill thereupon prayed for a decree requiring the defendants to specifically perform the agreement. The defendants demurred to the bill upon the grounds that the suit was barred by the prior judgments of the state courts of California set forth in the bill, that the circuit court had no jurisdiction to grant the relief prayed for, and that there was no equity in the bill. The demurrer was sustained, and a decree was entered dismissing the bill, from which decree the appellant brings this appeal.

Jefferson Chandler, S. W. Holladay, and E. B. Holladay, for appellant.

S. M. Buck, for appellees.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

GILBERT, Circuit Judge, after stating the facts as above, delivered the opinion of the court.

Before discussing the points of law which are involved in the case, it becomes necessary to inquire what was the nature and effect of the judgment in ejectment which is the subject of the present suit. The judgment in the ejectment case was controlled by a former judgment, which had been rendered in a suit which the appellant brought against the appellees to redeem the land from the mortgage. The complaint in the redemption suit contained the essential allegations of a complaint in a suit of that nature. The answer was a denial of the trust, and of the intention to regard the deed as a mortgage, and an assertion of title in the defendants by virtue of the deed. The court found these facts against the defendants. It found that the facts were as they had been alleged by the plaintiff. But the defendants had pleaded, as a further defense, the statute of limitations. Upon that defense the court adjudged that the suit was barred by the provision of section 361 of the Code of Civil Procedure of California. It held that, because the plaintiff had not offered to repay the defendants the money which was intended to be secured by the deed until after the defendants' right to enforce the collection had, by lapse of time, been lost in New York, where all the parties resided, the plaintiff's right of redemption was barred. The language of the judgment was: "That said plaintiff has no cause of action whatever against said defendants by reason of any of the matters and things set out in the amended complaint herein." The grounds of that decision were thereafter fully considered by the supreme court of California, on appeal, in Allen v. Allen, 95 Cal. 184, 30 Pac. 213, in which case the supreme court held that, since the deed and the contract of security were executed in the state of New York, between residents of that state, either party could have maintained an action in that state on the contract,—one to enforce the right to redeem, and the other to recover the amount for which the land was held as security; but that the action in that state to recover the debt had become barred by the laws of that state, and therefore no action to redeem from the security could thereafter be maintained in California, where, by the law in force at the time of the execution of the deed, the legal title had passed to the grantee by the deed, and the right to redeem was barred whenever the debt to secure which the deed was made became barred by the statute of limitations. After the decision in that case the appellant entered into the possession of the land, and the action of ejectment was brought against him by the appellees to recover possession. Their complaint alleged title in the plaintiffs in fee simple. The answer denied their title, and set forth the nature of the deed and its purpose, and alleged that the plaintiffs in said action had received from sales of a portion of the lands and otherwise more than sufficient to satisfy their mortgage and all the taxes which they had paid thereunder. The defendant in said action then filed a cross complaint setting forth the same facts, and praying that he be permitted to redeem from the mortgage. Replying to the cross complaint, the plaintiffs

pleaded in estoppel the former decree in their favor in the suit to redeem. Upon the issues so tendered the court found as facts that the plaintiffs were the owners in fee simple of the land, and entitled to the possession thereof, and found further that the deed was a mortgage to secure $500, but that the plaintiffs had made personal advances to the defendant in addition thereto in the sum of $4,500, and had paid taxes on said lands, which had not been repaid save by the receipt of $2,200, from the sale of a portion of said land; that by the laws of the state of New York the right of the plaintiffs to maintain an action against the defendant for said sum of $500 was barred from and after November 20, 1874. The court further found the facts of the former suit to redeem and the decree rendered thereon. As conclusion of law the court found that the plaintiffs were entitled to judgment against the defendant for the possession of the lands and for costs, and that the cause of action set forth in the cross complaint was barred in equity by the laches of the defendant in not offering to pay the indebtedness due the plaintiffs until the right of the latter to enforce the collection thereof was barred by lapse of time. The judgment was that the plaintiffs recover the land, with costs, and that the defendant had no cause for action against the plaintiffs by reason of the facts set forth in his cross complaint. On appeal that judgment also was affirmed by the supreme court of California in Allen v. Allen, 106 Cal. 137, 39 Pac. 436. In the opinion in that case the court said of its former decision in 95 Cal. 184, 30 Pac. 213:

"By that decision it was held that under the transfer and conveyances to plaintiffs herein they acquired the legal title to the property, leaving in defendants a mere equity of redemption. * * * The judgment upon the former appeal is determinative of the rights of either party to this transaction, and operates as an estoppel. While the plaintiffs cannot foreclose, defendants cannot redeem. Wherever the right to possession of the land may have been before the time for redemption had expired, upon the failure of defendants to redeem within the statutory period the right vested absolutely in plaintiffs, and their title, freed from defendants' equities, became full and complete."

It is sought by the bill in the present suit to enjoin the defendants from availing themselves of the benefit of the judgment rendered in their favor in the action of ejectment. It is not alleged that the judgment is void for want of jurisdiction of parties or of subject-matter. The judgment is not attacked on the ground of any irregularity in the proceedings upon which it was rendered. The demand for relief is based upon the allegation that the judgment contravenes provisions of the federal constitution and the Revised Statutes, and the further allegation that the defendants procured the judgment by fraud. So far as the latter ground for relief is concerned, the rule applicable to such a case is thus expressed in 2 Story, Eq. Jur. § 887:

"In regard to injunctions after a judgment at law it may be stated, as a general principle, that any facts which prove it to be against conscience to execute such judgment, and of which the injured party could not have availed himself in a court of law, or of which he might have availed himself at law, but was prevented by fraud or accident, unmixed with any fault or

negligence in himself or his agents, will authorize a court of equity to interfere by injunction to restrain the adverse party from availing himself of such judgment."

See, also, Insurance Co. v. Hodgson, 7 Cranch, 332; Crim v. Handley, 94 U. S. 652; Metcalf v. Williams, 104 U. S. 93; Knox Co. v. Harshman, 133 U. S. 152, 10 Sup. Ct. 257; Marshall v. Holmes, 141 U. S. 590, 12 Sup. Ct. 62.

The charge of fraud in this case consists in the averment that the defendants suppressed their relation to the appellant as trustees, and withheld and concealed the fact that they had received from the land which was deeded to them, or the proceeds thereof, a sum sufficient to cancel the indebtedness to secure which the deed was given. It is not alleged, however, that fraud was successfully practiced upon the court at the trial of the action of ejectment, or was connected therewith, or that fraud was an inducement to or entered into the judgment. The facts concerning the receipt of moneys from the land by the defendants were fully disclosed to the courts. It is true that the judgment in the ejectment case was based upon an adjudication in a prior suit between the same parties, and that in the prior suit the defendants had asserted title to the land by virtue of their conveyance, and had denied that the deed was intended as a mortgage. But notwithstanding their failure to disclose the facts, and notwithstanding their assertion of title under their deed, the court in the first suit found that the deed was intended as security for a debt, and found that money had been received from the lands as it is now alleged in the bill that it had been received. If it be admitted that the defendants, by their claim of title under the deed, intended to defraud the plaintiff, it is nevertheless true that the court was not thereby imposed upon, for, notwithstanding that defense, the court, in the first action arrived at the true state of the facts, reached the conclusion that the conveyance was a mortgage, but denied the plaintiff's right to redeem his land from the conveyance solely upon its construction of the law which it deemed applicable to the facts. The court was in possession of all the facts. If there was error in its judgment it was in the conclusion which it reached in applying the law to the facts. The case is wholly lacking in the features which authorize a court of equity to restrain the enforcement of a judgment at law. At no stage of the proceedings in either cause in the state court is it shown that fraud was successfully perpetrated by the defendants, or that the plaintiff was by fraud, or accident, or mistake prevented from availing himself of all the facts upon which his claim of title was predicated.

It is contended that the judgment of the state court in the ejectment case was rendered in violation of section 1977 of the Revised Statutes, which declares that:

"All persons within the jurisdiction of the United States shall have the same right in every state and territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."

It was said in Strauder v. West Virginia, 100 U. S. 303, that this section puts in the form of a statute what has been substantially ordained by the fourteenth amendment to the constitution. In Gibson v. Mississippi, 162 U. S. 565, 580, 16 Sup. Ct. 904, it was said that the purpose of the statute was "to enact appropriate legislation for the enforcement of the provisions of the fourteenth amendment, which was designed, primarily, to secure to the colored race, thereby invested with the rights, privileges, and responsibilities of citizenship, the enjoyment of all the civil rights that, under the law, are enjoyed by white persons." We are at a loss to discover wherein the statute so quoted can be said to affect the rights of the appellant in the case at bar. There is no suggestion in the bill that the appellant has been denied the full legal benefit of the laws and proceedings for the security of persons and property which is enjoyed by white citizens. There is no averment, nor is there anything in the facts which are pleaded, to indicate that a discrimination has been made against the appellant in the state courts of California on account of his citizenship in another state, or for any reason. It is not alleged that he has been treated otherwise than a citizen of California would have been treated. It may fairly be inferred from the bill that the state courts applied to his case the law of the state as the courts interpreted it, and as they would have applied it to the case of any litigant who presented the same question. To hold that the protection of the statute may be invoked in a case of this kind is practically to rule that any judgment may be set aside upon an original suit in equity, provided it can be shown that prejudicial error or mistake has been made in the construction of any statute upon which depended the substantial rights of the plaintiff; or, in other words, that a suit in equity may be made to perform the office of a writ of error or an appeal.

It is urged, also, that the appellant is entitled to relief by virtue of the constitutional prohibition against the passage of state laws impairing the obligation of contracts. This provision of the constitution has always been held to apply strictly and solely to the enactment and enforcement of laws either by a legislature, or by some municipal corporation, or other body to whom has been delegated legislative power, and that it does not apply to erroneous decision by a court. Railroad Co. v. Rock, 4 Wall. 177; New Orleans Waterworks Co. v. Louisiana Sugar-Refining Co., 125 U. S. 18, 8 Sup. Ct. 741; Hanford v. Davies, 163 U. S. 273, 16 Sup. Ct. 1051. There is no intimation in the facts stated in the bill that the obligation of the appellant's contract has been impaired by the terms of any state law. The state laws are admitted to be constitutional. Complaint is limited to the action of the court which it is alleged has erroneously applied the law to the facts of the case. Against such action by the court, as we have seen, the provision of the constitution so quoted affords no protection.

The appellant makes the further contention that the judgment in the ejectment case was rendered on pleadings which presented no issue, and that, therefore, the judgment is void. It is said that

in the ejectment suit the appellant, who was the defendant therein, alleged in his cross complaint that in 1886 and 1887 he had offered in writing to pay all that was due the defendants as trustees under the deed in controversy, and that this allegation was not denied by the defendants in their answer, and that no issue was taken thereon. To this it may be said that, if it was believed that the court erred in the ejectment suit in rendering judgment in the face of the admission that such written offers had been made, the remedy was to have brought the matter before the appellate court on the appeal from the judgment. This court has not the power now to correct the error, if error there were, in the conclusion of law at which the court arrived in the ejectment suit in ruling that the written offers to pay the mortgage, made many years subsequent to the time when, as the court decided, the right of redemption had expired, operated neither to revive the cause of action on behalf of the mortgagees to recover the money which the mortgagor owed them nor to revive the latter's right of redemption. The fact that such written offers to pay had been made was brought to the attention of the court in the redemption suit also; in fact, the redemption suit was itself an offer to pay. But the court, notwithstanding such offers, held that the right of redemption was barred.

The case presented by the bill comes within none of the recognized grounds upon which courts of equity are permitted to interfere with judgments at law, and restrain their execution. The decree of the circuit court will be affirmed.

BROWNING v. VAN RENSSELAER.

(Circuit Court, E. D. Pennsylvania. November 20, 1899.)

LIBEL—CRITICISM OF BOOK.

To say of a book purporting to show what American citizens are descended from royalty, that it gives no authority for its statements, and that in almost all cases the descendants are proved to be illegitimate, is not libel; the first being within the ordinary scope of literary criticism, and as to the second it being admitted that "some" descents are traced through illegitimates.

Francis G. Taylor, for plaintiff.
J. Rodman Paul, for defendant.

McPHERSON, District Judge. This is an action of libel. The plaintiff avers that he is an expert on matters of genealogy, and the author of many publications on this subject; among them a book entitled "Americans of Royal Descent," which was first published in 1883, and is now in its fourth edition. The language complained of is contained in a letter written by the defendant to a Miss Farnsworth, who appears to have been interested in establishing in America a society to be called the "Order of the Crown." To this society only persons of royal descent were to be admitted, and its portals were to be guarded by Mr. Browning's book. "Amer-

icans of Royal Descent" was to furnish the evidence by which the lineage of aspirants was to be judged. In the letter Mrs. Van Rensselaer declined an invitation to become a member of this somewhat bizarre association, and gave these sensible reasons for declining:

"Firstly. I think the title of this society disrespectful to our ancestors who fought in the war of independence to free this country from a crown; and also think it un-American and unpatriotic.

"Secondly. If the aim of this society is purely social, I cannot agree with you that royal descent will insure distinguished social position in this country."

Another reason was this:

"Thirdly. As I understand this matter, Mr. Browning's book called 'Americans of Royal Descent' is to be the standard of admission to the society. This work quotes no authorities for the statements it contains, but gives lists of people that Mr. Browning declares are descended from monarchs of the Middle Ages, and in almost all cases the descendants are proved to be illegitimate. If I have any such blot on my escutcheon, time has drawn the merciful veil of oblivion over it, and it would be folly for me to be the one to point it out and emphasize it. The only insignia that you could adopt for your society would be the 'Bar Sinister,' and that is hardly one to be proud of."

This paragraph is said to be false and libelous in two particulars: First, because it declares that "this work gives no authorities for the statements it contains"; and, second, because it declares that "in almost all cases the descendants are proved to be illegitimate." In my opinion, neither declaration is legally objectionable. The first is within the ordinary scope of literary criticism, and is not actionable, even if it be untrue. There is no personal reflection upon an author in declaring, even untruly, that he has cited no authority for his statements. It is a matter of common observation that historical writers often give the result of their studies without referring to the sources on which they rely; and even if, in a given case, it were untrue to say that such sources were not specifically referred to, this would not of itself be an attack upon the personal character of the author. Moreover, in the case now in hand, it appears from the plaintiff's statement that there have been several editions of the book in question, and it may well be (as was averred upon the argument of the demurrer, and not denied) that the earlier editions lacked the citations that the later editions may have contained, and that the defendant's criticism was based upon, and was apparently justified by, this deficiency in the early issues.

The second declaration is as unobjectionable as the first. The defendant says that in almost all cases the descendants are proved to be illegitimate, and the plaintiff, in effect, admits this to be true. He formally avers it to be false; but, as he adds immediately, "Wherever the descent is traced through illegitimates, the book contains a statement to that effect," this addition distinctly contradicts the formal averment. He admits that some descents are traced through illegitimates, while the defendant declares that almost all are thus traced. This is a narrow difference, indeed, and wholly insufficient to support a charge of libel.

It is unnecessary to pursue the discussion further. No special damage is set out, and, as the alleged libel is against the book, and

not against the author personally, the failure to aver such damage might of itself be a good reply to the action. But I do not rest the decision on this ground. In my opinion, the letter is not libelous in any particular; and therefore, even if the averment that the defendant furnished a copy of the letter to Town Topics is sufficient,—I think it is insufficient, because it is argumentative and lacks the necessary directness,—this would not strengthen the plaintiff's case. "Americans of Royal Descent" may be highly valued by a limited public, and may be a work of great research, but I am unable to see that the defendant's indifference to its merits has been expressed in such language as the law condemns.

Judgment will be entered for the defendant upon the demurrer.

HEATH et al. v. AMERICAN BOOK CO.

(Circuit Court, D. West Virginia. October 18, 1899.)

TORTS—INTERFERENCE WITH PERFORMANCE OF CONTRACT.

One having a contract with a state, made pursuant to law, to supply, for a term of years, all of certain text-books, adopted by act of the legislature, for use in the public schools of the state, may maintain an action for damages against a third person, who, with knowledge of the facts, induces the school-book boards of counties to purchase books from him and discard those of the plaintiff.

Heard on Demurrer to Declaration.

Daniel B. Lucas, for plaintiffs.

Flick, Westenhaver & Noll, for defendant.

JACKSON, District Judge. This suit is an action of trespass on the case brought by the plaintiffs against the defendant in the circuit court of Morgan county, W. Va., to recover damages from the defendant for an alleged interference by the defendant with the rights of the plaintiffs, in furnishing certain school books to the school-book boards of the state, under and by virtue of the several statutes of the state providing for the furnishing of books for the use of the schools throughout the state, and, upon the petition of the defendant, the case was moved into this court. The declaration alleges that on the 22d day of February, 1895, the legislature of West Virginia passed an act providing for a series of text-books, to be used in the public schools of this state, and providing for the contracting of the same and establishing a "school-book board"; that by the first section of the said act it was provided that on and after the 1st day of July, 1896, certain text-books and none other (except as thereinafter provided) should be used, among which were text-books known as "Hyde's Language Lessons," "Hyde's Advanced Lessons in English for High Schools," and "Harvey's Revised English Grammar for High Schools." It was further provided that the state superintendent of schools should, on or before the 1st day of September, 1895, contract with the several publishers for the text-books named in the statute, or that may be adopted under the provisions of the act for supplying such books for use in the free schools of

the state, and providing the terms upon which the books were to be sold, and that the contract should run for a period of five years, beginning with the 1st day of July, 1896. There were certain other provisions of the act, unnecessary to notice, requiring bond to be given by persons who entered into the contract, and directing the governor, in a certain event, to appoint three persons, citizens of the state, who were to be the "state school board." Plaintiffs allege that they are the owners of the Hyde series of text-books described and set out in the statute heretofore referred to, and that they contracted with the state superintendent of schools before the 1st day of September, as required and prescribed by law, to supply the books, and that they in every respect complied with the provisions of the act. The declaration further alleges that on the 19th day of February, 1897, the legislature of West Virginia passed an act amending the school law of West Virginia, and providing for the establishing in every county of the state of a "school-book board"; prescribing its duties as to the manner of selecting, purchasing, and providing text-books for the public schools, imposing a limitation in the act that nothing contained in it should be construed as changing or modifying the contracts made with publishers of text-books under authority of chapter 37 of the Acts of 1895; and providing that no change in the text-books should be made until the expiration of the contracts made under the provisions of the act of 1895, except by failure of the contractor to provide the books contracted for. There are other provisions in the law of 1897 that bear, to some extent, upon the question before us, but are not deemed of sufficient importance to refer to in this opinion. It is alleged that the defendant, the American Book Company, declined to enter into any contract with the superintendent of schools, as provided for in the act of 1895; but that subsequently the defendant company wrongfully and unlawfully submitted for consideration to the school-book boards in some, if not all, of the counties of West Virginia, a grammar to be by them adopted, under the act of 1897, entitled "Harvey's Revised English Grammar," a publication owned and published by the defendant, although, at the time the defendant submitted this book to the consideration of the school-book boards, it well knew that a contract existed between the plaintiffs in this action and the state, by which the plaintiffs were to furnish Hyde's series of books heretofore referred to, and that the adoption of the defendant's book by the county school-book boards in lieu of plaintiffs' books would be in violation of the statutes of West Virginia, and also of the instructions given to said school-book boards by the state superintendent of schools; and it is further alleged that the defendant wrongfully and unlawfully urged upon said boards and other school officers and teachers of West Virginia to use, in the primary, graded, and high schools of the state, the said unauthorized text-book, and contracted with many of said county school-book boards to sell them said text-book. To the allegations of the plaintiffs' declaration the defendant interposes a demurrer, and insists that this action cannot be maintained, for the reason that the acts complained of are the acts and neglect of the school-book boards

of the several counties in the state of West Virginia, and are not the acts of the defendant, and that the use of text-books in the free or public schools of the state is a matter exclusively under the control of the school-book boards of the various counties and districts in the state, for whose decisions, wrongful or rightful, in adopting or contracting for unauthorized text-books in the place of authorized text-books, the defendant is not responsible.

It is a general principle of law that a state cannot be sued, and for this reason public officers may, and some of them often do, violate contracts entered into by the state, for which there is no remedy except by an appeal to the legislative body; nor can, in this instance, the school-book boards be sued, for the reason that they have no legal existence against which an action at law could be maintained. For these reasons, I presume, the plaintiffs, in bringing their action, sought relief against the only party whom they supposed to be liable in law. The question now under consideration is whether or not any improper means were resorted to, or improper influences used, by the defendant in this case, to secure such action upon the part of the officers of the state, so as to interfere with the rights of the plaintiffs, under their contract and agreement with them for the use of the books that were authorized and designated by the acts of the assembly for the use of the free schools. If they did do this, are they, under the law, liable?

The declaration alleges that the defendant "wrongfully and unlawfully submitted for consideration to the school-book boards in West Virginia, for their use and adoption, certain books, which they knew was contrary to law, and to the instructions given to the county school-book boards by the state superintendent of schools." It is a settled principle of law that there is no wrong for which there does not exist a remedy. It cannot be denied that the plaintiffs in this action, as alleged in their declaration, had a legal and existing contract, authorized by the act of 1895, with the state, for two years prior to the action of the defendant complained of; that, under that contract, they were entitled to furnish certain books for the period of five years; but that, prior to the termination of that contract, the defendant in this case presented itself to the county school-book boards, and induced them to consider its application for the supplanting of the books of the plaintiffs by the book of the defendant, which the school-book boards, after examining the book and considering the application of the defendant, decided to do, and the books of the plaintiffs were discarded, and the book of the defendant used in their places. Can it be denied that there was a wrong perpetrated by both the school-book boards and the defendant in this case? It is not alleged in the declaration that a conspiracy existed between them, and it is unnecessary to so allege; for if the parties, or either of them, are responsible, then each one is primarily responsible, and there exists no legal necessity why they should be joined together in a suit, even if a liability in law existed, as against the school-book boards.

The question for the court to consider and determine is whether or not the damage complained of in this case is the natural result

and consequence of the defendant's act. If so, ought not the defendant to be held liable? The plaintiffs allege that the American Book Company wrongfully and unlawfully submitted its book to the school-book boards, to the prejudice of the books of the plaintiffs in this action, which the defendant well knew at the time were being used in the schools under and by virtue of a contract between the plaintiffs and the state, and in pursuance of an act of the legislature which specified and enumerated the books of the plaintiffs that were to be used in the schools; but, notwithstanding this, the defendant was able to induce the school-book boards of the state to use its book instead of the plaintiffs' books, and thereby to entirely supplant the use of the plaintiffs' books in the state.

I have carefully considered the authorities cited and relied upon by the defendant,—especially the Kentucky case of Bourlier v. Macauley, 91 Ky. 135, 15 S. W. 60, and other authorities cited to sustain the ruling in that case,—and I am inclined to think, although there is a conflict of authority upon the questions arising upon this declaration, that the better rule is for the courts to sanction an action of this character; otherwise, a great wrong could be inflicted without any remedy. Such was the conclusion of a majority of the court in the leading case of Lumley v. Gye, 2 El. & Bl. 216; and the doctrine there laid down has been considered settled law from that time, although there are some cases that are in conflict with it. In Wood's Mayne, Dam. (1st Ed.) p. 67, § 52, under the title of "General Principle," he states the law to be, in cases of this character, that "the first, and in fact the only, inquiry, in this class of cases, is whether the damage complained of is the natural result of the defendant's act," and says: "It will assume this character, if it can be shown to be such a consequence as, in the ordinary course of things, would flow from the act, or, in cases of contract, if it appears to have been contemplated by both parties." For this position he cites in the footnotes numerous authorities. In this case we think it cannot be denied that the damage complained of was the result of the defendant's act in submitting its book to the school-book boards, and urging them to adopt it in lieu of the plaintiffs' books, which resulted in supplanting the plaintiffs' books by the school-book boards, and their use dispensed with in the schools, and that, when the contract was entered into between the school-book boards and the defendant, such was contemplated by both parties to it. If the plaintiffs in this action cannot get redress from the party who interfered with their business, as alleged in the declaration, then there is a great wrong to the plaintiffs without a remedy. For the reasons assigned, I am of opinion to overrule the demurrer.

PORT BLAKELY MILL CO. v. GARRETT et al.

(Circuit Court of Appeals, Ninth Circuit. October 2, 1899.)

No. 532.

MASTER AND SERVANT—DUTY TO FURNISH SAFE APPLIANCES—NEGLIGENCE OF CO-SERVANT.

Stakes which fit in sockets on the side of a flat car designed for transportation of lumber are appliances necessary for the proper equipment of the car, and the railroad company is not relieved from liability for personal injuries sustained by an employé by reason of the breaking of such stakes on a loaded car, where they were defective and insufficient in number, by showing that they were made and supplied by a co-servant of the person injured.[1]

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

This was an action brought by the widow and two minor children of Hugh Garrett against the Port Blakely Mill Company, under the Code of Procedure of the State of Washington, to recover damages for the death of the said Hugh Garrett. The decedent, just prior to his death, was employed by the Port Blakely Mill Company, plaintiff in error, as a brakeman on its line of railroad in Mason county, in the state of Washington. This railroad extended from tide water, at or near a place known as Kamilchie, into the forest, for a distance of about 38 miles, and was principally used for the purpose of transporting saw logs from the forest to tide water. There were operated on this road the ordinary locomotives, logging trucks, and flat cars, the latter being 30 feet in length and 7 feet and 8 inches in width, and used for various purposes, not infrequently for hauling lumber from tide water to points along the road. Iron sockets were fastened to the sides of these flat cars, into which stakes were placed, when hauling lumber, to retain the lumber in its place on the car. The plaintiff in error employed one Johnson as a car loader, who, at the time of such loading, selected from the lumber yard of the plaintiff in error the material out of which to make the stakes for the sockets on the sides of the car. On the 21st day of July, 1897, a train was made up at the tide-water terminus of the road, composed of a locomotive, 18 empty logging trucks, and 1 flat car loaded with lumber; the flat car being placed directly behind the locomotive and ahead of the logging trucks. The lumber was loaded on the car by Johnson, assisted by his three sons. The train was operated by a conductor, engineer, fireman, the said Hugh Garrett, and three other brakemen. While the train was running around a left-hand curve, certain of the stakes on the right-hand side of the car broke, and lumber was thrown from the flat car to the ground, and under the wheels of the train, causing the logging trucks following to be derailed. As a result, the said Hugh Garrett was thrown from the car on which he was working as a brakeman, and killed.

Evidence was introduced tending to prove that some of the stakes selected by Johnson were defective, and also that Johnson had not used a sufficient number of stakes to insure the safety of the load. There was expert testimony to the effect that stakes of the size and number used would be sufficient to support the amount of lumber hauled on that day, providing the stakes were made from sound, strong timber; and also testimony that the stakes which broke were not sound and strong, but defective and insufficient. The car loader testifies that he made the stakes from the material designated by the plaintiff in error. It was claimed, upon the evidence, that the plaintiff in error was negligent in its duty to the deceased, in providing unsound, unsafe, and insufficient stakes for said lumber car. The defense was urged that the injury, and consequent death, of the said Hugh Garrett, was caused by the negligence, imprudence, and want of care of his fellow servants and co-

[1] As to duty of railroad companies to furnish safe appliances, see note to Felton v. Bullard, 37 C. C. A. 8.

employés. As against this defense, it was contended, in support of the cause of action, that side stakes were customarily used by persons of ordinary caution and prudence in running loaded lumber cars such as the one operated by the railroad in this case; that such stakes, of the proper character and in the requisite number, were a part of the necessary and usual equipment of a lumber car, to provide which the law required that the persons operating the railroad should make suitable provision and exercise reasonable care; and that this duty cast upon the management of the road could not be delegated to any one, so as to relieve the railroad company from liability for negligence in failing to provide such proper and necessary stakes, where injury to an employé was caused by such failure. The cause was tried before the court and a jury, and resulted in a verdict awarding damages to the plaintiffs (defendants in error) in the sum of $5,000. Motion for a new trial was denied, and the cause is now before this court upon a writ of error.

Preston, Carr & Gilman, for plaintiff in error.

Lindsay, King & Turner, for defendants in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

MORROW, Circuit Judge, after stating the facts, delivered the opinion of the court.

The assignments of error, eight in number, relate to instructions given to the jury to which exceptions were taken by the plaintiff in error, and instructions to the jury requested by the plaintiff in error which the court refused to give. These several assignments of error involve but a single question, which is sufficiently contained in the following instruction that the court gave to the jury, and which plaintiff in error contends was erroneous:

"It was the duty of the defendant in this case to inspect all the cars in that train, including this car upon which the lumber was loaded, and see, before it went out upon a run, that they were in safe condition for operation. And, when I speak of the car upon which the lumber was loaded, it is to be understood as including, not only the platform itself, and the trucks and running gear, but the side stakes which were required to hold the lumber in place, and keep it from shaking off or being toppled off. That obligation is one which the defendant company owed to all of its employés, including Hugh Garrett, and it cannot be relieved from responsibility and liability by showing that, if there was anything wrong about that car, it was negligence of a co-employé of Hugh Garrett. In the matter of seeing that the car was fit for service—that is, in the matter of exercising reasonable care and prudence to have it in fit condition for safe operation—is a duty which the employer owed; and no matter who the employé was, charged by the defendant with that particular duty, any neglect in that regard would be a breach of duty by the defendant company which would create a liability, if in consequence of neglect in that particular an injury resulted."

It is a well-established rule, in the doctrine of master and servant, that it is the duty of the master to provide a reasonably safe place for the servant to work in, and to furnish reasonably safe and adequate appliances or instrumentalities for the servant's use. Under this rule, it became the duty of those charged with the management of the railroad to fit or prepare the lumber car for the use to which it was assigned. But it is urged by plaintiff in error that its duty in this respect was fulfilled in the supplying of proper material for the stakes in question, and that the preparation of the stakes and fitting them to the car was a part of the work the car loader was employed to perform; that, as the car loader was admittedly a fellow

servant of the deceased, any accident or loss resulting from the negligence of the car loader could not be attributed to the plaintiff in error. The objection to this interpretation of the rule is that it limits the duty of the master to the mere act of furnishing suitable material for the construction of a safe place and the supply of adequate appliances, —an interpretation applicable to the relation of employer and employé in the erection of temporary scaffolding and structures of that character in the building of houses, the opening of mines, or the grading of railroads, but inapplicable to the relation of master and servant in the operation of a railroad, where the suitable equipment of a car for a particular service is necessarily the duty of the master. If the act from which an injury arises is one pertaining to the duty which, under the law, the master owes to his servants, he is responsible to them for the manner of its performance, and is not excused from liability to an employé for an injury caused by the negligence of a fellow servant unless he himself has done his full duty. Hough v. Railway Co., 100 U. S. 213, 218; Railroad Co. v. Herbert, 116 U. S. 642, 6 Sup. Ct. 590; Railroad Co. v. Baugh, 149 U. S. 368, 386, 13 Sup. Ct. 914; Railway Co. v. Daniels, 152 U. S. 684, 689, 14 Sup. Ct. 756.

In the case of Railroad Co. v. Baugh, supra, after a careful review of the cases bearing upon this question, the supreme court explained the rule in the following language:

"A master employing a servant impliedly engages with him that the place in which he is to work, and the tools or machinery with which he is to work, or by which he is to be surrounded, shall be reasonably safe. It is the master who is to provide the place and the tools and the machinery, and when he employs one to enter into his service he impliedly says to him that there is no other danger in the place, the tools, and the machinery than such as is obvious and necessary. Of course, some places of work and some kinds of machinery are more dangerous than others; but that is something which inheres in the thing itself, which is a matter of necessity, and cannot be obviated. But, within such limits, the master who provides the place, the tools, and the machinery owes a positive duty to his employé in respect thereto. That positive duty does not go to the extent of a guaranty of safety, but it does require that reasonable precautions be taken to secure safety, and it matters not to the employé by whom that safety is secured, or the reasonable precautions therefor taken. He has a right to look to the master for the discharge of that duty, and if the master, instead of discharging it himself, sees fit to have it attended to by others, that does not change the measure of obligation to the employé, or the latter's right to insist that reasonable precaution shall be taken to secure safety in these respects. Therefore it will be seen that 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."

In Railroad Co. v. Peterson, 162 U. S. 353, 16 Sup. Ct. 843, the same court, in speaking of the duty of the master to provide reasonably safe tools, appliances, etc., for the accomplishment of the work to be done, said:

"If, instead of personally performing these obligations, the master engages another to do them for him, he is liable for the neglect of that other; which, in such case, is not the neglect of a fellow servant, no matter what his position

as to other matters, but is the neglect of the master to do those things which it is the duty of the master to perform as such."

Applying the principles of these decisions to the facts in the case before us, the conclusion follows that it was the duty of the plaintiff in error to see that the lumber car was in safe condition for operation before it was put into service on the day of the accident, and the delegation of this duty to a fellow servant of the deceased did not relieve the master from liability. This duty required that there should be provided a lumber car in safe condition for service, including side stakes of proper material and sufficient number. The car was not completely equipped for the safe transportation of lumber without them. They take the place of permanent sides or restraining appliances, and are only made detachable to allow the car to be used for other purposes. This very point was in issue in the case of Railroad Co. v. La Rue, 27 C. C. A. 363, 81 Fed. 148, where the court held that, "in the case of a low-sided gondola car employed in the transportation of lumber, side standards to keep the load in place, whether such standards are for constant use, and permanently attached to the car by chains, or are unattached and intended for use on a single occasion, are appliances necessary for the proper equipment of the car, and as essential to the safe transportation of the load as is a proper car body. These side standards, to all intents and purposes, are part of the car,"—citing, to the same effect, Bushby v. Railroad Co., 107 N. Y. 374, 14 N. E. 407. We discover no error in the instructions or in the rulings of the court below. The judgment is therefore affirmed.

In re CLIFFE.

(District Court, E. D. Pennsylvania. October 27, 1899.)

No. 45.

1. BANKRUPTCY—EXAMINATIONS—CREDITOR AS WITNESS.
   The provisions of the bankruptcy act determining the forum in which suits by a trustee in bankruptcy against an adverse claimant may be brought do not in any way limit the right of the trustee to examine any competent witness concerning the acts, conduct, or property of the bankrupt; and he may examine a creditor, whose claim he disputes, concerning the extent and nature of the bankrupt's alleged indebtedness to him, without regard to the question as to what court, federal or state, would have jurisdiction of the trustee's suit against such creditor if he should decide to sue.
2. SAME—SCOPE OF INQUIRY.
   Under Bankr. Act 1898, § 21a, providing for the examination of any competent witness "concerning the acts, conduct, or property of the bankrupt," a creditor of the bankrupt, being examined as a witness in the proceedings, cannot refuse to answer questions concerning the nature, extent, or evidences of his claims against the bankrupt, on the ground that his answers may furnish evidence which may be used against him in a civil suit thereafter to be brought against him by the trustee in bankruptcy.

In Bankruptcy. On review of decision of referee in bankruptcy.

In proceedings in the bankruptcy of Walter R. Cliffe, at a meeting held before the referee, one Frederick W. Tunnell was sum-

moned as a witness by the trustee and the petitioning creditors, and, being sworn, was examined. In the course of the examination, the following interrogatory was propounded to him: "On January 11, 1899, in what sum was he [the bankrupt] indebted to you, and what obligations of his did you hold?" Counsel for the witness objected to the question upon the ground that, from evidence of the bankrupt previously given, it appeared that there was a controversy pending between the witness and the trustee in bankruptcy; that the proper forum for its determination, should a suit be brought by the trustee, would be the state court; and that, in advance of such trial in such court, the trustee or the creditors of the bankrupt were not entitled to question the witness in this court about the subjects so in controversy or dispute. On advice of his counsel, witness refused to answer the question; and the referee, deciding that he was bound to answer, certified the matter and his decision thereon to the judge for review, with the following opinion:

The witness was called to testify on behalf of the trustee and creditors under section 21a of the bankruptcy act of July 1, 1898, which provides that "any designated person * * * who is a competent witness under the laws of the state in which the proceedings are pending" may be required to appear and "be examined concerning the acts, conduct or property of a bankrupt whose estate is in process of administration under this act."

Under section 26 of the bankruptcy act of March 2, 1867 (see Rev. St. U. S. §§ 5086, 5087), any person could be required to attend as a witness and be examined as to all "matters concerning the property and estate of the bankrupt and the due settlement thereof." Section 26 of the act of 1867 has been frequently interpreted by the courts, and a reference to a few of the cases will be made:

In Re Fay, Fed. Cas. No. 4,708, Judge Lowell decided that a witness cannot refuse to answer questions concerning his dealings with the bankrupt on the ground that his answers may furnish evidence against him in a civil case brought or to be brought on behalf of the assignee, and says, "The main, if not the only, purpose of the statute authorizing such an examination, is to enable the assignee to obtain evidence for civil suits, or to ascertain that there is no such evidence." In this case suit had been begun by the assignee to recover a large sum of money which he alleged had been received by the witness, and the witness denied the right of examination while the suit against him was still pending, contending that he could not be compelled to give evidence against himself.

In Re Blake, 2 N. B. R. 10, Fed. Cas. No. 1,492, the district court for the Western district of Michigan decided that a witness cannot rightfully object to being sworn or refuse to be examined upon any matters which shall be within the subjects mentioned in section 26 of the bankruptcy act of 1867.

In Re Stuyvesant Bank, 6 Ben. 33, Fed. Cas. No. 13,582, Judge Blatchford decided that in such examination a witness is not entitled to counsel, even though his examination may establish a liability on his part to the bankrupt's estate, and must be compelled to answer questions respecting his transactions with the bankrupt. To the same effect are the cases In re Comstock, Fed. Cas. No. 3,080, 3 Sawy. 517; In re Fredenberg, Fed. Cas. No. 5,075, 2 Ben. 133; In re Feinberg, Fed. Cas. No. 4,716, 3 Ben. 162.

Section 26 of the act of 1867 and section 21a of the act of 1898 are substantially the same, and the decisions under the former are controlling.

But one case upon this subject arising under the act of 1898 has been reported. In Re Howard (D. C.) 95 Fed. 415, the district court for the Northern district of California has applied the decisions under the act of 1867 to the act of 1898, and decides that a witness must submit to examination relevant to matters concerning the acts, conduct, or property of the bankrupt.

As to the objection that the proper forum for the trial of the controversy,

which is assumed by counsel for the witness to exist in this case between the trustee and the witness, is the state court, it may be said that this question does not now require decision. If it did, it might perhaps be held that the trustee could bring suit in the United States district court. See Carter v. Hobbs (D. C.) 92 Fed. 594, and In re Sievers (D. C.) 91 Fed. 366.

As to the objection that the witness cannot be examined in this proceeding concerning the acts, conduct, or property of the bankrupt, because it may be that the trustee will hereafter bring suit against the witness, and that the witness cannot be compelled to testify, on the ground that his answers may furnish evidence against him in such suit, the referee is of opinion that this objection cannot prevail against the provisions of the act and the decisions by the courts above stated.

The referee is of opinion that the objections are invalid, and overrules them, and orders that the witness be required to answer the question objected to, and all other questions relevant to matters concerning the acts, conduct, or property of the bankrupt. And the question whether or not the examination of the witness can be taken under the objections made is certified to the judge for his opinion.

R. C. Dale, for witness.

Andrew W. Crawford, Simpson & Brown, and H. J. Williams, for petitioning creditors.

McPHERSON, District Judge. The referee has certified that Frederick W. Tunnell, who was called as a witness by the trustee and the petitioning creditors, has declined to answer questions concerning the indebtedness of the bankrupt. Judgment was obtained against the bankrupt by the witness in January of this year, about a month before the petition in bankruptcy was filed, and the sum appearing by the judgment to be owing was collected by execution. The question is presented whether the provisions of the act of 1898 concerning the examination of witnesses before a referee differ from similar provisions in the bankrupt act of 1867. Without quoting the language of the two statutes, it may be enough to say that such difference as may exist does not seem to me to be material; and I feel bound, therefore, by the decisions upon the act of 1867, cited in the learned referee's opinion.

Even if section 23 of the act of 1898 forbids the trustee to sue an adverse claimant in a federal court, unless the bankrupt himself could have sued in that tribunal,—a point I do not decide,—nevertheless there is no limitation expressed by that section upon the right, given by clause "a" of section 21, to examine "any designated person * * * concerning the acts, conduct or property of a bankrupt whose estate is in process of administration"; and I do not find a limitation necessarily implied by the language, or by the subject-matter, of section 23. Whether the trustee shall sue at all is the principal and preliminary question to be determined by the examination provided for by section 21. Before what tribunal he shall sue, after the preliminary question has been decided in the affirmative, is a distinct and succeeding step, and with this matter only is section 23 concerned. The two subjects are so far separate, that I do not regard one as materially modifying the other.

The decision of the referee is approved, and it is now ordered that the witness submit to examination upon matters concerning the acts, conduct, or property of the bankrupt.

In re HOAG.

(District Court, W. D. Wisconsin. November 20, 1899.)

No. 92.

BANKRUPTCY—EXEMPTIONS—GROWING CROPS ON HOMESTEAD.

Where the state statute exempts from execution a homestead of 40 acres of land used for agricultural purposes, a bankrupt, who has had such homestead set apart to him by his trustee, cannot claim, as exempt, in addition thereto, the crops growing on the land at the time of the filing of his petition in bankruptcy.

In Bankruptcy. On review of decision of referee in bankruptcy.

Whitehead & Matheson, for bankrupt.
William G. Wheeler, for mortgagee.
J. J. Cunningham, for trustee in bankruptcy.

BUNN, District Judge. This is an appeal from an order of the referee denying the claim of the bankrupt to have set off by the trustee as exempt property all the crops raised upon his homestead of 40 acres, in addition to the exemptions of specific personal property provided by statute. The bankrupt filed a voluntary petition in bankruptcy in June, 1899, asking for leave to turn over to a trustee for the benefit of his creditors all his property not exempt by law, and to be discharged from the payment of his debts. The petition of the bankrupt shows that at the time he filed his petition there was growing on his homestead 9½ acres of corn, 8 acres of oats, and 10 acres of hay; that the remainder of the homestead is occupied with the garden, pasture ground, and buildings. The trustee set apart for a year's support of the bankrupt and his family and stock 200 bushels of corn, 200 bushels of oats, and 8 tons of hay, and scheduled the balance of the crops grown for sale. It is conceded that the trustee has set apart all that the statute would allow, unless the crops growing on the homestead are exempt, in addition to other statutory provisions, as a part of the homestead. But he claims these crops in addition to all the other exemptions of personal property. The referee decided that the claim could not be allowed, and this appeal is from the order denying the same.

The statute of this state is very liberal in its provisions for the debtor against seizure and sale upon execution, and, were it not for some decisions in other states,—notably by the supreme court of Iowa in Morgan v. Rountree, 55 N. W. 65, Cox v. Cook, 46 Ga. 301, and Alexander v. Holt, 59 Tex. 205,—I would think this not so much a question of the proper construction of our statute (for its provisions seem to be clear), as it is whether the court will allow to the bankrupt who seeks to be discharged from the payment of his debts a large amount of personal property over and beyond what the legislature, in its wisdom, has thought proper to exempt. And the only reason that I could suggest why, in the 50 years during which the exemption laws of Wisconsin have been administered

by the state courts, this question has never been decided, or, so far as is known, ever been made in the courts, is that no one has had the confidence or hardihood to make the claim. The question, as one of the proper construction of the statute, cannot be doubtful unless we are to wholly disregard every other rule of construction except the one to construe the law liberally in favor of the debtor. The exemptions of personal property under the statute are substantially these, so far as these provisions can have any bearing upon this case: The Family Bible, family pictures, and school books; the library of the debtor; a pew in a church; one gun; all wearing apparel; all beds, bedsteads, and bedding; all stoves; all cooking utensils, and all other household furniture, not exceeding $200 in value; two cows; ten swine; one yoke of oxen and one horse or mule, or, in lieu of them, two horses or two mules; also ten sheep, and the wool from the same, either in raw material or manufactured into yarn or cloth; the necessary food for all the stock so mentioned for one year's support, either provided or growing or both, as the debtor may choose; also one wagon, cart, or dray, one sleigh, one plow, one drag, and other farming utensils, including tackle for teams, not exceeding $200 in value; and provisions for the debtor and his family necessary for one year's support, either provided or growing or both, and fuel necessary for one year; also the tools, implements, and stock in trade of any mechanic, miner, merchant, trader, or other person used and kept for the purpose of carrying on his trade or business; all sewing machines owned by individuals, and kept for the use of themselves or families. There are some other special provisions for particular classes of persons, not necessary to state. The provision for the exemption of a homestead is as follows: A homestead, to be selected by the owner thereof, consisting, when not included in any city or village, of any quantity of land, not exceeding forty acres, used for agricultural purposes, and, when included in any city or village, of any quantity of land, not exceeding one-fourth of an acre, and the dwelling house thereon, and its appurtenances, owned and occupied by any resident of this state, shall be exempt from seizure or sale on execution, from the lien of every judgment, and from liability in any form for the debts of such owner. Such exemption is not impaired by temporary removal with intention to reoccupy, nor by a sale, but shall extend to the proceeds derived from such sale while held with the intention to procure another homestead therewith, for a period not exceeding two years. These provisions are quite specific, and at the same time very liberal. The homestead, consisting of 40 acres of land, with the dwelling house thereon, without regard to value, is exempt from seizure and sale. This provision secures the debtor a home against the exaction of creditors. The provision for exemption of cows, teams, sheep, swine, and provisions for a year's support for these and for the debtor and his family secure to him personal property sufficient for his subsistence from year to year. If it had been the intention of the legislature, in addition to these specific provisions for the debtor's support, to exempt all the crops grown upon the

homestead, it could have made that manifest by four or five additional words. "The homestead and the products thereof," or "the crops grown or growing thereon," would have made the intention manifest. And it seems somewhat inconsistent with the other specific provisions in regard to the homestead that the legislature should not have used some such language if this had been its intention. If we are not wholly to disregard the maxim, "Expressio unius est exclusio alterius," the extended and minute enumeration of exempt personal property intended for the support and maintenance of the debtor and his family and stock contained in the statute would seem to exclude the idea that the legislature could have intended to exempt large amounts of other personal property not so enumerated. I understand counsel for the bankrupt to claim the crops as exempt, on the ground that they are attached to the soil, and so a part of the realty, at the time of the filing of the petition. I think it would be a constrained construction to so hold. Growing crops are personal property in the law. Although, on a sale of the land without reservation, they go with the land, because the implication is clear that such is the intention, they pass by a bill of sale or chattel mortgage without seal, and, even by oral agreement, may be levied upon by execution or attachment as personal estate, and on the death of the owner descend to his personal representatives, and not to the heirs. It is also claimed that the crops are exempt as being the product of the homestead, which is itself exempt. If this be so, it would follow that cattle, horses, and other stock grown on the homestead are also exempt for the same reason. So that it would be possible for a thrifty debtor with an eye to business to easily double or quadruple the exemptions enumerated by statute, and, instead of being allowed provisions for one year's support, claim two, and, instead of having two cows, ten sheep, and ten swine, have allowed him six cows, forty sheep, and as many swine, with grain and provisions for a year's support. Or he could plant all that part of the 40 acres not required for buildings and outhouses to garden vegetables and fruit, employ fifty or a hundred men to tend it, and put in thousands of dollars of capital, and make large profits, and yet claim the entire produce as exempt, in addition to the enumerated statutory exemptions which could be taken from other property. If such a bountiful exemption had been intended by the legislature, it is fair to presume that it would not have left so important a provision to implication.

As stated by the referee in his opinion, the statutes of Georgia and Texas are so unlike our statute as to make the decisions in these states of little value here. In the Northern district of Texas, notwithstanding the decisions of the state court, it was held in Re Coffman (D. C.) 93 Fed. 422, which was similar in its facts to the case at bar, that a bankrupt cannot hold as exempt crops growing on the homestead at the time of the adjudication in bankruptcy. This decision is in line with the decision of the supreme court of California in Horgan v. Amick, 62 Cal. 401, and Erickson v. Paterson, 47 Minn. 525, 50 N. W. 699, and the recent decision of the

United States district court of Oregon in Re Daubner (D. C.) 96 Fed. 805.

In Morgan v. Rountree, supra, the question certified to the supreme court of Iowa by the trial judge was this: "Where the judgment debtor, who is a resident of this state, and the head of a family, is temporarily absent from her homestead for one year, for the purpose of educating her daughter, and voluntarily executes a lease of the homestead to a tenant during the said period, are moneys due to the debtor from the tenant for the rent exempt from execution against the judgment debtor?" The court answers this question—which was the only one before it in the case—in the affirmative. The question there decided is not before this court, though the Iowa case is the one perhaps mainly relied upon by counsel for the bankrupt. That court, after deciding the one question before it, proceeded to say that the growing crops would also be exempt,—a question which is now squarely before this court under a statute somewhat similar, but was not in the case before that court at all. The court regrets, in the opening line of its decision, considering the importance of the question certified, that the case was argued by counsel only upon one side. That is, I believe, always considered as desirable; and possibly, if the court could have had the benefit of argument upon both sides of the case, it might have come to a different conclusion, or, if not that, would have been enabled to keep more closely to the one issue submitted. It may be that the question submitted was correctly decided. That question is not before this court. Leaving the homestead for temporary purposes, as she might do, the rent reserved represented the rental value of realty which was itself exempt by law. But growing crops represent much more, to wit, capital and labor expended in planting and tending the crop, which might be many times the rental value. I do not, therefore, consider the case an authority in point, and, if it were, I should not feel at liberty to follow it.

Some cases decided by the supreme court of this state have been cited, but it is evident that this question has never been before it. Among other cases, that of Phelps v. Rooney, 9 Wis. 70, is referred to. This is a leading case upon the point involved, though made by a divided court, Chief Justice Dixon delivering two vigorous dissenting opinions. Rooney owned a building upon one of the principal business streets in Milwaukee, which was built for a store. He leased the basement and main floor for a store at a yearly rent of $1,500, but resided, with his family, in the upper stories of the house. The question litigated was whether such a building could be regarded as the dwelling house of the debtor. The chief justice thought you might as well say that, if a man lived on a steamboat it made the steamboat his dwelling house, or if Diogenes lived in a tub it made the tub a dwelling house. But a majority of the court held it to be a dwelling house, and the entire building and ground exempt, and that the owner could not alienate the same by mortgage without the consent of the wife. There was no question in the case as to whether the rent received or due would be exempt

from execution or garnishment, nor can I find that a question like the one decided in the Iowa case has ever been adjudicated in this state. The order of the referee is affirmed.

In re BARBER et al.

(District Court, D. Minnesota, Fourth Division. September 25, 1899.)

No. 22.

1. BANKRUPTCY—FEES OF REFEREE.
   The compensation of a referee in bankruptcy is fixed by the statute, and will not be abated or diminished in a particular case because some of the duties which ordinarily would be discharged by the referee, in the holding of hearings and making of orders, were assumed by the judge, at the request of the parties, on account of the magnitude of the interests involved, and the unusual character of the proceedings.
2. SAME—"DIVIDENDS" IN BANKRUPTCY.
   A "dividend" in bankruptcy is a parcel of the fund arising from the assets of the estate, rightfully allotted to a creditor entitled to share in the fund, whether in the same proportion with other creditors, or in a different proportion.
3. SAME—PAYMENT OF SECURED DEBT AS DIVIDEND—COMMISSIONS.
   Where real property of a bankrupt, incumbered by a mortgage securing a series of bonds in the hands of different holders, is sold by the trustee free of liens, pursuant to an order of the court of bankruptcy on the petition of the trustee and of the secured creditors, and the avails of sale brought into court for distribution, that portion of the proceeds which is paid over by the trustee to each bondholder, in satisfaction of his debt, is a "dividend," within the meaning of Bankr. Act 1898, §§ 40, 48, providing for the compensation of referees and trustees in bankruptcy by commissions on "sums to be paid as dividends."
4. SAME.
   While a secured creditor may ordinarily collect his debt by foreclosure or sale, as if no bankruptcy were pending, yet if, without his request, and solely to realize a surplus for other creditors, the court directs sale of the property discharged from the incumbrance, his rights must be conserved; and the satisfaction of his secured debt from the proceeds of such sale may not be regarded as a dividend, nor charged with commission.

In Bankruptcy. On objections to final account of trustee in bankruptcy.

Keith, Evans, Thompson & Fairchild, for bankrupts.

Fred. B. Snyder, in pro. per.

Gilfillan, Willard & Willard, for Hennepin Land Co. and First Nat. Bank of Minneapolis.

W. C. Tiffany, for Trenton Banking Co.

Cross, Hicks, Carleton & Cross, for First Nat. Bank of Hazelton, Pa.

W. J. Hahn, for Minnesota Loan & Trust Co.

LOCHREN, District Judge. In this case the principal assets of the bankrupts consisted of a large and valuable flouring-mill property, and other improved and income-producing real estate, in the city of Minneapolis, upon which the bankrupts had on June 1, 1893, executed a mortgage (which was duly recorded) to the Min-

nesota Loan & Trust Company, as trustee, to secure the payment of bonds of the same date, payable to said trustee or bearer, of the denomination of $1,000 each, to the amount of $542,000, which constituted the principal indebtedness of the bankrupts. The petition in bankruptcy was filed August 27, 1898. At the first meeting of the creditors the bondholders appeared, and proved to the satisfaction of the referee that the value of their security did not exceed 26 per cent. of the amount of their claims; and, to enable them to participate in the creditors' meetings, their claims were allowed at 74 per cent. of the amounts of the same; and they constituted more than nine-tenths of the claims of creditors taking part in creditors' meetings. Fred B. Snyder was by the creditors appointed trustee in bankruptcy. Appraisers were appointed, and the entire estate was appraised at $177,208.54, including the real estate covered by said mortgage, which was appraised at $167,100. On May 6, 1899, the trustee in bankruptcy petitioned the court for leave to sell all the real estate of the bankrupt at public sale, including the sale of said mortgaged real estate free and clear from the lien of the mortgage. All the holders of said bonds appeared by their attorneys, and joined in asking the court to grant the petition of the trustee in bankruptcy; representing, as did the trustee, that the real estate covered by the said mortgage would sell for better prices at such absolute sale than could be obtained by foreclosure of the mortgage and by separate sale of the equity of redemption, and that the whole matter could thus be closed and disposed of in brief time, to the advantage of everybody. The petition was therefore granted, and an order made directing the sale of all of said real estate, free and clear from the lien of said mortgage, at public auction, in parcels, after prescribed notice, and providing, among other things, that any purchasers of any real estate covered by said mortgage should "be entitled to a credit upon the purchase money to the aggregate amount of the dividends which will be payable out of the same upon any of said bonds or coupons then held by said purchaser or purchasers, upon indorsements thereof upon such bonds and coupons, respectively." It was further ordered that the proceeds of such sale be brought into court, and thereupon the lien of the said trust deed should attach to so much thereof as should remain after the court should ascertain and determine the value of the equity of redemption, and set the same apart for the general creditors. The sale was accordingly made by the trustee in bankruptcy, and confirmed by the court, which also determined and set apart for the general creditors the value of the equity of redemption in the real estate covered by the mortgage, and satisfied and canceled said mortgage. Every detail was agreed to by all the parties concerned. The mortgaged real estate sold for sums aggregating, in the whole, $139,500, including the equity of redemption, valued at $7,722.18, leaving for division among the bondholders $131,777.82. Other amounts were realized by the trustee from the estate, so that after payment of expenses of administration, aside from commissions to the referee and trustee, there remained for distribution to general creditors, including

the value of the equity of redemption aforesaid, $12,524.46. Among the purchasers of the said mortgaged real estate was the Hennepin Land Company, which was the owner of said bonds to the amount of $492,000, and which purchased, of the same real estate, parcels, the purchase price of which amounted to $82,500, upon which it was credited with its dividend on said sum of $131,777.82, $68,696.32, and paid in cash to the trustee $13,803.68. The final report of the trustee shows the amounts upon which commissions to the referee and trustee are to be computed, as follows:

Amount realized (less value of equity of redemption) from sale of the mortgaged property, and payable to the bondholders pro rata	$131,777 82
Amount for division to general creditors	12,524 46
	$144,302 28

And his report allows as commission to be paid to Orlando C. Merriman, as referee, $1,443.02, or 1 per cent. upon the aggregate amount applicable to dividends to the secured bondholders and to the general creditors, and from which to pay the commissions. The allowance of this commission to the referee is objected to by the Hennepin Land Company, the creditor holding the largest amount of the said bonds, on the claim that neither the referee nor trustee is entitled to any commission on the moneys realized from the sales of the mortgaged real estate for the benefit of the bondholders, because of their mortgage lien or security, and that the commissions of the referee should only be $125.24, or 1 per cent. on the amount to be divided among the unsecured creditors. It contends, further, that in any event the referee is not entitled to commission upon the sum of $68,696.32, being the dividend of the Hennepin Land Company as holder of bonds upon the sum of $131,777.82 produced by the security, and which sum of $68,696.32 said Hennepin Land Company was credited upon its purchase of mortgaged real estate upon indorsing the same as payment upon its bonds, and no part of which, therefore, actually passed through the hands of the trustee in bankruptcy.

The hearing on the applications above mentioned might have been had before the referee, and all the orders aforesaid could have been made by him; and the fact that the judge, at the request of the parties, and because of the large amount involved, and the unusual character of the proceeding, consented to act in some matters where the referee might have acted, in no way affects the right of the referee to commissions. His commissions are fixed absolutely by the terms of the act, and cannot be increased, however inadequate they may appear in view of the amount of services actually performed by the referee, nor diminished in the rare cases where they may seem to afford a very generous compensation for such services. The commissions of referees are fixed by section 40 of the act, which provides that they shall have "from estates which have been administered before them one per centum commissions on sums to be paid as dividends and commissions." The commissions of trustees are by section 48 of the act based up-

on the same "sums to be paid as dividends and commissions." It is apparent, therefore, that in any case the commissions of the referee and of the trustee are to be computed on the same identical sums. The contention here arises upon a dispute as to the proper construction and meaning of the word "dividends," as used in the above-quoted clauses of the act. The objecting creditor insists that a dividend, within the meaning of the law, is declared and paid on unsecured claims only (citing In re Ft. Wayne Electric Corp. [D. C.] 94 Fed. 109), while the referee urges that all moneys paid upon any claims of creditors which have been voluntarily submitted, by the creditors holding the same, for payment by and through the administration of the estate in the court of bankruptcy, are paid as dividends. The word "dividend" is a business term, applied to the division among stockholders of a fund arising from profits, or to the division among creditors of an insolvent of the fund arising from the assets of the insolvent's estate. In either case it is the fund that is divided and parceled out among those who are entitled, and the part of the fund so allotted to a stockholder or creditor is his dividend. Dividends upon profits may be apportioned at one rate to the holders of preferred stock, and at another rate to the holders of common stock. So, in insolvency, a creditor having priority may be paid in full, yet such payment is just as certainly his dividend or share of the fund as is the small percentage on his claim which the general creditor may receive from the same fund; and, unless there is something in the act requiring a different holding, the referee and trustee are entitled to commissions upon all such dividends. If the word "dividend" could be construed as applying to a division of the debts, so that such commissions are to be allowed only in respect to such debts as are divided by being paid only in part, then, in a case like In re Sabine, 1 Nat. Bankr. News, 312, where, by good management of the referee and trustee, every claim was paid in full, these officers would be entitled to no commissions. A dividend in bankruptcy is a parcel of the fund arising from the assets of the estate, rightfully allotted to a creditor entitled to share in the fund, whether in the same proportion with other creditors, or in a different proportion. I think I have indicated the general understanding of the meaning of the word "dividend," and I fail to discover anything in the act tending to show that it is used in any different sense. Section 64, relating to debts which have priority, strengthens my conclusion. That provides that the trustee shall pay all taxes "in advance of the payment of dividends to creditors." This would exclude taxes from the category of dividends, but nothing else. The payment of debts having priority are payments to creditors from the fund arising out of the assets, of the amounts to which they are entitled, severally,—to each his proper dividend of the fund, under the terms of the act. Debts having priority must be examined by the referee upon proofs, and allowed or disallowed like other claims. It might happen that, after the payment of debts of the three first classes having priority, the remainder of the fund will be insufficient to pay in full the wages of workmen,

clerks, and servants of the fourth class, and that the referee must ascertain the dividends that can be paid to creditors having priority of that class by a per centum computation. In all cases he must ascertain and declare the dividends to be paid to creditors having priority, as well as to others, and put them all upon the "dividend sheets" which he must deliver to the trustee as required by the first clause of section 39. These dividend sheets constitute the trustee's only warrant for paying money to any creditor. Section 57*l*, providing that "whenever a claim shall have been reconsidered and rejected in whole or in part, upon which a dividend has been paid, the trustee may recover from the creditor the amount of the dividend received upon the claim if rejected in whole, or the proportional part thereof if rejected only in part," is just as applicable to claims of a class having priority as to claims of any other kind, and supports the construction I have given to the word "dividend" as employed in the act. As before suggested, the misconstruction of this word seems to have arisen from the mistaken idea that the word "dividend," instead of relating to a division of the fund according to the rights of the several creditors, of whatever classes, has some fanciful relation to such of the debts as are not paid in full. But the fund is the thing which is divided, and the dividends are the parcelings to the creditors from that fund. Section 65a, which is usually referred to as supporting the idea that payments to unsecured creditors having no priority are the only dividends contemplated by the act, does not purport to cover all dividends, but only directs how the dividends of that part of the fund applicable to the one general class of claims having neither priority nor security shall be computed, declared, and paid. The provisions of the other subdivisions of the same section (65) are applicable only to dividends to that same general class of creditors, as the matter of dividends to creditors whose claims have priority is fully covered by the provisions of the preceding section (64). That the word "dividend" had in the act of 1867 the meaning here claimed for it is very obvious. Rev. St. U. S. §§ 5101, 5102. Had the congress intended that the word should have a different meaning in the act of 1898, that intention would have been plainly expressed, as it is well understood that, in construing statutes, reference to other statutes on the same subject affords the most reliable aid.

Having ascertained the scope and meaning of the word "dividend" as employed in this act, it remains to be considered whether, in the administration of an estate in bankruptcy, there may be circumstances under which payments to secured creditors of moneys coming into the hands of the trustee, and into the referee's accounts of the estate, upon sale by the trustee, agreeably to orders of the court of bankruptcy, of the property pledged or mortgaged, —the moneys being paid to the secured creditors as the avails realized from their securities,—can or ought to be treated and regarded as "dividends," in respect to which rights to commissions in favor of the referee and trustee attach. While the act is intended to enforce the payment of debts having priority, as well

as general unsecured debts, through the administration of estates of insolvents in courts of bankruptcy, it is not framed with any special view to the enforcement of the securities for the benefit alone of the secured creditors. Nor does it seem to contemplate the interference with or any enforcement of such securities by the trustee, or upon his motion alone, except for the purpose of realizing from the property pledged or mortgaged some moneys, which, after discharging the incumbrance, will go into the fund arising from the general assets, and benefit the unsecured creditors, whether entitled to priority or not. The trustee may, by order of the court of bankruptcy, pay off the incumbrance, or sell the property subject to the incumbrance; or, if the conservation of equitable rights require such action, the same court has doubtless the power to order the absolute sale of the property free from and discharged of the incumbrance, taking care of the rights and equities of the secured creditors in the disposition of the moneys realized by such sale. Ordinarily a secured creditor may, at his option, refrain from invoking the assistance of the court of bankruptcy, and proceed to collect his debt from the securities, by sale, foreclosure, or other procedure conformable to law and to the contract, as if no bankruptcy was pending, and then, if a portion of the debt remains unsatisfied, it may be proved and allowed as an unsecured debt. Or, if the security is inadequate, he may, without enforcing it, have its value ascertained in one of the other ways indicated in the act, and, such value being treated as a credit, have the balance of his claim allowed, and receive his dividends thereon. If a secured creditor refrains from asking or invoking the aid of the court of bankruptcy to enable him, through its officers and its exercise of jurisdiction, to turn his securities into cash, then, although the court, for the benefit of the unsecured creditors, should use its equitable power to the extent of selling the incumbered property free and discharged of the incumbrance, assuming to care for the equitable rights of the secured creditor in its disposition of the moneys arising from the sale, there would seem to be reason for holding that the moneys going to the secured creditor under such circumstances only came into the case incidentally, as the result of the effort to realize and obtain other money for the unsecured creditors, and that it should not be regarded as any dividend, or charged with any commissions. It is doubtless true, and for obvious reasons, that, in all cases where improved real estate is mortgaged, the amount for which it can be sold on foreclosure, subject to the year's equity of redemption before the purchaser can have possession, added to what that equity of redemption will produce if sold separately, will not equal the amount for which the same property can be sold if full title and possession can be given at once. This is especially true where, as in this case, the principal real estate covered by the mortgage is a large and extensive flouring mill, with all the modern machinery and appliances for the manufacture of flour in such quantity that the principal markets of the world must be canvassed for its sale. Purchasers at a foreclosure sale only would not know whether they would get the mill

or redemption money at the end of the year following the sale, nor to what extent the property, by careless usage and want of repair, might deteriorate in that time. A separate sale of the equity of redemption would be measurably unproductive, as no one could easily forecast the result of investing the necessary capital and making the arrangements for carrying on such a business, if it must close at the end of one year. In this case the secured creditors,—the bondholders,—in their own interest, sought and invoked the aid of the court of bankruptcy in the making of this sale, whereby they realized upon their security more than they could have expected through foreclosure, and without the expense and delay of that remedy. Their equities were preserved, and by including the equity of redemption in the sale the best results were at the same time realized for the unsecured creditors. After determining and apportioning to the general fund of the estate that part of the proceeds of the sale which it was agreed fairly represented the equity of redemption, the remainder, as realized from the security, had to be apportioned and assigned to the several bondholders,—to each his dividend from that fund. The fact that in this case they agreed that the whole of that fund—the sum of all their dividends from it—should be paid to an agency of their own selection, for division and apportionment among them, made no difference. The special fund arising from the security was obtained, not by the action of the creditors converting the security into money according to the terms of the mortgage, and the law in respect to foreclosure, but through the jurisdiction of the court of bankruptcy, invoked for that purpose by the secured creditors, and under the orders and procedure of that court carried into effect by its officers, the referee and trustee. The payment of that fund to the parties entitled was the payment to each bondholder of his dividend of that fund upon his claim which had been proved and allowed. The fact that the Hennepin Land Company, as purchaser of parcels of the mortgaged property, was permitted to defer the payment of the purchase price until the "dividend" to which it was entitled as bondholder from the security fund was ascertained, and then allowed to receive that dividend by taking a credit for it on such purchase price, was a mere matter of convenient offset. It received in that way its dividend from that fund, precisely the same as if it had paid over the money on the purchase, and received it back as dividend. It is properly the basis of commission to the referee and trustee, whether paid the one way or the other. That arrangement rested entirely on the order of the court, even though its convenience may have been suggested by a provision contained in the mortgage. The sale of the property was in no sense a foreclosure of the mortgage, but an absolute sale of all rights in the property under the equity power of the court, exercised on the motion of all the interested parties, with the view of obtaining the most money the property would bring, for division among the creditors, secured and unsecured, according to their respective rights and equities. The provisions of the mortgage relative to proced-

ure in case of its foreclosure were wholly immaterial in respect to this sale.

The case of In re Slevin, 4 Dill. 131, Fed. Cas. No. 12,942, has no bearing. There the sale was made by the trustee named in the mortgage, and the assignee in bankruptcy, who would have been entitled to receive only any surplus after the payment of the mortgage debt, joined in the deed. But there was no surplus, no money whatever to be administered by the court of bankruptcy, and he was properly held entitled to no commission. Here the entire fund was obtained through the action of the court of bankruptcy, whose officers alone made the sale and administered the fund; paying the avails of the security directly to the bondholders, and entirely disregarding the trustee named in the mortgage. The mortgage was functionless in the proceeding, except as it showed the extent of the rights and equities of the bondholders which were entitled to the protection of the court. The payments to the bondholders were of their dividends or allotments of the fund produced in the court of bankruptcy through the execution of its orders by its officers upon the motion or request of the secured creditors, and the referee and trustee are entitled to commissions on such dividends. Such sale, when agreed to by all the parties, was doubtless within the equity powers of the court of bankruptcy. Ex parte Christy, 3 How. 292, 315. It enabled the mortgagees or bondholders to realize with greater speed the avails of the security than could have been done by foreclosure under the terms of the mortgage, and of the law under which the creditors might have acted. But there is nothing in the law which excludes the referee from commissions upon dividends to any class of creditors from a fund obtained through the action of the court alone, and the services of its officers, when such action and services have been invoked by such creditors. The commission of the referee is therefore allowed at the sum of $1,443.02, as stated in the final account filed by the trustee.

In re KENNEY.

(District Court, S. D. New York. November 14, 1899.)

1. BANKRUPTCY—DISSOLUTION OF LIENS—PROCEEDS OF EXECUTION.

Under Bankr. Act 1898, § 67f, providing 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," where, within four months before the filing of a petition in bankruptcy against an insolvent judgment debtor, an execution has been issued and levied on his personal property, and sale made, the proceeds of such sale remaining in the sheriff's hands at the time of the adjudication, do not belong to the judgment creditor, but to the estate of the bankrupt, and the court of bankruptcy has power and jurisdiction to order the sheriff to pay over such proceeds to the trustee in bankruptcy when appointed.

2. SAME—OBSTRUCTIVE SUITS.

Where, at the time of an adjudication in bankruptcy, the sheriff held in his hands the proceeds of a sale on execution of the property of the

bankrupt, levied within four months prior to the filing of the petition in bankruptcy, and therefore annulled by the adjudication, and was ordered, after due hearing of all parties concerned, to pay over such proceeds to the trustee when appointed, and thereafter the judgment creditor filed a bill in equity in the United States circuit court to enjoin the sheriff from paying the money to the trustee, and to require him to pay it to complainant, *held*, that such bill was obstructive, and without merits, and an attempt to oust the jurisdiction of the court of bankruptcy, and constituted no reason why the sheriff should not be required to obey the order of the latter court.

8. SAME—PARTNER AS TO CREDITORS ONLY—INDIVIDUAL PETITION.

Where no actual partnership exists between two persons, one of whom carries on business in his own name partly on capital loaned by the other, a petition in bankruptcy, based upon liabilities incurred in such business, is properly brought against the ostensible owner of the business alone; and his trustee in bankruptcy will be entitled to the stock in trade, or the proceeds of its sale, without regard to the fact that the person who loaned the capital may have incurred the responsibilities of a partner as regards creditors.

In Bankruptcy.

Stickney, Spencer & Ordway, for trustee in bankruptcy.
George Bell and S. L. Samuels, for judgment creditor.
Philip J. Britt, for sheriff.

BROWN, District Judge. This is mainly a rehearing of the matter decided by me in July last (In re Kenney [D. C.] 95 Fed. 427), upon which an order was entered on July 20th continuing a previous order restraining the sheriff from paying to E. H. Clark, a judgment creditor of the bankrupt, the sum of $12,451.09, the proceeds of a sale on execution of the bankrupt's goods. That order further directed the sheriff to pay those moneys to the trustee of the bankrupt upon his appointment and qualification. The present hearing is upon an application for a resettlement of that order for the purpose of striking out this last clause, on the ground that it was not asked for in the moving papers, and accordingly was not properly considered by opposing counsel on the former motion, and that the order is in fact beyond the authority of the court. The trustee having in the meantime been appointed and qualified, a further application in his behalf has been made on notice to the sheriff and the judgment creditor, for an order directing the sheriff to pay over the proceeds of the execution sale to the trustee, as previously ordered. Both applications were directed to be heard together.

The objections made to granting the order asked for are principally those raised upon the previous hearing, although they are now more fully elaborated in the briefs submitted, and some further objections are presented requiring consideration.

The petition in involuntary bankruptcy was filed April 13, 1899, and the defendant interposed an answer denying insolvency and the act of bankruptcy alleged. Upon the trial of the issue by the court, although the main facts were found as alleged, an amendment of the petition by the introduction of an additional petitioning creditor was deemed expedient, and an additional creditor having thereafter joined in the petition and further objections thereto being

withdrawn by the defendant, he was adjudged a bankrupt on the 12th of July.

The defendant was in the fur business in this city, and on March 6, 1899, judgment was recovered against him in the state supreme court by E. H. Clark for the sum of $20,906.66. On the same day execution thereon was issued to the sheriff, under which on March 15th the defendant's stock of goods was sold by the sheriff, realizing the net proceeds of $12,451.09. On April 13th after the filing of the involuntary petition in bankruptcy, the petitioning creditors obtained an order directing the sheriff and said Clark, the judgment creditor, to show cause before this court on April 18th why the sheriff should not be enjoined from paying over any portion of the proceeds of sale until the appointment of a trustee, or the further order of the court; and "why the petitioners should not have such further or different order or relief in the premises as to the court shall seem meet." By this order the sheriff was also restrained from paying over the proceeds until the hearing and decision of the order to show cause. The hearing on this order was postponed by consent of the parties from time to time until the decision of the court on the question of the adjudication in bankruptcy, whereupon the question of a stay was argued and submitted by counsel for the petitioning creditors and by counsel for Clark, the judgment creditor. The latter also submitted an affidavit, dated July 5th, from which it appeared that one Leon Abbett had commenced an action in the supreme court against Clark, Kenney and the sheriff, to declare Clark's judgment fraudulent and void, and that a temporary injunction had been therein obtained against the sheriff restraining him from paying Clark the proceeds of said sale, and that this injunction had been vacated on the day the petition in bankruptcy was filed. In the brief then submitted in behalf of Mr. Clark, it was argued that the proceeds of the sale in the sheriff's hands had become the property of Mr. Clark, the judgment creditor, and were no part of the bankrupt's estate over which the court had jurisdiction; that section 67 applies only to pending process and not to consummated process or executed process, and that property held adversely by third parties cannot be taken from them except by a plenary suit. In this hearing on the merits, the notice of motion for further relief was sufficient for the order made, if that order was correct.

1. There is no doubt that by the law of this state, moneys collected by a sheriff through a sale on execution are in a certain sense the property of the plaintiff, provided the proceedings are valid (Nelson v. Kerr, 59 N. Y. 224; Bank v. Eltinge, 40 N. Y. 391, 395; Wehle v. Conner, 83 N. Y. 231), but not completely so, nor subject to levy against him until paid over (Baker v. Kenworthy, 41 N. Y. 215; Turner v. Fendall, 1 Cranch, 134). But the execution creditor is not entitled to the specific moneys, nor can he maintain any action against the sheriff for not paying them over, until either the return day of the writ of execution has passed, or the sheriff has made return of the writ. Not until then can the creditor have either possession, or the right of possession. The sheriff is not the mere agent of the creditor, but an officer of the law as well, who may pay the

money into court along with the return of the writ. Nelson v. Kerr, supra; Turner v. Fendall, 1 Cranch, 134–137.

Under the act of 1867, and under the present act except for the provisions of section 67, the right of the execution creditor to recover these moneys could not have been interfered with in the present case; but since the passage of the act of 1898, every judgment creditor issuing execution and procuring a levy and sale, does so subject to the contingency that his proceedings may be nullified and all the lien or preference that he might otherwise acquire be avoided by a petition in bankruptcy filed against the debtor within four months, followed by an adjudication. Subdivision f of section 67 provides not only that the levy, execution, etc., in that case shall be deemed null and void, but that the property affected by the levy shall be deemed wholly discharged and released from the same, and shall pass to the trustee; and further that

"The court may order the right under such levy to be preserved for the benefit of the estate, and such conveyance thereof to be made as shall be necessary;"

Provided that nothing therein shall destroy or impair the title obtained by such a levy, by the bona fide purchaser for value. This provision, as observed in the previous decision, shows incontestably, as it seems to me, that no preference can be acquired by a levy and sale within four months of filing the petition in bankruptcy; but that though the bona fide purchaser at the sale will be protected, the proceeds must stand in lieu of the property sold (In re Franks [D. C.] 95 Fed. 635); and that the judgment creditor's "right under such levy" will pass to the trustee in bankruptcy. By the terms of the act, moreover, the court is expressly authorized to order the "right" of the judgment creditor "under the levy" to be transferred and conveyed to the trustee. This is properly accomplished by ordering the sheriff to pay over the proceeds. In re Fellerath (D. C.) 95 Fed. 121.

Against these clear provisions of section 67, the objection that these moneys belong to the judgment creditor and that the court has no power or authority to order the sheriff to pay them over to the trustee, seems to me without force. The cases cited under the act of 1867 are inapplicable, not only in consequence of the different express provisions of section 67 of the act of 1898, but because those decisions themselves are limited to cases of third persons in possession of property, who have at least some color of title, or adverse interest. But Mr. Clark, the judgment creditor, at the time the petition in bankruptcy was filed, was not in possession of these proceeds; nor had he then acquired any right of possession; nor could he then have maintained any action against the sheriff for the recovery of the proceeds, since the execution had not been returned, nor had the time for returning it expired. Such right as he had previously acquired was not consummated or complete. It is the sheriff, moreover, and not Mr. Clark, who is to pay over these moneys to the trustee, because the sheriff alone is in possession of them. The sheriff has no adverse interest against such payment, and he is not, therefore, within the cases cited. In re

Baudouine (D. C.) 96 Fed. 536. The proceeds represent the bankrupt's property, and before Mr. Clark's title and right to the possession of the money became consummated, the entire basis of his claim was swept away by the petition in bankruptcy and the provisions of section 67f. When the restraining order was made, therefore, Clark, under the law applicable, had not even color of title to these proceeds; and he had neither possession, nor right of possession. To such cases the decisions under the act of 1867 have no application. Smith v. Mason, 14 Wall. 419, 20 L. Ed. 748.

The decision in the case of In re Easley (D. C.) 93 Fed. 419, was based on the view that section 67f applies only to involuntary petitions; whereas that was a case of a voluntary proceeding. This, on the contrary, is an involuntary proceeding, expressly embraced in clause f of that section. To my previous rulings on these points I must, therefore, adhere.

2. A further objection is raised that Leon Abbett, one of the original petitioning creditors was in reality a partner, at least as respects creditors, in Kenney's business; that Abbett is solvent; that the present proceeding in bankruptcy against Kenney alone upon the liabilities of this business, is, therefore, irregular; that the trustee appointed in this proceeding is a trustee of Kenney individually, and not of the firm of Kenney & Abbett, and that such a trustee is not entitled to the firm assets, from which the moneys in question were derived. Amsinck v. Bean, 22 Wall. 395, 404, 405.

The facts in reference to the relation of Abbett to Kenney were developed upon the trial as to Kenney's insolvency, as above stated, and seem not to have been previously known to creditors. Under an agreement between them dated September 9, 1897, Abbett agreed to permit a debt owing to him by Kenney to remain as an investment in Kenney's business to the amount of $27,828.83; and "at the risk of the business," on the agreement that

"On the 15th day of August, 1902, said Abbett should be entitled to receive, if Kenney's business should prove profitable, in addition to the amount above named a sum equivalent to 10 per cent. of the net profits of the business."

There is no express provision in the contract for the payment of interest, or any other compensation for the use of this money for about five years, except "a sum equivalent to 10 per cent. of the net profits of the said business," as above stated. This is followed by the provision,

"That nothing herein contained shall be deemed, considered or to be construed to constitute a co-partnership between the parties herein, anything contained to the contrary notwithstanding;"

and considering that there is no agreement that Abbett should share in the profits as such, but that the profits were to be merely the measure of his compensation for Kenney's use of the money, or Abbett's forbearance of the debt, I greatly doubt, taking these provisions together, whether the parties to the agreement should be deemed partners even as to creditors. The case seems to be precisely within the decision of Richardson v. Hughitt, 76 N. Y. 55, and subsequent cases, Cassidy v. Hall, 97 N. Y. 159, 169; Hackett

v. Stanley, 115 N. Y. 625, 631, 22 N. E. 745; Bank v. Gallaudet, 122 N. Y. 657, 25 N. E. 909. It is not necessary, however, to decide that question here. Kenney and Abbett certainly were not partners as respects each other; and even if for the purposes of this case it be assumed that Abbett was a partner as respects creditors, his liability as such was only a personal liability to them, and their remedies against him will be in no way affected by this proceeding. The agreement gave Abbett no property interest in the business assets of Kenney, and none of the rights of a partner therein; because by the contract between them all such rights are expressly excluded. In re Pierson, 10 N. B. R. 107, Fed. Cas. No. 11,153. The assets remained the sole property of Kenney. The estate is necessarily the individual estate of Kenney only; and all his debts, whether belonging to his business or outside of it, are alike provable against these assets and all his other property, as one individual estate. Abbett cannot call him to account as a partner and he could not have a receiver appointed in any attempt to wind up Kenney's business. The various provisions of section 5 of the bankruptcy act, as respects partners, show that it has reference to a partnership between the parties, where there may be both joint and individual assets, and not a partnership as to creditors only, without any possible joint estate. See In re Downing, 3 N. B. R. 748, Fed. Cas. No. 4,044.

Even if Abbett, therefore, were assumed to be a partner as to creditors, I think the bankruptcy proceeding in this case was properly brought against Kenney only: (a) Because Kenney alone is the owner of the property; there is but one estate, and that the individual estate of Kenney, and a trustee of Kenney alone could take it; (b) because Abbett has no rights as a partner against Kenney, or in the assets of his business; (c) because the remedy of creditors against Abbett, is a personal remedy only; and (d) their remedies are in no way affected by this bankruptcy proceeding.

3. On the part of the sheriff, it is further objected, that since the former hearing and decision, the judgment creditor, Clark, has filed a bill in equity in the United States circuit court of this circuit against the sheriff and the trustee for the purpose of enjoining the sheriff from paying over the moneys to the trustee and decreeing that they be paid to the complainant, and that the sheriff has been served with a subpœna in equity upon the bill of complaint, against which the sheriff is entitled to protection. The grounds of the suit are the same as those above considered. An affidavit on behalf of the sheriff further states that a suit in the state supreme court has been brought against him and others by said Abbett in reference to said moneys, and that an attachment also against said Kenney in favor of said Abbett, issued out of the supreme court of the state of New York, and executions against said Kenney, were in his hands prior to the filing of the petition in bankruptcy for more than sufficient to exhaust the moneys in his hands.

The attachment and executions last referred to are manifestly subsequent to Clark's execution, and have no color of claim against

the proceeds of sale. As respects the equity suit by Abbett, it is sufficient to say, that with the papers submitted on this motion is a consent by Abbett that the moneys in question be paid to the trustee.

The bill in equity filed by Clark in the United States circuit court, is an obvious attempt to oust this court of its proper jurisdiction, which it had acquired of the subject-matter in controversy prior to the filing of the bill, and which was in due course of adjudication. The complainant had appeared before this court, as he had a right to do in the defense of his asserted rights, submitted an affidavit, and was fully heard by counsel on the previous hearing, as he has been again heard now. If aggrieved, he had, and still has, a further remedy by appeal, or petition of review on all the points raised. If in any case such a bill could be entertained, no facts seem to justify it here. No preliminary injunction has been obtained or sought; though the case is emphatically one for a preliminary injunction if there were any merits in it. I must regard that suit, therefore, as merely obstructive and without merits, which should not be suffered to delay the enforcement of the statutory right of the trustee to the payment of the moneys in question for the benefit of the general creditors. Even should that suit be ultimately successful, the sheriff would not be harmed thereby, since the judgment would protect him in making payment under the order of this court, by directing the decree to be satisfied by the co-defendant alone, the trustee, who will have received the money. The appeal from this order, which will doubtless be taken, will, moreover, settle all the questions raised by the bill in equity; so that if this order is affirmed, that suit will in effect be also disposed of; while if no appeal be taken, the matter will be res judicata as against the complainant.

An order may be entered directing that the moneys in question be paid to the trustee, to whom all claims of Clark, the judgment creditor under said levy, shall be deemed transferred and conveyed.

In re VAUGHAN.

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

BANKRUPTCY—DISSOLUTION OF LIENS—VOLUNTARY AND INVOLUNTARY CASES.

Bankr. Act 1898, § 67f, providing 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," is to be construed as applying to voluntary as well as involuntary cases, since section 1, cl. 1, declares that "'a person against whom a petition has been filed' shall include a person who has filed a voluntary petition"; and a levy of execution on personal property is dissolved by an adjudication of the debtor as a voluntary bankrupt within four months thereafter, although the suit in which the execution issued was begun more than four months before.

In Bankruptcy. On motion for stay, and delivery of property by sheriff.

Alexander Thain, for execution creditor.
Charles M. Hough, pro se.

BROWN, District Judge. On November 4, 1899, an adjudication of bankruptcy was made upon the voluntary petition of the bankrupt. On the day previous the sheriff levied upon a considerable amount of personal property under an execution in favor of Robinson in a suit which was begun more than four months before the petition in bankruptcy. This levy is sought to be set aside as null and void under section 67f, and section 1 (1).

The construction given by this court to subdivision f of section 67 in connection with section 1 (1), from almost the beginning of the administration of the act, has been, that it applies alike to both voluntary and involuntary proceedings; and in a number of cases of voluntary proceedings, liens under circumstances like the present have been held by me to be null and void, and their enforcement enjoined. I must adhere to this practice, notwithstanding some recent decisions to the contrary. In re O'Connor (D. C.) 95 Fed. 943; In re De Lue (D. C.) 91 Fed. 510; In re Easley (D. C.) 93 Fed. 419. The opposite decisions (In re Richards [D. C.] 95 Fed. 258; In re Fellerath [D. C.] 95 Fed. 121; In re Brown [D. C.] 91 Fed. 359; In re Friedman, 1 Nat. Bankr. News, 208; Manufacturing Co. v. Mitchell, Id. 262) seem to me more in harmony both with the text and the purpose of the bankrupt act.

No sound reason has been suggested, nor can I imagine any sound reason why a levy should be set aside upon an involuntary petition, and not upon a voluntary one. The relation of the execution creditor to other creditors, to the bankrupt, and to his estate, is the same in both cases; and the preference acquired by the creditor if the levy is not set aside, its consequent injury to other creditors and its subversion pro tanto of the manifest intent and policy of the bankrupt act, are in both cases precisely the same. Nothing in the bankrupt act elsewhere countenances any such distinction in the result of a voluntary and an involuntary proceeding. In every other particular the final result of each is the same.

As respects creditors, one of the most important and manifest objects of the bankrupt act is to prevent preferences and to secure an equal distribution of the assets, in spite of any action, inaction or collusion of the bankrupt. The four months clauses of the act were evidently introduced in furtherance of this purpose; and it is not credible that the application of these clauses could have been intended to depend upon the immaterial circumstance whether the bankruptcy proceeding was initiated by a voluntary or by an involuntary petition. If such a distinction were adopted, the creditor's preference by a levy, would depend wholly on the bankrupt's option; if he thereafter filed a voluntary petition he would establish the preference; if he reported the facts to creditors who filed an involuntary petition, the preference would be set aside. Thus an open door would be given for preferences ad libitum of the most important and injurious character at the mere option of the bank-

rupt alone—a result precisely opposite to the evident intent of the law.

A construction leading to results so incongruous and subversive of one of the main purposes of the act in avoiding preferences, could only be admitted under the strictest necessity. No such necessity, as it seems to me, can be said to exist when section 1 (1) declares that:

"'A person against whom a petition has been filed' shall include a person who has filed a voluntary petition,"

—thus apparently making obligatory the opposite construction. Reading this provision with section 67f, the act becomes harmonious and consistent and its chief objects are secured.

That this construction of subdivision f of section 67 may more or less supersede the application of subdivision c, seems to me, in view of the composite structure of the act (Coll. Bankr. p. 383; In re Friedman, supra), to be of minor importance as compared with the preservation of one of the main purposes of the act. Somewhat similar instances of overlapping provisions occur both in the revenue and even in the criminal sections of the Revised Statutes.

The stay should be granted.

In re WAXELBAUM.

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

BANKRUPTCY—JURISDICTION—PROOF OF RESIDENCE.

Where the allegation of a voluntary petition in bankruptcy as to the residence of the proposed bankrupt within the district is contested, and it is shown that, until a few years before, he resided and did business in another state, that he is still in the employ of a business firm in that state, and that he spends part of his time in the one state and part in the other, the burden is on the petitioner to prove his alleged change of residence by satisfactory evidence.

In Bankruptcy. On motion to set aside an adjudication in voluntary bankruptcy and dismiss the petition.

Joseph Fried, for the motion.

H. Joseph and Arthur Furber, for bankrupt.

BROWN, District Judge. The bankrupt's voluntary petition was filed on April 14, 1899, stating that he had had no place of business in the city of New York or elsewhere during the six months preceding, but that he resides at 119 East Forty-Seventh street within this county, and has resided there for the greater part of the six months next immediately preceding. Adjudication as a bankrupt followed, and a reference to a referee, before whom considerable testimony was taken, as well as testimony by commission in Macon, Ga., tending to show that the defendant was not a resident within this county, as alleged. The direct testimony of the witnesses on this point is very conflicting. The bankrupt is unmarried. Until a few years ago he was in business at Macon on his own account, and resided with his mother there. He is still in the employ of

a business firm in Macon, for which he has a general power of attorney, spending his time partly in Georgia, and partly in New York. He testifies that for three years past his residence has been here.

The burden of proof is upon him to show satisfactorily the alleged change of residence. I agree with the referee's report, that with this burden of proof upon him, and in the conflict in the testimony of witnesses, the fact that the bankrupt registered his name as a voter at Macon in the spring of 1898, and that his poll tax of one dollar was regularly paid there until the following autumn, should prevent finding any such change of residence as to authorize bankruptcy proceedings within this district.

The petition is, therefore, dismissed.

In re DIETZ.

(District Court, S. D. New York. November 16, 1899.)

1. BANKRUPTCY—DISCHARGE—BUYING OFF OPPOSITION.
   Where a creditor who has filed specifications in opposition to the discharge of a bankrupt is induced to withdraw the same, and suffer the discharge to be granted, in consideration of part payment of his claim made to him by a friend of the bankrupt, it is a fraud upon the act, and ground for vacating the discharge, although done without the procurement or participation of the bankrupt, if he was privy to the arrangement and consented to it.
2. SAME—WITHDRAWAL OF SPECIFICATIONS—NOTICE TO CREDITORS.
   Where creditors of a bankrupt file specifications in opposition to his application for discharge, and other creditors rely upon the same as representing their own objections, and instruct their attorneys to co-operate with the attorneys of the objecting creditors in opposing the discharge, all parties being well aware of these facts, and the creditors who have filed specifications withdraw the same, and allow the discharge to pass as unopposed, without notice to the other creditors, the discharge will be vacated and the case reopened on motion of the latter.

In Bankruptcy. On motion to vacate order granting bankrupt's application for discharge.

Joseph Rosenzweig and Stillman F. Kneeland, for the motion.

Max D. Steuer, opposed.

BROWN, District Judge. This is an application to vacate the discharge of the bankrupt granted on July 19, 1899, on the ground that it was corruptly procured by the payment of $200 to an opposing creditor as a consideration for withdrawing his objections to the discharge.

The adjudication was made on the bankrupt's voluntary petition on February 25, 1899. Seven creditors proved claims. Among them was the petitioners' for the amount of $4,029.91 and a claim of Feigenbaum & Schweiger for $1,690.37. Max Schweiger, a partner in the last-named firm, was chosen trustee by the creditors, the present petitioners voting for him. Upon the bankrupt's application for a discharge in April, specifications in opposition to the discharge were filed by Feigenbaum & Schweiger only, although the attorneys

employed by Groen & Bro., petitioners, were instructed to co-operate with the attorneys of Feigenbaum & Schweiger in opposing the discharge. Considerable testimony was taken before the referee to whom the specifications were referred. On the 7th of July a written withdrawal of the specifications was filed with the referee, and thereupon on the report of the referee a discharge was granted on July 19th.

The various affidavits submitted upon the present petition show that Feigenbaum & Schweiger received $200, being about 10 per cent. of their claim, and two other creditors a like percentage, from one Blumberg, a cousin of the bankrupt's wife, for an assignment of their respective claims to him and the withdrawal of the objections to the discharge. The money was first lodged with a depositary, under an agreement made by the attorneys of Feigenbaum & Schweiger, who thereupon withdrew the objections, suffered the discharge to be granted unopposed, on the motion of the bankrupt's attorney, and thereafter received the money as agreed from the depositary.

There is no doubt as to the payment of the money. That appears from the affidavit of Mr. Schweiger himself. But it is contended that the bankrupt neither procured this payment nor had any knowledge of it, and was not in any way privy to it. The bankrupt makes oath to this effect, as thoroughly and as variously as possible. Mr. Schweiger indeed makes affidavit to certain circumstances leading to the contrary inference, as that during the negotiations the bankrupt was seen by him in the elevator coming down from the office of his attorneys, though this is denied by the bankrupt. The whole amount paid by Mr. Blumberg for the assignment of these claims was $500. He had acted previously to some extent as a banker for the bankrupt, and he states that the payment of this money was purely voluntary and as a gift, and as a consequence of his interest in the bankrupt, and his wish to make some use of him, and to rid himself of the annoyance of further examination in the bankruptcy proceeding.

There is no doubt that if the opposition of the creditor is bought off through the procurement or privity of the bankrupt, it is such fraud upon the act as would warrant vacating the discharge, the fact itself being prima facie evidence that the bankrupt was not entitled to it. Tuxbury v. Miller, 19 Johns. 311; In re Douglass (D. C.) 11 Fed. 403, 406; In re Palmer, 14 N. B. R. 437, Fed. Cas. No. 10,678; Blasdel v. Fowle, 120 Mass. 447; Bell v. Leggett, 7 N. Y. 176. The general subject was very fully considered in the case last cited, and it was declared to be

"Of no consequence that the arrangement was made between the creditors of the bankrupt and a third person without the intervention or knowledge of the bankrupt."

All such arrangements are to be condemned, as at variance with the policy of the bankruptcy acts, whether expressly prohibited by statute or not (Smith v. Bromley, 2 Doug. 696), and as injurious to all creditors, because calculated

"To suppress inquiry and to protect fraud and concealment from successful disclosure and development, * * * and to give the bankrupt a benefit

designed for the honest insolvent, and which the fraudulent debtor by sound justice and express provisions of the statute was prohibited from receiving."

In the case of Ex parte Briggs, 2 Low. 389, Fed. Cas. No. 1,868, where a surety of the bankrupt upon an attachment bond paid the debt to a creditor who was opposing the bankrupt's discharge on his own account and wholly without the bankrupt's knowledge or privity, it was held that the discharge was not vitiated. Judge Lowell, however, expressly avers that that was an exceptional case; and he adds;

"I do not intend to say that payment by a friend actually made in behalf of the debtor with his knowledge is not prohibited, nor that very slight evidence would not affect him with participation."

It is not necessary for me to make any ruling in this case on the effect of a withdrawal of opposition procured without any actual or constructive knowledge or participation by the bankrupt. I am not satisfied that such was the present case. Though the verbal protestations are very strong to this effect, the circumstances all point to a contrary conclusion. Not indeed that the bankrupt personally was an active participant, for no doubt he was not; but his prior personal relations to Blumberg, as well as through his wife, the improbability that this sum of $500 would have been advanced by him in the manner stated without the bankrupt's indirect privity, the fact that the money was lodged with a depositary, to be turned over only after the discharge was granted, and the course of practice necessary to procure such a withdrawal and a discharge of the bankrupt through the bankrupt's attorney upon such a withdrawal, show that the transfer of these claims to Blumberg had nothing of the character of a mere purchase of them for what they might be worth, but was a very carefully planned and systematic means for procuring the withdrawal of the opposition, and thereupon the bankrupt's discharge; and such a procedure could not well take place without the privity, concurrence and knowledge of the bankrupt's attorney, as to which nothing appears in the opposing affidavits.

Another circumstance also makes it peculiarly proper that this case should be reopened, namely; that in the conduct of the proceedings, the specifications in opposition to the discharge filed by Feigenbaum & Schweiger were relied upon by the petitioners as representing their own objections and under which their attorneys were acting conjointly. They had no notice of the application for discharge and were not heard. Strictly they were not entitled to notice of hearing since they had not interposed independent objections; but considering the relations of Mr. Schweiger as trustee for all, and the knowledge of all parties of their reliance upon these specifications and participation in the opposition, as shown by the record, good faith requires that the proceedings should be reinstated to the situation immediately prior to the withdrawal.

The order of discharge should be vacated, and the matter remitted to the referee for further hearing in behalf of the petitioners upon the specifications previously filed, which may be adopted by them.

In re McCORMICK.

(District Court, S. D. New York. November 17, 1899.)

1. BANKRUPTCY—JURISDICTION—REQUIRING SURRENDER OF PROPERTY BY BANKRUPT.

A court of bankruptcy has authority to order the bankrupt to pay over to the trustee money in his hands which belongs to his estate in bankruptcy, and to enforce his obedience by commitment as for contempt; but this power should be cautiously exercised, and only in cases where the bankrupt's present possession of the money, and his retention of it in willful disobedience of the order, are proved beyond a reasonable doubt.

2. SAME—PRACTICE—EXAMINATION—COMMITMENT.

Where a bankrupt, having been ordered by the referee to pay over to his trustee a sum of money alleged to be in his possession and to belong to his estate in bankruptcy, denies his present possession of the money, and attempts to explain its loss by a story which, though difficult to believe, is not impossible, nor an obvious fabrication, he may be ordered before the judge for further examination as to whether or not he has made a full disclosure of the facts; and if satisfied that his story is false, the court will order commitment.

In Bankruptcy.

George W. Wingate, for trustee.
Eugene Sweeney, for bankrupt.

BROWN, District Judge. Application has been made to this court under section 2, subds. 13, 16, to punish the bankrupt for not complying with two orders of the referee made on the examination of the bankrupt before him in regard to his property, and directing the bankrupt to pay the sums of $1,500 and $450 respectively to the trustee.

There can be no doubt of the authority of the court to enforce obedience to all "lawful orders" and to punish contempts by virtue of the provisions above referred to. As such punishment may involve imprisonment, however, this power should be cautiously exercised, and in cases only where willful disobedience by the bankrupt is proved beyond reasonable doubt, as in a criminal case.

As respects the sum of $450, which the referee ordered the bankrupt to pay the trustee, I do not think the evidence is sufficiently clear to warrant an enforcement of the order by commitment. The bankrupt testifies that he gave that money to his clerk for renewing his stock in trade while he was sick at home. His business would apparently require a renewal of stock; the money was drawn from his bank about three weeks before the business was sold out; and his testimony on this point is not disproved, nor is it in itself so improbable as to authorize its rejection as a fabrication. In re Mooney, 15 N. B. R. 456, Fed. Cas. No. 9,748.

As respects the sum of $1,500 ordered to be paid to the trustee, the explanation given by the bankrupt that he carried that money in his trousers pocket for some two or three weeks until he lost it by having his pocket picked upon an Eighth avenue car, after a visit to Coney Island, though quite possible in itself, is accompanied by such improbable circumstances stated by him as occurring before and after, that it is difficult to be credited. I think it bet-

ter to pursue the course indicated by Judge Drummond (In re Salkey, 11 N. B. R. 516, 521, Fed. Cas. No. 12,254) to direct the bankrupt to be brought before me for further examination as to whether or not he has made a full disclosure of the facts.

An order to that effect may be entered and the further consideration of this application is reserved.

(November 29, 1899.)

The account of the $1,500 given by the bankrupt not being a credible one, as given before the referee, I have spent nearly a day in a personal examination of him in court; his statements increase the previous contradictions, and his explanations are hardly better than might be expected of a lunatic, or an imbecile, or of a man without memory. My examination was largely directed to testing him in these regards; and I find he is not suffering any mental disability, and his memory is sufficiently precise and exact in whatever he seems interested in explaining. My conclusion is that his story is a fabrication, and that he conceals the $1,500 and should be committed until payment.

MURRAY v. BEAL.

(District Court, D. Utah. November 13, 1899.)

No. 191.

1. BANKRUPTCY—JURISDICTION—SUITS BY TRUSTEE.
   Bankruptcy Act 1898, § 23b, providing that "suits by the trustee shall only be brought or prosecuted in the courts where the bankrupt might have brought or prosecuted them if proceedings in bankruptcy had not been instituted," is to be strictly construed, as being a limitation upon the general grant of jurisdiction to the courts of bankruptcy in other parts of the act; and this provision applies only to suits upon causes of action originally vested in the bankrupt, and which he might have maintained if there had been no adjudication in bankruptcy, and not to suits upon causes of action created by the bankruptcy proceedings, or vesting originally in the trustee as trustee. Of the latter the courts of bankruptcy have jurisdiction.
2. SAME—BILL IN EQUITY—SHOWING JURISDICTION.
   On demurrer to a bill in equity brought in the court of bankruptcy by a trustee in bankruptcy to quiet his title to a part of the assets of the estate in bankruptcy as against a claim of the defendant, where the bill did not affirmatively show that the right of action was one vesting originally in the trustee, or that it was not one originally accruing to the bankrupt himself, *held*, that the demurrer should be sustained, with leave to the plaintiff to file an amended bill.

In Equity. On demurrer to bill in equity filed by plaintiff as a trustee in bankruptcy.

W. R. Hutchinson, for plaintiff.

W. T. Gunter and Ephraim Hanson, for defendant.

MARSHALL, District Judge. The plaintiff, as trustee of the estate of a bankrupt, instituted this suit to quiet his title to a part of the assets in bankruptcy against a claim of the defendant. A demurrer has been interposed to the bill on the ground of a want of

jurisdiction in the court. The question raised is important, and has been differently answered by the several courts before which it has come.

Among the powers conferred by section 2 of "An act to establish a uniform system of bankruptcy throughout the United States," approved July 1, 1898, on the district courts of the United States as courts of bankruptcy, is authority to "cause the estate of bankrupts to be collected, reduced to money and distributed, and determine controversies in relation thereto, except as herein otherwise provided." Section 2, subd. 7. In the absence of some limitation on this grant of power, the district court, having assumed the administration of the bankrupt estate, would have jurisdiction of suits to determine all adverse claims thereto. This jurisdiction would rest upon the same principle as that of a court, which has taken charge of property through its receiver, over suits relating to that property, or to property rights vested in the receiver. Porter v. Sabin, 149 U. S. 473, 13 Sup. Ct. 1008; White v. Ewing, 159 U. S. 36, 15 Sup. Ct. 1018. The court of bankruptcy is charged with the administration of the bankrupt's estate. It must cause it to be reduced to money and distributed. It is evident that under its orders expense must be incurred, either in the ordinary administration of the estate, or under the power to "authorize the business of bankrupts to be conducted for limited periods by receivers, the marshals or trustee, if necessary in the best interests of the estates." Section 2, subd. 7. If the title to real property of the estate be clouded by an adverse claim, it would ordinarily be necessary to determine that claim before the property could be reduced to money. If the court of bankruptcy cannot entertain such a suit, it might be that by the decree of another court the entire property of the estate, in view of which expense had been incurred, would pass out of its hands. This result is at variance with the established principles regulating the administration of property by courts of equity. It is only to the extent that congress has clearly so provided that it can be held to be the law. All presumptions are the other way.

But the jurisdiction granted by subdivision 7 of section 2 of the act is expressed to be "except as herein otherwise provided." Section 23b is doubtless referred to. That section provides:

"Suits by the trustee shall only be brought or prosecuted in the courts where the bankrupt, whose estate is being administered by such trustee, might have brought or prosecuted them if proceedings in bankruptcy had not been instituted, unless by consent of the proposed defendant."

Since the grant of power to courts of bankruptcy should be liberally construed, in order that the act may have the beneficial effect intended, and be capable of harmonious execution, section 23b (an exception to that grant) should be strictly construed. In Epps v. Epps, 17 Ill. App. 196, the court said:

"It would seem that the same policy which dictates a liberal construction of the statute in furtherance of its general beneficial purpose would necessitate a restricted construction of an exception by which its operation is limited and abridged."

In U. S. v. Dickson, 15 Pet. 141–165, the supreme court of the United States had under consideration a statute allowing receivers of the public money 1 per cent. on the money received, as compensation for clerk hire, receiving, safe-keeping, and transmitting of such money. To this was added a proviso "that the whole amount which any receiver of public moneys shall receive, under the provisions of this act, shall not exceed for any one year the sum of $3,000." It was held that the proviso limited the sum to be annually retained by each individual receiver, and not by the incumbents of the office, where there were more than one within the year. In delivering the opinion of the court, Mr. Justice Story said:

"We are led to the general rule of law which has always prevailed, and become consecrated almost as a maxim in the interpretation of statutes, that where the enacting clause is general in its language and objects, and a proviso is afterwards introduced, that proviso is construed strictly, and takes no case out of the enacting clause which does not fall fairly within its terms. In short, a proviso carves special exceptions only out of the enacting clause, and those who set up such exceptions must establish it as being within the words as well as within the reason thereof."

Without any violence to the language of section 23b, it may be construed as relating wholly to suits which the bankrupt might have brought if there had been no adjudication in bankruptcy,—to rights of action once existing in the bankrupt. As so construed, it leaves a substantial operation to the grant of jurisdiction in section 2, subd. 7. If the bankrupt, within four months before the filing of a petition in bankruptcy, or after the filing of the petition and before the adjudication, shall have transferred any of his property with intent to defraud his creditors or to prefer any creditor, or has permitted any creditor to gain a preference through legal proceedings, and the transfer or proceeding is taken with knowledge of the intent to prefer, it is voidable by the trustee. A general assignment of the bankrupt's property for the benefit of his creditors would, under similar circumstances, be voidable. The right of action would never have been in the bankrupt. In the instances stated, except the first, it is only as against a trustee in bankruptcy that the fraud would be possible, and the right of action would be an original one in the trustee. A suit brought to avoid such a transfer or preference, and to recover the property transferred, is not one which the bankrupt "might have brought or prosecuted * * * if proceedings in bankruptcy had not been instituted," and therefore is not one of the suits contemplated in section 23b. That section must be restricted to suits to enforce rights of action once existing in the bankrupt, and vested in the trustee pursuant to the adjudication in bankruptcy.

The authorities on this question are not harmonious. The conclusion here reached is supported by the following cases: In re Gutwillig (D. C.) 90 Fed. 481; In re Brooks (D. C.) 91 Fed. 508; Carter v. Hobbs (D. C.) 92 Fed. 594; Lowell, Bankr., p. 411. In the case of In re Sievers, 91 Fed. 366, Judge Adams, in a strong opinion, held that section 23b did not apply to suits brought in the district court, but only to suits in the circuit court. This holding was not necessary, however, to a decision of the case before him. The case was affirmed on appeal, sub nomine Davis v. Bohle, 34 C. C. A. 272, 92 Fed. 325,

without noticing this question. In Burnett v. Mercantile Co. (D. C.) 91 Fed. 365, and in Mitchell v. McClure, Id. 621, it was held that the court of bankruptcy had no jurisdiction to entertain a suit by a trustee to recover property transferred by the bankrupt in fraud of his creditors. In the first case cited it is said:

"It is argued that because the bankrupt cannot maintain a suit to set aside a conveyance as fraudulent, made by himself, therefore the provision quoted does not apply in a case like this. But this is a question of jurisdiction,—a question of the right to determine, not of the principles to obtain in reaching a determination. If the bankrupt himself brought the suit, he could not be turned out of court on the question of jurisdiction."

It is rather a question of ascertaining the intent of congress as expressed in section 23b. The word "suits" is used. The context shows that the suits contemplated were those in vindication of the bankrupt's rights of action. The ordinary canons of statutory construction, as applied to this section, require that it should not be extended beyond its plain purport. Ryan v. Carter, 93 U. S. 78. In Bernheimer v. Bryan, 35 C. C. A. 592, 93 Fed. 767, the court of appeals answered in the negative the following question:

"Did the district court, as a court of bankruptcy, have jurisdiction to try the title to the goods involved in this controversy by summary proceedings, seizure of the goods, and a rule to account entered against the adverse claimant?" Page 598, 35 C. C. A., and page 780, 93 Fed.

This answer left intact the question here presented. Under the bankruptcy act of 1867, the jurisdiction of the court of bankruptcy of suits like the present one was undoubted, and yet it was held by the supreme court of the United States that the matter could not be decided summarily on motion or petition. Smith v. Mason, 14 Wall. 419. As was said in Marshall v. Knox, 16 Wall. 551, 556:

"We think that it could not have been the intention of congress thus to deprive parties claiming property, of which they were in possession, of the usual processes of law in defense of their rights."

So far as the court went beyond this question in argument, the opinion is merely dictum. The same question was presented and similarly decided by the same court in Camp v. Zellars, 36 C. C. A. 501, 94 Fed. 799.

Goodier v. Barnes (C. C.) 94 Fed. 798, is cited in support of the demurrer. That was a suit in the circuit court, and not in the court of bankruptcy. In the opinion it is said:

"A persuasive argument, sustained by several recent decisions, can be advanced in favor of the jurisdiction of the district court in these cases; but this conclusion, if affirmed, will not aid the complainant."

The case does not support the demurrer.

Other cases might be noticed in which it has been held that the court of bankruptcy has no jurisdiction by summary proceedings to determine adverse claims of third parties to the property of the bankrupt estate, but, for the reasons before stated, they leave unaffected the question here presented for decision. No summary proceeding is here attempted. The usual process of the court is invoked.

If the bill is examined in the light of the distinction drawn between rights of action of the bankrupt transferred by the adjudica-

tion in bankruptcy to the trustee, and of which the court of bankruptcy would have no jurisdiction, and rights of action original in the trustee, of which it has jurisdiction, it will be seen that it does not affirmatively appear that the right of action did not originally accrue to the bankrupt. It is not alleged that the property was conveyed by the bankrupt in fraud of his creditors, or with intent to create a preference. The nature of the adverse claim is not stated. The court is of limited jurisdiction, and the plaintiff who invokes that jurisdiction must affirmatively state the facts necessary to its exercise. The demurrer will be sustained, with leave to the plaintiff to file an amended bill within 10 days.

In re HIRSCH et al.

(District Court, S. D. New York. November 8, 1899.)

1. BANKRUPTCY—OPPOSITION TO DISCHARGE—BURDEN OF PROOF.
   Creditors opposing the bankrupt's application for discharge on the ground of his having concealed property from his trustee in bankruptcy must establish the fact by satisfactory and sufficient evidence, or their opposition will be overruled and the discharge granted.
2. SAME—OMITTING PROPERTY FROM SCHEDULE.
   It is no ground for refusing a bankrupt's application for discharge that he omitted to list in his schedule a leasehold interest in realty, under a yearly lease, where there is no evidence that the use of the property was worth more than the rent.
3. SAME—JURISDICTION—PARTNERSHIP OR INDIVIDUAL PETITION.
   Under Bankruptcy Act 1898, § 5a, providing that a partnership may be adjudged bankrupt "during the continuance of the partnership business, or after its dissolution and before the final settlement thereof," there is no final settlement of the affairs of the firm until its debts are paid, or in some other way extinguished; and hence an adjudication may be made upon the voluntary petition of the partners, alleging that there are firm debts remaining unsatisfied, notwithstanding the fact that there are no assets of the firm to be administered, though an individual petition will also lie.

In Bankruptcy. On opposition to bankrupt's application for discharge.

Benno Loewy and Charles Goldzier, for bankrupts.
E. G. Benedict and L. A. U. Zinke, for opposing creditors.

BROWN, District Judge. The discharge of the above bankrupts is opposed (1) upon the ground that the court has no jurisdiction, where, as in this case, the application is for the adjudication of a partnership and there are no assets; (2) on the ground that assets of the firm were concealed and that various false oaths have been made in regard thereto. Although these objections are mutually exclusive of each other, I shall briefly consider each.

The petition, signed by all the co-partners, was filed on October 27, 1898, stating that the bankrupts composed the firm of S. Hirsch & Sons; that the firm had been dissolved, but that no final settlement of its affairs had been made; that they were insolvent; that the firm had no assets whatever; that Solomon and Seligman Hirsch had no individual debts; that the firm debts (stating them)

amounted to above $15,000, and that Adolph Hirsch owed one individual debt of $47.50 only, and that each of the co-partners has only a small amount of individual property, all of which is claimed to be exempt.

The evidence shows that the firm of S. Hirsch & Co. carried on the fur business in Mercer street, New York, for several years prior to May 7, 1888, when the firm failed. On that day confessions of judgment were entered up in favor of several relatives and their attorney, upon which their leviable stock was sold by the sheriff on execution, and bought in by one Meyers of Philadelphia, who thereafter continued the business at the same place for about a year, having the bankrupts in his employ. The rest of the assets of the firm were conveyed by a general assignment made on May 7, 1888, to an assignee in behalf of the creditors, under which a dividend was paid, and the assignee discharged. About a year after the failure a similar business in furs was started in Greene street by Rosa Hirsch, the wife of Seligman Hirsch, and the mother of Adolph and Solomon, with another son Simon as her partner, under the name of Hirsch & Co. That business has been continued up to the present time. The bankrupts were employed in this business; Adolph and Solomon were evidently its general managers; their mother gave little personal attention to it, and the other partner Simon, was a deaf mute who took but a very subordinate part. The objecting creditors claim that the business of Hirsch & Co. is in reality the business of the old firm of S. Hirsch & Co., that is, of the bankrupts who now seek their discharge. The alleged false oaths occur in the evidence of the bankrupts denying this claim.

1. The evidence is not sufficient to justify the contention of the opposing creditors. The creditors present no evidence on the subject except the evidence of the bankrupts themselves and of Mrs. Hirsch; and while there are more or less minor inconsistencies and contradictions in details, they all agree on the general facts, that prior to the failure of the firm in 1888 Mrs. Hirsch had loaned to S. Hirsch & Co. from time to time moneys amounting to about $5,000, for which the judgment was confessed to her, but upon which she had received nothing; that about a year following the failure the new business was started upon $1,200 capital supplied by her, and $200 supplied by her son Simon; that the bankrupts put no capital in the new concern, and had no interest in it except as employés. The notes upon which the confession of judgment was given were produced and proved, running back to 1884. There is no evidence whatever going to show that the money put into the new concern came from any of the bankrupts. The circumstances indicate strongly that everything belonging to the bankrupts was swept away in the failure of the year before, by the assignment, and the sales on execution. The execution in favor of their own attorney was only about half satisfied, as appears by the sheriff's return. The execution in favor of Mrs. Hirsch was returned nulla bona, and there is no evidence showing that she ever received anything upon her judgment. The circumstance mostly relied on to dis-

credit Mrs. Hirsch's claim as to her advancing $1,200 to start the new business, is her testimony that this came from her savings which she had made from time to time, but which she had not deposited anywhere, but kept about her. Unsatisfactory as this is, even making allowance for the different habits of different people, it is not sufficient to discredit all the testimony in the case, when the other circumstances are considered, and particularly the long period of 11 years during which the new firm has conducted its business in that name, perfectly openly and with the ostensible relation of all the parties fully known, and unchallenged by any one. The principal opposing creditor has during nearly all this time continued his business with the new firm as before, selling them goods, and receiving payment in the name of the new firm, and he must have understood how it was formed. The checks he received were signed by Solomon Hirsch as attorney. He obtained a judgment for his claim in the month following the failure, and he had opportunity by examination in supplementary proceedings 11 years ago, had he chosen to seek it, to ascertain all that was ascertained in these proceedings. Notwithstanding this, no such suggestions or doubts as are now raised were ever mooted. If mere suspicions were to be indulged, I see no reason why the good faith of the present opposition might not be questioned with as much reason as the genuineness of the new firm established in 1889. Unless the new business was started with assets of the bankrupts, drawn from the old concern, or with new funds contributed by them, which the evidence fails to show, there are no grounds in this case for holding any of the property of the new concern to be assets of the bankrupts. The objections founded on the relations of the new firm to the bankrupts are, therefore, overruled.

2. It is further claimed that a lease of the house in which Seligman Hirsch and his family live, at a rental of $50 a month, should have been stated in the schedules. The lease was only for a year, and there is no evidence that the premises were worth more than the rent. No reason appears for holding that the omission to state this tenancy was either intentional or fraudulent.

3. Finding then that there were no assets of the firm, the question is presented whether the adjudication and discharge of the bankrupts in a joint proceeding by them as partners can be sustained under the act of 1898. Under the former act of 1867, it was ruled in this district that a firm proceeding should not be sustained where there were no assets at the time of the petition. This was based in part on the peculiar wording of the act of 1867. In re Crockett, 2 Ben. 514, Fed. Cas. No. 3,402; In re Hartough, 3 N. B. R. 422, Fed. Cas. No. 6,164; Hopkins v. Carpenter, 18 N. B. R. 339, Fed. Cas. No. 6,686. In other districts there were divers adjudications, the majority being in favor of upholding the joint proceedings. In re Williams, 1 Low. 406, Fed. Cas. No. 17,703; Hunt v. Pooke, 5 N. B. R. 161, Fed. Cas. No. 6,896; In re Noonan, 10 N. B. R. 330, Fed. Cas. No. 10,292.

The language used in the present act seems to me to have been designed to put an end to this doubt, since it authorizes a part-

nership to be adjudged bankrupt "after its dissolution and before the final settlement thereof." Section 5a. The petition alleges the fact of dissolution, and that there has been no final settlement of the firm affairs. The proof shows the existence of debts to a considerable amount unpaid; and incontestably, it seems to me, there is no "final settlement" of the business of a firm, until its debts are paid or in some way extinguished, by the statute of limitations, or otherwise. The decisions to this effect under the present law seem to me to be fully justified by the terms of the act of 1898 (In re Levy [D. C.] 95 Fed. 812; In re Altman [D. C.] 95 Fed. 263, 264, last sentence; Id., 1 Nat. Bankr. News, 358; In re Freund, 1 Nat. Bankr. News, 105); although in my own judgment a partner may at his option proceed upon his individual petition for his own adjudication and discharge without reference to the other partners, as under the act of 1867 (In re Abbe, 2 N. B. R. 75, Fed. Cas. No. 4; In re Marks, Fed. Cas. No. 9,094; Crompton v. Conkling, 15 N. B. R. 417, 420, Fed. Cas. No. 3,408; Id., 9 Ben. 225, Fed. Cas. No. 3,407), where all are insolvent and there are no firm assets whatever, inasmuch as partnership debts are all several, as well as joint. In re Meyers (D. C.) 96 Fed. 408; In re Laughlin, Id. 589; In re Winkins, 2 N. B. R. 349, Fed. Cas. No. 17,875; In re Downing, 3 N. B. R. 748, Fed. Cas. No. 4,044. There is nothing in the present act or rules necessarily excluding this course in such a case; it prejudices no one; and it is recommended by its simplicity and convenience in often avoiding the useless burden of proceeding adversely and by publication against an insolvent partner who may be inimical, or whose whereabouts may be unknown, and whose presence in the cause, real or constructive, would not be of the least benefit to creditors.

The specifications are not sustained, and the discharge of the bankrupts should be granted.

In re MORROW.

(District Court, N. D. California. October 4, 1899.)

No. 2,798.

BANKRUPTCY—OPPOSITION TO DISCHARGE—CONCEALMENT OF ASSETS.

The omission of a bankrupt to include particular property in his schedule of assets will not be ground for refusing his application for discharge, where such omission was not caused by a fraudulent intent to conceal the property from his trustee, but was the result of a mistake of law or of fact, or of an honest, though erroneous, belief that he had no available interest in the property.

In Bankruptcy. On application of bankrupt for discharge, and opposition of creditors thereto.

Nancy J. Morrow, the bankrupt, by the will of her deceased father took an interest to the extent of one-seventh in certain parcels of his real estate and in his personal property. She made four several conveyances to Frederick Hewlett, by which she purported to convey to him all her right, title, interest, and distributive share in the property of the said decedent; Hewlett at the same time acknowledging that he took the conveyances as security for a cer-

tain promissory note for $8,000 made by Nancy J. Morrow, and payable to himself and another as executors of the estate, and to secure any and all other indebtedness of hers to said estate, and agreed to reconvey to her upon the discharge of such indebtedness "at any time before or upon the final distribution of said estate." Afterwards a similar deed was made, conveying to Hewlett the bankrupt's interest in one particular parcel of real estate, which was intended to have been included in the original conveyances, but was omitted by mistake. Thereafter the executors of the estate paid to Hewlett, as the assignee of the bankrupt, her distributive share of the moneys then in their hands, and the same was applied in reduction of her indebtedness as recited in the agreement to reconvey. After this, but before the final distribution of the estate, Hewlett, by two several deeds, in which Nancy J. Morrow joined, conveyed to two other persons the interest and shares which she had conveyed to him in two parcels of the real estate in question, and, upon receiving the consideration therefor, applied the same in further reduction of the indebtedness of Morrow to the estate. Upon final settlement of the estate a decree of distribution was made, by which all the distributive share of Nancy J. Morrow was assigned to Hewlett, as grantee of her deeds, except as to the two parcels already conveyed away to others. After this decree, upon petition for partition previously filed, the court made an order for partition by commissioners, who in due course reported, inter alia, that they had allotted to Hewlett the above-mentioned promissory note of Nancy J. Morrow, and the real estate described in the schedule of property which she filed with her voluntary petition in bankruptcy herein. Such allotment was made subject to such charges for owelty of partition and expenses as left a balance of $400 still due and unpaid on said note of the bankrupt. The report of the commissioners was confirmed, and the partition made by them adjudged to be valid and final. The other facts of the case, so far as they bear on the question of the bankrupt's application for discharge, sufficiently appear in the opinion of the court.

Edward C. Harrison, for bankrupt.
Chickering, Thomas & Gregory, for opposing creditors.

DE HAVEN, District Judge. The parties to this proceeding have, in addition to other matters, stipulated as a fact:

"(12) That said Nancy J. Morrow has never claimed, and has never believed she had any right to claim, any interest or equity in any of the property of said estate of said deceased since the final distribution and partition thereof, other than her right to a reconveyance of said real property described in said schedule herein upon payment of the aforesaid balance of $400 still due on her said promissory note, with interest at legal rate from December 12, A. D. 1898."

This is, in substance and effect, a stipulation that the bankrupt did not believe that she had any interest in the property mentioned in other parts of the stipulation, and not included in her schedule of assets. If this was her honest belief, even though it should be conceded that at the time of filing her petition in bankruptcy she had an interest in other property, the court would not be warranted in finding that she omitted to include such property in her schedule of assets for the purpose of concealing the same from the trustee in bankruptcy, or with the intention of defrauding her creditors; and the omission to include property in the schedule of assets filed by a bankrupt, when such omission was due to a mistake either of law or fact, is not an offense under subdivision "b" of section 29 of the bankruptcy act, and is not ground for withholding a discharge. In re Parker, 4 Biss. 501, Fed. Cas. No. 10,720; Loveland, Bankr. § 230. This view makes it unnecessary to

determine whether the bankrupt has any substantial interest in other property referred to in the stipulation, and not included in the schedule of assets filed in this proceeding. There will be a general finding that the specifications of opposition to the bankrupt's discharge filed by the First National Bank of Oakland are not sustained by the stipulated facts, and the petition for discharge is granted.

MAR BING GUEY v. UNITED STATES.

(District Court, W. D. Texas. November 1, 1899.)

1. ALIENS—STATUS OF CHINESE PERSONS—MERCHANTS.
   A Chinese man, who owns an interest in a mercantile firm, but is not actively engaged in the conduct of its business, and who works as head cook in a restaurant, of which he is a part proprietor, is a laborer, and not a merchant, within the terms of Act Nov. 3, 1893 (28 Stat. 8).[1]
2. SAME—DEPORTATION OF CHINESE—ERRONEOUS DECISION PERMITTING ENTRY.
   Under Act July 5, 1884, §§ 6, 12 (23 Stat. 116, 117), which requires Chinese persons other than laborers desiring to enter the United States, and not domiciled therein, to procure a certificate from the Chinese authorities, visé'd by the consular representative of the United States, and makes such certificate the only evidence receivable to establish the right of such person to enter, a Chinese person erroneously permitted to enter without such certificate is unlawfully within the United States, and may be arrested and deported, without regard to his occupation since his entry; and in such case the action of the customs official in permitting his entry is not even prima facie evidence of his right to remain.

This case is on appeal from the decision of the United States commissioner at El Paso ordering the deportation of the appellant, Mar Bing Guey, to China, for being unlawfully in the United States.

On the 10th day of June, 1899, Mar Wing Joh, the father of the appellant, made application to the collector of customs at El Paso, Tex., for the admission of his son into the United States. The application was predicated upon the affidavit of two citizens, Parker and McPhetridge, and the affidavits of Mar Wing Joh and Mar Bon. The affidavit of Parker and McPhetridge is as follows: "Whereas, Mar Wing Joh, a Chinese resident of the city of El Paso and state of Texas, a correct photographic likeness of whom appears upon this page, is desirous of establishing his status as Chinese merchant, to the end that his son, Mar Bing Guey, may be permitted to enter the United States of America for the purpose of joining his father: Now, therefore, we, the undersigned residents of the city of El Paso, and citizens of the United States, do solemnly swear that we are personally well acquainted with the said Mar Wing Joh, and that we have been so acquainted with him for more than five years last past; that he was for several years a member of the firm of Woey Gee & Co., Chinese merchants doing business at the corner of Oregon and Second streets in El Paso, and that he is now a Chinese merchant, and a member of the firm of Hong Chun & Co., recently organized, and doing business at 117 Second street, in El Paso, Texas; and we do further swear that we have reason to believe and do believe that the interest of the said Mar Wing Joh in said mercantile business is of the value of one thousand dollars." Mar Wing Joh made affidavit to the following statement: "I, Mar Wing Joh, do solemnly swear that Mar Bing Guey, a correct photographic likeness of

[1] As to citizenship of Chinese persons, see note to Gee Fook Sing v. U. S., 1 C. C. A. 212, and, supplementary thereto, note to Lee Sing Far v. U. S., 35 C. C. A. 332.

whom appears on this sheet, is my lawful son, and that he was born in the village of Nan Yong, in the province of Kwang Tung, in the empire of China; that he was born on the 15th day of May, eighteen hundred and eighty-eight; that his mother is now dead; that I have been a resident of the city of El Paso and state of Texas for about eleven years last past. I do further solemnly swear that I am a Chinese merchant, and a member of the firm of Hong Chun & Co., recently organized, and doing business at No. 117 Second street, in the city of El Paso, Texas, and that my interest in the said mercantile business is of the reasonable value of more than one thousand dollars; that for several years previous to the formation of the firm of Hong Chun & Co. I was a member of the firm of Woey Gee & Co., a firm carrying on a general Chinese merchandise business at the corner of Oregon and Second Sts., in El Paso, Texas, which said firm is since dissolved. I further solemnly swear that the said Mar Bing Guey is without any other lawful guardian and custodian than myself." The affidavit of Mar Bon will be pretermitted, as it is not regarded as material. On the date of the presentation of the application the collector permitted the appellant to enter the United States pursuant to the following indorsement made by him on the papers: "Admitted on within evidence this 10th day of June, A. D. 1899." Upon further investigation into the facts of the case, the collector concluded to revoke his action granting the appellant permission to enter, and on July 29, 1899,—the date of the appellant's arrest for being unlawfully in the United States,—he made the following indorsement on the affidavits: "On reinvestigation of within case, it is found the within evidence is not true, and permission to enter is hereby revoked." Accompanying the record is a certificate of residence in the usual form issued to Mar Wing Poh—intended for Mar Wing Joh—as a laborer by the collector of internal revenue of the Third district of Texas on the 29th day of January, 1894. The remaining material facts which have been agreed to by counsel are substantially: (1) That the appellant is a native of China, the son of Mar Wing Joh, and was born May 15, 1888; (2) that Mar Wing Joh has resided in El Paso since the year 1888, and that the certificate issued to him is a genuine laborer's certificate; (3) that Mar Wing Joh was formerly a member of the firm of Woey Gee & Co., general Chinese merchants doing business in El Paso, Tex., and remained a member of said firm until its dissolution in 1896; that in 1898 he became a member of the firm of Hong Chun & Co., general Chinese merchants doing business in El Paso, and is a member of said firm at the present time; (4) that since 1892 Mar Wing Joh has not actively engaged in conducting such business of merchandising, and has not been about said stores engaged in buying and selling merchandise; that he owns a one-third interest in the restaurant known as the "Union Kitchen," and is the head cook in it, and that he has been cooking since the date of the issuance to him of his certificate of residence; (5) that shortly after the entrance of the appellant into the United States his father placed him in a night school, where he is being taught reading and writing in English, and he has been in regular attendance upon said school up to the date of his arrest; (6) the appellant has not been engaged in any manual labor; his mother died about one year ago, and after her death he left China, and came to Juarez, Mexico. He has never been in the United States before.

Richard F. Burges, for appellant.

Henry Terrell, Dist. Atty., and A. G. Foster, Asst. Dist. Atty., for the United States.

MAXEY, District Judge, after stating the facts as above, delivered the following opinion:

It appears from the foregoing statement that it was the purpose of Mar Wing Joh, in submitting affidavits to the collector of customs, to establish his status as a merchant, with the view of securing the admission of the appellant into the United States. The appellant had never before been in this country, and the father doubtless entertained the view that, with his own status as a merchant

established to the satisfaction of the collector, such status would be imputed to his minor child, and that he could enter without obtaining the certificate required by the sixth section of the act of July 5, 1884 (23 Stat. 116, 117). And it is contended by counsel for the appellant that, the collector having permitted the appellant to enter upon the evidence submitted to him, he was thereafter lawfully in the country, and it was beyond the power of the collector to revoke the permission to enter previously granted. In view of the conclusion reached by the court upon other questions presented by the record, it is not deemed important to determine whether the collector had authority to recall his previous action; and, leaving that question for future consideration, the court will assume that when the appellant was arrested for being unlawfully in the country he was here by permission of the collector. But the action of the collector was not final. The court may still inquire whether the appellant was lawfully in the country, and, if unlawfully here, it is the duty of the court to deport him. The principle is clearly stated by Judge De Haven in the case of U. S. v. Lau Sun Ho (D. C.) 85 Fed. 423, 424, in the following language:

"But the action of a collector of customs in permitting a Chinese alien to land in this country is not in any sense judicial, and does not fall within the rule applicable to decisions of special tribunals of the character of those which have been referred to. The law does not give to such order or permission the effect of a judgment that such person is entitled to remain in the United States. The only effect of such permission is that the passenger claiming the right so to do is allowed to land, and if subsequently such alien is arrested, and charged with being unlawfully in the United States, the order of the collector of customs, under which such person was permitted to land, is not even prima facie evidence of his right to remain in the United States; and the court, in such a proceeding, inquires into the truth of the matter unembarrassed by such order of the collector." In re Li Sing, 30 C. C. A. 451, 86 Fed. 896; In re Li Foon (C. C.) 80 Fed. 881; U. S. v. Loo Way (D. C.) 68 Fed. 475; U. S. v. Gee Lee, 1 C. C. A. 516, 50 Fed. 271. See, also, U. S. v. Jung Ah Lung, 124 U. S. 621, 8 Sup. Ct. 663; U. S. v. Chung Shee, 22 C. C. A. 639, 76 Fed. 951.

Was the appellant then lawfully in the United States at the date of his arrest? If it be conceded, ex gratia argumenti, and as held by Judge Hanford, of the Ninth circuit, in the cases of In re Lee Yee Sing (D. C.) 85 Fed. 635, and U. S. v. Gue Lim (D. C.) 83 Fed. 136, that the minor son of a resident merchant may enter the country for the first time without having obtained the certificate required by the sixth section of the act of 1884, does it appear from the record that Mar Wing Joh is a merchant, within the meaning of the Chinese exclusion acts? By the second paragraph of section 2 of the act of November 3, 1893, "merchant" is defined as follows:

"The term 'merchant' as employed herein and in the acts of which this is amendatory, shall have the following meaning and none other: A merchant is a person engaged in buying and selling merchandise, at a fixed place of business, which business is conducted in his name, and who during the time he claims to be engaged as a merchant, does not engage in the performance of any manual labor, except such as is necessary in the conduct of his business as such merchant." 28 Stat. 8.

While the testimony shows that Mar Wing Joh has owned an interest in two mercantile establishments at El Paso, and still re-

tains an interest in one of them, it is further shown, in the written stipulation of counsel, that he has not actively engaged in conducting the business, but that he has a third interest in a restaurant, of which he is the head cook, and that he has been cooking since the date of his certificate of residence, issued to him as a laborer in 1894. Tested by the plain provisions of the statute, he is not a merchant, but a laborer, and is entitled only to such rights and privileges as pertain to Chinese persons of his class. In re Ah Yow (D. C.) 59 Fed. 561; Lew Jim v. U. S., 14 C. C. A. 281, 66 Fed. 953; Lai Moy v. U. S., 14 C. C. A. 283, 66 Fed. 955; U. S. v. Yong Yew (D. C.) 83 Fed. 832; U. S. v. Chung Ki Foon (D. C.) 83 Fed. 143.

It is further insisted by counsel for the appellant that the latter is shown by the testimony to be a student, and it is therefore assumed that he is not within the prohibited class. Congress has clearly indicated by the sixth section of the act of July 5, 1884,[1] how Chinese persons, other than laborers, may lawfully enter the United States:

Such persons who may be entitled to come to this country (except diplomatic and other officers, who are exempted from the provisions of the act of congress by section 13), "and who shall be about to come to the United States, shall obtain the permission of and be identified as so entitled by the Chinese government, or of such other foreign government of which at the time such Chinese person shall be a subject, in each case to be evidenced by a certificate issued by such government, which certificate shall be in the English language, and shall show such permission, with the name of the permitted person in his or her proper signature, and which certificate shall state the individual, family and tribal name in full, title or official rank, if any, the age, height and all physical peculiarities, former and present occupation or profession, when and where and how long pursued, and place of residence of the person to whom the certificate is issued, and that such person is entitled by this act to come within the United States."

It is further provided that the certificate and the identity of the person named therein shall, before such person goes on board any vessel to proceed to the United States, be viséd by the indorsement of the diplomatic or consular representative of the United States, etc. And it is further provided that:

"Such certificate viséd as aforesaid shall be prima facie evidence of the facts set forth therein and shall be produced to the collector of customs of the port in the district in the United States at which the person named therein shall arrive, and afterward produced to the proper authorities of the United States whenever lawfully demanded, and shall be the sole evidence permissible on the part of the person so producing the same to establish a right of entry into the United States; but said certificate may be controverted and the facts therein stated disproved by the United States authorities." 23 Stat. 116, 117.

By section 12 of the act it is provided:

"That no Chinese person shall be permitted to enter the United States by land without producing to the proper officer of customs the certificate in this act required of Chinese persons seeking to land from a vessel. And any Chinese person found unlawfully within the United States shall be caused

[1] Note by the Court: Section 6 of the act of 1884, above referred to, does not apply to Chinese merchants already domiciled in the United States, who, having left the country for temporary purposes, animo revertendi, seek to reenter it on their return to their business and their homes. Lau Ow Bew v. U. S., 144 U. S. 47, 12 Sup. Ct. 517.

to be removed therefrom to the country from whence he came, and at the cost of the United States, after being brought before some justice, judge or commissioner of a court of the United States and found to be one not lawfully entitled to be or to remain in the United States."

It is conceded by counsel that the appellant did not procure the certificate required by the act of congress prior to his departure from China, nor did he attempt to comply, in any respect, with the provisions of the act. Under the law the certificate was the sole evidence permissible to establish his right of entry. His entry, therefore, was unlawful, and his residence here is equally so; and it is made the imperative duty of the justice, judge, or commissioner to cause a Chinese person to be deported "if found to be one not lawfully entitled to be or to remain in the United States." The statutes above referred to effectually dispose of this case, and the ruling here announced finds abundant authority in its support. Wan Shing v. U. S., 140 U. S. 424, 11 Sup. Ct. 729; U. S. v. Chu Chee, 35 C. C. A. 613, 93 Fed. 797; In re Li Foon (C. C.) 80 Fed. 881; In re Wo Tai Li (D. C.) 48 Fed. 668.

Counsel further insists that, should the appellant be deported to China, he would still have the right to return as a student, and his deportation would result merely in a useless expense to the government, and an unnecessary hardship upon the appellant. Whether he would be entitled to return to the United States admits of serious question. The circuit court of appeals for the Ninth circuit in the case of U. S. v. Chu Chee, supra, held that the status of minor children, under the laws, was that of the father, and that "the policy of the exclusion acts is to prohibit the entry into the United States of the entire class of Chinese laborers as a class." If his right to return, however, should be conceded, it would still be the duty of the court to enforce the law. The plain, unambiguous language of the statute should not be disregarded because its enforcement would result in inconvenience, nor should its meaning be frittered away by judicial misconstruction to mitigate the supposed hardships of particular cases.

If the court has erred in the conclusions announced, the appellant may have the error corrected by the appropriate tribunal. U. S. v. Gee Lee, supra. For the reasons assigned, the order of deportation passed by the commissioner should be affirmed, and it is so ordered.

In re LOUIE YOU.

(District Court, D. Oregon. September 14, 1899.)

No. 4,471.

ALIENS—EXCLUSION OF CHINESE—EVIDENCE OF NATIVITY.

The uncorroborated testimony of Chinese witnesses will not be accepted as sufficient to identify a Chinese person claiming the right to enter the United States on the ground that he was born in this country, where it is admitted that he left it when 3 years old, and has remained away for 16 years.[1]

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[1] As to citizenship of the Chinese generally, see notes to Gee Fook Sing v. U. S., 1 C. C. A. 212, and Lee Sing Far v. U. S., 35 C. C. A. 332.

This was an application by Louie You, a Chinese person, for a writ of habeas corpus. On petition for rehearing. Denied.

James Gleason, for petitioner.
Edwin Mays, for government.

BELLINGER, District Judge. This is a petition for a rehearing in the case of Louie You, in whose behalf a writ of habeas corpus was sued out some time since, and where, upon a hearing, the writ was dismissed for want of proof of the identity of the petitioner. The facts are that the petitioner claims to be one of the sons of a former Chinese merchant residing in this city, named Louie Park. Louie Park left the United States some 16 years ago, with his family, and has since resided in China. He has been deterred from returning to this country by the fact that he became liable, in a civil action, for a very large amount of money, growing out of a business transaction in which he was concerned during his residence in this city. This fact is urged in behalf of the petitioner, as explanatory of the long absence of the alleged son of Louie Park in China. The fact that Louie Park, during his residence in Portland, had children born to him here, is established by white testimony, but there is no white testimony tending to show that the petitioner is one of that family. The petitioner claims that he went away with his father 16 years ago, when he was 3 years of age. Three Chinese witnesses testify that he is the son of Louie Park, born here. One of these is his brother, another is his father's former partner, and a third is the Chinese doctor who claims to have been present at the birth of the petitioner. It may be that this petitioner is the son of Louie Park. I have no means of satisfying myself that he is what he claims to be, unless I accept unreservedly the uncorrobarated testimony of these Chinese witnesses, and this I am unwilling to do. I am not willing to establish the precedent of admitting Chinese persons, who have admittedly remained out of the country for so great a length of time, unless some white witness, or some fact not depending upon Chinese testimony, corroborates the testimony of the Chinese witnesses relied upon to establish the identity of the person who seeks a landing. Those who leave the country when infants must not expect to gain ready readmission after they have, in effect, reached maturity. If satisfactory proof of their right to land is not possible in such a case, the fault is theirs. The difficulty is one easily foreseen. It is true that the father of Louie You seems to have a sufficient reason for his long absence from the country, but this merely explains the absence of himself and family. It makes no difference whether he had a reason for remaining away or whether he ever had an intention to return. These are matters that have little or nothing to do with the question of the nativity of the petitioner, which cannot, under such circumstances, be established by the uncorroborated testimony of Chinese witnesses. The petition is denied.

JEW SING v. UNITED STATES.

(District Court, W. D. Texas, El Paso Division. November 1, 1899.)

DEPORTATION OF CHINESE—EFFECT OF CERTIFICATE OF RESIDENCE.

A certificate of residence issued to a Chinese person under the act of May 5, 1892, as amended by the act of November 3, 1893 (28 Stat. 7), providing that "any Chinese person, other than a Chinese laborer, having a right to be and remain in the United States, desiring such certificate as evidence of such right, may apply for and receive the same without charge," is prima facie evidence of the right of the holder to remain in the country, of which right he can only be deprived by the courts upon clear proof that he has committed some act which would work its forfeiture.

This was an appeal by Jew Sing from an order of deportation made by a commissioner.

W. C. McGown and Beall & Kemp, for appellant.
Henry Terrell, U. S. Atty., and A. G. Foster, Asst. U. S. Atty.

MAXEY, District Judge. This case is before me on appeal from the order of the United States commissioner at El Paso deporting the appellant, Jew Sing, to China, for being unlawfully in the United States. Sing is a Chinaman, and had upon his person when arrested a certificate of residence, in the usual form, issued to him as a general merchant on the 2d day of March, 1894, at San Francisco, by O. M. Welborn, who was then collector of internal revenue of the First district of California. The certificate was admitted by the district attorney to be genuine, and to have been duly issued to the appellant. A full description of the appellant, including his occupation as a general merchant, is given in the certificate, which also contains the following recital:

"This is to certify that Jew Sing, a Chinese person, other than a laborer, now residing at San Francisco, has made application, No. 6,205, to me for a certificate of residence under the provisions of the act of congress approved May 5, 1892; and I certify that it appears from the affidavits of witnesses submitted with said application that said Jew Sing was within the limits of the United States at the time of the passage of said act, and was then residing at San Francisco, California, and that he was at that time lawfully entitled to remain in the United States."

It bears upon its face the following indorsement in red ink: "Issued under amendatory act of November 3, 1893;" and the photograph of appellant is pasted upon the certificate. He was arrested on the 8th day of August, 1899, by virtue of a warrant issued by the commissioner on that day, based upon an affidavit made by Charles Mehan, a Chinese inspector at El Paso. The question of fact in the case was whether the appellant, while residing in the United States as a general merchant, had visited the republic of Mexico, and clandestinely returned without complying with the provisions of the third paragraph of section 2 of the act of 1893. If it be conceded, as the district attorney insists, that the appellant was in Juarez, Mexico, on the 28th day of July, 1899, and that he re-entered the United States without making the proof required by that act, the important question of law would arise, whether the paragraph of the act referred to

applied to Chinese merchants who were residing in the United States at the date of the passage of the act, or was applicable to those only who might come into the United States for the first time since that date. Atty. Gen. Olney, in two opinions, held that the act applied exclusively to Chinese merchants who come into this country for the first time subsequent to the passage of the act. In concluding his first opinion he said:

"I am constrained to the conclusion, therefore, that this third paragraph of section 2 of the act of November 3, 1893, is to be regarded as wholly prospective in its operation, and as applying exclusively to Chinese merchants who both come into the United States for the first time since November 3, 1893, and, having carried on business here, afterwards leave the country and seek to return. Merchants already here when the statute took effect may leave the country and return as if the act of November 3, 1893, had not been passed." 21 Op. Attys. Gen. 21; Id. 99.

A contrary view, however, seems to have been taken, under somewhat differing facts, by the circuit court of appeals for the Ninth circuit, and by Judges Morrow and Welborn. Lew Jim v. U. S., 14 C. C. A. 281, 66 Fed. 953; Lai Moy v. U. S., 14 C. C. A. 283, 66 Fed. 955; In re Yee Lung (D. C.) 61 Fed. 641; In re Loo Yue Soon (D. C.) 61 Fed. 643; U. S. v. Loo Way (D. C.) 68 Fed. 475.

Just what view of the question of law this court would be inclined to adopt, it is not necessary in the present case to determine, for the reason that the order of deportation made by the commissioner must be reversed upon the facts. The certificate of residence was issued to the appellant, as a merchant, under the sixth section of the act of May 5, 1892, as amended by the act of November 3, 1893, which provides, among other things, as follows:

"And any Chinese person, other than a Chinese laborer, having a right to be and remain in the United States, desiring such certificate as evidence of such right, may apply for and receive the same without charge." 28 Stat. 7.

Certificates issued under the act have a meaning and value. They are the evidence of the right of the holder to remain in the country. The right thus conferred is a valuable one, to be taken away by the courts only upon clear proof that the holder has committed some act which would deprive him of the privilege of remaining in the United States. The certificate makes out a prima facie case in behalf of the right to remain. To overcome the presumptions arising from the possession of the certificate, the testimony should be clear and convincing, and until the government has made out such a case the holder of the certificate is not required to make further proof. In this case it is contended by the district attorney that the appellant has forfeited his right to reside in the United States by crossing the river into Mexico and clandestinely returning. Has the government clearly shown that the appellant was ever in Mexico? The testimony of Mehan, who was the only witness offered in behalf of the government, falls short of clearly showing that the appellant was the man whom he saw at Juarez with two other Chinamen on the 28th of July. Mehan admitted that he would be unable to identify either of the other two men. He admitted further that he neither recognized nor identified the appellant when he arrested him at

El Paso about 10 o'clock on the morning of the 5th of August at the instance of the Arizona sheriff, and it was not until the afternoon of that day or the next morning that the appellant was recognized by him. It is also shown that the Arizona sheriff mistook the appellant for another Chinaman whom he was endeavoring to arrest for theft, and detained him in custody two or three days upon the supposition that the appellant was the thief. Inspector Mehan doubtless in good faith believed that the man whom he saw at Juarez was the appellant, but a careful analysis of the stenographic notes of the testimony leads to the conclusion that he may have been, and probably was, mistaken. The evidence in this case is not sufficient to justify the court in holding that the appellant has committed any act which would operate as a forfeiture of his right to remain in the country. The order of deportation should therefore be reversed, and the defendant discharged, and it is so ordered.

In re LIPSHITZ.

(Circuit Court, E. D. Pennsylvania. November 16, 1899.)

NATURALIZATION—VOUCHERS.

An applicant for naturalization should produce a voucher other than one who habitually, and for compensation, appears as such.

DALLAS, Circuit Judge. An applicant for naturalization is a suitor who by his petition institutes a proceeding for the purpose of having the right which he claims judicially determined. The burden is upon him to satisfy the court of the existence of the facts which he necessarily alleges. He must furnish the requisite proof, or he establishes no right. In re Bodek, 63 Fed. 813. The law requires that some of the essential facts shall be made to appear to the satisfaction of the court by evidence other than the testimony of the applicant himself, and, to meet this requirement, a single witness is usually produced, who is commonly called a "voucher." The person who has presented himself in this capacity in the present instance has within the last six months borne the same relation to nine cases in this court, and seven in the district court for this district. It appears from his own statement, made in answer to questions put to him by the court, that he has been in the habit of making a charge for appearing and giving his testimony, and that in this case he either has been or is to be compensated. He has said that he has not permitted his testimony to be influenced by any reward or hope of reward, and it is not assumed that it has been; but it is obvious, I think, that a very vicious practice would seem to be sanctioned, if the court should in such cases accept without scrutiny the testimony of any man who habitually and for compensation appears as a voucher. These applications are generally disposed of immediately upon their presentation and investigation, and ordinarily no adequate inquiry into the motives and character of witnesses can be made. Therefore every applicant, except where some peculiar exigency may demand a departure from the rule,

must and will be required to produce a voucher of whose freedom from bias and improper influence there can be no reasonable question.

In this connection I deem it proper to refer to the standing rule of this court which provides that "the papers must be presented and the proceedings conducted by the applicant in person, or by an attorney admitted to the bar of this court." It is of especial importance that these applicants shall be represented only by those whose professional duty and responsibility give assurance of all due fidelity as well to the court as to the client.

The petition of Charles Lipshitz is retained, with leave to the petitioner to renew his application upon producing in its support an acceptable voucher.

HOSTETTER CO. v. COMERFORD et al.

(Circuit Court, S. D. New York. November 14, 1899.)

UNFAIR COMPETITION—BURDEN OF PROOF—SUFFICIENCY OF EVIDENCE.

In a suit for unfair trade, in which it is charged that defendants fraudulently refilled bottles which had contained complainant's bitters with a cheap spurious imitation, which they sold as the genuine article, the burden of proof rests strongly on the complainant; and, where no analysis was made of the samples bought from defendants, who were shown to have purchased the genuine bitters, and the formula of complainant was not disclosed, the complainant's case resting entirely on the opinions of witnesses who had no expert knowledge, the evidence is insufficient to warrant a decree which would brand the defendants as frauds and cheats.[1]

This was a suit in equity for unfair competition and fraud. On final hearing.

Albert H. Clarke, for complainant.

E. Marshall Pavey, for defendants.

COXE, District Judge. The bill charges the defendants with fraud and unfair dealing in selling cheap, spurious bitters to their customers as genuine Hostetter's bitters. It is alleged that this fraud is accomplished by refilling empty bottles, having the trademarks and labels of the complainant, with the imitation article. The charge is a grave one. The defendants are accused of perpetrating a contemptible fraud not only upon the complainant but upon the public as well. The accusation is one which, if sustained, will brand the defendants as common cheats and impostors, outside the pale of decent society and unworthy to associate with honest men. It is an elementary principle of law that such an allegation must be proved; it cannot be imagined or inferred.

The witnesses for the complainant purchased several bottles of the defendants partly full of a liquid which they pronounce to be an imitation of the genuine "Hostetter's bitters." These witnesses are all

[1] As to unfair competition in trade, 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.

in the complainant's employ and they base their opinion upon their familiarity with the taste, smell and color of the genuine article. No one of them is a chemist. No analysis is produced either of the genuine or the alleged bogus article. It is the complainant's misfortune in a case of this character that the formula under which it manufactures is a trade secret and is, therefore, never produced. But when fraud is charged the court cannot close its eyes to the fact that the complainant has in its possession proof which will remove all doubt, and withholds it for its own advantage. It would seem, however, that, even without this disclosure, an analysis of the two liquids by a competent chemist would demonstrate whether or not the ingredients are the same. It is not denied that the resemblance is very close, and yet, as before stated, the case for the complainant rests upon the opinion of witnesses who have had long experience, it is true, but no special expert knowledge. On the other hand, the defendants and all of their employés deny in the most emphatic manner that they ever refilled empty bottles with bogus bitters. It is shown that the defendants purchase largely from the well-known and highly-reputable house of Acker, Merrill & Condit and that during the time in question they bought at least two cases of genuine Hostetter's bitters from that firm. It also appears that the demand for these bitters is very limited in the saloon business. It is used more as a medicine than as a beverage. In some of defendants' saloons it is not sold at all. Again, there is nothing in the record to indicate that the defendants are men who would descend to the level of the petty trickster. For aught that appears they are men of fair standing in the business in which they are engaged. The burden is strongly upon the complainant to prove fraud by a fair preponderance of evidence. This it has not done. Stated as fairly as the complainant can expect the matter is involved in doubt. Should the court decree for the complainant it would be still harassed by the fear that it may have condemned innocent men. The situation is almost identical with that which confronted this court in Hostetter Co. v. Bower (C. C.) 74 Fed. 235. The absence of an analysis in that case was the subject of comment at the argument and in the decision. With the attention of the complainant drawn so sharply to the subject it would seem that in the present case the defect should have been remedied. The bill is dismissed.

TROW DIRECTORY, PRINTING & BOOKBINDING CO. v. BOYD.

(Circuit Court, S. D. New York. October 4, 1899.)

COPYRIGHT—SUIT FOR INFRINGEMENT—PRELIMINARY INJUNCTION.

In a suit for infringement of a copyrighted directory by copying therefrom lists of names used by defendant in a rival publication, where the moving affidavits for a preliminary injunction make a strong showing of infringement, and defendant fails to furnish the testimony of the canvassers whose work is attacked, or the lists returned by them, he will be required to give security to respond for any damages which may ultimately be recovered against him; otherwise, an injunction will be awarded.

This is a suit in equity for infringement of a copyrighted directory. On motion for preliminary injunction.

Wm. F. Opdyke, for the motion.
Samuel D. Levy, opposed.

LACOMBE, Circuit Judge. The moving papers make out a very strong prima facie case of infringement, and called for the fullest and most detailed reply from the defendant. The explanations, however, contained in the affidavits submitted in his behalf, are not entirely satisfactory. It seems undesirable to discuss at length the various charges of infringement as they are presented now upon the affidavits of both sides. Precisely these questions will have to be disposed of at final hearing, when the record may be changed in many particulars; and the expression of an opinion at this early stage might possibly tend to embarrass the court at final hearing. Suffice it to say that the impression produced by a careful consideration and analysis of all the affidavits is that several of the canvassers employed by the defendant disobeyed the instructions given to them, and made up their returns largely from the complainant's publication, instead of from their own investigations. Of course, for their acts the defendant is responsible, whatever instructions he may have given. This impression is most strongly confirmed by the circumstance that in almost every instance of infringement charged by the complainant there has been a failure to produce either the individual canvasser whose work is thus attacked, or his original return to his employer, or even the statement of his name. It is suggested that to a greater or less extent the original documents are lost or destroyed. When it is borne in mind that the defendant has had large experience in the production of directories, and it is further borne in mind that he must have anticipated competition with complainant's work, and a suit of this very character, should the complainant find anything to base it on, it is most extraordinary that he should not have preserved records sufficient to enable him to determine, as to any particular list of names, the identity of the canvasser or canvassers who reported them. Under the principles enunciated in West Pub. Co. v. Lawyers' Co-operative Pub. Co., 25 C. C. A. 648, 79 Fed. 756, the work of the dishonest employés, when identified, could be eliminated from the work, and thus an honest defendant would not be exposed to the loss of his entire work. Nevertheless, an injunction to the full extent prayed for by the complainant would, if issued now, be practically a judgment in advance of trial, which would work irreparable injury to the defendant, while it seems as if the complainant might be sufficiently protected by a bond and an account of sales. The complainant may therefore take an order directing the defendant within 10 days to file a bond in the amount of $10,000 to respond for any damages or profits to which complainant may be ultimately held entitled, and further requiring the defendant to file, not later than the 10th day of each month, a sworn statement of the sales of the alleged infringing directory for the prior calendar month, giving the name and address of each purchaser; and further providing that, in the event of failure to file such bond, or to file the required statement of sales, a preliminary injunction as prayed for may issue.

TESLA ELECTRIC CO. v. SCOTT et al.

(Circuit Court, E. D. Pennsylvania. September 27, 1899.)

No. 28.

1. PATENTS—INVENTION—ELECTRO-MAGNETIC MOTORS.
The Tesla patents, No. 511,915, for electrical transmission of power, and No. 555,190, for an alternating motor, both of which relate to electro-magnetic motors operated by alternating currents of electricity, considered, and each *held* to involve invention, in view of the prior art, including the other patents in suit previously granted or applied for, and also the prior patents to the same inventor relating to the same subject-matter. Each of said patents also *held* infringed.

2. SAME—SUIT IN EQUITY FOR INFRINGEMENT—DEFECT OF PARTIES.
The objection that complainant in a suit for infringement of a patent has assigned his interest therein to one who is not joined as a party complainant, when not taken by the pleadings, and first urged on the hearing, will not be deemed ground for dismissing the bill, which would only result in requiring a second trial of the same issues, but the complainant will be given leave to join his assignee.

This was a suit in equity by the Tesla Electric Company against Scott & Janney and others for infringement of certain letters patent relating to electro-magnetic motors.

Kerr, Page & Cooper, for complainant.
Alexander & Magill and Albert H. Walker, for respondents.

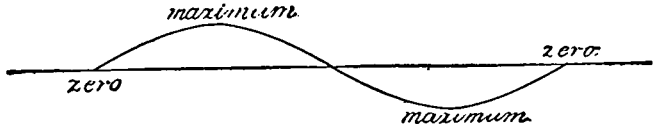
McPHERSON, District Judge. The defendants are charged with infringing letters patent Nos. 511,915 and 555,190, granted to the plaintiff as assignee of Nikola Tesla. The patents relate to electro-magnetic motors operated by alternating currents of electricity, and the points in controversy cannot be understood without a brief preliminary consideration of certain properties manifested by the electric fluid. I condense the following account from the brief of plaintiff's counsel, understanding that no objection is made by the defendants to the accuracy of the theory now to be repeated:

Suppose two coils of insulated wire, A and B, to be wound in opposite directions, and placed at two points on a soft iron bar, C. If a current of electricity be passed through either coil, or through both coils, the bar will become a magnet for the time being. If a current of given direction be passed through coil A alone, a north pole will be thus produced at one end of the bar, and a south pole at the other end. The same current passed through coil B alone will also produce north and south poles, but in reversed positions. If the same current be passed through both coils at the same time, a north pole will be produced in the bar midway between the coils. If the current through coil A is weaker than the current through coil B, the stronger current will have more influence upon the position of the pole, and will fix it nearer to A than to B. If the stronger current be shifted from A to B, the position of the pole will also be shifted to a point nearer to B than to A; and thus, by increasing

and decreasing from zero to maximum the relative strength of the currents through the respective coils, the pole may be made to travel backward and forward from one end of the bar to the other. If, therefore, a magnetic bar or armature, D, be suspended near the bar, and be free to move, it will inevitably follow the pole in this backward and forward movement. The bar need not be continuous, and need not be straight. It may be bent into the form of a ring. Soft iron forms a better path for the magnetic lines that flow from the coils than the air affords; but the lines will pass through the air for some distance, and therefore the middle section of the bar may be removed, leaving only the sections that are surrounded by the coils, or the bar may be removed altogether. In either event the armature, D, will still be affected magnetically, while its movement may be less obstructed. The partial removal of the bar may therefore be an important physical advantage. The movement of the armature will depend upon the relative strength of the magnetizing influences of the coils, and upon the forces that may be set in motion by these influences.

If, therefore, the pole is to shift uniformly, and is thus to produce a uniform magnetic attraction, the electric current passing through each coil must vary in strength, and must vary uniformly. There must be a definite relation between the two currents, and this relation must be constant in all the changes in strength that the currents undergo. Tesla discovered—and the discovery has been of vast importance—how to use alternating currents of electricity so as to bring about this uniform shifting of the poles or attractive forces in a motor, and thus to cause the rotation of an armature, and the consequent transmission of power.

A continuous current of electricity flows in one direction only, and in its course does not vary much in strength. An alternating current flows backward and forward, and in its course varies in strength four times between zero and maximum. It begins at zero, increases in a given direction to maximum, decreases again to zero, increases to maximum, but now in the opposite direction, and finally decreases once more to zero. The following curve will serve to illustrate what takes place:



The application of alternating currents in the operation of motors will be best shown by examining another of Tesla's patents, No. 381,968. Fig. 3 of this patent shows a generator of alternating currents, and a motor connected therewith. In this motor the soft iron bar, C, is bent into the shape of a ring, around which are wound two pairs of magnetizing coils, A and B, arranged alternately. The armature, D, is centrally mounted within the ring, and is free to

revolve upon this central axis. If a current be passed through coil A alone, a horizontal line of polarization will be developed in the core, C. A similar current through coil B alone will develop a vertical line of polarization, while currents of equal strength passed through both sets of coils at the same time will produce a resultant line of polarization that will be diagonal in direction, midway between the horizontal and vertical lines. If the two currents be applied at the same time, but varying in strength and direction, the poles will travel around the ring, and the shifting magnetic attraction, or rotating field, will draw the armature after it. The necessary variations in the strength and direction of the two currents are produced in the generator. What takes place there is thus detailed in the account I have been following:

"E and F, in said generator, are two field-magnet poles; G, a cylindrical armature mounted to rotate between them; and H, K, two coils wound on the armature at right angles to each other.

"It is well known that, when any coil is moved in a magnetic field so as to cut at right angles the lines of force extending between the poles, a current is developed in the coil, which depends for direction upon the direction of movement of the coil with respect to the magnetic lines, and for strength or potential upon the number of lines cut per unit of time.

"In any given generator, therefore, such as that shown in Fig. 3, in which the magnetic lines may be assumed to extend across, in parallelism, from one pole to the other, an armature coil, H, moving through such a field in a circular path, will, at one instant of time, cut no lines of force, since its direction is parallel to the direction of the lines. At such instant the coil is developing no current, and is said to be in the neutral position.

"At another point in its path, 90 degrees from the neutral point, the coil is cutting the lines of force at right angles. It is then said to be in the maximum position, because its direction is such as to cut the greatest number of lines per unit of time, and therefore to produce the maximum current. At every intermediate point in its path, from the neutral to the maximum points, it is evident that the coil will cut a gradually increasing number of lines of force in a given angular movement, and will in consequence develop a current which rises from zero to maximum.

"The coil, in passing beyond the maximum point, develops gradually less current until it reaches a point 180 degrees from the start, where it is again said to be at the neutral point, and its current is nil. In moving through the next 180 degrees of arc, the action above described is repeated, but the direction of current is reversed, since the coil is moving in the opposite direction across the lines of force. When the coil has returned to the assumed starting point, it has undergone a complete cycle of changes, and a current has been developed which, in potential and direction, corresponds throughout to the position and movement of such coil. These cycles of current may therefore be regarded as divided into 360 degrees, and we may express the relations of any two of such currents by a statement of their relative displacement as measured by such a scale. Thus, two currents are said to be in phase when they rise and fall simultaneously, and in the same direction. They are said to differ by 90 degrees, or a quarter of a cycle or phase, when one begins to rise from zero positive at the instant that the other begins to fall from maximum positive, and so on.

"In the generator under consideration the coils H and K, having an angular displacement of 90 degrees, will generate alternating currents different by 90 degrees, or a quarter phase; or, in other words, the periods of maximum current in one coil coincide with those of minimum current in the other, and conversely. If, then, the generator coils, K and H, be connected in circuit with motor coils, A and B, respectively, the resulting action will be as shown in the accompanying series of figures:

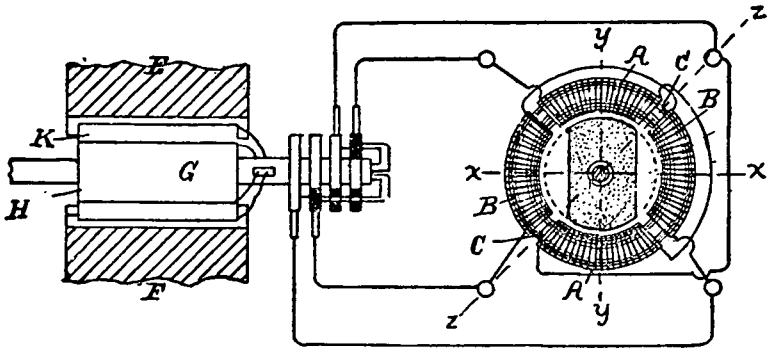


Fig. 3.

"Starting with the generator coils in the position indicated in Fig. 3, the current in coil H is practically nil, whereas the coil K is at the same time developing its maximum current; and, since the last-named coil is in circuit with motor coils, B, a magnetization of the ring, C, results, the poles being in a vertical line, N, S.

"When the generator coils have made one-eighth of a revolution, and reached the position indicated in Fig. 4, both will be generating currents which, owing to the position of the coils in the field, will be of equal strength. Both

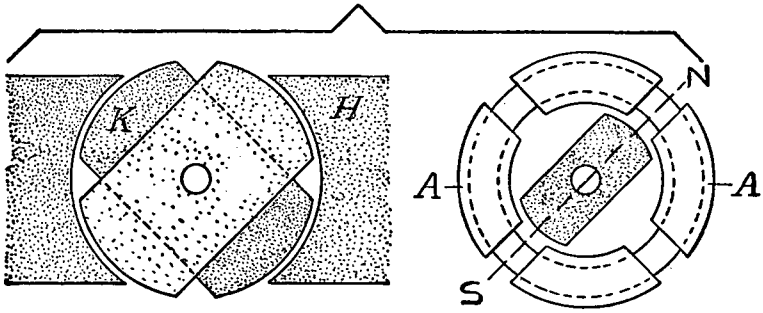


Fig. 4.

pairs of motor coils, A and B, will therefore receive equal currents; and the poles, resulting from the conjoint magnetizing effect, will have advanced along the ring to a position corresponding to one-eighth of the revolution of the armature of the generator.

"In Fig. 5 the armature of the generator has progressed to one-quarter of a

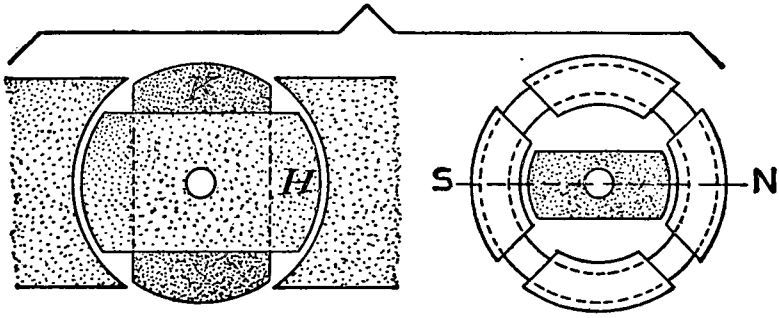


Fig. 5.

revolution. At the point indicated the current in the coil H is maximum, while in K it is nil, the latter coil being in its neutral position. The poles of the ring will in consequence be shifted to a position 90 degrees from that at the start, as shown. In like manner the conditions existing at each successive eighth of one revolution are shown in the remaining figures, a short reference to which will suffice for an understanding of their significance. Fig. 6 illustrates the conditions which exist when the generator armature has com-

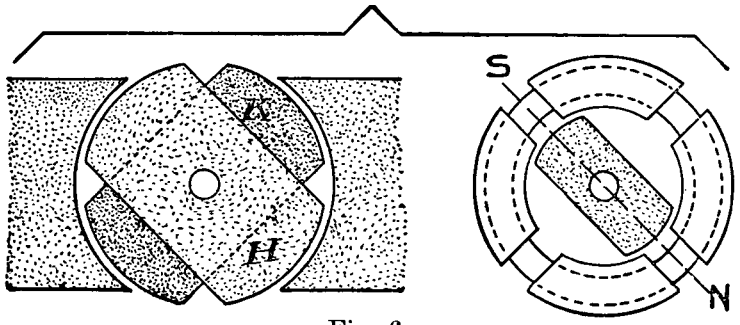


Fig. 6.

pleted three-eighths of a revolution. Here both coils are generating current, but the coil K, having now entered the opposite field, is generating a current in the opposite direction, having the opposite magnetizing effect; hence, the resultant pole will be on the line, N, S, as shown. In Fig. 7 one-half of the revolution of the armature of the generator has been completed, with the re-

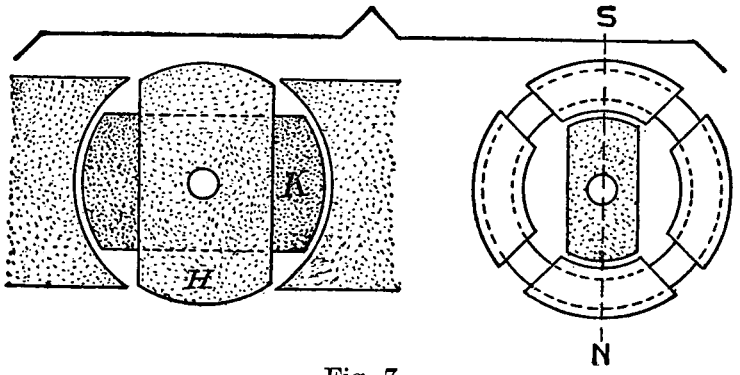


Fig. 7.

sulting magnetic condition of the ring as shown. In this phase coil H is in the neutral position, while coil K is generating its maximum current, which is in the same direction as in Fig. 6. The poles will consequently be shifted through one-half of the ring. In Fig. 8 the armature has completed five-eighths of a revolution. In this position coil K develops a less powerful current, but in the same direction as before. The coil H, on the other hand, having entered a field of opposite polarity, generates a current of opposite direction. The resultant pole will therefore be in the line, N. S; or, in other words,

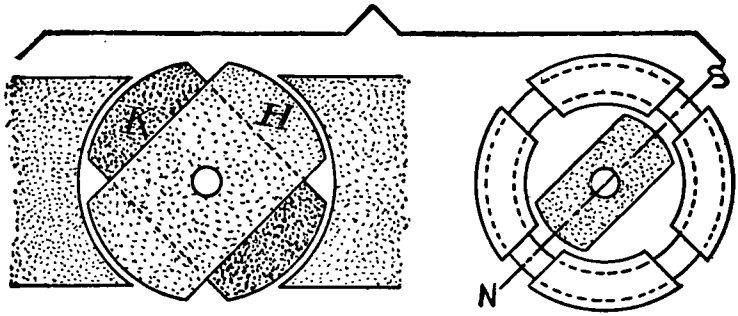


Fig. 8.

the poles of the ring will be shifted along five-eighths of its periphery. Fig. 9 in the same manner illustrates the phases of the generator and the ring at

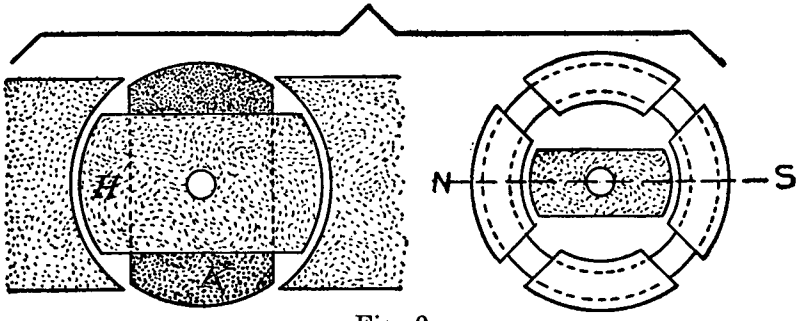


Fig. 9.

three-quarters of a revolution; and Fig. 10, the same at seven-eighths of a

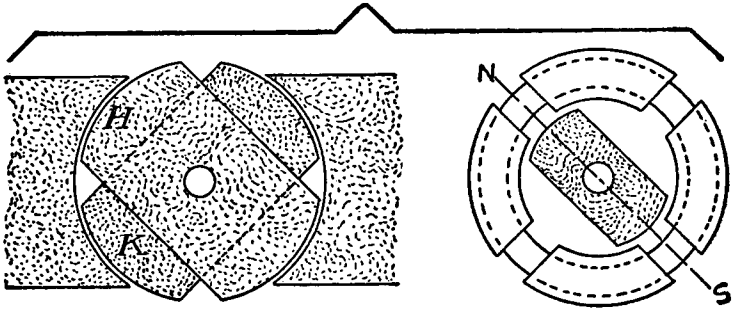


Fig. 10.

revolution of the generator armature. * * * When a complete revolution is accomplished, the conditions existing at the start are re-established, and the same action is repeated for the next and all subsequent revolutions; and, in general, it will be seen that every revolution of the armature of the generator produces a corresponding shifting of the poles, or lines of force, around the ring.

"As the poles of the motor shift, the armature follows; and it will be seen that, in any motor in which a progressive shifting of the poles or points of attraction is produced, there must be a constant drag or pull upon the armature, tending to set and maintain it in rotation."

As already stated, a continuous bar or ring is not essential, and therefore a rotating field may be produced in a motor of the form shown on page 11 of the brief.

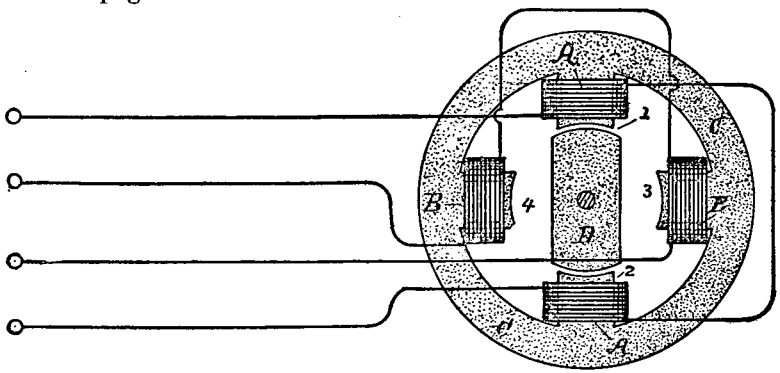


Fig. 11.

"This motor has four poles, 1, 2, 3, 4, projecting inwardly from a ring, C, which may be of iron, brass, wood, or any other material. The poles 1 and 2 are energized by coils, A, which are in one of the circuits from a generator of the same construction as that above described, while poles 3 and 4 are energized by coils, B, in the other circuit of said generator. The currents in the two circuits differ by a quarter phase.

"In such a motor the coils A at a given instant are receiving the maximum current from the generator; and, we will assume, are imparting to the cores which they surround the maximum magnetization. At this moment the poles 3 and 4 will be neutral, since no circuit is flowing in the coils B. An armature, D, therefore, will tend to place itself in the path of the greatest number of magnetic lines, or, obviously, in line with poles 1 and 2.

"Following the phases of the two currents, however, the magnetism of the poles 1 and 2 then decreases, while that of poles 3 and 4 increases, with the result that the attraction of poles 1 and 2 for the armature becomes less, while that of poles 3 and 4 becomes greater, and the armature turns in obedience to the shifting resultant of these two forces. Then, with a change of polarity, the rise and fall of magnetism in the two sets of poles, respectively, continue, as will now be understood."

What has been said will explain Tesla's theory of polyphase alternating current motors.

"His broad invention, expressed in a few words, was the production, by means of two or three alternating currents, differing in phase, of a shifting or rotating magnetic field, as distinguished from one in which the poles, or points of maximum attraction, were merely alternated in polarity, either with or without variation in strength.

"In other words, if the two alternating currents which energize such a motor as that shown in Fig. 11 were exactly in phase, or, what would be the same thing, if the motor were energized by a single alternating current, the magnetism of the poles would rise, fall, and reverse at the same instants of time. Such a motor is capable of maintaining rotation of the armature if the latter be brought, by the application of power, up to a speed corresponding to the rate of alternations of the energizing current. But such a motor will not start

from a state of rest, because there is no rotary effort, or torque, exerted by the field upon the armature, but only a force tending to keep the armature in a fixed position with relation to poles of given sign.

"The moment, however, that a time interval occurs between the periods of magnetization of adjacent poles, such as would result from energizing such poles by currents differing in phase, or any other cause, a rotative tendency is created, due to the shifting or swinging of the magnetic resultant from that pole which reaches its maximum first towards that which reaches it later."

The effect produced by such a motor is the same as would be produced if the poles of permanent magnets were presented to the armature, and the magnets themselves were revolved bodily around it.

The attraction between the armature and the rotating magnetic field may be intensified by placing on the armature itself closed or short-circuited coils. The nearness of the magnetic field will induce currents of electricity in these closed coils, which will thereupon magnetize the armature, and increase the attractive effect between the armature and the field. This feature is a subject of patent No. 382,279 (not now in dispute), and may be further explained as follows:

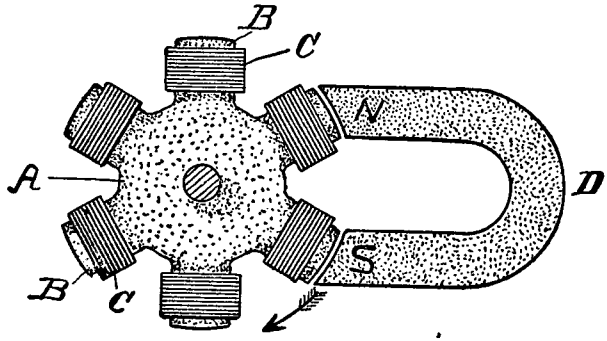


Fig. 12.

"Let A, in Fig. 12, designate a magnetic body mounted on a central shaft, and having a number of polar projections, B, each of which is surrounded by a short-circuited or closed coil or conductor, C. Let D represent a permanent magnet having a north and a south pole, N, S. If, now, the magnet, D, be moved rapidly around the periphery of the magnetic body, A, in the direction of the arrow, while A is held stationary, it is obvious that the passage of its poles in front of the polar projections, B, will cause lines of force to pass into and out of the projections, and these lines threading the closed coils, C, will develop electric currents in said coils. This is what happens in any magneto-electric generator in which the armature coils are moved through the magnetic lines of the field, or the latter are moved through the coils.

"The currents developed by this means will magnetize the cores which the coils surround, and as the development of such currents and the resulting magnetization cannot occur simultaneously with the passage of the poles, but must lag somewhat after it, there will always be magnetized portions in the armature behind the moving poles, and endeavoring to catch up with them. If the armature be free to rotate, there will be between the magnetic poles in the armature, due to the currents induced in the closed coils and the moving poles of the magnet, D, a torque or mutual attraction tending to produce rotation very much greater than would exist between the magnet, D, and the armature, A, if the coils, C, were not present.

"If, instead of moving bodily a magnet, D, around the armature, its action

be imitated by the shifting poles in a ring, or the shifting resultant between polar projections produced by two alternating currents of different phase, the same result would follow, and we should have the highest development of the Tesla motor."

In such a motor as has now been described, the most favorable condition for operation exists when the two currents differ in phase by 90 degrees, or a quarter of a period. To obtain this condition, the currents must proceed from independent sources. They may proceed from different machines, or from different coils in the same machine. In the patents of May 1, 1888, preceding those in suit, the currents were furnished by two complete circuits extending from the generator to the coils of the motor. At that time, however, all alternating-current apparatus was designed for a single circuit, and therefore a Tesla motor could not be used with such apparatus. In order to meet this objection, Tesla devised several schemes by which his motors could be operated by a single circuit. He proposed to split a current into two currents, and to produce a sufficient difference in phase between them to secure the necessary rotating field. For present purposes, only two methods of obtaining the desired result need be considered:

"(1) Splitting a single current into two currents, and obtaining the requisite difference of phase by induction.

"(2) Splitting a single current into two currents by dividing the path of a single current, and obtaining the requisite difference of phase by making the two branches of the main path of different electrical character."

The first method is thus explained:

"If a current be flowing in a conductor, it sets up in the vicinity of such conductor a condition known as a 'field of force.' If another conductor be placed within the influence of this field of force, and parallel to the first, a current will be developed or induced in it by any change that takes place in the strength of the current in the first. But such induced current will not be in phase,—that is, in step with the changes in the original current,—for the reason that the force which causes it to flow is in proportion to the rate of change of the original force. There are obvious complex considerations attending this phenomenon, but for present purposes it is sufficient to accept the general proposition that, whenever one conductor is brought within the inductive influence of another, any change in the current in one conductor induces a current in the other with corresponding, but later, changes.

"Tesla conceived the idea of utilizing this law for the production of a rotating field motor capable of being run from a single circuit.

"Applying this principle to the operation of his motor, he connected one of the energizing circuits directly with the main circuit of a single-phase generator, and near the motor formed the wire of the main circuit into a coil, which he surrounded with a second coil connected with the other motor circuit. By this means there was induced in the second motor circuit a current similar to that which flowed through the first circuit directly from the main line, but later in phase, and, as explained above, this would necessarily result in the operation of the motor."

The second method is as follows:

"A circuit offers to the passage of an alternating current two kinds of resistance,—one known as dead, or ohmic, resistance; the other known as live, or active, resistance. The first is dependent solely upon the length and area of cross-section of the conductors forming the circuit, and upon their specific resistance; that is, upon the kind of metal or material of which they are composed. Copper, for instance, has a low specific resistance, while German silver has a high specific resistance; which simply means that, for a given length

and cross-section of conductor formed of the two metals, copper will oppose to the passage of the current a much lower dead resistance than will the German silver.

"Active or live resistance is of an entirely different character, and is the result, to use a rough analogy, of a sort of inertia which is characteristic of the circuit, and which varies with the arrangement. To carry the inertia analogy still further, it may be said to be comparable to the inertia resistance which is opposed to the attempt to move suddenly on its hinges a heavy door. It is a commonly-observed fact that if an attempt be made to push open a heavy door, however free from friction its hinges may be, the door will not immediately move in response to a pressure exerted upon it, but the motion will lag behind the pressure exerted; but, having once begun to move, it will continue to swing, and will resist an attempt to stop it, so that a pressure in the opposite direction must be exerted for some little time before the motion of the door is reversed. If an attempt were made to swing such a door back and forth, its motion would always lag behind the pressures exerted upon it.

"In a similar or analogous manner, when an attempt is made to send a rapidly varying alternating current through a circuit, the circuit at first resists the flow of the current; and, the current having once started, the circuit resists any change in its strength or direction. This property of a circuit is known as 'self-induction.' It results, therefore, that, where self-induction exists in a circuit, there is a delay, or lag, or displacement of phase, between the current flow and the pressure tending to produce it; and this delay is due to the live resistance, or electro-motive force of self-induction. The analogy just used may be carried still further, and the dead resistance of the circuit may be compared to the friction of the hinges. If there were no resistance opposed to an attempt to move the door, except the friction of the hinges, the door would begin to move the instant a pressure greater than the friction were exerted, and would stop when the pressure ceased; and, in a similar way, the dead resistance of the circuit opposes no varying resistance, and does not delay the current. If the door have both a large inertia and a large friction, the inertia resistance or active resistance will be proportionately less, and a proportionately less force will be exerted in starting it, and it will continue to swing for a shorter time after the force is removed; that is, it will stop quicker. Its delay will therefore be less. In a somewhat analogous manner, an increase of the dead resistance of a circuit will make the effect of its active resistance relatively less, and the delay or lag of the current less.

"Tesla also conceived the possibility of utilizing these facts in the production of a rotary field motor capable of being run by a single circuit, and carried out this conception by dividing a single circuit of alternating current into two branches at the point where the motor was located, and using these two branches as independent circuits to energize the motor. Then, in order to secure a difference of phase between the currents flowing in said branches, he made them of different electrical character; that is to say, by the introduction of some means in one to increase its self-induction or inertia, he retarded the current therein to a greater degree than in the other."

This brings us to the patents in suit, which have to do with "split-phase" motors. The applications were made, and the patents were granted, on the following dates:

No. 555,190, for an alternating motor, was applied for on May 15, 1888, and was granted February 25, 1896.

No. 511,915, for a method of electrical transmission of power, was applied for on May 15, 1888, and was granted January 2, 1894.

The patents stand upon the same application, which was divided in December, 1888, and are attacked together on the ground that they are void for want of invention. It is argued that in view of the prior state of the art, and especially in view of Tesla's patent No. 382,279, of May 1, 1888, the step from obtaining separately from the generator the two alternating currents, different in phase, that are required to

operate the motor described in No. 382,279, to obtaining only one of such currents from the generator, while the other is obtained by induction from the primary current, was an obvious step, easy to be taken by any one possessed of skill in electrical engineering, and therefore did not involve invention. Upon this point the opinions of the experts do not agree, and I am so little of an expert myself in this difficult branch of science that I scarcely feel entitled to have or express an independent opinion. Nevertheless, I have given the subject such consideration as lay within my power, and have come to the conclusion that the step was taken in the exercise of invention. The grant of the later patents is prima facie evidence of novelty and invention, as has often been decided; but, aside from this presumption, so far as I can realize the situation before and after May 1, 1888, the two patents now attacked seem to me to be so connected with the earlier group that the same faculties that were necessary to produce those that are first in point of time must have continued in exercise to produce those that followed. It is often very difficult to draw the line between invention and skill, and different minds may draw it at different points. I submit my own conclusion for what it may be worth.

Another defense asserts that the disputed claims of No. 555,190 are invalid because they are identical with the claims of No. 445,207. If the claims in both patents are for the same inventions, the position is sound; for No. 555,190, although first applied for, was not granted until more than five years after No. 445,207. But I do not think the inventions are the same. The claims are certainly not expressly alike, as will be seen at once; and their identity must be found, if at all, in what is implied by the claims of No. 555,190. Upon this point the testimony is in conflict, and my examination of the opposing views has led me to the conclusion that the defendants' position has not been sustained. I think the plaintiff's argument is sound, as thus expressed on page 42 of the brief:

"The distinction between the inventions claimed in these two patents resides in the fact that in No. 445,207 the two circuits of the motor are, as stated in claim 1, of different electrical character or resistance; in claim 2 they are of different self-induction; while in claim 3 one set of the energizing coils is formed of conductors of small size and few turns, while the other is a conductor of larger size. None of these three requirements is found in either of the claims of patent 555,190, and therefore the two patents are not for the same invention. Moreover, while it is true that claims 1, 2, and 6 of patent 555,190, which are the claims relied upon by the complainant herein, do cover the construction set forth in patent 445,207, yet, on the other hand, the invention of said claims can be embodied in motors which do not contain the invention claimed in patent 445,207, because it is quite possible to make the circuits of the motor of 555,190 of the same electrical character or resistance, and of the same self-induction, since the difference in phase in such a motor would be secured by the induction of one current from the other. In fact, the motor shown and described in patent 555,190 does not embody the inventions of the claim of patent 445,207."

Another defense sets up patent No. 511,559, granted December 26, 1893 (not hereinbefore referred to), as a sufficient answer to the validity of No. 511,915, granted January 2, 1894; the position being that both patents are for the same invention, and therefore that the

patent later in date is void. This defense was not set up in the answer, and for this reason objection is made to its consideration. It is not necessary to pass upon the objection, however, since I do not think that the defense should prevail. The claims of No. 511,559 are as follows:

"(1) The method of operating motors having independent energizing circuits, as herein set forth, which consists in passing alternating currents through both of the said circuits, and retarding the phases of the current in one circuit to a greater or less extent than in the other.

"(2) The method of operating motors having independent energizing circuits, as herein set forth, which consists in directing an alternating current from a single source through both circuits of the motor, and varying or modifying the relative resistance or self-induction of the motor circuits, and thereby producing in the currents differences of phase, as set forth."

And the disputed claim of No. 511,915 is in this language:

"(1) The method of operating electro-magnetic motors having independent energizing circuits, as herein described, which consists in passing an alternating current through one of the energizing circuits, and inducing by such current the current in the other energizing circuit of the motor, as set forth."

I think the earlier patent claims (1) a generic method of operation by difference of phase; and (2) a specific method of obtaining that difference, namely, by "varying or modifying the relative resistance or self-induction of the motor circuits,"—while the disputed claim of No. 511,915 claims a different method of obtaining the difference in phase, namely, by induction. As already pointed out, induction and self-induction are different things.

The last defense is noninfringement. To this point much of the testimony has been directed, and the subject has received the most careful attention in my power. It has not been easy to understand, as will immediately appear to any one who undertakes its examination. The defendants' counsel describes it as "one of the most abstruse departments of electricity," and he rightly speaks of the principal testimony on this point as "two elaborate and highly technical scientific expositions." Fortunately the oral arguments and the briefs of counsel have presented the opposing views with such admirable clearness and force that I think I have been able to understand the disputed points sufficiently to choose between the antagonistic theories. The difficulty is, of course, increased by the fact that the operations of the electric fluid are not visible. We see only the phenomena that result from such operations, and can only form an opinion, more or less probable, concerning the actions and reactions that co-operate to produce the phenomena. Upon many points opinions agree. Upon other points there is at present a wide divergence. Such divergence exists among the witnesses who have testified concerning the electrical and magnetic forces that combine to cause the armature of the defendants' motor to revolve, and I cannot give the reasons by which they support their respective conclusions without quoting their precise and condensed language at such length as would unduly extend this opinion. The defendants' expert concludes that the motor is operated (D, E, p. 78) by "the mutual action between the field set up by the copper band, H," (which incloses one of the pole pieces of the field magnet), "and the field set

up by the current in the armature circuit, F, under that part of the field magnet marked D." On the other hand, the plaintiff's experts conclude that the motor is operated by the progressive shifting of polarity that is the characteristic effect of a Tesla motor, and that such shifting is produced by substantially the same arrangements in the one case as in the other.

As already indicated, I am of opinion that the plaintiff's theory of operation is correct, and I cannot do better than state it in the language of counsel. The defendants' motor is thus described:

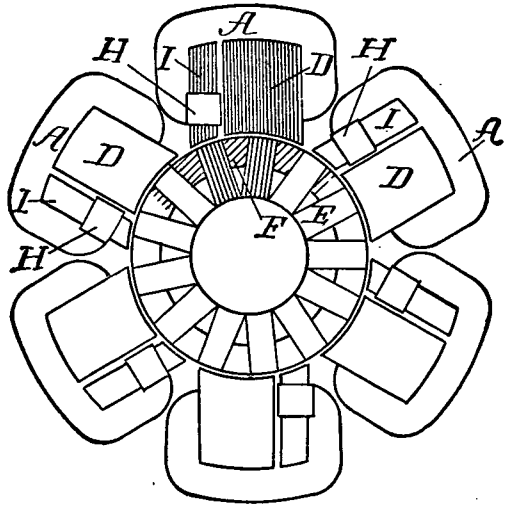


Fig. 13.

"The infringing apparatus is an alternating-current motor. Two forms and sizes of this motor, as made by the defendants, are in evidence; but, as the experts for both sides agree that they differ only in structural details, but one form will be considered.

"The motor, in general appearance, is of cylindrical form, with a shaft passing axially through it, and carrying a fan at one end. An inspection of the outside cylindrical portion of the motor proper shows it to consist of laminated magnetic cores composed of bundles of iron plates disposed in a circle parallel to the shaft, and which in the small motor are six in number. The arrangement of these bundles of plates is roughly analogous to that of the staves of a barrel.

"The cores have at each end inwardly extending polar projections, radial with respect to the cylindrical outline which the group as a whole presents. On each of the cores or bundles of plates which constitute elements of this cylinder, and between the polar projections of the same, are wound coils of wire which produce magnetic poles of opposite sign at the polar projections; and the coils of the several elements of the cylinder are so wound and connected that, when joined to the supply circuit, and traversed by a current impulse of given direction, they produce alternately opposite poles in the circumferentially successive polar projections. These coils, when joined up together, constitute the main or primary energizing circuit of the motor, which receives current from an external source.

"Each of the bundles or cores is divided throughout its length into two parts, and the polar projections of the smaller parts are surrounded by conductors in the form of a coil of a single convolution, and composed of flat

copper bands, the ends of which are soldered together, so that each constitutes a short-circuited or closed conducting path around one of the two polar projections into which each of the cores is divided.

"The secondary element or armature of the motor is composed of a circular series of bundles or iron plates, thirteen in number, arranged around the shaft, and parallel thereto. Each of said bundles or cores has polar projections at its ends extending radially outward, and surrounded by closed conductors or coils formed of copper cylinders with longitudinal slots through which the polar projections extend. The copper cylinders resemble in form the rotating portion of a squirrel cage, and this form of winding has long been known as a 'squirrel-cage' winding. The motor is in all respects substantially the same in construction as the fan motors made by the complainant's licensees, and is a slavish copy of a form of motor patented in 1895 by the Westinghouse Company, hereinafter referred to."

The plaintiff's theory of operation is as follows:

"Assume, therefore, that the motor be connected with the circuit of a generator so that alternating currents flow through all the main or primary coils, A, A, surrounding the field cores. In the absence of any disturbing causes, the polar projections, I and D, would, in consequence, exhibit magnetic phases corresponding to those of the currents producing them; that is to say, the magnetism of each pair of polar projections would simultaneously rise, fall, and reverse, while at any given instant of time the polarities of circumferentially successive pairs of polar projections would be of opposite sign. This would exert no rotative effect upon the armature, whether the latter were provided with closed coils on its polar projections or not; for, as explained above, we should then have the conditions which obtain in the ordinary single-phase synchronous motor, in which the armature must be brought up to a speed corresponding to the rate of alternations of current producing the field, before it can rotate in obedience to the magnetic actions of the field.

"But the armature of the defendants' motor does start from a state of rest, and runs up to full speed even when run by a current of 16,000 alternations per minute, so that there must be present some conditions other than those due to the simple alternation of its poles, and it only remains to determine what those conditions are.

"It is evident that a current which passes from an outside source through any of the coils, A, A, magnetizes both of the cores surrounded by such a coil. In other words, it creates a magnetic field which passes through both of the polar projections of the compound core energized by such a coil; that is, through the polar projection, D, which is not surrounded by the copper band, and through projection, I, which is.

"It is further evident that the passage of the lines of force through the plane of the closed circuit which is afforded by the copper band, H, must result in the development of a current in such band, which will not be in phase with the primary current, but will follow after it, rising from zero to its maximum, and then falling and reversing later than the current in coil, A, by which it is produced.

"But the existence of a current in a closed conductor or coil necessarily implies the creation by such current of a field of force, and, if the coil surround a magnetic core, the magnetization of such core. This is what happens in the present case; but as the current in the copper band, H, is later than that in the wire coil, A, the magnetization which it imparts to the portion of the core, I, which it surrounds, is later in time than that developed by the wire coil.

"The fact that a current is developed in the copper band, H, also implies, and of necessity involves, the transformation of a portion of the energy of the magnetic field produced by the coil, A, into such a current. In other words, a portion of those lines of force which would otherwise pass into the smaller polar projection, I, and be there immediately manifested in its magnetization, are absorbed by the copper band, and converted into current. Hence the initial magnetization of the smaller projection will be weaker than that of the larger projection, in proportion to the number of lines that have been taken up by the copper band, so that not only the maximum, but also the minimum,

magnetizations of the smaller projections, I, will occur at later periods than the corresponding phases of the larger ones, D.

"We have therefore in the defendant's motor a series of pairs of poles, each pair consisting of a large polar projection, D, and a smaller one, I, the periods of magnetization of which do not accord in point of time, for the phases of the smaller projections follow after those of the larger. These are the conditions of a rotating or shifting field, and they are produced by the conjoint action of two alternating currents of different phase, one of which is induced by the other.

"It being incontestably true that, as between any two polar projections of the same compound core, there exists a time difference in the phases of magnetism which they exhibit, it will readily be seen how such conditions result in the rotating or shifting magnetic field of the Tesla patents. For, assume that this time difference were equal to one-quarter of a complete cycle of change, which is the ideal condition of operation. Then, when any given polar projection, D, exhibits maximum magnetism of one polarity, the adjacent projection, I, which is surrounded by the same wire coil, will have practically no magnetism. As the strength of D decreases, that of I increases, until the first becomes nil, and the second reaches its maximum.

"The magnetism of the first then rises from zero to a maximum in an opposite direction, while that of the second or smaller is falling from maximum to zero, but without change of direction. Next the first falls from maximum to zero, while the second rises from zero to maximum, but with the same direction now as the first, and so on.

"Under these conditions it is obvious that the resultant attractive effect of any pair of projections will shift or swing from that pole which is first to reach its maximum towards that which is later; and, having regard to the polarity of this resultant, it will be seen that, after shifting from a larger projection, D, to its smaller companion, I, it then shifts from the latter to the larger projection, D, of the next adjacent pair, and so on through the whole series around the armature, in exactly the same manner as takes place in any Tesla motor having more than two single or double poles.

"To explain this further: When the resultant, which is, say, of north polarity, has shifted from a larger to a smaller projection, the latter is maximum north, and the former is zero, and just about to change; but the larger projection, D, of the pair next adjacent on the side of the smaller projection, I, now at its maximum, is also zero, and just about to change. Its change, however, will be from south to north, or to the same polarity as that exhibited by the smaller projection, I, of the first pair; hence the north resultant will continue to shift from the said smaller projection, I, over to the larger projection, D, of the adjacent pair, while a south resultant will at the same time shift from the larger to the smaller projection of the first pair.

"Each pair of projections may be regarded as constituting an independent couple, all of which, however, co-operate; one couple taking up and carrying on the resultants that have shifted between the members of the couple preceding it. This is, of course, true of all Tesla motors having more than one couple, as in practice is nearly always the case. And it is also true in cases where the difference in phase between the currents, or the magnetizations resulting therefrom, is not exactly a quarter of a cycle, but something less or more. As explained above, and as stated by Tesla in the patents in suit, the ideal difference in phase of 90 degrees can only be obtained by the employment of independent sources of current; but sufficient difference of phase for all practical purposes is secured artificially in the Tesla 'split-phase' motors and in that of the defendants, and the general law of operation is the same in all cases.

"The shifting or rotating field in the defendants' motor has precisely the same effect on the armature with closed coils as would result from moving bodily around the armature one or more permanent magnets, as we have explained in a previous portion of this brief."

I think, therefore, that this defense must fail, and that the defendants' motor infringes all the disputed claims of the patents in suit.

The last defense avers that the plaintiff has assigned all its interest in the patents in suit to the Westinghouse Electric Company by an agreement executed July 7, 1888, and therefore that the present action cannot be maintained, because the Westinghouse Company has not been joined as a party complainant. This defense was not taken by the pleadings, as it should have been in order to bring it properly before the court, and under the circumstances I am not disposed to give it any weight. Assuming the agreement of July 7th to have the effect contended for, the only result of dismissing the bill would be to renew the controversy in another proceeding, where the same evidence would be heard, and the same conclusion would be reached. The failure to make the Westinghouse Company a party plaintiff, if such a joinder was necessary, is a formal defect, that has no bearing, so far as has been made to appear, upon the substance of the controversy. But I think it would be reasonable to protect the defendants from the possibility of being called upon to answer that company for the same cause of action, and I understand the plaintiff to agree that the court should take that course. If, therefore, within 20 days from the date of filing this opinion, the plaintiff shall file with the clerk a stipulation, executed by the Westinghouse Electric Company, agreeing to be bound by the decree in all respects as if it had been originally a party plaintiff, the decree prayed for by the bill will be entered.

Motions to Amend Answer and for Rehearing.

(December 1, 1899.)

I have considered these motions, but without being able to conclude that either should be allowed. I am still of opinion that the defense of want of proper parties was not taken in time, and I think, also, that the motion to amend—which was not presented to the court until after the decision of the case had been announced, and the form of the final decree was under consideration—has been unduly delayed; but the court, of its own motion, has given the defendants a protection to which, in strictness, they were not entitled, and I confess to some surprise at finding them apparently aggrieved.

The remaining ground upon which a rehearing is asked is the supposed failure of the court to consider the defendants' argument upon the subject of comparative structure. The supposition finds some support in the silence of the opinion upon this point, but the failure is in appearance only. I considered the argument, and did not extend the opinion by discussing it at length, because I regarded it as answered, in effect, by the decision upon the subject of comparative method of operation. It seemed to me that the testimony showed the two subjects to be so closely connected, in this particular case, that, if the method of operating both forms of motors was found to be the same, the structures must at least be equivalent, if not substantially the same. The point was considered, therefore, and decided, although it is not expressly referred to.

Both motions are accordingly denied.

WARNER BROS. CO. v. WARREN-FEATHERBONE CO. (three cases).

(Circuit Court, S. D. New York. September 5, 1899.)

PATENTS—SUIT FOR INFRINGEMENT—DEMURRER TO BILL.

Where the allegations of a bill for infringement of a patent are good, and the patent is not made a part of the bill, except by reference to it "to be produced," the sufficiency of such allegations cannot be determined on demurrer.[1]

These are three suits for infringement of patents. Heard on demurrers to the bills.

Dickerson & Brown, for plaintiff.
Sullivan & Cromwell, for defendant.

WHEELER, District Judge. The bills in these cases are each in the usual form for the infringement of a patent, but the patent is not annexed to or in any way made a part of the bill. The issue of the patent is well stated for the new and useful invention mentioned, as by a certified copy "to be produced will more fully appear." The demurrers are to such parts of the bill as relate to particular claims specified by their respective numbers. The bills would be good if they should be maintained by proof, and they would be maintained in this respect if the patents, when produced, should be valid. When they are produced, they will be evidence in support of the bills, but not parts of the bill. The bills appear to be sufficient, although the patents may not, when produced, be sufficient to maintain them. As the bills are drawn, the question as to the validity of the patents upon their face does not yet arise, and cannot now properly be considered. It is merely a moot question in the cases. Demurrers overruled, defendants to answer by October rule day.

SOCIÉTÉ ANONYME POUR LA TRANSMISSION DE LA FORCE PAR L'ELECTRICITÉ v. GENERAL ELECTRIC CO.

(Circuit Court, S. D. New York. November 14, 1899.)

PATENTS—VALIDITY—PRIOR FOREIGN PATENT.

A foreign patent, to affect a subsequent patent in the United States for the same invention, under Rev. St. § 4887, must have been one which conveyed substantive rights by granting a monopoly which the patentee could enforce in the courts; and a provisional patent, issued under the law of Switzerland, which merely secures the applicant against the effects of publication for three years, and entitles him to a definitive patent on making the required proofs of the existence of either the article itself or a model thereof within that time, is not such a patent as is referred to in the statute.

Hearing on Bill and Plea.

Edmund Wetmore, for complainant.
C. L. Buckingham, for defendant.

[1] As to pleading in patent infringement suits, see note to Caldwell v. Powell, 19 C. C. A. 595.

COXE, District Judge. The bill alleges infringement of letters patent No. 553,469, granted January 21, 1896, to the complainant as assignee of Hutin and Leblanc for improvements in alternating current motors. The plea alleges that a Swiss patent, granted to the inventors for the same invention, lapsed before the United States patent was granted, or before an application containing the claims of the patent had been filed. The defendant seeks by this plea to bring the case within the doctrine of Huber v. Manufacturing Co., 148 U. S. 270, 13 Sup. Ct. 603. The keystone upon which the plea rests is the existence of a patent in Switzerland and its expiration on or about September 12, 1894. Section 4887, Rev. St. U. S., has reference only to inventions previously patented in a foreign country. If there was no foreign patent the statute has nothing on which to operate. A patent implies a grant from the sovereign power securing to the inventor, for a limited time, the exclusive right to make use and vend the invention; it conveys to the inventor substantive rights and secures to him a valuable monopoly which he can enforce for his own advantage either by using it himself or by conveying the privilege to others. He receives something tangible, something which has a present existing value which protects him from competition and is the source of gain and profit. An instrument which falls short of this, which gives only limited and temporary protection, which is but a condition precedent to the definitive grant, which conveys no monopoly or the right to proceed against infringers, is not the patent contemplated by the statute.

The document, dated September 12, 1891, issued to Hutin and Leblanc by the Swiss government, was not a patent in any true sense of the word. A patent was never issued for the reason that a model satisfactory to the Swiss officials was not produced. The patentees never had a monopoly in Switzerland. They could not sue infringers or exercise any of the rights of patentees. What they received was little more than a promise of a patent if they subsequently convinced the Swiss officials of their right to receive one. It no more conveyed to them the exclusive right to make, use and vend the invention in Switzerland than the promise to give a deed upon receiving the purchase price, at or before a specified date, conveys the fee of an estate in land. Without considering the patent law of Switzerland in extenso it seems entirely clear that no definitive patent can be granted there unless the invention is applicable to industry and is represented either by the object itself or a model thereof. Proof must be presented "that there exists a model of the object invented, or that the object itself exists, and as a model is considered an execution of the invention, or a plastic representation, clearly displaying the nature and object of the latter." It is impossible to read the Swiss law and patent-office procedure without being convinced that unless this proof is made a definitive patent is simply out of the question.

The Swiss law also provides for a provisional patent and its effect is thus described:

"The provisional patent has only the effect of assuring to its owner, during a period of three years to date from the day of the application, the right to obtain a definitive patent, notwithstanding the publicity which might have been given to the invention during the interval. The owner of a provisional patent shall have no right of action against persons who imitate or who utilize his invention.

"Before the expiration of the aforesaid period of 3 years the owner of the provisional patent must, by the performance of the formality prescribed by art. 14, clause 3, cause the delivery to him of a definitive patent, in default whereof the patent becomes forfeited."

The law further provides that if the inventor does not annex to his application for a definitive patent proof of the existence of a model, or the object itself, he can claim a provisional patent only which he can exchange for a definitive patent as soon as he furnishes such proof. If he makes the proof the date and hour when it is furnished shall be noted and "it is starting from this last date that the definitive protection assured to inventions shall commence." If he fails to make the proof within the prescribed period he forfeits his right to a patent. Hutin and Leblanc failed to furnish proof satisfactory to the Swiss officials and, consequently, never obtained a definitive patent. For this reason their provisional patent lapsed, the fact being noted as follows: "The patent was canceled on September 12, 1894, by reason of not furnishing the proof of a model." In the judgment of the court it is established beyond doubt that the document which the patentees obtained in Switzerland was not such a patent as is referred to in the United States statute and, therefore, that its abortive existence produced absolutely no effect upon the patent in suit.

The rule that the lapsing of a provisional grant, which has not ripened into a patent securing a monopoly does not destroy a United States patent is firmly established by many well-considered authorities. It is immaterial that these decisions relate to provisional patents emanating from other countries than Switzerland. So long as they possess the same characteristics the principle involved is the same. A British provisional patent is similar in its fundamental purpose to a Swiss provisional patent and it has been frequently held that such an instrument is not a patent within section 4887. Gold & Stock Telegraph Co. v. Commercial Telegram Co. (C. C.) 23 Fed. 340; Emerson, Smith & Co. v. Lippert (C. C.) 31 Fed. 911; Seibert Cylinder Oil Co. v. William Powell Co. (C. C.) 35 Fed. 591; Telephone Co. v. Cushman (C. C.) 57 Fed. 842; Edison Electric Light Co. v. Waring Electric Co. (C. C.) 59 Fed. 358.

The patentees are not estopped from showing the true character of the Swiss patent because of the formal statement in the preamble of the specification that a patent had been granted them in Switzerland. The facts are all before the court and this perfunctory statement cannot operate to transform a mere protection against publication into a definitive patent. Light Co. v. Bloomingdale (C. C.) 65 Fed. 213; Commercial Mfg. Co. v. Fairbank Canning Co. (C. C.) 27 Fed. 78. It follows that the plea must be overruled with costs; the defendant, on payment of costs, to have leave to answer within

30 days from the date of the order overruling the plea. Equity rule 34; Desty, Fed. Proc. (9th Ed.) pp. 1747, 1748; Walk. Pat. (3d Ed.) p. 453, and cases cited. In default of an answer the complainant is entitled to a decree.

LEIN v. MYERS et al.

(Circuit Court, S. D. New York. November 14, 1899.)

1. PATENTS—SUIT FOR INFRINGEMENT—BURDEN OF PROOF AS TO ANTICIPATION.
   Where the device of the patent in suit is disclosed by another antedating it by more than two years, the burden rests upon the complainant to prove beyond a reasonable doubt that his was the prior invention.
2. SAME—PATENTABLE INVENTION—IMPROVEMENTS.
   The public policy which is the foundation of the patent laws should constrain the courts to sustain the validity of a patent, although the invention is one of limited scope and minor importance, where it shows the exercise of invention, and is a distinct improvement over the structures of the prior act.
3. SAME—INFRINGEMENT—MATTRESS FRAME.
   The Lein patent, No. 615,073, for a mattress frame, as to claim 1 *held* not anticipated by the Taber design patent, No. 26,245, on the ground that Lein's invention was prior. Also *held* valid and infringed.

This was a suit in equity by John P. Lein against Solomon A. Myers and Daniel I. Tompkins, composing the firm of S. A. Myers & Co., for infringement of a patent. On final hearing.

Clifton V. Edwards, for complainant.
Milton E. Robinson, for defendants.

COXE, District Judge. This is an equity action for infringement of letters patent No. 615,073, granted to the complainant November 29, 1898, for a mattress frame. The application was filed August 7, 1897. The specification states that the object of the patentee is to construct a cheap and simple frame in which the smallest possible surface will be exposed to the accumulation of dust, dirt or vermin and in which the weight put upon the mattress is so distributed that the greater the weight the more firmly will the frame be held together. The first claim is involved. It is in the following words:

"(1) A socket for a mattress frame comprising a part adapted to engage the upper surface of the side rails of the mattress frame, a horizontally extending shoulder formed on one side thereof, a vertically extending bracket at the outer end of said shoulder, a similar bracket at the point where said shoulder engages the side rail, and means for securing the end bar of the mattress to the upper ends of said brackets substantially as described."

The defenses are anticipation, lack of patentable novelty and non-infringement. It is conceded by the complainant that the subject-matter of the first claim is disclosed in the design patent No. 26,245 for a corner block for mattress frames granted to Winfield H. Taber, November 3, 1896, on application filed August 10, 1896. The Taber patent antedating the patent in suit by more than two years, the burden is shifted to the complainant to prove beyond a reasonable doubt that his was the prior invention. Thayer v. Hart (C. C.) 20 Fed. 693, and cases cited; The Barbed-Wire Patent, 143 U. S.

275, 285, 12 Sup. Ct. 443, 450. The complainant has succeeded in sustaining this burden. He testifies that he commenced experimenting in December, 1894, and in the spring of 1895 had a casting made which embodies the invention of the first claim. This casting is in evidence. A few months afterwards he made another pattern from which a second and more satisfactory casting was made which was used in a mattress frame in the latter part of 1895 or early in 1896. In brief, the testimony is to the effect that he conceived the invention in the early part of 1895 and completed it in the latter part of that year or in the early part of the succeeding year. He is corroborated by three witnesses who were with him during the period in question. There is nothing to impeach the honesty and intelligence of these witnesses and they were speaking of events so recent that they can hardly be mistaken as to the facts. This is not one of those cases which so often occur where a witness depends upon his unaided memory to describe structures which he has not seen for more than a decade.

A situation very similar to the present was examined by this court in Webbing Co. v. Nicholls (C. C.) 70 Fed. 1009. The reasons there given for accepting the evidence of prior invention apply to the present case and need not be repeated. It is enough that the testimony is fair and reasonable and is wholly uncontradicted.

The latest date that can be fixed for the Lein invention is several months prior to the Taber patent. Two other exhibits are subsequent to the date of the Lein invention. These it is unnecessary to consider. None of the prior patents shows the device of the claim in question. They show various ways of supporting the mattress but nothing which is the equivalent of the Lein socket. Lein was the first to construct this form of support and it is plain that it possesses many advantages over pre-existing structures. The mattress is, in appearance, more symmetrical and attractive than any which preceded it; it is cheap, strong and able to stand the severest tension likely to be put upon it; it is supported directly on the bed frame and dispenses with bed slats and all wooden structures which attract and harbor vermin. The fabric is raised five inches above the frame and the socket provides a very strong connection for the side and end bars. In brief, it is a marked improvement over the structures of the prior art. It is, of course, true that the invention is one of limited scope and minor importance. It is not a great invention and should the court see fit to strike down the patent ample authority for such action can be found among the reported cases. On the other hand the more liberal, and, in the opinion of the court, the wiser and more progressive rule, established by a long line of clear and convincing judgments, of which The Barbed-Wire Patent, supra, and Machine Co. v. Lancaster, 129 U. S. 263, 9 Sup. Ct. 299, are conspicuous examples, leads to a conclusion sustaining the patent.

It is seldom in this age of intense material activity that an inventor strikes out upon a path never traveled before and startles the world by an entirely new discovery. It is the constant addition of new features and improvements to old methods and structures

which has advanced science and the useful arts to their present state of perfection. In this marvelous march of progress the American workman has always held the advanced position, due to the encouragement he has received from a liberal and enlightened application of our patent laws. A recent writer of recognized ability and wide experience says upon this subject:

"Public policy is the very foundation of the patent system, and the only reason for its existence. The theory of the constitution is that patents are granted, not as a reward for the past, but as a stimulus for the future—to encourage the making of further improvements and discoveries. But if public policy requires them to be granted for that purpose it equally requires them to be sustained and enforced. The absurdity of trying to encourage invention by granting patents and then holding them invalid is too obvious for comment. * * * It needs no argument to show that the courts should exercise exceptional care to protect the inventors of minor improvements in the arts. True, their claims are often difficult to properly construe, because they closely approach the invisible line which separates patentable invention from mere skill and judgment; but that is no reason why the benefit of the doubt should always be given to the infringer. * * * Public policy is far better promoted by the friendliness which would go too far in sustaining patents than by the cold indifference which would not go far enough; for the stimulus to the making of improvements is only increased by the former, while it is deadened and destroyed by the latter."

There is little difficulty in according to Lein a higher place than that of the skilled mechanic. It requires no expert knowledge to perceive that his device is distinctly an advance over those which preceded it. This is true from whatever point of view the subject is approached, and others should not be permitted to appropriate the results of his genius and labor.

There is hardly room for discussion upon the question of infringement. Indeed, it is not easy to see why the defendants are not concluded by their own admissions. Having alleged that Taber's device is identical with Lein's and that theirs is identical with Taber's, how can they escape the conclusion that it is also identical with Lein's? But however this may be there is no question upon the proofs that their construction has all the elements of the first claim and is an infringement thereof. The complainant is entitled to a decree.

SPRAGUE ELECTRIC RAILWAY & MOTOR CO. v. NASSAU ELECTRIC R. CO.

(Circuit Court, E. D. New York. November 10, 1899.)

PATENTS—INFRINGEMENT—ELECTRIC RAILWAY MOTORS.

The Sprague patent, No. 324,892, for an improved electric railway motor, describes an invention for carrying the motor frame suspended beneath the vehicle centered on the axle at one end, and supported at the other by a flexible connection with the truck frame or body of the car, its principal feature being to provide a flexible connection between the motor frame and truck frame or car body, so that the position of the motor will not be affected by the movement of the truck on its springs. Claims 2 and 6 construed, and *held* infringed.

This was a suit in equity for infringement of a patent. On final hearing.

Frederick H. Betts and L. F. H. Betts, for complainant.
George J. Harding, William H. Kenyon, and Frank S. Busser, for defendant.

THOMAS, District Judge. Letters patent No. 324,892, issued to F. J. Sprague on August 25, 1885, relate to the suspension of an electric motor under a car propelled by it. The patent, although not in issue, was considered by the circuit court of appeals for the Eighth circuit in a suit between the Adams Electric Railway Co. and the Lindell Railway Co., 23 C. C. A. 223, 77 Fed. 432, 452. It was directly involved in Sprague Electric Railway & Motor Co. v. Union Ry. Co. (C. C.) 84 Fed. 641, decided by Judge Wheeler, whose decree was affirmed by the circuit court of appeals for the Second circuit (31 C. C. A. 391, 88 Fed. 82); which litigations did not bring to notice the precise feature of the patent alleged to be infringed in the suit at bar. A preliminary injunction was granted by Judge Lacombe in the present action, and the circuit court of appeals for the Second circuit, in another action between the same parties, upon an appeal from an order granting a preliminary injunction (C. C. A.; 95 Fed. 821), passed upon the patent. Upon these various occasions the validity of the patent has been sustained, but the reason at present urged for noninfringement was not suggested by the defendant until the present argument on the merits. In the Union Railway Case, Judge Shipman plainly describes the Sprague mechanism. He says:

"Sprague hung the motor under the car body directly upon the axle of one of the pairs of wheels by an extension or solid bearing attached directly to the motor. He used a magnet having a yoke and pole pieces, and by sleeving one end upon the axle he caused the armature, which was carried between the poles of the magnet, to be held with firmness, and the armature shaft to be held in alignment with the car axle. The opposite end of the motor was upheld by springs extending to a crossbar on the truck frame. He also relieved the weight upon the axle by a spring support from the truck of the vehicle. The motor was thus hung below the car, one end being centered upon the axle, and the other end being flexibly attached by springs to the truck frame. The effect of the mode of construction is explained in the specification as follows: 'The armature being carried rigidly by the field magnet, these two parts must always maintain precisely the same relative position under every vertical or lateral movement of the wheels or of the car body; and as the field magnet which carries the armature is itself centered by the axle of the wheels to which the armature shaft is geared, the engaging gears also must always maintain precisely the same relative position. At the same time the connection of the entire motor with the truck is through springs, so that its position is not affected by the movements of the truck on its springs.'"

The complainant's device, and the useful result to be attained therefrom, having been stated, the claims alleged to be infringed may be considered. Such claims are Nos. 2, 4, and 6. They are as follows:

"(2) The combination of a wheeled vehicle and an electro-dynamic motor mounted upon and propelling the same, the field magnet of said motor being sleeved upon an axle of the vehicle at one end, and supported by flexible connections from the body of the vehicle at the other end, substantially as set forth."

"(4) The combination of a wheeled vehicle, an electro-dynamic motor mounted upon and propelling the same, the field magnet of said motor being sleeved upon an axle of the vehicle, and the armature of said motor being supported upon the field magnet, and gearing between the armature shaft and the driving wheels of the vehicle, substantially as set forth."

"(6) The combination, with a wheeled vehicle, supported upon its axles by springs, of an electro-dynamic motor flexibly supported from such vehicle, and centered upon the driving axle thereof, substantially as set forth."

The issue in this case relates solely to the support of the off or nose end of the motor. It will be noted that by claim 2 such end is "supported by flexible connections from the body of the vehicle." Claim 4 makes no allusion to the support of such end of the motor, while claim 6 provides for a motor "flexibly supported from such vehicle"; and such vehicle, in the same claim, is stated to be "a wheeled vehicle, supported upon its axles by springs." Upon the hearing respecting the preliminary injunction (C. C. A.; 95 Fed. 821) the circuit court of appeals stated:

"Unless the defendant's motor is 'supported by flexible connections from the body of the vehicle' at the end opposite the driving axle, it does not infringe the second claim; and, unless it is 'flexibly supported from such vehicle,' it does not infringe the sixth claim."

The court further states:

"The Sprague invention was not a pioneer, and was not of a broad character, but it was a distinct and clearly-defined invention in the method of hanging electric motors for vehicles, and its gist consisted in the utilization of the frame of the motor itself with the necessary extension, and the centering of the motor on the driven axle by extension pieces from the field magnet at one end, and in its flexible suspension at the other end to the car truck, the armature being carried rigidly by the field magnet."

The court further says:

"The prior patent to Finney discloses the principal features of Sprague's invention, and what Sprague has described and claimed in the present patents are improvements in details of construction and arrangement. One of his improvements consists in introducing a flexible connection between the motor and the car body, or the truck frame, at the end opposite the driving axle. In the motor of the Finney patent that end rests upon the crossbar of a frame which is supported by the axles of the vehicle. It is rigidly connected with the crossbar, and the crossbar is bolted to the frame. In the present patent that end of the motor is 'hung from a crosspiece, F, on the truck, by heavy springs, b, b, or from the car body itself in the case of a street car or other vehicle having no truck.' Another improvement described in the patent consists in introducing supporting springs at the axle end of the motor. 'These springs extend to crossbars on truck frame, or to the car body in case no truck is used. Their tension is adjusted by nuts, t, which are locked by other nuts, u. This adjustment may be such as to carry wholly or partially the weight of this end of the motor, or so as to actually exert a pressure upon the lower side of the driving axle.' The improvements described are apparently contrived to hold the motor in elastic restraint. The specification states that 'the connection of the entire motor with the truck is through springs, so that its position is not affected by the movements of the truck upon its springs.'"

It is considered that this quotation suggests the salient features of the Sprague patent, and that the last sentence thereof embodies a full statement of the mischief which Sprague intended to avert, and his means of averting it. The disturbing element was the movement of the body or truck on the springs, and the consequences

therefrom to the motor were to be avoided by flexibly attaching the motor to the body or such truck. In all the opinions which have been written in this circuit concerning the Sprague patent, the relation of the motor to the body of the car, or to the truck of the car, has been considered with reference to the twisting or turning of the body of the car upon its springs; and no other thought seems to have been in the mind of the inventor, save as shall be hereinafter stated. It is thought that Sprague had no conception whatever of preventing any movement which could be communicated to the motor, provided the motor were so placed that it was totally unaffected by the motion of the body of the car upon its springs. This view is strengthened by the language of the specification, which states:

"My invention relates to electric motors mounted upon railway cars for the purpose of propelling the same, and my object is to so arrange and support the motor that the relative positions of the armature and field magnet of the motor will not be changed, and the mechanical connections between the armature and the driving axle will not be disturbed by any movement of the car body on its springs at the same time that the driving axle will be relieved of dead weight."

This is the introductory sentence of the specification, and presents the vital thought in the mind of the patentee. The specification further states:

"The truck body is supported from the axles, C, C', through springs, in any usual manner."

This indicates that the truck in the inventor's conception was one resting on springs, and thereby supported from the axles. Again:

"The yoke or back piece, a, of the field magnet, is hung from a crosspiece, F, of the truck, by heavy springs, b, b, or from the car body itself in case of a street car or other vehicle having no truck." Again: "The armature being carried rigidly by the field magnet, these two parts must always maintain precisely the same relative position under every vertical or lateral movement of the wheels or of the car body."

Here is a single reference to a "vertical or lateral movement of the wheels," but it is made in connection with a description of the fastening of the motor to the driving axle, for the patentee states, in the next sentence:

"At the same time the connection of the entire motor with the truck is through springs, so that its position is not affected by the movements of the truck on its springs."

The movement of the body of the car or of the truck on its springs is constantly manifest, and is the ever-present thought. True to this thought, the inventor has in no way suggested the attachment of the off end of the motor to any part of the car totally unaffected by the movement of the car body or car truck upon its springs. Claim 2 in terms describes a motor "supported by flexible connections from the body of the vehicle at the other end." The language of claim 6 is no broader in this regard:

"The combination, with a wheeled vehicle, supported upon its axles by springs, of an electro-dynamic motor flexibly supported from such vehicle, and centered upon the driving axle thereof, substantially as set forth."

The question now arises whether, in view of all that has gone before, the word "vehicle" means the entire car, or whether it refers to the body of the car. The very language used in the claim indicates that the patentee used the word "vehicle" in the sense of the body of the vehicle, for he refers to a "wheeled vehicle, supported upon its axles by springs." If the word "vehicle" referred to the whole car, then it would mean that the whole car must be supported upon its own axles by springs; which would call for a vehicle as a unit, supported upon one of its component parts. Such construction not only would involve an absurdity, but also would be inconsistent with the other parts of the specification. Again, in claim 9 provision is made for "a spring support for the other end of motor from the truck or body of a vehicle, substantially as set forth." To what does "substantially as set forth" refer? If the reference be to the descriptive part of the specification, there will be found only a conception of some attachment to the truck or body of the vehicle; if reference be to the figures, such conception, and nothing else, will be found.

It remains to be considered whether the defendant's structure infringes the patent under the construction above put upon it. In order that no injustice may be done the defendant in portraying its structure, the only description thereof contained in the defendant's brief is here given:

"The car and motor support employed by defendant is in its essential character a wholly new creation. It is true that the longitudinal plates marked A, A, in the exhibit, are practically identical in location and function with the truck frame, A, of the Sprague patent; that is, they are mounted upon the car springs, and the car body is attached thereto either directly in the case of a single-truck car, or pivotally in the case of a double-truck car, such as is shown in the Sprague patent. It may be admitted that this part, A, A, of respondent's structure is the substantial equivalent of the truck frames described in the patent in suit, as it is mounted upon the car springs, B, B, in just the same way as the truck frame of Sprague. The whole structure, however, between the axle boxes, H, and the car springs, B, B, is peculiar to the modern art, and constitutes the special motor frame or motor truck frame or motor frame of the truck, whose primary purpose is to support the motor. The motor frame, comprising mainly the equalizing bars or axle bars, C, and crossbars, E, E, and D, D, is practically rigid with the axle boxes. The equalizing bars, C, are four in number, two on each side of the axles, and arranged on edge, with castings to stiffen them, and rivets uniting the members of each pair and the stiffening castings. The equalizing bars are carried by very stiff journal springs, normally inactive, whose sole function is to prevent shocks to the vehicle when the wheel strikes a high or low place in the track by permitting the motor frame to give slightly in a vertical direction. Heavy brackets, G, are provided, which are secured firmly to the motor frame, so as to engage as closely as possible the sides of the axle boxes, H, thus preventing any longitudinal movement of the frame. It is upon this rigid motor frame that the off end of the motor is carried."

Some addition to this description is necessary for the purposes of greater accuracy. A rod passes through the end of each journal spring and the so-called "motor frame," and, as the end of the journal spring lies in a guide or loop extending from the truck frame, both the truck frame and motor frame are so connected by such rods that any upward lift or strain upon the former is brought to bear upon the latter. This establishes a direct relation between the two frames.

It is already conceded by the defendant's description of its structure that the motor frame is so adjusted as to allow it a vertical motion. The result is that in theory a downward movement of the truck frame is communicated to the motor frame, and a vertical motion thereof results. If such motion exists, there is no reason why the same should not be communicated to the crossbar to which the motor is attached; and, to avoid the same, what are called by the defendant "cushioning springs" are placed at each end of the crossbar. It is claimed by the defendant that in practice the springs are so adjusted that the vertical movement is very slight, and that it could not be carried injuriously through the crossbar to the motor. However that may be, there is a mechanical connection between the truck frame and the motor frame, whereby the former rides upon the latter, with the possible result of giving it motion. If such motion be not communicated to the motor frame, it is because of some special arrangement of parts tending to prevent the same. Primarily, the two frames are so related that one influences the other; and it is considered that the relation is sufficient to bring the defendant's structure within the terms of the complainant's claim. This conclusion accords with the several former decisions involving the defendant's structure, or similar structures, whose authority this court should observe.

It results from the foregoing views that complainant should have a decree enjoining the defendant from infringing claims 2 and 6. Claim 4 involves no greater rights.

NEWTON v. McGUIRE.

(Circuit Court, S. D. New York. November 14, 1899.)

1. PATENTS—LIMITATION BY FOREIGN PATENTS—ACT EXTENDING TERM.
   Act March 3, 1897 (29 Stat. c. 391), amending the statutes relating to patents, by its terms does not affect patents granted prior to January 1, 1898.

2. SAME—SUIT FOR INFRINGEMENT—RIGHT OF LICENSEE TO MAINTAIN.
   A decree reforming a license so as to confer on the licensee the exclusive right to make and vend a patented machine does not entitle the licensee to maintain a suit for infringement against one not a party, who had previously purchased a machine from the patentee, who then held the title to the patent.

3. SAME—BRICK-MOLD SANDING MACHINE.
   The Newton patent, No. 407,030, for a brick-mold sanding machine, claim 5, is void for lack of patentable invention in the device shown in the specification.

4. SAME—FEEDING MECHANISM.
   The Newton patent, No. 372,698, for improvements in feeding and delivering mechanism for brick-mold sanding machines, consisting chiefly of an additional feed pulley, which positively separates the lower mold of a series from the table and from the next one above it, and moves it towards the cylinder of the machine, discloses an invention of merit, and is valid. It is infringed by a machine which embodies such feature, and only differs in having the table provided with anti-friction rollers, on which the lower mold rests, and which facilitate its movement.

This was a suit in equity by Addie Newton against Terrence McGuire for infringement of certain patents. On final hearing.

Walter E. Ward, for complainant.
George A. Mosher, for defendant.

COXE, District Judge. This is an infringement suit founded upon four patents for brick-mold sanding machines. No. 284,115 was granted to James A. Buck, August 28, 1883. This patent was limited to the term of a Canadian patent for the same invention which expired March 31, 1898, prior to the commencement of this action. The contention that the act of March 3, 1897 (29 Stat. 694), operated to extend the term of the patent for two years cannot be maintained. The explicit statement that the act "shall not apply to any patent granted prior to said date" (January 1, 1898), would seem to be a sufficient answer.

No. 301,087 was granted to James A. Buck, July 1, 1884. The defense is that the complainant has no title to the patent which enables her to proceed against the machines operated by the defendant, which were purchased of the patentee James A. Buck at a time when he was the owner of the patent. In the action brought by the complainant against Buck the circuit court of appeals for this circuit decided (23 C. C. A. 355, 77 Fed. 614) that the complainant had no title to the patent and that the legal and equitable title were in Buck. This decision must, of course, be respected by this court. The contention that it should be disregarded because no judgment was entered thereon is untenable. Although the precise date when the defendant purchased the alleged infringing machines is not in evidence it seems to be conceded on all sides that they were purchased of Buck at a time when, by the law of the said decision, he was the owner of the patent. On the 10th of March, 1897, Buck assigned the patent to the Buck Machine Company, and the company on the 15th of November, 1897, granted to the complainant an exclusive license to manufacture and sell under the patent. On the 16th of March, 1897, the complainant commenced an action against Buck and Albert H. Newton, the company not being a party, and on the 4th of February, 1898, obtained a decree which, among other things, reformed the assignments from which the patent number had been inadvertently omitted. It is unnecessary to determine what rights this license and decree conferred upon the complainant further than to say that under the law, as above stated, she acquired, in the opinion of the court, no title to maintain this action against one whose rights cannot be affected by proceedings to which he was not a party and which were begun after those rights became vested.

No. 407,030 was granted to A. H. Newton July 16, 1889. Claim 5 is the only one involved. It is as follows:

"In a brick-mold sanding machine, a feed table, a sanding cylinder, belt rollers, and feed rollers, in combination with belts passing around said cylinder, belt rollers, and feed rollers, substantially as described."

Assuming that this claim, which is an exceedingly broad one, can be limited to the precise mechanism shown, it is still void for lack of patentability. No patentable improvement is shown over the

structures of the prior art. The court understands that, after the discussion at the argument, this proposition was not seriously disputed by the complainant's counsel.

No. 372,698 remains to be considered. The patent was granted to the Newton brothers November 8, 1887, for improvements in feeding and delivering mechanism for mold-sanding machines. This patent is free from the almost inextricable tangle in which the title to the Buck patent is involved. The specification states that it has been found by experience that where a "water strike" is employed the molds are liable to adhere to each other when placed upon the feed table. One of the objects of the invention is to provide a positive mold-feeding device which shall operate to separate the lower mold of a series from the one next above it in order to insure its being conducted to the sanding cylinder. This is accomplished by providing an additional feed pulley which projects slightly through the bed of the feed rack so as to come in contact with only the lower mold which is thus rolled down upon the belt which holds it in the desired position on the drum. The introduction of this positive feed pulley seems to be new with the patentees and is a valuable addition to the art. It prevents the machine from clogging and feeds the molds to the sanding cylinder continuously without break or hitch. The claims involved are as follows:

"(1) In combination with the feed table of a brick-mold sanding machine, a rotary mold separator arranged to come into contact with the lowest mold on the table, and to positively separate it from the table and from the next mold above, and to positively move the mold towards the cylinder of the machine, substantially as specified. (2) The combination, with the cylinder of a brick-mold sanding machine and with the endless belts employed therewith, of a rotary mold separator having a motion, when separating molds, substantially agreeing in time with and in the same direction as the said endless belts, substantially as specified."

The defense relied on is noninfringement.

The defendant's rack is provided with two idle rollers which extend beyond the plane of the feed track of the rack and, by preventing friction, assist gravity in feeding the molds to the cylinder. In addition to these rollers his rack is provided with an unquestioned equivalent for the positive mold separator of the patent, which comes in contact with the lowest mold and separates it from the table and from the next mold above. The defendant contends that he escapes infringement by the use of these idle rollers, because they separate the molds from the rack and, therefore, the molds cannot be separated from the rack by the positively moving rollers of the claim. The use of the idle rollers may or may not be an improvement. Very likely they facilitate the downward movement of the molds, but their presence does not enable the defendant to use the patented device. The rack is none the less a rack because it is provided with anti-friction rollers. The entire slideway from top to bottom might be composed of a series of such rollers so that the molds at no time contact with anything else, but it would still continue to be a feed rack. No one has the right to appropriate the invention because the feed table used by him differs in some minor particulars, in no way affecting the invention, from the feed table

shown in the patent. Were this otherwise any one who uses a device, a downwardly extending flat spring for instance, which lifts the mold a fraction of an inch from the slideway at the moment of contact with the moving pulley, will be able to escape infringement. These idle rollers enable the molds to descend with greater ease. To use a homely simile, they grease the tracks of the feed table; but it will hardly be contended that one who keeps these slideways thickly coated with a lubricant, so that the molds slip down easily, can use the patented mechanism. If, as contended, the idle rollers make the positive rollers unnecessary, the defendant's remedy is simple; he has only to remove the latter from his machine. Of course there is no virtue in the contention that infringement is avoided because the drawing shows the positive feed pulleys mounted on a separate shaft while in the defendant's device they are mounted on the same shaft which is revolved by the endless belts or chains. A better example of an equivalent is seldom seen. The location of the idle pulleys on the defendant's rack is apt to deceive the casual observer. He is misled into thinking that they bear some relation to the positive pulleys of the drawing. When, however, it is remembered that the idle pulleys have nothing whatever to do with the invention and that the only change the defendant has made is to mount the sprocket wheels on the same shaft with the positive pulleys, the situation is made clear. There can be little doubt that the defendant uses the combination of the claims; that he uses something else in addition is immaterial. It follows that the complainant is entitled to a decree limited to claims 1 and 2 of letters patent No. 372,698.

REGINA MUSIC-BOX CO. v. HASSE.

(Circuit Court, S. D. New York. August 23, 1899.)

PATENTS—INFRINGEMENT—IMPROVEMENTS IN MUSIC BOXES.

The Cuendet patent, No. 474,520, for improvements in music boxes, as to claim 1, which covers an independent damper, is limited by the prior art, and especially by the Lochmann patent, No. 417,650, to the particular device described in the specification, which is a positive side damper, and to a narrow range of equivalents; and such claim is not infringed by a negative damper, which is applied by its own resilience, and held from engagement by the pressure of another part of the mechanism.

This was a suit in equity for infringement of a patent. On final hearing upon pleadings and proofs.

Antonio Knauth, for complainant.

Louis C. Raegener and S. L. Moody, for defendant.

LACOMBE, Circuit Judge. This is a suit for infringement of United States letters patent No. 474,520, granted May 10, 1892, to Samuel Cuendet for improvements in music boxes. The patent covers a number of improvements. The particular one in controversy relates to the damper, and is embodied in the first claim, which reads:

"(1) In a music box, the combination, with the vibrating comb blades and means for moving the same, of an independent damper forked at the upper end, one prong of which comes in contact with the vibrating comb blade,

and the other is formed as a projection acted upon by the pin of the cylinder, substantially as set forth."

The damper of a music box is an appliance which is brought into contact with a tongue of the metal comb, which produces the sound, in order to stop its vibrations. This is done immediately before the picker engages with the tongue, vibrations at other times being an advantage. The picker may be the pin on a revolving cylinder, or the point of a star-wheel, which is set in motion by the other moving parts of the machine. When the damper is attached to the tongue itself, it is a dependent damper; when affixed independently to the framework of the machine, it is an independent damper. To this latter class the invention of the patent belongs. Several varieties of damper were known before the patentee Cuendet entered the field. In some of them, the picker acted directly upon the damper; in others, it acted upon some arm or prong which imparted motion to the damper proper. The most notable improvement in dampers was that of Lochmann (United States patent 417,650, December 17, 1889). Prior to his invention all dampers had operated in the direction of the vibrating tongue, and those vibrations were checked by impact upon the damper, producing more or less of a discordant sound. Lochmann brought the damper up against the side of the tongue, thus checking its motion by frictional pressure without noise. This was a radical departure from the old abutting damper, and Lochmann's patent, together with the varying forms of damper already disclosed to the art, operating some by direct pressure, some by their own resilience, left an extremely narrow field for Cuendet. The Lochmann side damper is a single-arm damper, which is moved to and from the comb tongue by a cam in the damper situated below the comb tongue, so as to be in the path of the picking device. When it operates to damp the tongue, it is pressed against the latter by its own resiliency. At other times, i. e. when the star-wheel is at rest, one of its fingers rests on the cam, and forcibly holds the damping end of the damper out of contact with the tongue. A damper operating in this way is known as a "negative damper." When the natural resilience of the damper tends to keep it out of contact with the tongue, and contact is effected by the pressure of some part of the moving devices, it is known as a "positive damper." Both methods of operation (although not with side dampers) had been shown before Cuendet.

As was before said, the Lochmann damper has practically gone into general use in star-wheel music boxes with a single comb. In a so-called "duplex box," it is used for the upper comb; but, in its original shape, cannot be used for the lower comb, by reason of the lack of space or of a place to anchor it. The improvement of the patent in suit in reality consists in providing a Lochmann side damper with an arm or prong, which carries the cam and is moved by the picking device, dragging the other arm with it (since both arms are integral). Whether this improvement is obvious to one skilled in the art, and therefore, as defendant contends, devoid of invention, need not be decided here. It will be quite sufficient to hold that, in view of the various devices shown in the prior art, the patentee must

be held strictly to the precise combination of old elements by which he has adapted the Lochmann side damper to use in a duplex box.

The claim is a broad one. It is confined to independent dampers, and to such as are pronged; but, except so far as it is restricted by the words, "substantially as set forth," it includes positive and negative, abutting and side dampers, and would cover dampers already described in the literature of the art, such as Macaulay (401,188) and Jacot (461,633). The words quoted, therefore, must be given effect to incorporate into the claim limitations which the specifications show to be present in the combination of the patent. From his description it appears that the prong d^2 (which operates as the damping finger) is straight, and extends vertically between the blade or tongue of the comb it is intended to act upon and the next one, and that said prong d^2 reaches the blade it acts upon by a lateral displacement; that, when the damper is at rest, both prongs of the fork are out of engagement with the corresponding blade of the comb, being kept so by the natural resiliency of the device, and that contact is effected by the positive pressure of the pin or picking device upon the cam of the one prong, thus causing lateral pressure of the other prong against the blade or tongue. This is a "side damper," and a "positive damper," and, in view of the state of the art, the patent in suit must be confined to positive side dampers, if the first claim is to be sustained at all.

The defendant's device is well described in defendant's brief as follows:

"In the position of rest, or normal position, the damper is held out of contact with the comb tongue by the tooth of the star wheel, which is also at rest, pressing against its cam. This tooth is a tooth which has previously picked the tongue, and now lies just under it, having picked the tongue from above downward. When this particular comb tongue is to be again picked and sounded, the proper projection in the music disk, engaging one of the upper teeth of the star wheel, causes the star wheel to revolve, so that the tooth lying just above the comb tongue shall pick the same. But before the said tooth can come in contact with the comb tongue the tooth below, which has been holding the damper away, passes off from the damper cam in its revolution, and allows the damper to be applied by its own resilience, and to stop or damp any vibration that may exist in said comb tongue just before the picking tooth comes in contact therewith, so that such contact shall be made smoothly and noiselessly. Then, as the star-wheel still revolves, this picking tooth presses down the comb tongue, and, in so doing, itself comes against the damper cam, and moves the damper away again into the free position, to allow the tongue to vibrate freely when released. The star wheel still revolving, this picking tooth releases the comb tongue, and then stops just below the comb tongue, and just as it has reached the highest part of the damper cam, and is thus holding the damper as far away from the comb tongue as possible. Here it rests until the note is to be sounded again by the next following tooth, when the same operation is repeated. The reason that the star wheel stops just when it does is that the tooth which was engaged by the music-disk projection has now in its revolution passed so far downward that this projection can no longer reach it, and so turn the star wheel. During this partial revolution, however, another tooth of the star wheel has come up into position, to be engaged by any projection of the music disk which is properly placed."

The operation, therefore, of defendant's device, shows it to be, like Lochmann's, a negative damper, which is applied by its own resilience, and is held free of the blade by the pressure of the star-wheel

tooth. Since the invention in suit, conceding that it is an invention, and not a mere obvious improvement of the Lochmann damper, is not of that broad character which calls for a liberal application of the doctrine of equivalents, the distinction above pointed out is sufficient to take defendant's device out of the scope of the first claim, as that claim must be construed. Bill dismissed.

PLASTIC FIREPROOF CONSTRUCTION CO. v. CITY AND COUNTY OF SAN FRANCISCO.

(Circuit Court, N. D. California. October 20, 1899.)

1. PATENTS—INVENTION.
   The mere carrying forward and application of old ideas so as to secure a better result, by substituting newer and better materials for those previously used, does not involve invention which will sustain a patent.
2. SAME—ARTIFICIAL SLATE.
   Claim 1 of the Brown patent, No. 399,374, which claims "as a new article of manufacture an artificial slate consisting of an interstitial metallic web and a covering of set plastic material, as set forth," having admittedly been anticipated as to the use of sheets of woven wire for the interstitial web, which was the material the patentee had in mind and used when he made his supposed invention, cannot be sustained as valid for the purpose of covering the use of sheets of expanded metal for such web, although such metal, which was the invention of another, was known to the patentee at the time his patent was applied for, and stated to be the preferable material in his specification. The substitution of such metal for the woven wire of the anticipating patent did not involve invention.

There was an action at law by the Plastic Fireproof Construction Company against the city and county of San Francisco to recover damages for the infringement of a patent. On motion by defendant for direction of a verdict.

This is an action at law to recover damages for alleged infringement of letters patent No. 399,374, granted by the United States March 12, 1899, to Calvin Brown, for a supposed invention of a new and useful article of manufacture, called "artificial slate." In the specifications of the patent it is stated that the "invention relates to improvements in roofing and sheathing buildings and other structures, and the object thereof is to obtain an artificial slate of durable and incombustible quality, to take the place of, and be used for the same purposes as, natural slate; and it consists in making, forming, and molding such artificial slate, and in the product so produced, and in the peculiar form and configuration of the slabs or strips thereof." The component parts of the artificial slate, as described in the specifications, are an interstitial web "formed of wire, but preferably, on account of its superior stiffness, of expanded metal," or "slashed metallic screening," made according to the specification of the United States letters patent No. 287,382, granted to John F. Golding on April 22, 1884, and body material of "any impervious, durable, and incombustible substance susceptible of being made plastic, and in this condition worked around and through the interstitial web, afterwards becoming hard and indestructible and adhering closely thereto. These conditions are fulfilled by the use of the best quality of Portland cement, but it is evident that any mastic of suitable materials, properly prepared, may be used for the production of a slate or slab with such an interstitial web." The specifications describe the process of manufacturing the artificial slate as follows: "The slate is molded in an open frame or mold, across which, laterally, are placed rod supports for the sheet of interstitial web by which

the web is raised above the molding bed on which the frame rests, and thus admits of the plastic body material, when fitted into the mold, becoming distributed through and below the web. After the plastic material is consolidated into the mold by tamping or by pressure, and the perfectly formed slate is removed therefrom, the grooves remain, so that afterwards, when the slate is to be laid in place, these grooves may be placed over rods adjusted upon the roof; the slate being held in position thereby, and thus prevented from slipping down upon sloping surfaces. The plastic material, after the slate is formed, being truly surfaced and slicked off on the upper or weather side, the under side being made plain and smooth by the molding table upon which it is pressed, it is left for a short time to set, when the molding frame is removed, the slate being then placed aside for further induration until it is fit for use. In this manner it is evident that slabs or strips of any desirable dimensions of combined body material and interstitial web may be made." The drawings referred to in the specifications resemble a molded cement slab, with a sheet of expanded metal for stiffening imbedded in the center; that is, about midway between the top and bottom surfaces of the slab. Only the first claim of the patent is alleged to have been infringed by the defendant, which claim is as follows: "(1) As a new article of manufacture, an artificial slate consisting of an interstitial metallic web and a covering of set plastic material, as set forth."

The case was brought to trial before the court and a jury, and the plaintiff introduced evidence tending to prove that in the new Hall of Justice, erected by the city and county of San Francisco, there was used in the construction of flooring, walls, and ceilings, in the interior of the building, a compound substance of sheets of expanded metal and body material of cement or plaster. The walls and ceilings are similar to other plastered walls and ceilings, except that, in place of wooden laths or wire, sheets of expanded metal were used. The floors were constructed by laying down sheets of expanded metal, and laying over the same cement in a plastic state, about four inches in thickness, so that after the hardening process the floors are in fact monolithic, instead of being constructed of slabs or strips fitted and joined as pieces of slate or tiles would be laid and fitted. The sheets of expanded metal were intentionally placed at the bottom of the cement, so as to secure the greatest advantage in the matter of tensile strength. The material called "expanded metal" is described in the specifications of the Golding patent as follows: "It is made of blank pieces of sheet metal of the required size and thickness, cut or slashed at intervals, each line of cuts being opposite to the spaces between the slashes or cuts of adjoining lines. After the metallic sheet has been so cut, it is stretched in a line transversely to the length of the slashes or cuts, thus forming meshes; the act of stretching causing the metal forming the boundaries of each mesh to become twisted, thus presenting the cut edges of the metal at the surface of the screening." The defendant introduced in evidence the file wrapper and contents, showing all the proceedings relating to the Calvin Brown patent, from which it appears that, in his original application for the patent, Mr. Brown's claims were much broader than the claims in the patent which was finally issued; and the application was rejected in the patent office on May 9, 1888, because the supposed invention was considered to have been anticipated by patents issued to Klueber March 31, 1885, and to Greene September 21, 1886, and to Hyatt July 16, 1878, and to Underwood November 3, 1885. Thereupon Mr. Brown amended his application by substituting the claims set forth in the patent now in suit, for and in place of the broader claims in his rejected application. June 8, 1888, the application was again rejected, because considered to have been anticipated by a patent issued to Turley October 12, 1886, for composite roofing. To overcome the objections on the ground of apparent anticipation of his supposed invention, Mr. Brown submitted evidence to prove that his invention had really been completed in 1881,—a date prior to all the supposed anticipations, except the Hyatt patent of 1878, which is for paving blocks having construction different from that of Brown's artificial slate. In his own affidavit Mr. Brown makes the following declaration: "That during the spring of the year of 1881 (that is to say, during the months of May and June of that year) affiant was in the employ of the United States government, as a civil engineer, at the

Mare Island navy yard, in the county of Solano, in the state of California. That about said time, or previous thereto, affiant's attention was called to the fact of the great scarcity in California of natural slate, and the exorbitant prices at which the same was being sold. That by reason thereof affiant conceived the idea of manufacturing an article of artificial slate to take the place of the natural article, and which could be made and sold cheaper than the natural article. With that end in view, affiant, with the assistance of one B. C. Towle, during said months of May and June, 1881, at said Mare Island, conducted a series of protracted experiments in manufacturing artificial slate, and, as the result thereof, made, completed, and perfected the invention described in his said above-mentioned application for a patent. That in said experiments affiant used as his plastic material Portland cement, and as his interstitial web woven-wire gauze, and by means thereof he manufactured many specimens of artificial slate. That each one thereof consisted of a body of plastic material allowed to indurate and set around an interstitial metallic web of woven wire fixed in a temporary frame. The woven wire was first fixed in the temporary frame, and the plastic material, while in a soft state, was then placed around and over the wire, so as to completely cover and envelope it, and was tamped down firmly, and the whole placed aside and allowed to set, after which the slate was removed from the frame, ready for use. That said invention was perfected and completed long prior to December 12, 1885, and as early as June, 1881, and is identically the same invention described in affiant's present application herein for a patent." In this declaration he is supported by the affidavits of Wilfred L. Brown, Frank E. Brown, and B. C. Towle; and upon this showing the application for a patent was granted as for an invention which was fully perfected as early as the month of June, 1881, which was about three years before Mr. Brown had any knowledge of the construction or use of expanded metal as described in the Golding patent, to which reference is made in the specifications of the Brown patent. The defendant also introduced in evidence, for the purpose of showing the state of the art previous to the time of Mr. Brown's supposed invention of artificial slate, a large number of patents for various compositions of plastic material. The defendant also introduced in evidence United States letters patent No. 200,320, issued February 12, 1878, to Michael F. Lyons, of New York, for fireproof material for walls, ceilings, flues, etc., which it is claimed is a complete anticipation of the Brown patent for artificial slate. The Lyons patent is for a new material, consisting of a composition of lime, calcined plaster, coal ashes or cinders, and alum, with sheets of wire net incorporated for toughening material. After the introduction of the defendant's evidence the plaintiff voluntarily entered a disclaimer as to any article of manufacture in which woven wire or any form of wire fabric is used as a constituent, conceding thereby that the Brown patent, in so far as it covers an article of manufacture consisting of interstitial web made of wire, with any kind of cement or other plastic body material, is invalid for want of novelty; but the plaintiff still contends that, as owner of the Brown patent, it is entitled to have a monopoly in the manufacture, sale, and use of the same description of article in which expanded metal is used as an interstitial web in place of wire. After the introduction of all the evidence, the defendant moved the court to instruct the jury peremptorily to render a verdict for the defendant.

John H. Miller, J. J. Scrivner, and N. A. Acker, for plaintiff.

James L. Hopkins, Walter M. Willett, George W. Lane, and Franklin K. Lane, City and County Atty., for defendant.

HANFORD, District Judge (after stating the facts). The motion which has been argued by counsel, and submitted to the court for decision, requires me to decide whether, in view of the admitted facts and uncontradicted evidence, the first claim of Mr. Brown's patent is valid for any purpose whatever. It is for the court to construe the patent, and in doing so it is necessary to give consideration to the drawings and specifications, and the claim set forth

in the patent itself, as well as the declarations of the patentee in the file wrapper; and I must also give effect to the disclaimer which has been made here during the progress of this trial. It is obvious that this first claim of the Brown patent has reference to the production of a particular artificial substance. If it might be regarded as a patentable invention at all, it would have to be classed as one of a secondary character, as distinguished from inventions of a primary character. Therefore the claim must be limited to the particular article specified, and it is necessary to keep in mind that this patent was granted for an invention perfected in the year 1881. Now, what is the article which was at that time produced by the combination of materials according to the formula which at that time Mr. Brown had perfected? Referring to the specifications in the patent, and Mr. Brown's affidavit in the file wrapper, we find that it is an artificial slate, to be used for the same purposes for which natural slate may be used. Natural slate is a metamorphic clay rock. In the quarry and in masses it has cleavage planes, so that it can be readily divided into thin plates or slabs, which are very solid and fine grained, and which may be easily worked and smoothed; and it is therefore useful as a top covering, where such covering is required to be thin, smooth, and water-tight. It is especially valuable for roofing, and in the manufacturing of mantels, billiard tables, and other similar objects. "Whet slate has a fine grain, and makes hones. A tough kind (hornblende slate) is used for flagging and sidewalks. A soft kind, containing carbon (drawing slate or graphic slate), is used for pencils. Polishing slate has a peculiarly fine grain, and is found in Bohemia. It is used in slips and in powder. Slate clay consists of alumina and silica, and, from the absence of fluxes, makes a refractory fire brick." Slate is also made into tablets for use in schools, and wherever it is convenient for writings and drawings intended to be expunged. 3 Knight, Mech. Dict. p. 2199. See, also, Stand. Dict. According to the evidence introduced upon this trial, slate, except when used as tablets, and for such purposes as tablets may be used, is only valuable as an exterior or top covering in the roofing of a building, or for side walls, or for the top of a table, or in any place where an even-surfaced, close-grained, hard, durable, noncombustible, and nonabsorbing substance is desirable. It is used for a top or an outside covering, where thin slabs or strips may be put in place as shingles and tiles are laid. That is the use of natural slate, and, to produce a substitute for natural slate in a form convenient for use, Mr. Brown perfected his formula for a combination of an interstitial metallic web, with plastic material molded into plates or slabs, with smooth surfaces and uniform planes, so as to be portable after the hardening process, and adapted to be laid in place and joined as may be required in the construction of roofs, and the sheathing of buildings, and any similar purposes. It is so stated in the specifications of this patent, and also in Mr. Brown's affidavit, which was made for the purpose of obviating the objections to his application with the broad claims which he originally presented. In his specifications he says:

"My invention relates to improvements in roofing and sheathing buildings and other structures, and the object thereof is to obtain an artificial slate of durable and incombustible quality to take the place of, and to be used for the same purpose as, natural slate."

I do not find in the patent any suggestion of an idea to provide a new material, having additional tensile strength, which might be used for bridge timbers or the framework of large structures. It was the shell, the outer covering, the top covering, of buildings or other structures, which was in this inventor's mind, as shown by his declarations all through the record in the patent office. The connection in which he uses the word "slate" in this first claim of the patent shows that he had in mind something in the nature of a slab or strip having uniform planes, and of definite dimensions,—not any particular size, but whatever dimensions might be required in materials to be laid in place, in connection with other similar slabs or strips, to form a covering. Instead of using words which would carry the idea of a claim to a new substance in mass, like slate in a quarry, he uses the article "an,"—"an artificial slate." This I think fairly implies, as one of the expert witnesses seems to have understood it, that the claim is for material having form and dimensions. In his specifications he speaks of it being molded in form so that afterwards, when the slate has been molded, it may be laid in place. From this description it must be inferred that the manufactured article would be portable, and in shape to be put in place somewhere, instead of being constructed as a continuous, solid formation, constituting a substantial part of a large structure. The kind of interstitial metallic web referred to in the first claim, which the patentee had in mind at the time when he claims to have made the invention, was woven wire. He had no knowledge at that time of expanded metal. And, in the face of the evidence which has been introduced upon this trial, it is now admitted by the plaintiff that there was in fact no originality or invention in the combination of sheets of woven wire with a body material of cement or other plastic substance at that time. Therefore he was in error in supposing that he had made a discovery, or created a new article of manufacture. The combination of materials which he at that time made did not constitute a patentable invention, because in that he had been anticipated. Mr. Brown is not the inventor of expanded metal. After that material had been discovered and described in the Golding patent, there could be no invention in the mere adoption of it as a substitute for a metallic mesh of wire. The expanded metal produced no new result. All that may be said in its favor is that for certain purposes it produces a better result. By the use of expanded metal in place of wire a superior article of artificial slate can be produced, but the mere carrying forward and application of old ideas by the use of the newest and best materials does not require the exercise of the inventive faculties in the human mind. This case seems to come fairly within the rule laid down by the supreme court in the case of Railway Co. v. Rowley, 155 U. S. 621–631, 15 Sup. Ct. 224. The decision of that case appears to rest mainly upon a principle stated in the opinion by Mr. Justice Shiras in the following words:

"A mere carrying forward of the original thought, a change only in form, proportion, or degree, doing the same thing in the same way, by substantially the same means, with better results, is not such an invention as will sustain a patent. Roberts v. Ryer, 91 U. S. 150; Belding Mfg. Co. v. Challenge Corn-Planter Co., 152 U. S. 100, 14 Sup. Ct. 492."

Having given in brief my opinion upon the questions argued in this case, I feel constrained thereby to instruct the jury, according to the defendant's request, as follows: Gentlemen of the Jury: The court instructs the jury to render a verdict in favor of the defendant and against the plaintiff, because the first claim of the patent in suit is void for want of novelty. It will not be necessary for you to retire to render your verdict. The form of the verdict has been prepared by the clerk. It only requires the signature of your foreman to complete it. You may choose a foreman, and let him sign this verdict.

MYERS v. STERNHEIM.

(Circuit Court of Appeals, Ninth Circuit. October 2, 1899.)

No. 524.

1. PATENTS—ACTION FOR INFRINGEMENT OF DESIGN PATENT—EVIDENCE.
   Invention is as essential to the validity of a design patent as of a patent for a mechanical device; and, in an action at law for infringement of a design patent, defendant may introduce in evidence, under the general issue, other design patents, for the purpose of showing the prior state of the art, and as going to the question of invention.
2. SAME.
   It is not error in such an action to permit a witness to compare the design of plaintiff's patent with others in evidence, and point out the differences between them.
3. APPEAL—REVIEW—INSTRUCTIONS.
   Exceptions to the charge of the court cannot be considered by the appellate court where only a portion of the charge is contained in the record.

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

William H. Jordan, for plaintiff in error.
John H. Miller, for defendant in error.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

ROSS, Circuit Judge. We see no merit in this appeal. The action was one at law, for damages growing out of the alleged infringement of a design patent for a lamp stove, in which the defendant pleaded the general issue. Three points are made as grounds for a reversal of the judgment entered in the court below. The defendant was permitted to introduce in evidence, against the objections of the plaintiff, various design patents, to which action of the court exceptions were entered by the plaintiff, and are here relied upon as grounds for a reversal of the judgment given below. Those patents were not offered or allowed in evidence for the purpose of showing anticipation, for there was no such de-

fense pleaded by the defendant. They were offered and admitted for the purpose of showing the prior state of the art. The exercise of the inventive faculty is just as essential to the validity of a design patent as it is to the validity of a patent for any kind of a mechanical device. Smith v. Saddle Co., 148 U. S. 674, 13 Sup. Ct. 768; Hammond v. Agricultural Works, 17 C. C. A. 356, 70 Fed. 716. And to patents for designs all the regulations and provisions which apply to obtaining or protecting patents or discoveries, not inconsistent with the provisions of title 60 of the Revised Statutes, are by section 4933 of those statutes expressly made applicable. It is therefore clear that it is as permissible for the defendant to an action on a design patent to show the prior state of the art, as it is in the case of a patent for a machine. The purpose of such a showing is to throw light upon the question of invention, which lies at the foundation of the case.

The court below also permitted the counsel for the defendant, against the objections of the plaintiff, to ask certain witnesses to point out differences between the patents introduced for the purpose of showing the prior state of the art, and the patent sued on. To these rulings the plaintiff excepted, and they are also assigned as error. The true rule in respect to design patents is thus stated by the supreme court in Gorham Co. v. White, 14 Wall. 511, 528:

"If, in the eye of an ordinary observer, giving such attention as a purchaser usually gives, two designs are substantially the same,—if the resemblance is such as to deceive such an observer, inducing him to purchase one supposing it to be the other,—the first one patented is infringed by the other."

The conclusion in respect to the matter is to be drawn by the jury, or, where a jury is waived, by the court; but this fact does not preclude the showing by witnesses of differences that may exist in the various designs. Such detailed differences, where shown, are not, of course, conclusive upon the jury, which, on the contrary, is to say from the whole evidence, under the rule stated, whether or not there was an infringement of the plaintiff's patent. The court below so told the jury, and was right in doing so.

The only other point relied upon by the plaintiff in error arose out of exceptions to the charge of the court; but a reference to the record shows affirmatively that the plaintiff in error has brought up only a part of the court's charge, and there is nothing to indicate that the omitted portion had no bearing upon the point made. Under such circumstances, we would not be justified in reversing the judgment, even if, in the portion of the charge brought here, error appeared, since, in the portions of the charge omitted, the error, if any, may have been corrected. We do not intend, however, to be understood as intimating that the portion of the charge printed in the record contains any error. The judgment is affirmed.

EXCELSIOR NEEDLE CO. v. MORSE-KEEFER CYCLE-SUPPLY CO.

(Circuit Court, D. Connecticut. November 4, 1899.)

1. PATENTS—INVENTION—WIRE-SWAGING MACHINES.
   The Dayton patent, No. 474,548, for a swaging machine, which is especially adapted, and largely used, for the manufacture of double-butt swaged bicycle spoke blanks, is void for anticipation and lack of patentable invention; the means broadly shown in the first claim having long been generally known and applied for analogous purposes, and the detail construction covered by claims 2 and 3 having been shown in the Brown and Sharpe machine for making screws.
2. SAME—INFRINGEMENT.
   The Dayton patent, No. 492,576, for a swaging machine acting in cooperation with an automatic feed to produce double-butt bicycle spoke blanks, as to the first four claims, covering the broad combination of swager and automatic feed, and claim 6, was anticipated by the Kaiser patent, No. 33,707, for a needle machine, and by the Breedon machine for making straight wire blanks; the mechanism of such machines having merely been combined in the Dayton machine, and modified to adapt it to making the longer spoke blanks, which involved mechanical skill only. Claims 5, 8, and 9, in so far as they cover a variable connection between the cutter plate and pinchers, involve invention; also *held* infringed by machines made under the Morse patent, No. 588,648.

This was a suit in equity by the Excelsior Needle Company against the Morse-Keefer Cycle-Supply Company for infringement of certain patents.

Chapman & Hall and H. A. Seymour, for complainant.
Alfred Wilkinson, for defendant.

TOWNSEND, District Judge. Final hearing on usual bill and answer raising questions of validity and infringement of complainant's patents No. 474,548, granted May 10, 1892, and No. 492,576, granted February 28, 1893, to William H. Dayton for swaging machines.

In the discussion of the questions presented, the following contentions of complainant's counsel are proved: The inventions of the Dayton patents in suit relate to improvements in machines for swaging wire, which are especially adapted to the manufacture of double-butt swaged bicycle spoke blanks. These blanks were a great improvement on the prior art, were promptly adopted by the trade, and have gone into almost universal use, and Dayton's machines were the first to produce said improved spoke blanks. The defendant's machine infringes the claims of the first patent. The difference in construction of tappets is immaterial.

The following contentions of defendant's counsel are proved: The first patent makes no mention of spokes. Both patents are for wire-swaging machines. The swaging of wire to make spoke blanks is exactly the same operation as the swaging to make needle blanks, and these machines perform only one operation in the manufacture of the double-butt spokes, which are not a patented article, and in a prior patent this patentee (Dayton) had shown a similar way to swage blanks for needles. The defendant makes its machines under patent No. 588,648, granted to A. J. Morse, August 24, 1897.

Rotary swaging machines for reducing wire were old. Prior to the patents in suit, the art, as illustrated by Hopson and Brooks and Dayton and other patents, showed such machines, consisting generally of a stationary ring or head provided with tappets, and inclosing a circular rotary head, in a cross groove of which were swaging dies or die blocks. This rotary head is mounted on a revolving shaft, which, being rotated at a speed of several hundred revolutions per minute, causes the dies to be thrown outward by centrifugal force, and, as they impinge on the tappets, they are driven rapidly inward against the wire. The improvement covered by the first patent in suit, as claimed by Dayton, consisted in inserting longitudinally adjustable wedges between the dies and die blocks, and constructing the said dies and blocks with inclined faces to fit the wedges, and then connecting said wedges with a longitudinally adjustable tube, so that, when the narrowest portion of the wedges is between the blocks and dies, the dies will be thrown radially so far outward as to let the wire pass through without being swaged, but, when the wedges are forced back or inwardly by the movement of the tube, the swaging operation is continued; that is, the swaging is interrupted without interfering with the operation of the machine.

The single question on this branch of the case is whether this was the patentable invention of Dayton.

The claims are as follows:

"(1) The combination, with the swaging dies and means for closing the same, of inclined surfaces, and mechanism for moving the inclines during the action of the dies, for causing the dies to perform the swaging operation, when either nearer together or farther apart, substantially as set forth.

"(2) The combination, with the swaging dies and the revolving shaft and head carrying the same, of wedges, means for moving the wedges endwise during the swaging operation, and die-actuating mechanism controlled in its action on the dies by the wedges, substantially as set forth.

"(3) The combination, with the revolving shaft and its head, of dies and die blocks, and mechanism for closing the dies, and wedges intervening between the dies and the die blocks for varying the action of the dies, and the adjusting tube within the revolving shaft, and the connections to the wedges for moving the same, substantially as set forth."

Dies with inclined surfaces were old. The Peck patents, Nos. 428,519 and 428,572, of May 20, 1890, for swaging machines, show dies secured on the end of a rotating tube, and so engaging, by means of inclined surfaces, with tappets having inclined surfaces, that the dies were moved inwardly or outwardly, so as to swage when near together or far apart, without interrupting the action of the machine. Complainant cannot successfully meet this proof. It is true these are paper patents, but that fact does not remove them from consideration as part of the prior art, where, as in this case, they disclose the alleged invention. The specification of said patent No. 428,519 describes, and one claim covers specifically, the combination of "means for reciprocating the die-holding head to open and close the dies, and means for automatically feeding the wire between the open dies." It is true that the Peck machine was designed to be operated in connection with a complicated and clumsy automatic contrivance. But it required no invention to

strip off this automatic device, or to move said tube and wedges longitudinally by a forked lever, as was suggested in one of Dayton's patents. John N. B. Briggs v. Ice Co., 8 C. C. A. 480, 60 Fed. 87.

Complainant relies on the fact that Peck does not show the wedges and tube, which it contends are the fourth element of the first claim of the first patent in suit, and which are specifically covered in the second and third claims. But such wedges were well known in the prior art of swaging machines, as shown by the Miller and Cochrane patents, and in gripping machines, as shown by the Brown patent and machine. And the earlier Dayton patent, No. 268,874, and the later Dayton patents, Nos. 492,573 and 492,574, show the construction covered by this first claim, and the construction of the two latter patents is substantially identical, as to said fourth element, with that shown in the Peck patents.

The correctness of these conclusions is supported by the following extracts from the able and exhaustive brief of complainant's counsel. He says, speaking of the Peck machine, as follows:

"When the driving shafts, dies, and feeding rolls are moved forwardly, the dies are opened by their springs, and the feed rolls are actuated, and caused to feed the wire through them a short distance into and between the dies. When the parts are reciprocated in the opposite direction, the dies commence to operate on the wire; and, as the dies are gradually forced towards each other, the force of their blows grows harder and harder, until they reach the limit of their inward movement, when their movement is reversed, and they are gradually moved in the opposite direction, which causes their blows to become lighter and lighter, until the limit of their outward travel has been reached, and then the feeding mechanism operates to feed another short section of wire to the dies, which is then reduced in the same manner."

He then adds:

"The defendant may possibly contend that the Peck patents anticipate the first claim, in view of the testimony of Mr. Serrell, complainant's expert witness, that the third element of the first claim, viz. 'inclined surfaces,' is broad enough in terms to cover and include such a construction and arrangement of inclined dies and rollers as is shown in the Dayton patents, Nos. 492,573 and 492,574, of February 28, 1893, by arguing that such construction and arrangement is the same as that shown in the Peck patents."

In order to swage a double-butt blank in the Peck machine, it would only have been necessary to run the wire through clear, far enough for the enlarged end, and then push back the inclined surfaces so as to bring the dies together, and swage. It is clear that the broad first claim is anticipated.

If it were necessary to the decision of the question of anticipation of the first claim, it could be shown that complainant's expert, having asserted that defendant's Morse patent infringed said wedges or inclined surfaces of said first claim, on cross-examination admitted that the Morse wedges were substantially similar to those in the prior swaging-machine patent to Hendey, No. 439,952. Knapp v. Morss, 150 U. S. 228, 14 Sup. Ct. 81.

Anticipation of the details of construction covered by the second claim is more doubtful, except by reference to the Brown-Sharpe patent and machine for manufacturing screws. The following

statement of defendant's expert as to this patent and machine is abundantly proved:

"In the Brown & Sharpe machine, for many years prior to 1885 in practical use, and in the Brown patent, No. 51,257, November 28, 1865, we have Dayton's exact wedges, arranged and operated in exactly the same way; that is, a rotating head, operated by a tubular shaft, a second tube within the shaft, wedges elastically, and not rigidly, secured to the end of the tube, and means for moving said tube and wedges longitudinally while the whole mechanism is rotating, to force the dies nearer together or the reverse. To be sure, this is a gripping, and not a swaging, machine; but the wedges, their arrangement, function, operating parts, even the form of the parts, are exactly those of Dayton, and meet exactly the details specified in his claims 2 and 3. All Dayton had to do was to appropriate these identical parts."

And, although the grip function of a rotary clutch device is unlike the lever beating of the rotary swager, yet the art is, in a certain sense, analogous; for one butt of the bicycle spoke blank becomes a screw. But because this patent appears to owe its prominence, not to the inventive faculty of the patentee, but to the development of the bicycle industry, and because the means therein broadly shown had long been generally known and applied for analogous purposes, and because, in view of the prior art, the question as to the presence of invention in the new details of said second and third claims is doubtful, and because the Brown and Sharpe patent and machine show the identical detail construction covered by said second and third claims, they cannot be sustained. It does not appear from the briefs or arguments of counsel that any material distinction is drawn between said two claims.

The second patent in suit, No. 492,576, issued to Dayton, February 28, 1893, is for a swaging machine, acting, in co-operation with an automatic feed, to produce double-butt blanks. It is claimed and proved that defendant infringes all of the nine claims of said patent except the seventh. Said claims are as follows:

"(1) The combination, with the swaging mechanism, of pinchers for grasping the article to be swaged, mechanism for giving motion to the pinchers to draw the article through between the swaging dies, and a holding clamp for holding the article operated upon, and mechanism for opening the pinchers, and returning them to take a fresh hold for drawing through another length, substantially as set forth.

"(2) The combination, in a swaging machine, of dies for effecting the swaging, mechanism for actuating such dies, pinchers for holding the article to be acted upon, mechanism for opening and closing the pinchers, and moving them longitudinally for drawing the article to be swaged through between the dies, substantially as set forth.

"(3) The combination, with rotary swaging dies and mechanism for opening and closing the same, of pinchers for grasping the article to be acted upon, and mechanism for moving the pinchers, and drawing the article along between the swaging dies, a clamp for holding the article when the pinchers are opened, and a cutter and mechanism for actuating the same, to separate the swaged article from the wire or stock, substantially as set forth.

"(4) The combination, in a swaging machine, of swaging dies, rotary mechanism for actuating such dies, a moving wedge or backing for varying the closing of the dies, pinchers and mechanism for opening and closing the same, and for moving the pinchers longitudinally for drawing the article to be swaged along between the dies, a clamp for holding the material when the pinchers are opened, and a cutter for separating the swaged article, substantially as set forth.

"(5) The combination, with swaging dies, of pinchers, mechanism for opening and closing the same, and for moving them longitudinally, and carrying the article longitudinally between the swaging dies, a cutter for separating the swaged article, and a connection between the cutter and the pinchers, whereby the cutter is brought into position by the movement of the pinchers, substantially as set forth.

"(6) The combination, in a machine for swaging wire spokes, of revolving swaging dies, and mechanism for moving and regulating the action of said dies, pinchers and mechanism for opening and closing the same, a cam and variable lever mechanism for regulating the longitudinal movement given to the pinchers, and varying the length of the spoke, substantially as set forth."

"(8) The combination, with the swaging mechanism, of the revolving shaft, through which the wire to be swaged passes, and which shaft carries the swaging mechanism, pinchers and means for opening and closing the same to grasp or relieve the wire, a cam and intervening connections to the pinchers for giving motion to such pinchers to move the wire between the swaging dies, a cutter plate and cutter movably supported upon the machine, and a variable connection between the cutter plate and the pinchers for determining the position of the cutter, and mechanism for giving motion to the cutter, substantially as set forth.

"(9) The combination, with the swaging mechanism, of the revolving shaft through which the wire to be swaged passes, and which shaft carries the swaging mechanism, pinchers and means for opening and closing the same to grasp or relieve the wire, a cam and intervening connections to the pinchers for giving motion to such pinchers to move the wire between the swaging dies, a cutter plate and cutter movably supported upon the machine, and a variable connection between the cutter plate and the pinchers for determining the position of the cutter, mechanism for giving motion to the cutter, and a clamp for holding the wire during the return movement of the pinchers, substantially as set forth."

The specification states as follows:

"In carrying out this invention, any suitable swaging apparatus may be made use of, such, for instance, as that represented in letters patent No. 474,548, granted to me May 10, 1892, and the wire as fed into the machine is preferably passed through a straightener, and the longitudinal movement is given to the wire by pinchers that grasp the partially or entirely finished blank, and draw the same along, together with the wire that is being swaged, and the wire is then held in a stationary position, while the pinchers are opened and returned to the point of beginning to take a fresh hold, and the completed article is cut off, and drops away from the machine."

This arrangement of devices is broadly covered by the first four claims.

The Kaiser patent, No. 33,707, of 1861, for a needle machine, and the Breedon machine, in use for the past 15 years at Amsterdam, N. Y., for making straight wire blanks, show substantially all the claimed elements, arranged in the same way and operating for the same purpose. Complainant, comparing Kaiser and Dayton, contends as follows:

(1) "Not an element of the sawing mechanism of Kaiser is appropriated in the swaging mechanism of Dayton."

But this is immaterial, for Dayton says he only refers to "any suitable swaging apparatus."

(2) The Dayton pinchers are heavy, strong, and positively actuated; the Kaiser nippers are closed by a spring.

This is a mere mechanical difference, especially in view of Breedon.

(3) The third element of the Dayton patent is mechanism for giving motion to the pinchers to draw the article through, and, while

Dayton gives a range of movement of 12 inches, Kaiser gives only about 2 inches.

The mechanism of Kaiser and Breedon is strikingly like that of Dayton, and, while in Breedon means are shown for varying the range of movement, it is only a matter of mechanical modification of cams to accomplish this result on either machine.

(4) The fourth element is "a holding clamp." Kaiser shows nippers.

The Breedon machine shows a clamp. The only objection suggested by complainant is that the Kaiser nipper would indent the spokes. The Breedon clamp works in the same way as the clamp of the patent in suit.

(5) The fifth element is "mechanism for opening the pinchers and returning them." Kaiser says: "The jaws are of such form that, when drawn towards the circular saws, they open of themselves, and glide over the needle wire," etc.

Breedon shows such mechanism in detail. Complainant's expert admits that every element of the first claim, except the old Breedon swager, is found in Kaiser.

Complainant's position is that the cam-faced clamp would have to be thrown away, and pinchers like the Dayton machine substituted therefor, "in order to secure a firmer grasp, and the mechanism for actuating the Breedon clamp could not be used in a spoke machine which required means for positively opening and closing the pinchers and reciprocating them throughout the distance of twelve inches." The question, therefore, is presented whether it required invention to adapt the existing needle and blank machines to the making of spoke blanks. It is unnecessary to discuss the well-settled principles of law applicable to this question. This case is a striking illustration of the inventive ingenuity of the patent solicitor rather than of the patentee, and of the reflected light which a new discovery or new art sheds upon details of construction. This patent covers any old swaging machine attached to any old automatic feed machine, so modified as to time its operations to a long piece of wire instead of a short one. Can it be doubted that, if the skilled mechanics in this needle factory had been called on to increase the length of their needles, or to grip them more firmly, and to time the feed accordingly, they would have adjusted the devices so as to have greater range of movement, or would have substituted a clamp or a pincher, or would have altered the shape and relations of the familiar cam-feeding devices? Such improvements would naturally follow in the development of the art. They would have found a considerable capacity for adjustment provided for in Breedon, and an elongated cam construction in Kaiser, pregnant in suggestions of adaptation such as is shown in Dayton's toe. Nor would these adaptations secure a novel result; for the bicycle blank, as to the operation of this patent, is only a larger needle blank. It is believed that no case can be found where a patent has been sustained for a mere change in size or degree.

The foregoing discussion relates to the first four claims for the broad combination of swager and automatic feed. The sixth claim

merely adds a cam and variable lever mechanism, which is sufficiently disclosed by Breedon. The fifth, eighth, and ninth claims cover, inter alia, the specific construction of "a variable connection between the cutter plate and pinchers for determining the position of the cutter." This connection is not found in the prior art, and involved invention. Defendant claims that it does not infringe, because it alleges that its cutter is different in construction, arrangement, and operation. In the second patent in suit the cutter and pinchers are mounted on separate carriages, connected by a rod. The pincher carriage moves longitudinally backward until it strikes and pushes back the cutter carrier, but when the pincher carriage moves forward it does not drag the cutter carriage until after it has progressed a sufficient distance to permit a nut on said rod to engage the cutter carriage. The cutter and pinchers are closed by different connections, distinct from each other.

Defendant's machine is built in accordance with the specifications of the Morse patent, as already stated. In its machine the cutters and pinchers are mounted on the same carriage, and are operated by the same mechanism, and the distance between them after they have once been adjusted is constant. Defendant, therefore, contends that its connection is not "variable." But it is variable in the sense of being adjustable, and it is only in this functional sense of "adjustable" that the word "variable" is used in said claims. I think this is a mere difference of terms; that it is unimportant; that one is first varied by adjustment for operation, while the other is varied during its operation to produce the same result.

That Morse was in complainant's employ, and left it, and became connected with the defendant company, and tried to secure a patent on various claims which were rejected on Dayton; that defendant claims to have submitted its machine and patents to the present commissioner of patents, and to have obtained an opinion from him that they did not infringe; that defendant has cut prices, and seriously interfered with complainant's business,—might have some bearing on one or the other side of the equities of this case, if they involved merely a question between the parties hereto. But the defense of want of patentable invention in a patent operates, not merely to exonerate the defendant, but to relieve the public from an asserted monopoly (Haughey v. Lee, 151 U. S. 285, 14 Sup. Ct. 331); and therefore the case has been decided upon the evidence as to patentable novelty.

Undue prominence has been given to the evidence as to increased sales of unpatented double-butt spokes, when the fact is that said increase is chiefly due to the enormous growth of the bicycle industry.

A decree may be entered for an injunction and an accounting as to claims 5, 8, and 9 of patent No. 492,576, and dismissing the bill as to the other claims of said patent, and as to patent No. 474,548.

RUSSELL v. WINCHESTER REPEATING ARMS CO.

(Circuit Court, D. Connecticut.)

1. PATENTS—PLEADING—MULTIFARIOUSNESS.
A bill based on several patents is multifarious, if it does not appear therefrom that the several improvements covered by such patents are or have been all conjointly used by defendant, or are or have been all embodied for conjoint operation and use in one machine, device, article, or apparatus.

2. SAME—PATENT WITH NUMEROUS CLAIMS—COMPELLING ELECTION.
When a bill is based upon a patent containing numerous claims relating to different groups of elements, the complainant may, on motion therefor, be required to specify the particular claims in respect to which he will attempt to prove infringement.

George D. Watrous and Harry G. Day, for complainant.
Charles R. Ingersoll and George D. Seymour, for defendant.

SHIPMAN, Circuit Judge. This suit was brought on four patents, namely, No. 230,823, dated August 3, 1880; No. 295,285, dated March 18, 1884; No. 295,286, dated March 18, 1884; No. 501,367, dated July 11, 1893. The bill of complaint was demurred to, and the following reasons of demurrer assigned:

"First. That the bill of complaint is multifarious, in that suit is thereby brought against this defendant for four separate and distinct matters and causes, to wit: (1) For an infringement of letters patent No. 230,823, for an alleged improvement in breech-loading guns; (2) for an infringement of letters patent No. 295,285, for an alleged improvement in magazine guns; (3) for an infringement of letters patent No. 295,286, for other alleged improvements in magazine guns; and (4) for an infringement of letters patent No. 501,367, for other alleged improvements in magazine guns,—of which said several letters patent profert is made by said bill. That these several alleged infringements and matters of controversy cannot be properly joined in one suit, and that the defendant, being, by this bill, required to litigate four distinct and independent controversies in this one suit, is thereby put to great and serious inconvenience and disadvantage, contrary to equity, and is prevented from making proper answer thereto, as it is rightfully entitled. That it nowhere in said bill of complaint appears, nor is it therein anywhere averred, that the complainant has at any time used all said several alleged inventions set forth in said several letters patent by embodying the same in one and the same breech-loading magazine gun or other machine, device, article, or apparatus for conjoint operation and use therein, or that all said several alleged inventions are practically capable of being so embodied for successful conjoint use. That it nowhere in said bill of complaint appears, nor is it anywhere averred, that the several alleged improvements set forth in said several letters patent are or have been at any time all conjointly used by the defendant in infringement of said several letters patent, or are or have been, by the defendant, all embodied, for conjoint operation and use, in one and the same breech-loading magazine gun or other machine, device, article, or apparatus, in infringement of said several letters patent. Second. That the bill of complaint, so far as the letters patent numbered 230,823 enter into the matters complained of therein, or are made the subject of the relief prayed for by the complainant, is without equity, and this court is without jurisdictional power to grant the relief prayed for therein for the reason that it appears by the bill of complaint that said letters patent No. 230,823 expired long before the filing of said bill of complaint, to wit, on the 3d day of August, 1897."

The demurrer was argued May 1, 1899, before Judge Shipman, who allowed it, and signed the following order:

"Upon a hearing of the demurrer filed it is ordered that the demurrer is sustained for these reasons: (1) That it nowhere in said bill of complaint appears that the several alleged improvements set forth in said several letters patent are or have been at any time all conjointly used by the defendant in infringement of said several letters patent, or are or have been by the defendant all embodied for conjoint operation and use in one and the same breech-loading magazine or other machine, device, article, or apparatus, in infringement of said several letters patent. (2) That the bill of complaint, so far as the letters patent numbered 230,823 enter into the matters complained of therein, or are made the subject of the relief prayed for by the complaint, is without equity, for the reason that it appears by the bill of complaint that the said letters patent No. 230,823 expired long before the filing of said bill of complaint, to wit, on the 3d day of August, 1897. Leave is given to amend the bill within thirty days upon payment of costs."

The bill was then amended, and limited to patent No. 501,367, dated July 11, 1893, containing 37 claims. The defendant then gave notice of a motion for "an order requiring the complainant to amend his amended bill of complaint by specifying those claims of the thirty-seven claims of the patent in suit, No. 501,367, under which he will attempt to prove infringement by the defendant, so that the defendant may be guided in answering the said amended bill of complaint, and relieved of the burden of answering as to a number of claims not infringed and not claimed to be infringed." This motion was argued June 17th before Judge Shipman, who on that day signed the following decision and order:

"It appearing that the patent now sued upon contains thirty-seven claims, which relate to different groups of elements, and that the complainant has heretofore entered into a stipulation that the defendant's answer may relate to five claims only, and that it may amend its answer if infringement of other claims is drawn in question in the prima facie case, which stipulation has never been filed, and is no longer in force; and it further appearing that it is unreasonable to require the defendant to make search for and prepare an answer in regard to all the claims of said patent, and that it is reasonable that the complainant shall be required to inform the defendant of the claims alleged to have been infringed: It is ordered that the complainant shall, within thirty days from June 17, 1899, specify in his bill of complaint the claims which he alleges to have been infringed by the defendant, and that the defendant shall answer said bill within thirty days after such amendment or statement has been filed, and that, if the complainant shall subsequently, and before the prima facie case has been closed, ascertain that other claims should have been included, he has leave to apply to the court for further amendment of his bill."

Thereupon the plaintiff again amended his bill of complaint by specifying the claims alleged to be infringed.

NORTON et al. v. WHEATON.

(Circuit Court, N. D. California. October 30, 1899.)

No. 12,135.

1. PATENTS—INFRINGEMENT—COMBINATIONS.
To constitute an infringement of a patent for a combination of mechanical powers in a machine, the elements of which are not separately claimed as the invention of the patentee, the infringing machine must substantially use all the elements of the combination.

2. SAME—CAN-HEADING MACHINES.
The Jordan patent, No. 307,197, for improvements in can-ending machines, is not for a pioneer invention either of a machine for heading cans or as to the appliances brought together in the mechanism of the machine described, and its claims cover only the exact union of the exact elements of the device shown. It is not infringed by machines made in accordance with the Wheaton patents, Nos. 477,584 or 499,949,—the latter being for improvements on the former,—as such machines, while performing the same functions as the Jordan machine, do so by entirely different mechanism, in which the principal elements of the combination shown by the Jordan patent are not used.

This was a suit in equity by Edwin and Oliver W. Norton against Milton A. Wheaton for infringement of a patent.

John H. Miller, for complainants.

Wheaton & Kalloch (I. M. Kalloch, of counsel), for respondent.

MORROW, Circuit Judge. This is an action for infringement of United States letters patent No. 307,197, bearing date of October 28, 1884, and granted to Edmund Jordan, for certain improvements in can-ending machines. A copy of the specifications and drawings of the patent is attached to and made part of the bill of complaint, as Exhibit A. Complainants are the owners of said letters patent. The bill alleges that respondent has made and sold can-heading machines made as described in United States letters patent No. 477,584, bearing date June 21, 1892, and No. 499,949, bearing date June 20, 1893, and that these machines are infringements upon complainants' patent. The amended answer denies that the patentee, Jordan, was the original inventor of any improvement in can-heading machines; alleges that Jordan's machine was impracticable, and incapable of performing the operation of heading cans; denies infringement; admits that respondent has made and sold two machines as described in patent No. 477,584, and one as described in patent No. 499,949; sets up an adjudication in an action of the United States circuit court of appeals for the Ninth circuit on or about March 10, 1892, in which Edwin Norton and Oliver W. Norton, the complainants herein, were complainants, and Mathias Jensen and John Fox were respondents, this action being brought for an alleged infringement by the respondents of complainants' letters patent No. 274,197, and avers that the said court of appeals decided that the said letters patent were invalid and void, and that the machine described therein was "not a practicable machine for putting heads on tin cans"; avers that this adjudication of the court of appeals is binding, and that complainants are now estopped from claiming that the Jordan patent

is a valid patent; sets up as anticipations of complainants' patent United States letters patent No. 152,757, bearing date July 7, 1874, and granted to George A. Marsh, for an improvement in devices for heading cans; United States letters patent No. 238,351, bearing date March 1, 1881, and granted to William J. Clark, assignor to Charles E. Hull and Jonathan Q. Rand, for a can-heading machine; United States letters patent No. 265,617, bearing date October 10, 1882, granted to George A. Marsh, for a machine for heading cans.

Letters patent No. 307,197, for the infringement of which complainants have commenced this suit, were granted to Edmund Jordan on October 28, 1884. The invention for which this patent was granted is described in the specification as "an improvement in can-ending machines for automatically putting the ends of sheet-metal cans onto the bodies," and more fully stated to be "an appliance devised to perform the following operations: First, to pick up and retain a can end; second, to grasp and hold the body of a can in a proper position; third, to force the end on the body; fourth, to release the end and body when these operations are completed." The specification further states:

"My invention relates generally to the class of mechanism adapted for putting the ends of sheet-metal cans on the bodies, and more specifically to the subdivision of such class which employs a method of grasping and holding the body of the can in position while the end is forced on. At present, my invention relates to and is employed in the machine the features of which are fully shown in the accompanying drawings and described in this specification, but is adapted to and can be operated in a press or machine of any suitable construction. * * * The mechanism employed in the machine herein described and shown consists, generally speaking, in a vertically-moving and horizontally-swinging arm, carrying a segmental spring clamp chuck adapted to pick up and carry a can end to a body, then center and hold the body firmly, and force the end on the body, afterwards releasing both end and body of the can, in combination with the intermittently-rotating disks provided with chucks, on one of which disks the can ends, and on the other the bodies of the cans, are placed, to be operated upon by the segmental spring clamp chuck."

The first two claims of this patent are as follows:

"(1) In a machine for automatically putting the ends of sheet-metal cans on the bodies, a segmental clamp chuck, and mounted to be capable of performing the following operations: First, to receive and retain a can end; second, to grasp and hold the body of the can in a proper position; third, to force the end of the can on the body of the same; fourth, to release the end and body of the can when these operations are completed,—combined with suitable means for actuating the same to effect these operations. (2) In a machine for automatically putting the ends of sheet-metal cans on the bodies of the same, a vertically-moving and horizontally-swinging arm, in combination with a segmental spring clamp chuck mounted to be capable of performing the following operations: First, to receive and retain a can end; second, to grasp and hold the body of the can in a proper position; third, to force the end of the can on the body; fourth, to release the end and body of the can when these operations are completed,—and suitable means for actuating the same to effect these operations."

The segmental spring clamp chuck consists of a number of segments or jaws. The drawings of the patent show six of these jaws, but the number does not appear to be material, except that there must be two, and there may be more. These segments or jaws are circularly arranged, and so connected or pivoted as to be movable

outwardly from the center of the chuck, presenting internally a funnel-shaped cavity or mouth with an annular space or seat at the top or inner end for the reception of the can head. This annular space is of the exact circumference of the can head, while the smallest circumference of the funnel-shaped mouth of the chuck is exactly that of the can body, sized and shaped to enter the can head. The segments of the chuck are encircled with a metal ring held in position by a latch. This latch is connected with a spring so arranged that the latch will be released at the proper time, and the ring allowed to make a partial rotation when so released from the latch, and this will cause the segmental jaws to expand. A reverse motion of the ring, produced by appropriate mechanism, causes the jaws to close. This chuck is mounted upon a radial arm, marked "A" in the patent, and this arm is attached to the frame of the machine, so as to be capable of an arc-shaped motion around its point of attachment. For feeding the cans and heads, or assembling them in such relations as to each other as to be convenient for the purpose of heading, two rotating tables are provided, so located with reference to the chuck arm that when the chuck describes its arc-shaped motion the heads and bodies of the cans being carried around may be concentric with the center of the chuck. Besides the arc-shaped motion of the chuck, a motion transverse to this arc motion is provided for, for forcing the head upon the can body. To operate the machine, the heads are placed upon the projections of one of the feed tables, called also "disks," and the bodies are placed in the depressions of the other. By the rotation of the feed table the head is brought into a position where it may be grasped by the open chuck, whereupon the chuck closes upon the head, and transfers the head to the body by its arc-shaped motion, the body having been brought into a proper position for receiving it by the revolution of the table in a depression of which it is placed. Now by a transverse motion of the chuck, the head is forced onto the body, the chuck being of such a form as to guide the body into the interior of the head. The chuck now opens automatically, and the headed can is dropped.

Respondent has taken out two patents for a can-heading machine. The former of these—No. 477,584—is dated June 21, 1892. Respondent calls his invention "an improvement in can-heading machines." The latter patent—No. 499,949—is dated June 20, 1893, and consists of certain improvements upon the former machine. These machines, complainants maintain, infringe claims 1 and 2 of patent No. 307,197. Respondent's machine for which patent No. 477,584 was issued may be described as follows: It consists of a revolving shaft, on which are two perforated disks. Through the perforations of the disks pass rods, and 10 sets of jaws are attached to these rods towards each end of the revolving mechanism. Ten other sets of jaws are placed opposite to these on the same rods. There is a mechanism by means of which these sets of jaws are drawn towards each other, and thus are enabled to put the heads on the can bodies. There are chutes connected with the upper portion of the machine for the purpose of feeding can bodies and can heads to the sets of jaws. As each

double set of jaws comes underneath the chutes, the upper half of each pair of jaws opens, so as to receive the can body into the lower half of the same pair of jaws. Simultaneously with the descent of the can body a can head descends at each end of the can body into the same lower jaw, there being a recess in the extreme back end of each jaw, made for the purpose of receiving the can head. As the shaft revolves, and, consequently, the disks attached to it, the upper jaws are forced forward, and fall, so as to close upon the can heads and the ends of the can body. When the jaws are thus closed, a conical-shaped opening is formed, in which rest the ends of the can bodies. The revolution of the shaft, combined with a certain mechanism, drives the two sets of jaws towards each other, forward, and the conical shape of the jaws compels the ends of the can bodies to enter the heads, resting in the recesses of the back of the jaws, thus putting the heads upon the can body. The further revolution of the shaft, together with that of the disks and jaws, continues, and, as the bottom of the machine is reached, the former upper half jaw becomes the lower half. The jaw opens, and the headed can drops out. There is no stopping of the disks and jaws, which proceed continuously around the shaft. According to the evidence this machine is capable of heading about 10,000 cans per hour, or 100,000 cans in a day of 10 hours. The invention for which letters patent No. 499,949 were issued consists of certain improvements upon the foregoing machine. These improvements are thus described in the specifications dated June 20, 1893:

"My machine, as changed by the improvements herein described, differs from the machine as described in my said patent of June 21, 1892, by so altering the jaws and changing the movements that the can bodies are first received into the open jaws, after which the jaws are closed before the can heads are admitted into them. After the jaws are closed, each one of the can heads is admitted to the jaws through a slot, which is made through the jaw end, which opens and closes. In my original machine the can bodies and can heads were admitted to the jaws simultaneously, and while the jaws were open. In my present improvements the jaws only revolve one-quarter of a revolution in opening, while in my original machine they revolved one-half of a revolution. In my present improvement the upper jaws, in opening, do not move toward or come in contact with each other, as they would do if they were opened simultaneously in my original machine, and consequently a shorter can may be headed in my improved machine than could be headed in my machine as originally patented."

These two machines of respondent may be considered as one, in regard to the infringement by them, or either of them, of claims 1 and 2 of complainants' patent, for, as regards such infringement, they are practically the same machine. There are very obvious differences, both in form and structure, between the complainants' and respondent's machines. The Wheaton patent puts both ends upon the can simultaneously; the Jordan patent merely heads. Instead of one segmental chuck, the Wheaton patent has 10 pairs of jaws. There is a complete dissimilarity in the feeding apparatus; the Wheaton patent being fed by chutes, and the Jordan patent by hand. The witness Smyth testified that the Jordan machine might be fed by means of a chute, but it did not appear

that this was the method employed in feeding it. The Wheaton chuck is opened before and closed after receiving the can and the head by a mechanism differing entirely from that in the Jordan patent. In the former the jaw, consisting of two halves, is completely thrown open; in the latter the exterior ring is so manipulated as to widen the orifice of the chuck sufficiently to allow the can to escape. The Wheaton machine, in operation, is horizontal in position; the Jordan machine is vertical. While admitting these differences and dissimilarities, complainants maintain that claims 1 and 2 of their patent are still infringed, and that the "jaws" of respondent's machine are but modifications and variations of the mechanism of complainants' "segmental clamp chuck." To determine this feature of the controversy, it is necessary to clearly understand the device or improvement for which a patent was granted to Jordan. The claims of the patent are what are known in the patent law as "combination claims," consisting in this case of two elements; one, a segmental clamp chuck mounted to perform certain functions specified in the claims, and the other a mechanism or suitable means for actuating the chuck to perform such functions. Both of these elements contribute to the single purpose of producing a can-ending machine which employs a method of grasping and holding the body of the can in a position while the can head is being forced upon the can body. The invention consists in the idea of the means which is in itself indivisible and acts as an entirety, and this idea of a means culminates in this patent in the machine by which the ultimate effect is produced, and not in the segmental clamp chuck, which, although an important agency, is nevertheless but one of the two elements constituting the mechanism required to complete the operation of forcing a can head upon a can body. If Jordan was the original inventor of the segmental clamp chuck (which, however, does not appear), he was entitled to claim it separately as his invention, even though it lacked utility except as a portion of the principal invention; but such a claim, to be effective for this purpose, must specifically point out the new element as an invention, that constructors and inventors may know what has been withdrawn from general use. Seymour v. Osborne, 11 Wall. 516, 541. This Jordan did not do in either of the claims of the patent now before the court,—probably because he was not entitled to make such a claim. The complainants are, therefore, left to sustain their case by showing that the respondent has infringed the combined mechanism constituting the can-ending machine described in their patent. Has that charge been sustained? The two machines accomplish certain similar results, but by very different mechanisms. Respondent's machine does its work much more rapidly than that of the complainants, and its rapidity and effectiveness depend, not merely upon the multiplication of the jaws, but also upon the design of the machine, which enables it to run in one constant direction. In complainants' machine the can head is first picked up by the clamp chuck, and carried to a point where it is in line with the can body. At the same time the can body has been carried

by a revolving disk to a place where it is in line with the can head. Here the forward motion of both carriers is necessarily brought to a stop, and another and a transverse motion comes into play, by which the can head is forced upon the can body. When this operation is completed, the carrier holding the headed can moves forward, and discharges the can, while the clamp chuck returns for another can head. The motions of the two carriers, although they may be continuous and rapid in movement, are clearly intermittent in action. This fact is established by the specifications of the Jordan patent, as follows:

"The mechanism employed in the machine herein described and shown consists, generally speaking, in a vertically-moving and horizontally-swinging arm carrying a segmental spring clamp chuck adapted to pick up and carry a can head to a body, then center and hold the body firmly and force the end of the body forwards, releasing both end and body of the can, in combination with two intermittently-rotating disks provided with chucks, on one of which disks the can ends, and on the other the bodies of the cans, are placed, to be operated upon by the segmental spring clamp chuck."

In respondent's machine, as constructed according to the former of his patents, the can and the body are fed into the machine simultaneously, and in the latter of respondent's two patents the can body is fed into the machine first. Complainants' patent calls for a segmental clamp chuck, with actuating machinery capable of operating it. Respondent's actuating machinery could not operate complainants' clamp chuck, neither could complainants' actuating machinery operate the jaws of respondent's machine. There is nothing in respondent's machine which answers to the "vertically-moving and horizontally-swinging arm," which, in combination with the segmental clamp chuck, forms the substance of the second claim of complainants' patent.

In Westinghouse v. Brake Co., 170 U. S. 537, 568, 18 Sup. Ct. 707, 722, the supreme court had before it the question of infringement involved in the mechanism for opening and closing certain valves in automatic air brakes. It was contended on the part of the complainant in that case that he was a pioneer inventor, and that the alleged infringing device corresponded to the very letter of the claims of complainant's patent; but it was held that even this fact was not sufficient to establish infringement. The court said:

"The patentee may bring the defendant within the letter of his claims, but, if the latter has so far changed the principle of the device that the claims of the patent, literally construed, have ceased to represent his actual invention, he is as little subject to be adjudged an infringer as one who has violated the letter of a statute has to be convicted when he has done nothing in conflict with its spirit and intent. 'An infringement,' says Mr. Justice Grier in Burr v. Duryee, 1 Wall. 531, 572, 'involves substantial identity, whether that identity be described by the terms "same principle," same "modus operandi," or any other. * * * The argument used to show infringement assumes that every combination of devices in a machine which is used to produce the same effect is necessarily an equivalent for any other combination used for the same purpose. This is a flagrant abuse of the term "equivalent."' We have no desire to qualify the repeated expressions of this court to the effect that, where the invention is functional, and the defendant's device differs from that of the patentee only in form, or in a rearrangement of the same elements of a combination, he would be adjudged an infringer, even if, in certain particulars, his device be an improvement upon that of the patentee. But, after

all, even if the patent for a machine be a pioneer, the alleged infringer must have done something more than reach the same result. He must have reached it by substantially the same or similar means, or the rule that the function of a machine cannot be patented is of no practical value. To say that the patentee of a pioneer invention for a new mechanism is entitled to every mechanical device which produces the same result is to hold, in other language, that he is entitled to patent his function. Mere variations of form may be disregarded, but the substance of the invention must be there."

In the present case it is not claimed that Jordan is a pioneer inventor, but, on the contrary, it does appear that his invention is a combination of old elements. And, stopping for a moment to consider that feature of the case, what do we find? As showing the state of the art, respondent introduced in evidence the specifications and drawings of the three prior patents which he has set up in his amended answer. The first of these is patent No. 152,757, granted to G. A. Marsh, July 7, 1874, for an "improvement in devices for heading cans." The Marsh patent was for a hand machine. In this machine there is a kind of chuck, one diameter of which receives a can head, and one-half of another diameter centers the end of the can body, and guides it into the can head. Patent No. 238,351, bearing date March 1, 1881, was issued to W. J. Clark for a "can-heading machine." This machine combined "a die for holding the head with a tapering expansible gauge for truing the wall blank or can body to the exact shape of the head, be it circular, oval, square, or polygonal, and guiding it to a position within the head flange." This machine might be operated either by hand power or by foot. Patent No. 265,617, dated October 10, 1882, was issued to George A. Marsh for a "machine for heading cans." This machine had a perpendicular stanchion erected upon the base. To this stanchion were fastened two guides, each having a circular opening in the same vertical line. A shaft passed through these openings. The lower end of the shaft terminated in a piece having in its lower side a circular shoulder. On the under side of this shoulder is a circular recess, concentric with the shaft, and of a diameter just sufficiently large to admit the cover of the can to be headed. In depth it may be equal to one-half the width of the flange of the cover. Hinged to the shoulder above mentioned, and on either side of it, are two arms, semicircularly bifurcated at their inner ends, so that the arms together form a circle concentric with the recess above described. In operating this machine the shaft with its apparatus at the lower end was carried downward by a lever, and thus the head was forced upon the body of the can. These machines are termed "bench headers," from being secured to a bench when worked. They were worked by hand. The method of forcing the heads on the cans employed by the complainants' machine is like that used in the Marsh machine. To this mechanism Jordan added a swinging rod, which had a horizontal movement, and was adapted to seize the can head from the chuck on one feed table, and swing it over the can body placed in position on the other feed table.

In the case of Norton v. Jensen, 1 C. C. A. 452, 49 Fed. 859, a majority of the circuit court of appeals for the Ninth circuit say,

with regard to the Jordan machine, patent No. 307,197, at page 467, 1 C. C. A., and page 874, 49 Fed.:

"Mr. Jordan is not the inventor of the mould, or discoverer of the principle of the segmental clamp described in the specifications for his patent. His invention consists of a new use of these appliances, in combination with others to produce certain results. This is a sufficient reason for limiting the patent to the particular use mentioned in the specifications."

This opinion of the circuit court of appeals may not be binding upon the complainants in this case, but it is certainly persuasive in determining, upon substantially the same evidence, the state of the art when Jordan entered this field as an inventor. The question is, however, not left in doubt upon the evidence in this case. Jordan was not a pioneer, either in the invention of a can-heading machine or in the production of the appliances brought together in the mechanism of his invention. The claims of his patent must, therefore, be held to cover only the exact union of the exact elements of his device. It follows that, in order that respondent's combination be equivalent to that of the Jordan patent, it must not only perform the same functions, but must perform them in the same way. 1 Rob. Pat. § 254, note.

In the case of Eames v. Godfrey, 1 Wall. 78, the patent was for a combination of mechanical powers for a new and useful improvement in boot trees, and included a certain mechanism for distending the leg of the boot tree. The plaintiff did not claim that the defendant had used the same mechanism that he did for distending the leg of the boot tree, but that the defendant had used all the other parts of his combination, and that the mechanism which the defendant used, although differing in construction from that described in the patent, yet performed the same functions. Mr. Justice Davis, delivering the opinion of the court, said:

"The patent in controversy was for a combination of mechanical powers to effect a useful result, and such a patent differs essentially in its principles from one where the subject-matter is new. The law is well settled by repeated adjudications in this court and the circuit courts of the United States, that there is no infringement of a patent which claims mechanical powers in combination, unless all the parts have been substantially used. The use of a part less than the whole is no infringement. In Prouty v. Draper, 16 Pet. 341, the law is well considered. The patent there was for the combination of certain parts of a plow arranged together so as to produce a certain effect. The suit was for an infringement. The court below had charged the jury that, unless the whole combination was substantially used in the defendant's plow, it was no violation of the plaintiff's patent. Chief Justice Taney, in describing the case, said: 'None of the parts referred to are new, and none are claimed as new, nor is any portion of the combination less than the whole claimed as new, or stated to produce any given result. The end in view is proposed to be accomplished by the union of all arranged and combined together in the manner described. The use of any two of these parts only, or of two combined with a third, which is substantially different in form, or in the manner of its arrangement and connection, with the others, is, therefore, not the thing patented. It is not the same combination if it differs from it in any of its parts.' "

In the case of Gage v. Herring, 107 U. S. 640, 647, 2 Sup. Ct. 819, 825, the court says:

"It is proved, and not denied, that the apparatus in the defendant's mill is substantially like that described in the plaintiff's patent, so far as regards

the first meal chest, the fan, and the spout connecting with the fan, and also so far as regards the elevator; in short, so far as regards the cooling and drying apparatus proper, and the device for collecting and conveying the greater part of the meal, after being cooled and dried in the bolts."

And on page 648, 107 U. S., and page 826, 2 Sup. Ct.:

"The defendant's mill contains no conveyor shaft in the dust room, and no mechanism which performs the same function of removing the meal there collected. So far as the evidence shows, the meal deposited upon the floor of that room remains there until it is shoveled or swept up by manual labor. Its removal by such means affords no equivalent in the sense of the patent law for the automatic action described in the plaintiff's patent. Eames v. Godfrey, 1 Wall. 78; Murray v. Clayton, 10 Ch. App. 675, note; Clark v. Adie, Id. 667, 675, 676, and 2 App. Cas. 315."

It was accordingly held that, as the defendant had not infringed the entire combination set forth in the claims of the complainant's patent, the bill should be dismissed.

The case of Miller v. Manufacturing Co., 151 U. S. 186, 14 Sup. Ct. 310, was a suit for the infringement of letters patent for improvements in wheeled cultivators. The respondent set up the prior state of the art as a defense. In the course of the opinion of the court, as delivered by Mr. Justice Jackson, it is said:

"We think it manifest from the prior state of the art, if the invention covered by his patent of 1879 was not anticipated, and if it has any validity, that it must be limited and confined to the specific spring device which is described in the specifications and shown in the drawings forming part of the letters patent. Being thus limited, there is clearly no infringement in the device used by the appellants or their principals, P. P. Mast & Co. The specific device described in and covered by the Wright patent could not be used in the appellants' combination. This interchangeability or noninterchangeability is an important test in determining the question of infringement."

The lack of interchangeability in the most important parts and elements of the Jordan and Wheaton machines is one of the features of this case.

In the case of Wheaton v. Norton, 17 C. C. A. 447, 70 Fed. 833, 851, the circuit court of appeals had before it the question of infringement, wherein the parties were the same as in this case. The complainants in that case, as in this, were Edwin and Oliver W. Norton, and the respondent there, as here, was M. A. Wheaton; but the patent sued upon in that case was No. 267,014, issued November 7, 1882, to Edwin Norton, for alleged improvements in machines for putting on the ends of tin cans. The machine used by the respondent was patent No. 477,584, granted June 21, 1892, and is the first of the patents involved in this case. Judge Ross, delivering the opinion of the circuit court of appeals for the Ninth circuit, said:

"Undoubtedly this mechanism of Wheaton, like that of complainant, puts tight-fitting can heads on the outside of can bodies automatically, to do which there must of necessity be mechanism for centering and bringing into exact line with each other the can body and can head, and also mechanism for shaping and sizing the can body, and also for forcing the head and body together. But the question is whether the device of Wheaton in centering and aligning the can body and can head, and in shaping and sizing the ends of the can body, and in forcing the heads and body together, uses the elements of the claim patented to Norton, or their mechanical equivalents."

The court then proceeds to make a comparison between the two can-ending machines in that case, and arrives at the conclusion that the differences between them were such that there was no infringement of the claims of the complainants' patent by the respondent's machine. The comparisons heretofore made in this case show differences of the same general character, and applying to the case at bar the principles of the cases which have been referred to, it does not appear that the device of respondent's machine infringes upon the segmental clamp chuck, which, in combination with appropriate actuating machinery, forms the basis of claim 1 of complainants' patent; nor does there appear to be any part of respondent's machine equivalent to the vertically-moving and horizontally-swinging arm, which, in combination with the aforesaid segmental clamp chuck, constitutes claim 2 of the Jordan patent. A decree will therefore be entered for the respondent, with costs.

PLUMB v. NEW YORK, N. H. & H. R. CO. et al.

(Circuit Court, D. Connecticut. October 31, 1899.)

No. 945.

PATENTS—PATENTABLE NOVELTY—AIR-BRAKE ATTACHMENT.

The McKenna patent, No. 348,289, for an air-brake attachment which consists of a short flexible tube with a coupling on one end by which it is attached to the train pipe of an ordinary air brake at one end of the car, and a stopcock at the other end, which is carried up so as to be conveniently reached by a brakeman on the platform, and by means of which he can vent the air from the train pipe, shows a device which is merely the result of mechanical skill, and the patent is void by reason of lack of patentable novelty in view of the prior art.

This was a suit in equity by Duncan C. Plumb against the New York, New Haven & Hartford Railroad Company and Charles P. Clark, president, for infringement of a patent.

Seward Davis, Frederick P. Fish, and Charles A. Brown & Cragg, for complainant.

Robert J. Fisher, for defendants.

TOWNSEND, District Judge. Final hearing on bill and answer raising question of validity of patent No. 348,289, granted August 31, 1886, to complainant's assignor, Edward W. McKenna, for an air-brake attachment known as "back-up hose," infringed by defendant. The patent is for a device to be used in connection with air brakes on railway trains. The old straight air brakes were applied by the direct pressure of air from the locomotive. In the later automatic brake system the brakes were applied by exhausting the air pressure. This device is intended to be used in connection with the automatic system. The object of the alleged invention was to provide a portable device adapted to be detachably attached to the train pipe at the end of any car, and to be operated by a brakeman to put on the brakes. The device itself consists of a flexible tube with a one-half coupling at one end and a stopcock at the other

end. Its construction is practically identical with that of the ordinary garden hose. Counsel for complainant contend, however, that for several years after the invention of the automatic brake a problem was presented of providing an effective contrivance for controlling a train which could be practically and conveniently operated from the platform of the car, and attached to any car without any extra mechanism, and without any interference with the operation of the air-brake system, and that this patentee was the first to solve the problem; that his solution involved invention, and that greater safety to employés has been secured thereby. The claims are as follows:

"(1) The combination of a railway car, an air brake and its pipes, and a flexible removable pipe or tube, D, connected to the brake pipes at its lower end, its upper end extending to above the platform of the car, and provided with a cock, substantially as and for the purposes set forth. (2) The combination of a car, an air brake, its pipe, C, a flexible portion, C^1, thereon having the usual half coupling, c, a separate tube or pipe, D, having a half coupling, d, upon one end, adapted to be coupled to the half coupling, c, and a stopcock, c^1, at the upper end; said device being thus adapted to be coupled to the end of said brake pipe or tube, and to be carried up alongside the hand rail to a convenient position to be used, substantially as set forth."

Long prior to this alleged invention, cars had been equipped with the "conductor's valve," usually placed in the water-closet of the coach, and having a cord attached to its handle, which passed through the interior of the car, so that the conductor or trainman could reach and operate it from any position within the car, and in some instances from the doorway opening onto the platform. So, also, long prior to said alleged invention, cocks were attached under the platform at each end of each car to the train pipe. A man, by lying down on the platform, or standing on its step, could operate these train pipe or angle cocks, and vent the pipe, in exactly the same way, and with exactly the same results, as by the operation of the conductor's valve or of the patented device. Each of these old devices is still in use. The patented device is simply a short extension of the train pipe, with a cock on the end. Another device, known as the "Richmond tail hose," was admittedly used, long prior to the alleged invention, on the Richmond, Fredericksburg & Potomac Railroad. Its construction was identical with that claimed in the patent,—a removable short piece of hose, with a cock on one end and a coupler on the other,—except that it had double, or male and female, couplings, so as to fit either coupling on the car to which it was to be attached. It was operated in the same way, by a man standing on the platform, and with the same result, namely, to vent the train pipe. The only material difference between this coupler and that of the patent in suit was that, being attached to the old straight air brake, the venting of the pipe released, instead of applying, the brakes. The breaking of the train pipe, the bursting of the hose between the cars, the opening of the angle cock or of the conductor's cock, would do just as effectively what this device does, namely, vent the train pipe and apply the brakes.

In these circumstances, the question presented is whether it involved invention to detachably couple on to the train pipe a piece of

hose to serve as an additional vent. The prior art already showed two such permanent valves for this identical purpose in automatic brakes, and one identical removable valve device in straight air brakes. Even if none of these prior devices anticipate, yet they must be reckoned with in considering the problem presented. Although the patented device is more convenient than the conductor's or train-pipe valve, yet there was no novelty in the means contrived. The idea of greater convenience by means of a detachable attachment was shown in the Richmond tail hose. Its use in the old operation of venting the hose for the analogous purpose of releasing instead of applying the brakes is strikingly like the analogous uses in Pennsylvania R. Co. v. Locomotive Engine Safety-Truck Co., 110 U. S. 490, 4 Sup. Ct. 220, and Harwood v. Railroad Co., 11 H. L. Cas. 666. In Aron v. Railway Co. (C. C.) 26 Fed. 314; Id., 132 U. S. 85, 10 Sup. Ct. 24,—where the patent in suit covered a connection for opening two gates simultaneously, which had hitherto been separately operated,—Judge Wallace said:

"The patentee is entitled to the merit of being the first to conceive of the convenience and utility of a gate opening and closing mechanism which could be operated efficiently by an attendant in the new situation. His right to a patent, however, must rest upon the novelty of the means he contrives to carry his idea into practical operation."

If this McKenna device had been first in use, and some one had devised the conductor's or train-pipe or Richmond valve, it cannot be doubted that they would have been held to be infringements. Peters v. Manufacturing Co., 129 U. S. 537, 9 Sup. Ct. 389; Knapp v. Morss, 150 U. S. 231, 14 Sup. Ct. 81.

Counsel for complainant further say: "How slight a change from what is shown in the prior art will constitute a patentable invention, when, as in the case at bar, there is secured a new and useful result, is shown by the following citations." They then cite the inventions of the Bell telephone and Edison lamp, and discuss, with illustrations, Krementz v. S. Cottle Co., 148 U. S. 556, 13 Sup. Ct. 719; Magowan v. Packing Co., 141 U. S. 332, 12 Sup. Ct. 71; Topliff v. Topliff, 145 U. S. 161, 12 Sup. Ct. 825; Gindorff v. Deering (C. C.) 81 Fed. 952. It is unnecessary to differentiate such pioneer inventions as the telephone or electric lamp from this mere mechanical extension of the train pipe. In Krementz v. S. Cottle Co., which is the strongest case in support of complainant's contention, the court below had found that "Krementz was the first to make a stud from a single continuous piece of metal, in which the head was hollow, and round in shape"; and the supreme court held that said novel construction was not obvious to any skilled mechanic, because the president of defendant company, skilled as he was in the art, and applying for a patent for a collar button, "failed to see what Krementz afterwards saw,—that a button might be made of one continuous sheet of metal, wholly dispensing with solder, of an improved shape, of increased strength, and requiring less material." These advantages were the direct results of said novel construction. The advantages claimed for the patent in suit are not the result of any novel construction. The citation and illustrations from Magowan v. Packing Co., 141 U. S. 332,

12 Sup. Ct. 71, show that the patent in suit was expressly stated to be for an improvement on McBurney, which consisted in "the combination with the McBurney packing of a vulcanized rubber backing of pure gum." The McBurney "furnishes the wearing surface," the patented "pure rubber furnishes an elastic backing," and "by this combination a new article results, namely, one which presents always the same character of surface under wear, and one which has sufficient elasticity to make a light joint." The new packing had a new collective mode of operation, in that its construction combined the advantages of the old packing and the resiliency of the India rubber, and by means of such construction it produced a new result. In Gindorff v. Deering, supra, the novelty of the patented device was not denied, and the defendants had tried to acquire it, and the need of some such device had been long felt and recognized. Although a similar claim of long-felt want is set up in this case, I think, in view of the existing devices, that it has not been satisfactorily proved. In the barbed-wire case the barb was new in material, in shape, and in combination, and these new means caused the new result; and in Topliff v. Topliff, supra, the court pointed out various differences of construction, and said:

"If this patent differed from the other merely in duplicating the rod, and applying it to the front bolster as well as to the rear axle, it is conceded that it would not, under the cases of Dunbar v. Myers, 94 U. S. 187, and Slawson v. Railroad Co., 107 U. S. 653, 2 Sup. Ct. 663, involve invention."

This case, therefore, is not like those above cited by complainant, nor like National Cash-Register Co. v. Boston Cash Indicator & Recorder Co., 156 U. S. 514, 15 Sup. Ct. 434, where the problem was perceived, and a solution furnished by the conception of a new idea of means and of a new device to put such means in operation. It is rather like Aron v. Railroad Co., supra, and like Wollensak v. Sargent, 151 U. S. 221, 14 Sup. Ct. 291, where it was held that there was no invention in a vertical rod device for opening and closing a transom, inasmuch as a previous patent showed a horizontal device applied for a similar purpose; or like Blake v. City and County of San Francisco, 113 U. S. 679, 5 Sup. Ct. 692, where an old automatic valve was applied to a steam engine. In that case the prior art showed only a hand-operated valve to relieve the pressure on fire hose. To obviate its defects, the inventor applied an automatic valve between the engine and pump, which discharged the stream, and relieved the pressure. The court found that, prior to the patent, similar automatic valves had been used to reduce the pressure of steam or water in steam pipes and cylinders. The court then said:

"It follows from this principle that, where the public has acquired in any way the right to use a machine or device for a particular purpose, it has the right to use it for all the like purposes to which it can be applied, and no one can take out a patent to cover the application of the device to a similar purpose. If there is any qualification of this rule, it is that, if a new and different result is obtained by a new application of an invention, such new application may be patented as an improvement on the original invention; but, if the result claimed as new is the same in character as the original result, it will not be deemed a new result for this purpose. For instance, an automatic relief valve, used to relieve the pressure of steam, produces no new result in char-

acter when used to relieve the pressure of water, unless some further effect besides the mere relief of pressure is obtained."

Even if the apparatus itself may be said to be safer and more convenient, it is merely because the brakeman will be more likely to use it because it is less trouble for him to reach it when it is on the platform than when it is under the platform or inside the car. These advantages are only the secondary objects attained by the direct mechanical result of the combination of the ordinary garden-hose coupler with the ordinary train pipe. They are not the result of any additional function due to the patented construction. The device itself has no new mechanical relation by reason of being an extension of the train-pipe valve, or a conductor's valve with location changed from the water-closet at the end of the car to the outside platform. "It is for the discovery or invention of some practicable method or means of producing a beneficial result or effect that a patent is granted, and not for the result or effect itself." Corning v. Burden, 15 How. 252; Westinghouse v. Power-Brake Co., 170 U. S. 537, 555, 18 Sup. Ct. 707.

A mass of evidence has been introduced as to prior uses of the alleged invention in Quincy, Chicago, and Cincinnati. They will not be discussed in detail. If, as claimed by complainant, they fall far short of the requirements of law to support this defense, they at least furnish persuasive evidence of the ways in which suggestions of how to make such a convenient device would naturally be presented to the ordinary mechanic. It may further be added that the alleged inventor saw his device used by others for nearly a year and a half before he applied for a patent, and, after the patent was issued, although he knew of various infringements, he never took any measures to warn infringers, or to assert any rights in said patent. No claim was made thereunder until after its sale to the present complainant, some 10 years after its issue. Apart from all other considerations, however, the device is merely the result of mechanical skill, and the patent is invalid by reason of lack of patentable novelty in view of the prior art.

The conclusions reached dispense with the necessity of considering the further contentions founded on the file wrapper of the patent in suit. Let the bill be dismissed.

THE PICQUA.

(District Court, S. D. New York. October 31, 1899.)

MASTER AND SERVANT—PERSONAL INJURY OF EMPLOYE—NEGLIGENCE—LOADING VESSELS—INDEPENDENT CONTRACTOR.

The hatch of a steamer, through which stevedores were loading it by means of a fall from the boom of a derrick, was 20 feet long, and had across it, to support the covers, two beams, 6 feet from the ends. According to custom, the carpenter, in arriving in port, had removed the bolts which fastened the beams, so that the stevedores might manage the beams as they desired, as for the purpose of loading they had the entire management of the hatches and beams; and, before commencing loading, their foreman had the after beam removed, but left in the forward beam. The derrick was so arranged that the vertical line dropped through the

after part of the hatch, but D. and co-laborers, working for the stevedores in the hold, not being able to move forward as far as desired a cask which had been lowered, and was somewhat forward of the hatch, attached the fall thereto, and gave the signal to raise it, execution of which brought the rope against the forward beam and threw it from its place onto D. *Held*, that there was no improper equipment of the ship, or fault on its part, but any negligence was that of D., his co-laborers, and the foreman of the stevedores, all fellow servants.

In Admiralty.

George W. Bristol, for libelant.
Convers & Kirlin, for claimant.

BROWN, District Judge. In the afternoon of August 29, 1898, the libelant, a longshoreman in the employ of stevedores loading the steamship Picqua, while stowing some casks of tobacco in the lower hold was seriously injured by the fall of an athwartship iron beam, which became dislodged from the hatch above him. The libel was filed to recover compensation for his injuries, on the ground that the ship was not properly equipped, in not having the above beam securely fastened, and that the stevedores, Phelps Bros., were the agents of the ship in doing the stevedore's work.

The hatch in question was about 20 feet long, fore and aft, across which were two athwartship iron beams, used to support the hatch covers. The cargo was being lowered into the hold by means of a fall from the boom of the derrick so arranged that the vertical line dropped through the after part of the hatch. The after beam had been removed, but the forward beam which was about 6 feet from the forward end of the hatch, had not been removed. The libelant and his co-laborers, not being able to move a cask that had been lowered into the hold as far forward of the hatch as they desired to move it, attached the fall to the cask, which lay somewhat forward of the hatch opening, and gave the signal to raise it up. For the purpose of attaching the fall to the cask, the lower end of the fall had been carried forward so as to be considerably out of the vertical line, in consequence of which the rope rubbed against the side of the forward athwartship beam above, and thence descended upon an incline forward; so that when the load began to be hoisted up, the beam, which rested in a slot in the sides of the hatch, was raised out of the slot and fell.

There is no doubt that it was gross carelessness to attempt to raise a load by a fall running in that way against a loose beam in the hatch; but I do not think that the ship was in any way responsible or to blame for this act. The management of the hatches and of the beams for the purpose of loading, as the evidence shows, was entirely in charge of the stevedores. Neither the master nor any of the ship's officers had anything to do with them. When at sea, such beams are usually bolted; but in port it is a common practice for the carpenter to remove the bolts so that the stevedores may manage the athwartship beams as they desire, whether they wish to have the whole hatch free, or so much of it as they find necessary. Before the stevedores began work in this hatchway the foreman directed the removal of the after beam only, leaving abun-

dant room, nearly 14 feet clear, for lowering the cargo by the fall through the space aft of the beam that was left. There evidently was no expectation of using the fall in such a way as the libelant made use of it, by carrying it forward so as to rub hard against the forward beam. There was certainly no defect in the ship's equipment, nor was it any fault of the ship that the carpenter removed the bolts in order that the stevedore might remove the beams as desired.

There is some testimony that the attention of the foreman was called to the fact that the forward beam was left in, and that it was insecure; and it is further sought to hold the ship on the ground that her agents, Phelps Bros., did the stevedoring, and that this was done as agents in her behalf. They were, indeed, the agents of the ship in this port. The vessel was owned by a corporation, in which Phelps Bros. had also a considerable interest as stockholders. But the business of stevedoring is no part of the duties of ship's agents as such, express or implied. Phelps Bros. did the stevedoring at fixed rates specified by contract with the owners. It is not an uncommon thing in this port for ship's agents to do, or to be interested in, the stevedoring for the vessel; but this is altogether an independent employment and a separate subject of contract, wholly outside of the rights or duties of ship's agents; and for any negligence in the stevedoring work the ship in such a case is no more responsible than if the stevedoring were done by other and wholly independent persons. Some passages in the master's testimony on this point have been misinterpreted in the libelant's behalf, and construed erroneously as meaning that the stevedoring was done by Phelps Bros. on account of the owners as principals in doing the work. Phelps Bros. in this respect, however, stood wholly as independent contractors; the stevedoring, as I have said, being no part of their agency, but being done by virtue of their contract arrangement with the owners. Whatever negligence there was in this matter was, therefore, the negligence of the foreman of the stevedores and of the libelant himself in making use of the fall as he did; and as this negligence was between fellow workmen, it follows that the libel should be dismissed. See Mining Co. v. Whelan, 168 U. S. 86, 18 Sup. Ct. 40, and cases there cited.

THE GOOD TEMPLAR.

(District Court, D. Massachusetts. November 7, 1899.)

No. 1,015.

SHIPPING—PROCEEDING FOR FORFEITURE OF VESSEL—MEASURE OF PROOF REQUIRED.

A proceeding under Rev. St. § 4377, for the forfeiture of a vessel and cargo for violation of her license by carrying smuggled goods, is a civil suit, and the government is not required to prove the allegations of its libel beyond a reasonable doubt, but by not more than a preponderance of evidence. Whether Rev. St. § 909, is applicable to the case, quære.

Proceeding in admiralty to enforce forfeiture of a vessel engaged in domestic commerce for violation of her license.

Boyd B. Jones, U. S. Atty., and Albert H. Washburn, Asst. U. S. Atty.

Grant M. Palmer, Wm. R. Pattangall, and Frank B. Livingstone, for respondent.

LOWELL, District Judge. This was a proceeding under Rev. St. § 4377, for the forfeiture of the schooner Good Templar and its cargo of fish. If a considerable part of the cargo was known by the claimant to be smuggled, it was conceded that the vessel is liable to forfeiture under that section. The Resolution, 2 Gall. 47, Fed. Cas. No. 11,709. The libelant contended: (1) That, after probable cause had been shown for the prosecution, the burden of proving that the goods were not smuggled lay upon the claimant, by virtue of Rev. St. § 909; and (2) that, if this section was held inapplicable to the case at bar, then the libelant was required to make out its case only by a preponderance of evidence. The claimant, on the other hand, contended that the libelant must prove its case beyond a reasonable doubt.

Upon the view which I take of the evidence, as will hereafter appear, it is not necessary to pass upon the libelant's first contention, but only upon the second, viz. that in this case the libelant, the United States, need prove the allegations of the libel only by a preponderance of evidence, as in civil cases. That a suit to recover a penalty or to enforce a forfeiture is generally a civil suit is well settled. Bish. Cr. Law, § 32; U. S. v. Mann, 1 Gall. 177, Fed. Cas. No. 15,718. The claimant relies upon U. S. v. The Burdett, 9 Pet. 682, where Mr. Justice McLean, in delivering the opinion of the supreme court, said:

"No individual should be punished for a violation of law which inflicts a forfeiture of property, unless the offense shall be established beyond reasonable doubt. This is the rule which governs a jury in all criminal prosecutions, and the rule is no less proper for the government of the court when exercising a maritime jurisdiction."

This apparently specific statement is, however, so modified in Lilienthal's Tobacco v. U. S., 97 U. S. 237, as to deprive it of pretty much all effect. Mr. Justice Clifford there said:

"Nor is there anything in the case of U. S. v. The Burdett, 9 Pet. 682, that is in conflict with these several propositions. Charges of the kind contained in an information ought to be satisfactorily proved; and it is correct to say that, if the scale of evidence hangs in doubt, the verdict should be in favor of the claimant, which is all that was there decided. Jurors in such a case ought to be clearly satisfied that the allegations of the information are true; and when they are so satisfied of the truth of the charge they may render a verdict for the government, even though the proof falls short of what is required in a criminal case prosecuted by indictment."

The expression above quoted was not a mere dictum, inasmuch as in Lilienthal's Tobacco v. U. S. the court had under consideration the correctness of the judge's failure to charge the jury that the property seized was not forfeited unless the matters charged in the information were proved beyond a reasonable doubt. Mr. Justice Clifford also observed that:

"Text writers of the highest authority state that there is a distinction between civil and criminal cases in respect to the degree or quantum of evidence

necessary to justify the jury in finding their verdict. In civil cases their duty is to weigh the evidence carefully, and to find for the party in whose favor it preponderates; but in criminal trials the party accused is entitled to the legal presumption in favor of innocence, which, in doubtful cases, is always sufficient to turn the scale in his favor;" and "authorities to show that the case before the court is a civil case are scarcely necessary, but, if any be needed, they are at hand."

In Coffey v. U. S., 116 U. S. 436, 6 Sup. Ct. 437, it was expressly assumed that upon an information in rem for a violation of the internal revenue laws, proof beyond a reasonable doubt was not required of the United States, but only a preponderance of evidence. In that case the claimant had been tried and acquitted for a breach of the law in question. The judgment which he had obtained in the criminal case he sought to set up as conclusive in his favor in the pending information in rem, and the court sustained his contention. "It is urged," said Mr. Justice Blatchford, in delivering the opinion of the court, "as a reason for not allowing such effect to the judgment, that the acquittal in the criminal case may have taken place because of the rule requiring guilt to be proved beyond a reasonable doubt; and that, on the same evidence, on the question of preponderance of proof, there might be a verdict for the United States in the suit in rem." That the United States need prove its case only by a preponderance of evidence was expressly decided in U. S. v. Brown, Deady, 566, Fed. Cas. No. 14,662. An examination of the facts and of the entire opinions in the three cases last mentioned shows that in none of them was the court dealing with the peculiar rule concerning the burden of proof established by section 909 of the Revised Statutes (even if that section was applicable), but that the judgments and the language of the opinions were based upon general principles of law applicable to suits in rem. The case of Boyd v. U. S., 116 U. S. 616, 6 Sup. Ct. 524, contains nothing contrary to what has just been said. See Zucker v. U. S., 161 U. S. 475, 16 Sup. Ct. 641. It follows, therefore, that the United States is required to prove the allegations of the libel only by a preponderance of evidence. It remains to apply this rule to the evidence in the case.

The learned judge then stated the facts as he found them, and ordered a decree of forfeiture against the schooner.

INSURANCE CO. OF NORTH AMERICA v. EASTON & McMAHON TRANSP. CO.[1]

(District Court, E. D. Pennsylvania. November 8, 1899.)

COMMON CARRIERS—BILL OF LADING—EXCEPTED RISKS—DANGERS OF THE SEAS—BURDEN OF PROOF.

Where a common carrier assumes to deliver a cargo in good order, "the dangers of the seas only excepted," the failure to do so casts upon him the burden of proving that the loss was caused by the excepted risk; and, in the absence of satisfactory proof thereof, the court is justified in finding for the libelant, even if the cause of the disaster does not clearly appear.[2]

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[1] Reported by Arthur G. Dickson, Esq., of the Philadelphia bar.

[2] As to loss or damage by perils of the sea, see note to The Dunbritton, 19 C. C. A. 465.

In Admiralty.

The libel alleged that on October 8, 1897, the defendant, a common carrier from Baltimore to Philadelphia and elsewhere, received from the Montana Coal & Coke Company, a corporation of Maryland, doing business in Baltimore, 230 tons of Montana gas coal, to be delivered, "the dangers of the seas only excepted," to the Philadelphia Bureau of Gas, and issued a bill of lading to the said coal company showing the shipment upon the barge W. E. Weller, belonging to the said respondent; that the libelant underwrote the coal upon this voyage; that on October 9, 1897, the barge left Baltimore, being placed in a fleet with four others, two in front and the other three lashed together behind, the Weller on the starboard side; that all the fleet were loaded with coal, and were towed by the tug Stella, employed by the respondent; that when in the vicinity of Poole's Island, below the mouth of the Susquehanna river, the barge Weller began to leak, and continued to do so until she sank, in about 14 feet of water, a mile below Turkey Point, the cargo being a total loss; and that the libelant paid the amount of the insurance to the Montana Coal & Coke Company. The loss was alleged to have been caused by the negligence of those in charge of the tug Stella, and by the unseaworthy condition of the barge W. E. Weller. The respondent's answer denied all negligence, and alleged that the loss was caused by a heavy storm of wind and heavy seas, which caused the W. E. Weller to pound against the barge next to it, and started the leak which proved fatal.

The evidence showed quite conclusively that the weather had not been at all unusual, and that the pounding of one barge against another had not been out of the ordinary. It was not perfectly clear on the question of the seaworthiness of the Weller. Decree for the libelant.

Francis S. Laws and John F. Lewis, for libelant.

J. W. Bayard and John G. Johnson, for respondent.

McPHERSON, District Judge. The respondent is a transportation company engaged in the business of carrying freight by water between the cities of Baltimore and Philadelphia. In October, 1897, it received at Baltimore upon one of its barges, the W. E. Weller, 230 tons of coal belonging to the Montana Coal & Coke Company. The coal was consigned to Philadelphia, and the bill of lading bound the respondent to deliver the cargo in good order, "the dangers of the seas only excepted." The barge was one of five that were lashed together in tow of a tug; two being first, and three, of which the Weller was one, being second. The tow left Baltimore in the afternoon, bound east across the Chesapeake Bay, and during the night encountered a fresh breeze that caused the barges to roll somewhat, and to bump against each other with some degree of force. The wind was not violent, and there was nothing about the weather or the motion of the boats to suggest danger to the men on board of the barge. In the morning the Weller was discovered to be leaking, and efforts were made to pump her out. When these were found to be unavailing, the tug tried to tow her into shallow water, but before this point was reached the barge sank, and the coal became a total loss. The tug was not in fault, either during the night or afterwards. The libelant, who had insured the coal, paid the loss on November 27, 1897, and brings this action for reimbursement.

The respondent agreed to deliver safely, the dangers of the seas alone excepted, and must, therefore, assume the burden of proving that the loss was occasioned by a peril of the excepted class. If it

has failed to prove that fact, it must be held liable, even if the cause of the disaster does not clearly appear. The respondent averred that a violent wind brought about the loss by causing the barges to bump together, and thus starting a leak in the Weller that could not be controlled. In my opinion, the evidence fails to establish the averment. Whatever may be the test of a peril of the seas, this much, at least, may be safely said: The injurious force must be unusual; it must be out of the ordinary run of events,—such a violent happening as is not fairly to be expected. Justice Story's definition in The Reeside, Fed. Cas. No. 11,657, is well known:

"The phrase, 'danger of the seas,' whether understood in its most limited sense, as importing only a loss by the natural accidents peculiar to that element, or whether understood in its more extended sense, as including inevitable accidents upon that element, must still in either case be clearly understood to include only such losses as are of an extraordinary nature, or arise from some irresistible force or some overwhelming power, which cannot be guarded against by the ordinary exertions of human skill and prudence."

This was approved in Garrison v. Insurance Co., 19 How. 312, and in Richards v. Hansen (C. C.) 1 Fed. 61. Another definition may be found in The Warren Adams, 20 C. C. A. 486, 74 Fed. 415:

"No loss which is the result of ordinary wear and tear, or a necessary consequence of the employment of the vessel in the usual course of navigation, is a loss by 'perils of the seas.' That term may be defined as denoting 'all marine casualties resulting from the violent action of the elements, as distinguished from their natural, silent influence, upon the fabric of the vessel; casualties which may, and not consequences which must, occur.' "

Tried by either of the tests found in these citations, the evidence falls far short of proving the existence of a wind of an "extraordinary nature,"—such a wind as might fairly be described as an "irresistible force" or an "overwhelming power," or even such a wind as might be described as "violent." At the most, there was a moderate breeze, not stronger than might be expected upon any voyage in the Chesapeake Bay during the month of October; and, if the Weller was injured by bumping against her consorts while such a wind was blowing, she was injured by an ordinary, and not by an extraordinary, accident of the voyage. If the loss was not due to an injury then received, it is unimportant to inquire what may have done the harm; for, as already stated, the bill of lading binds the carrier to deliver safely in every other event than the intervention of some peril of the sea. Whether caused by the breeze, therefore, or by some undisclosed agency, the loss does not appear to have been occasioned by a danger of the excepted class. The result is that the ordinary liability of a common carrier remains.

A decree will be entered in favor of the libelant for $460, with interest from November 27, 1897, and costs.

THE HUMBOLDT.

(District Court, D. Washington, N. D. November 7, 1899.)

CARRIERS OF PASSENGERS—LIABILITY FOR LOSS OF BAGGAGE—STEAMSHIP COMPANIES.

A passenger steamship company is not liable as an innkeeper, and under the general rule applicable to carriers it is not liable for the loss of a passenger's baggage, where the loss is not occcasioned by some particular breach of duty or negligence on the part of its servants, unless the baggage has been delivered to and taken into the exclusive custody of its officers or servants.

This is a suit by a passenger on the steamship Humboldt to recover damages for the loss of his valise and its contents while traveling on said steamer. Heard on exceptions to the libel. Exceptions sustained.

W. F. Hays, for libelant.
Charles F. Munday, for claimant.

HANFORD, District Judge. The libelant, having paid for a ticket which entitled him to transportation from Seattle to Skagway, and the use of a state room and meals while en route, went on board just before the time appointed for the voyage to begin, and placed his valise within the state room assigned to him, and it was stolen therefrom. The libel does not charge any special act of negligence on the part of the carrier, nor that the custody of the valise was surrendered by the libelant to the officers or servants of the vessel. The rule seems to be well settled that, in general, a carrier is not liable for the loss of a passenger's baggage, where the loss is not occasioned by some particular breach of duty or negligence on the part of the carrier's servants, unless the baggage has been delivered to and taken into the exclusive custody of the carrier's servants; but it is held by respectable authorities that, where the carrier is a steamship company, the liability of an innkeeper is assumed by its contract with passengers who pay for rooms and meals as well as for transportation. I find, however, that the latest decisions of the American courts, and the preponderance in weight of authorities and reason, is against this exception to the general rule. A steamship company is not permitted to choose whom it will serve, but must afford accommodations to all who pay fare. A passenger ship is necessarily accessible to all classes of travelers, and is so far a public place that it is unreasonable to impose upon the owners the burden of liability for thefts of the private baggage of passengers, unless the baggage has been delivered to and left in the exclusive control of the carrier's officers or servants. The R. E. Lee, Fed. Cas. No. 11,690; 3 Am. & Eng. Enc. Law (2d Ed.) 547-552, note 3. In my opinion, the facts alleged are not sufficient to create a legal liability either by contract or by the commission of a tort. Exceptions sustained.

PEABODY GOLD-MIN. CO. v. GOLD HILL MIN. CO.

(Circuit Court, N. D. California. November 6, 1899.)

No. 12,699.

1. JURISDICTION OF FEDERAL COURTS—FEDERAL QUESTION.
   A trespass upon a mining claim does not raise a federal question, nor does a claim of right based upon a mere location of a mining claim, as against a patent regularly issued by the land department, under authority of law, for the land covered by such location.[1]
2. MINING CLAIMS—VALIDITY OF PATENT—AREA INCLUDED IN SINGLE PATENT.
   A patent for a lode mining claim, issued under the act of May 10, 1872, is not restricted to the surface ground which may be taken under a single location, and the fact that a patent includes ground extending more than 300 feet on either side of the lode or vein does not render it invalid on its face as to the excess.

On Demurrer to Bill.

A. H. Ricketts, for complainant.
E. W. McGraw, for respondent.

MORROW, Circuit Judge. This is an action to quiet the title of the complainant to two certain mining claims situated in the county of Nevada, in the state of California; to declare null and void a certain patent issued by the United States to the respondent to the extent that it covers complainant's said claims; and to restrain the respondent from asserting any claim to the premises in controversy. The complainant and respondent are corporations organized under the laws of the state of California. It appears from the bill that the patent under which the respondent claims title to the premises was issued by the United States on the 9th day of August, 1883, for 1,263.2 linear feet of the Gold Hill quartz mine, vein, lode, or deposit, with an irregular superficial area, containing 14.71 acres of land. It is alleged in the bill that the complainant is in possession and entitled to the possession of certain described premises: First, a mining claim known as the "Peabody Quartz Lode Mining Claim," which is specifically described, and appears to be to the northwest of the Gold Hill quartz mine and outside its boundaries as described in respondent's patent; second, the Suum Quique mining claim, located by Hartwig Von Cleve on the 7th day of September, 1898, and consisting of 270 linear feet of the Suum Quique vein or lode, with 300 feet on each side of the center of the vein, and situated westerly of and adjoining the said Peabody quartz lode mining claim; third, the Crœsus mining claim, located by Hartwig Von Cleve on the 7th day of September, 1898, and consisting of 400 linear feet of the Crœsus vein or lode, with 300 feet on each side of the center of said vein, and situated westerly of and adjoining said Peabody quartz lode mining claim. Nearly all of the second claim and a portion of the third claim appear to be within the boundaries of the Gold Hill quartz mine, as

[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. C. C. & S. Min. Co., 35 C. C. A. 7.

described in respondent's patent. But the bill alleges that the Peabody quartz mine, the Suum Quique mining claim, and the Crœsus mining claim constitute but one parcel of mining ground, and one property. It is further alleged, in substance, that said mining ground—that is to say, the whole property—contains valuable mineral deposits and vein, rock, and earth bearing gold and other precious metals, and that the said deposits and veins constitute the sole value of said mining ground; that the complainant is now engaged in mining and developing the said mining ground, lands, and premises, and extracting therefrom the said ores and minerals, and had constructed at great expense, and had and has thereon, mines, drifts, cuts, excavations, and other works necessary for and adapted to the work of mining and developing the said ground; that the respondent, the Gold Hill Mining Company, on the 24th day of September, 1898, entered upon the mining ground claimed by the complainant for the purpose of mining the said ground, and extracting the ores therefrom, and made and excavated certain drifts and openings into and under and upon said premises, and has intruded and trespassed upon the same, and has dug up and extracted, taken out of, and removed from said mining ground, and converted to its own use, large quantities of the mineral deposits, earth, rock, and ores therein bearing gold and other precious metals, of the value of $2,000; that the respondent threatens to continue the acts of intrusion and trespass alleged in the complaint, and to continue to dig out, extract, and remove from said ground the rock and ores bearing gold and other precious metals, to the great and irreparable injury of the complainant. It is further alleged that this suit arises under the constitution and laws of the United States; that the respondent claims some right, title, or interest adverse to the complainant in the premises under or by virtue of the patent issued to the respondent by the United States for the Gold Hill mining claim; that the suit involves the construction of the act of congress approved May 10, 1872, and that a true construction of that act limits the right of the land department to issue a patent for a mining claim to surface ground 300 feet on each side of the middle of the vein or lode patented, and the complainant will contend at the trial of the case that a patent issued by the land department of the government for surface ground in excess of such width is void as to such excess, and that respondent's patent is void as to all that portion of the surface ground on the easterly side of the lode or vein described in the patent for the Gold Hill mining claim in excess of 300 feet from the center of the lode or vein; that the complainant will contend at the trial of the case that the area in excess of such width allowed by law belongs to the complainant by virtue of valid and subsisting mining locations and claims thereon, to wit, the Crœsus mining claim or location and the Suum Quique mining claim or location, by virtue of a conveyance from the locator and discoverer of said mining claims and locations.

To this bill of complaint the respondent has interposed the following demurrer:

"That it appears on the face of said bill of complaint that the said complainant is not entitled in equity to any such relief as is thereby sought and prayed for against this respondent in respect to the said Suum Quique and Crœsus lodes or veins, in this, to wit: That it appears from said bill of complaint that the said Suum Quique and Crœsus lodes or veins are within the patented surface boundaries of the Gold Hill mine, owned by respondent, and no facts are stated in said bill of complaint which tend to show that said patent was not regularly issued, and is not valid, and did not vest in this respondent absolute title to all the mining property therein described; and that it does not appear from said bill of complaint that said patent was founded on a single mining location, or that it was not founded on many and separate and distinct locations, covering, in the aggregate, all the lands described in said patent, and each valid and effectual under the mining laws of the mining district in which said lands are situate. That as to the relief sought on behalf of said Suum Quique and Crœsus lodes or veins this court has no jurisdiction of the said bill of complaint, for the reason that it nowhere appears therein that the value of said Suum Quique and Crœsus lodes or veins is as much as two thousand dollars, or that they are of any value whatever. And this respondent further demurs to so much of said bill of complaint as refers to said Peabody quartz lode mining claim, and for cause of demurrer showeth that this court has no jurisdiction thereof, for the reason that it does not appear from said bill of complaint that, as far as said Peabody quartz lode mining claim and the alleged trespass thereon, any federal question whatever is involved, nor are there any facts stated which show jurisdiction in this court on any other ground."

The allegations of the bill of complaint limit the controversy in this action preliminarily to the two locations made by Von Cleve on September 7, 1898, designated as the "Suum Quique" and the "Crœsus" mining claims, or so much of said claims as are located within the boundaries of the claim of the respondent under its patent from the United States issued August 9, 1883, for the Gold Hill mining claim. But the complainant alleges that it has possession also of the Peabody mining claim. This claim is, however, outside of the boundaries of the Gold Hill mining claim, and is, therefore, not in conflict with respondent's claim. These three claims are united in the bill of complaint as one property, and the trespass is alleged, and relief prayed for, with respect to the mining ground constituting the whole property, and not with respect to any one claim.

Under these allegations of the bill of complaint, evidence might be offered by the complainant showing mining operations of the respondent within the boundaries of its own Gold Hill mining claim where the same would come also within either of the two designated locations claimed by the complainant, or evidence might be offered showing operations on the part of the respondent on these two locations outside of its own claim, or evidence might be offered showing operations on the part of the respondent within the boundaries of the Peabody claim. Now, it is clear that, with respect to the alleged trespass on these different localities different questions might arise, and not all federal questions. As, for instance, a trespass by the respondent upon the ground of the Peabody claim would not raise a federal question. Montana Ore-Purchasing Co. v. Boston & M. C. C. & S. Min. Co., 29 C. C. A. 462, 85 Fed. 867; Id., 35 C. C. A. 1, 93 Fed. 274. Nor would a trespass upon the part of the respondent upon the ground of the two locations claimed by the complain-

ant outside of its own claim raise a federal question. Whether the operations of the respondent within the boundaries of its own claim, and also within the limits of the two locations claimed by the complainant, would raise a federal question, would depend upon the consideration to be given to respondent's patent as against the matters charged in the bill. Manifestly, a claim of right based upon the mere location of a mining claim would not be sufficient for that purpose as against a patent regularly issued by the land department of the government, under authority of law, for the land covered by such location; and a bill of complaint setting forth such facts without any charge of fraud would be insufficient to state a cause of action, either upon a federal question or otherwise. As was said by Judge Ross in his concurring opinion in Montana Ore-Purchasing Co. v. Boston & M. C. C. & S. Min. Co., supra:

"It is essential for the bill to show by clear and unambiguous allegations that the suit involves a controversy that can only be determined by reference to the federal statute, and its proper application to the facts of the case."

It follows, necessarily, therefore, upon this aspect of the case, that no federal question appears in the bill of complaint.

But the bill alleges that a true construction of the act of May 10, 1872, limits the right of the land department to issue a patent for a mining claim to surface ground 300 feet on each side of the middle of the vein or lode, and that, inasmuch as the surface ground of the Gold Hill mining claim, as patented in 1883, exceeds 300 feet easterly from the center of the vein or lode, the patent is void on its face for such excess, and that the area in excess of such width allowed by law belongs to the complainant by virtue of the mining locations thereon, to wit, the Crœsus mining claim and the Suum Quique mining claim. This question, as to the extent of mining ground that may be included in a single patent, was considered by the supreme court of the United States in Smelting Co. v. Kemp, 104 U. S. 636, where Mr. Justice Field, speaking for the court, said:

"A patent, in a court of law, is conclusive as to all matters properly determinable by the land department, when its action is within the scope of its authority; that is, when it has jurisdiction under the law to convey the land. In that court the patent is unassailable for mere errors of judgment. Indeed, the doctrine as to the regularity and validity of its acts, where it has jurisdiction, goes so far that if, in any circumstances under existing law, a patent would be held valid, it will be presumed that such circumstances existed. * * * The case at bar, then, is reduced to the question whether the patent to Starr is void on its face; that is, whether, read in the light of existing law, it is seen to be invalid. It does not come within any of the exceptions mentioned in the cases cited. The lands it purports to convey are mineral, and were a part of the public domain. The law of congress had provided for their sale. The proper officers of the land department supervised the proceedings. It bears the signature of the president, or rather of the officer authorized by law to place the president's signature to it, which is the same thing. It is properly countersigned, and the seal of the general land office is attached to it. It is regular on its face, unless some limitation in the law, as to the extent of a mining claim which can be patented, has been disregarded. The case of the defendants rests on the correctness of their assertion that a patent cannot issue for a mining claim which embraces over one hundred and sixty acres. Assuming that the words 'more or less,' accompanying the statement of the acres contained in the claim, are to be disregarded, and that the patent is construed as for one hundred and sixty-four

acres and a fraction of an acre, there is nothing in the acts of congress which prohibits the issue of a patent for that amount. They are silent as to the extent of a mining claim. They speak of locations, and limit the extent of mining ground which an individual or an association of individuals may embrace in one of them. There is nothing in the reason of the thing, or in the language of the acts, which prevents an individual from acquiring by purchase the ground located by others, and adding it to his own. The difficulty with the court below, as seen in its charge, evidently arose from confounding 'location' and 'mining claim,' as though the two terms always represent the same thing, whereas they often mean very different things. A mining claim is a parcel of land containing precious metal in its soil or rock. A location is the act of appropriating such parcel according to certain established rules. It usually consists in placing on the ground, in a conspicuous position, a notice setting forth the name of the locator, the fact that it is thus taken or located, with the requisite description of the extent and boundaries of the parcel, according to the local customs, or, since the statute of 1872, according to the provisions of that act. Rev. St. § 2324. The location—which is the act of taking the parcel of mineral land—in time became among the miners synonymous with the mining claim originally appropriated. So now, if the miner has only the ground covered by one location, his 'mining claim' and 'location' are identical, and the two designations may be indiscriminately used to denote the same thing. But if, by purchase, he acquires the adjoining location of his neighbor,—that is, the ground which his neighbor has taken up,—and adds it to his own, then his mining claim covers the ground embraced by both locations, and henceforth he will speak of it as his 'claim.' Indeed, his claim may include as many adjoining locations as he can purchase, and the ground covered by all will constitute what he claims for mining purposes; or, in other words, will constitute his 'mining claim,' and be so designated. Such is the general understanding of miners, and the meaning they attach to the term. * * * In addition to all this, it is difficult to perceive what object would be gained, what policy subserved, by a prohibition to embrace in one patent contiguous mining ground taken up by different locations and subsequently purchased and held by one individual. He can hold as many locations as he can purchase, and rely upon his possessory title. He is protected thereunder as completely as if he held a patent for them subject to the condition of certain annual expenditures upon them in labor or improvements."

The foregoing case related to placer claims, but the same doctrine has been held by this court applicable to quartz claims. In the case of Carson City Gold & Silver Min. Co. v. North Star Min. Co. (C. C.) 73 Fed. 597, Judge Beatty said:

"The North Star patent is of greater superficial area than any law has ever authorized for a single-ledge location; but it has been held by the supreme court that, while the law prescribes a limitation to the size of a single location, there is no limitation to the number of claims one person may hold by purchase, or that may be included in a single patent, and, as I understand, that may be included in a single survey, showing only the exterior boundaries, and omitting all interior lines of the several smaller claims. Such was the holding as to agricultural lands in Polk's Lessee v. Wendell, 9 Cranch, 87, and as to placer claims in Smelting Co. v. Kemp, 104 U. S. 636. There appears no reason why the same rule should not apply to quartz claims. Independent, however, of the foregoing consideration, a patent has been granted for the North Star claim. It has passed beyond the field of discussion that a patent cannot be collaterally attacked on account of any question which the land department could lawfully determine before issuing it. Without now defining what questions are settled by the issuance of a patent, it is held that the question of the defendant's right to a patent to the North Star, with the boundaries as defined by it, was within the jurisdiction of the department, and was determined by it, from which it is held to follow that the boundary lines, as defined by the patent, are the only lines by which the rights of the parties can be determined. To adjudge such rights by the original lines of the several claims of which the North Star is composed would be such an

assault upon the patent as cannot be sustained. The former ruling upon plaintiff's objection is therefore adhered to."

This case was taken to the circuit court of appeals for this circuit, where the judgment of the circuit court was affirmed. 28 C. C. A. 333, 83 Fed. 658. Judge Hawley, speaking for the court, and citing from the case of Smelting Co. v. Kemp, supra, said:

"This language is certainly as applicable to the location of lode claims as to placer claims."

And citing further upon the conclusiveness of patents, he said:

"In Mining Co. v. Campbell, 17 Colo. 267, 29 Pac. 513, the court declared that there could be no higher evidence of title than a patent from the United States, and that, in favor of the validity and integrity of such an instrument, it must be presumed that all antecedent steps necessary to its issuance were duly taken. As was said by Mr. Justice Field in the Eureka Case [Fed. Cas. No. 4,548]: 'A patent of the United States for land, whether agricultural or mineral, is something upon which its holder can rely for peace and security in his possessions. In its potency, it is ironclad against all mere speculative inferences.' And in Chambers v. Jones, 17 Mont. 156, 42 Pac. 758, the court held that, after the issuance of a patent to a mining claim, the sufficiency of the location notice cannot be questioned. These general principles are amply sufficient to sustain the ruling and decision of the lower court. Any other conclusion might result in making invalid many patents heretofore issued upon consolidated locations. Especially would this be true if plaintiff's contention should be sustained that every presumption must be construed against the patent. A patent from the government would be of but little, if any, use or effect, if the duty devolved upon the patentee, whenever the validity of his claim is called in question, to prove that each separate location was properly made in strict conformity with the law. One purpose, object, and effect of procuring a patent is to at once and forever settle this question, and set at rest all further contests in relation to such matters. As was said by the court in Doe v. Mining Co. (C. C.) 54 Fed. 935, 940: 'If questions relating to the boundaries of the location, the marking of them, the discovery of a vein, lode, or ledge within them, the posting of the required notice, etc., are open to contestation after the issuance of a patent for the claim as before, the issuance of such an instrument would be a vain act, and would wholly fail to secure to the patentee the rights and privileges designed by the law authorizing its issue. The very purpose of the patent is to do away with the necessity of going back to the facts upon which it is based.'"

It does not appear from the bill of complaint in the present case, or from the copy of the patent of the Gold Hill quartz mine, attached to the bill, that the mining ground covered by the patent was a single location, or that it is in excess of the legal area of all the locations embraced within the patented area. It may have included a number of locations, the aggregate superficial area of which was 14.71 acres, with the length and width described in the patent. Indeed, this fact is not denied by counsel for the complainant. His contention is that the true construction of the act of May 10, 1872, limits the right and the jurisdiction of the land department of the government to issue a patent for a mining claim to surface ground not in excess of 300 feet on each side of the middle of the vein or lode for which the patent is issued. But, as we have seen, this position cannot be sustained under the law as construed by the courts. It must be held, therefore, that the bill of complaint does not state facts sufficient to constitute a cause of action against the respondent upon any federal question with respect to any alleged trespass upon that portion of the Suum

Quique and Crœsus locations within the boundaries of the Gold Hill mining claim, and it follows that the demurrer must be sustained, and the order to show cause why an injunction should not issue be discharged; and such will be the order of the court.

ALDRICH v. CAMPBELL.

(Circuit Court of Appeals, Ninth Circuit. November 6, 1899.)

No. 556.

1. JURISDICTION OF FEDERAL COURTS—ANCILLARY SUIT.
   A suit in equity in a circuit court of the United States to restrain the defendant, as receiver of an insolvent national bank, from prosecuting an action at law in the same court against the complainant, is ancillary to the action at law, and the court has jurisdiction without regard to the amount involved.[1]
2. NATIONAL BANKS — ASSESSMENTS ON STOCKHOLDERS — CONCLUSIVENESS OF COMPTROLLER'S ACTION.
   The action of the comptroller of the currency in ordering an assessment against the stockholders of an insolvent national bank, whether a first assessment or one made subsequently, is a judicial determination of the necessity for such assessment, which is conclusive on the stockholders, and cannot be questioned by them in any litigation which may ensue, either at law or in equity.
3. SAME—POWER OF COMPTROLLER—SECOND ASSESSMENT.
   The comptroller has power to order successive assessments against the stockholders of an insolvent national bank, ratably on all, where the aggregate does not exceed the par value of the stock.

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

This is an appeal by the defendant in the court below from two orders made by the circuit court of the United States for the district of Washington, Western division, overruling the demurrer of defendant to the bill of complaint, and granting an interlocutory injunction restraining the defendant, as receiver of the Tacoma National Bank, from proceeding further against the plaintiff in an action at law pending in the same court. It appears: That Louis D. Campbell, a citizen of the state of Washington, was a shareholder, to the extent of 100 shares, in the Tacoma National Bank, a national banking association organized under the national banking laws of the United States, with a capital stock of $200,000. That on December 4, 1894, said bank suspended payment and closed its doors. Thereafter, on the 14th day of December, 1894, the then comptroller of the currency of the United States, in accordance with the banking laws of the United States, appointed one Philip V. Anderson as receiver of said banking association, who duly qualified and took into his possession all of the assets and effects of the said banking association, and served as such receiver until the 30th day of January, 1899, when he resigned from said receivership, and the appellant in the present suit, J. Frank Aldrich, was appointed by the comptroller to serve in his stead. Aldrich thereupon qualified, and ever since has been the duly appointed, qualified, and acting receiver of said Tacoma National Bank of Tacoma. About the 27th day of April, 1895, upon a proper accounting made by the receiver of said bank to the comptroller, and upon a valuation of the uncollected assets remaining in said receiver's hands, it appeared to the satisfaction of the comptroller of the

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[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.

currency that in order to pay the debts of said bank it would be necessary to enforce the individual liability of the stockholders thereof, as prescribed by sections 5151 and 5234 of the Revised Statutes of the United States, to the extent of $130,000, or $65 per share of the capital stock of said bank; and the comptroller accordingly levied an assessment in that amount upon the shareholders of said bank upon said 27th day of April, 1895, to be paid by them ratably on or before the 6th day of August, 1895, and directed said receiver to proceed, by suit or otherwise, to enforce to that extent the individual liability of the said stockholders. The appellee herein paid to said receiver $6,500 in compliance with said assessment. A further assessment was made upon the shareholders of said bank by the comptroller on January 30, 1899, of $34,000, or $17 per share, to be paid ratably on March 1, 1899, with the same direction to the receiver to take the necessary proceedings for its enforcement. The appellee, Louis D. Campbell, refused to comply with the demand of the receiver for the payment of his pro rata of this assessment; and thereupon the receiver commenced an action at law in said circuit court against said Campbell, demanding judgment for $1,700, with interest from January 30, 1899, and costs. Campbell then filed a bill in equity, stating the pendency of said action at law, and alleging that the total indebtedness of said bank at the time it suspended payment did not exceed $222,362.34; that the total amount collected by the receivers from the assets of said bank was $139,000; that the total amount of the assessment levied by the comptroller of the currency upon the shareholders was $130,000; and that the sum of these two amounts, $269,000, was at least $46,637.66 in excess of the total indebtedness of said bank at the time it suspended payment, and largely in excess of said indebtedness plus the interest thereon to the time of said assessment, August 6, 1895. He further alleged that he was debarred from interposing these facts as a defense to the action at law, and could not obtain full and complete justice in said action; that the comptroller of the currency, by said assessment of August 6, 1895, had collected from said Campbell $1,500 in excess of the amount lawfully assessable against him as a stockholder in said bank, wherefore he prayed that said comptroller and receiver be decreed to repay to him said sum of $1,500, and be enjoined from further prosecuting the said action at law. The comptroller filed a plea to the jurisdiction of the circuit court for the district of Washington, and the bill was dismissed as against him. The receiver of said bank, J. Frank Aldrich, demurred to the bill on the ground of want of jurisdiction, for the reason that the amount in controversy was less than $2,000, and the further ground that complainant had not in and by his bill stated such a cause as entitled him, in a court of equity, to any discovery from the respondent, or to any relief against him as to any of the matters contained therein. The court overruled the demurrer, and, in accordance with such ruling, entered an interlocutory order restraining the said Aldrich, as receiver of the Tacoma National Bank, until the hearing and determination of said cause, from proceeding further against said Campbell in the action at law pending in said court. From these orders an appeal is taken to this court.

P. Tillinghast, for appellant.

Campbell & Powell, for appellee.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

MORROW, Circuit Judge, after stating the facts as above, delivered the opinion of the court.

The principal question in the proceedings under review is the action of the court below in overruling the demurrer of the respondent (appellant) to the bill in equity filed by the complainant (appellee). The first ground of this demurrer was the want of jurisdiction of the circuit court, for the reason that the amount in controversy was less than $2,000. It has been repeatedly decided that a receiver appointed by the comptroller of the currency to close up the affairs of an insolvent national bank may sue in the federal

court without regard to his citizenship, or the amount in controversy. Price v. Abbott (C. C.) 17 Fed. 506; Platt v. Beach, 2 Ben. 303, 19 Fed. Cas. 836; Stanton v. Wilkeson, 8 Ben. 357, 22 Fed. Cas. 1,074; Kennedy v. Gibson, 8 Wall. 498; Bank v. Kennedy, 17 Wall. 19; Myers v. Hettinger (C. C. A.) 94 Fed. 370. It is also a well-settled principle of law that a bill filed in the equity side of a court to restrain or regulate a judgment or a suit at law in the same court is not an original suit, but ancillary and dependent, and merely supplementary to the original suit. Cortes Co. v. Thannhauser (C. C.) 9 Fed. 226; Id., 21 Blatchf. 552, 18 Fed. 667; Jones v. Andrews, 10 Wall. 327; Krippendorf v. Hyde, 110 U. S. 276, 4 Sup. Ct. 27; Johnson v. Christian, 125 U. S. 642, 8 Sup. Ct. 989, 1135. The bill demurred to here was ancillary to the common-law action brought by the receiver in the circuit court, and the jurisdiction of the court in the dependent case is founded upon the jurisdiction of the court over the original case.

The real controversy in the case at bar arises, however, on the second ground of demurrer, which presents this question: Does the bill state facts entitling complainant (appellee) to any relief or discovery in equity against said receiver? The bill alleges the total indebtedness of the bank at the time of suspension of payment; the amount collected by the receiver from the assets, and upon the first assessment levied by the comptroller; that these collections were in excess of the total indebtedness of the bank, including interest; and that the second assessment levied by the comptroller was for this reason unnecessary and unlawful. It is well established that the comptroller of the currency is vested, by virtue of the national banking law, with authority to determine when it is necessary, in winding up the affairs of an insolvent bank, to enforce the liability of the stockholders, and power to levy assessments accordingly; that such determination and any action thereon are conclusive upon the stockholders, and not to be questioned in any litigation that may ensue. Kennedy v. Gibson, 8 Wall. 498; Casey v. Galli, 94 U. S. 673; Bank v. Case, 99 U. S. 628; Richmond v. Irons, 121 U. S. 27, 7 Sup. Ct. 788; Bushnell v. Leland, 164 U. S. 684, 17 Sup. Ct. 209; Bank v. Mathews, 29 C. C. A. 491, 85 Fed. 934; Nead v. Wall (C. C.) 70 Fed. 806; Young v. Wempe (C. C.) 46 Fed. 354; Welles v. Stout (C. C.) 38 Fed. 67; Aldrich v. Yates (C. C.) 95 Fed. 78.

It is admitted by the appellee that the comptroller's action in levying the first assessment was conclusive upon the shareholders, but he contends that, under the facts stated, the second assessment was a wrongful and illegal one, and exceeded the jurisdiction of the comptroller.

Section 5151 of the Revised Statutes of the United States provides as follows:

"The shareholders of every national banking association shall be held individually responsible, equally and ratably and not one for another, for all contracts, debts, and engagements of such association, to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares. * * *"

Section 5234 provides:

"On becoming satisfied * * * that any association has refused to pay its circulating notes * * * and is in default, the comptroller of the currency may forthwith appoint a receiver. * * * Such receiver, under the direction of the comptroller, shall take possession of the books, records, and assets of every description of such association, collect all debts, dues and claims belonging to it * * * and may, if necessary to pay the debts of such association, enforce the individual liability of the stockholders."

In Kennedy v. Gibson, supra, a bill in equity had been filed in the circuit court for the district of Maryland by Kennedy, the receiver of the Merchants' National Bank of Washington, in the District of Columbia. It was alleged in the bill that the bank had failed to redeem its circulating notes, and that the receiver had ascertained that the assets and credits of the bank were wholly insufficient to pay its debts and liabilities, and that it would be necessary to the complete and entire administration of his trust that recourse should be had to the personal liability imposed on the stockholders by law. The bill, however, contained no averment of any action by the comptroller touching the personal liability of the stockholders. The defendants demurred to the bill, and the demurrer was sustained, whereupon the case was appealed to the supreme court. The principal question there was whether the omission of the bill to aver action by the comptroller touching the personal liability of the stockholders prior to suit being brought by the receiver was fatal to the bill. The court, in answering this question, explained the scope and purpose of the law relating to the dissolution of national banks in such full and explicit language that no doubt is left as to the power and duty of the comptroller, and the authority of the receiver of the bank, acting under his direction. The court said:

"The receiver is the instrument of the comptroller. He is appointed by the comptroller, and the power of appointment carries with it the power of removal. It is for the comptroller to decide when it is necessary to institute proceedings against the stockholders to enforce their personal liability, and whether the whole or a part, and, if only a part, how much, shall be collected. These questions are referred to his judgment and discretion, and his determination is conclusive. The stockholders cannot controvert it. It is not to be questioned in the litigation that may ensue. He may make it at such time as he may deem proper, and upon such data as shall be satisfactory to him. This action on his part is indispensable, whenever the personal liability of the stockholders is sought to be enforced, and must precede the institution of suit by the receiver. The fact must be distinctly averred in all such cases, and, if put in issue, must be proved. The liability of the stockholders is several, and not joint. The limit of their liability is the par of the stock held by each one. Where the whole amount is sought to be recovered, the proceeding must be at law. Where less is required, the proceeding may be in equity; and in such case an interlocutory decree may be taken for contribution, and the case may stand over for the further action of the court—if such action should subsequently prove to be necessary—until the full amount of the liability is exhausted. It would be attended with injurious consequences to forbid action against the stockholders until the precise amount necessary to be collected shall be formally ascertained. This would greatly protract the final settlement, and might be attended with large losses by insolvency and otherwise in the intervening time. The amount must depend in part upon the solvency of the debtors, and the validity of the claims. Time will be consumed in the application of these tests, and the results in many cases cannot

be foreseen. The same remarks apply to the enforced collections from the stockholders. A speedy adjustment is necessary to the efficiency and utility of the law. The interests of the creditors require it, and it was the obvious policy and purpose of congress to give it. If too much be collected, it is provided by the statute that any surplus which may remain after satisfying all demands against the association shall be paid over to the stockholders. It is better they should pay more than may prove to be needed, than that the evils of delay should be encountered."

In Casey v. Galli, 94 U. S. 673, the action was at law to enforce the individual liability of the defendant as a stockholder of an insolvent national bank. The defendant demurred to the declaration, and assigned, among other causes of demurrer, that the declaration demanded a larger sum than the defendant was required by the statute to pay, and also an additional sum by way of interest. The defendant was also permitted to enter a plea to the declaration, alleging, among other things, that the comptroller of the currency had determined and decided to exact from the defendant, and from a number of stockholders of the bank less than the whole, such sums of money as would suffice to pay all the debts and liabilities of the said bank, with the intent and purpose to compel the defendant, and others of the shareholders who might be solvent, to contribute the entire sum necessary to pay the debts and liabilities of the bank, without any contribution from those who were insolvent. The court denied the sufficiency of these defenses; holding that the order of the comptroller was conclusive, and could not be controverted in a suit against the stockholders.

The appellee in the present case does not deny the authority of the comptroller as declared by these decisions, but he seeks to avoid the effect of such authority by contending that while, in an action on the part of a receiver of a national bank to recover an assessment, no defense can be interposed by the stockholder to such an action, however excessive or wrongful the assessment may be, nevertheless the stockholder in such a case may restrain the receiver by a bill in equity to enjoin such action; and in support of this contention he relies upon an observation of Mr. Justice Swayne in delivering the opinion of the supreme court of the United States in the case of U. S. v. Knox, 102 U. S. 422. In that case the comptroller had levied an assessment of 70 per cent. upon the par value of each share of stock of the insolvent bank, and ordered the receiver to collect the assessment. By reason of the insolvency of many of the shareholders, not half of the amount of this assessment was collected. A large creditor of the bank requested the comptroller to order a further assessment of 30 per cent. upon each share of the capital stock, for the discharge of the remainder of the bank's indebtedness. The comptroller refused to do so, because the enforcement of such an assessment would compel the solvent shareholders to pay the sums and proportions due from the insolvent shareholders. A writ of mandamus was then petitioned for, directed to the comptroller, and refused in the lower court. In the United States supreme court the legislation which resulted in the provisions of section 5151 of the Revised Statutes was reviewed, and the court held that, as the law did not intend the shareholders to be put in the re-

lation of guarantors or sureties "one for another" as to the amount which each might be required to pay, the insolvency of one stockholder did not in any wise affect the liability of another. It was accordingly held that the comptroller had decided correctly as to his duty in the premises, but the court made this further observation:

"Although assessments made by the comptroller under the circumstances of the first assessment in this case, and all other assessments, successive or otherwise, not exceeding the par value of all the stock of the bank, are conclusive upon the stockholders, yet if he were to attempt to enforce one made, clearly and palpably, contrary to the views we have expressed, it cannot be doubted that a court of equity, if its aid were invoked, would promptly restrain him by injunction."

The appellee relies upon this last declaration of the court to support his action in his suit in equity. It should be noted, however, in this connection, that, immediately following the language quoted, the court distinctly reaffirms the doctrine of the cases to which reference has been made. The court says:

"Nothing in this opinion is intended in any wise to affect the authority of Kennedy v. Gibson, 8 Wall. 498, and Casey v. Galli, 94 U. S. 673. On the contrary, we approve and reaffirm the rule laid down in those cases."

It will be seen that the point to be decided in U. S. v. Knox was whether the comptroller was clothed with the power to make a second assessment that would, in effect, require certain solvent shareholders to pay, in addition to the amount due and paid by them, the proportionate sums due and delinquent on the first assessment from certain insolvent shareholders, and whether the solvent shareholders were thus liable for the default of the insolvent shareholders. The law had distinctly provided otherwise when it declared in section 5151 of the Revised Statutes that the shareholders of every national bank should be held individually responsible, equally and ratably, and not one for another. Had the comptroller attempted to make such an assessment, he would have been acting beyond the scope of his authority, and subject to the restraining power of the court. But that is not the proposition in the case at bar, as here the first assessment was fully paid. The comptroller has found the amount insufficient to meet all the bank's liabilities, including interest on the debts of the bank accruing subsequent to the first assessment, and the expenses of the receivership, and in accordance with the power and authority, judicial and executory, vested in him, has levied a second assessment upon the shareholders. The authority to do this is not controverted, even in the case just cited. On the contrary, it is there said:

"Assessments made by the comptroller, under the circumstances of the first assessment in this case, and all other assessments, successive or otherwise, not exceeding the par value of all the stock of the bank, are conclusive upon the stockholders. * * *"

And the only qualification of this declaration is that if the comptroller were to attempt to enforce an assessment made clearly and palpably contrary to the views expressed, namely, as to the liability of the solvent shareholders for those insolvent, a court of equity would doubtless restrain him by injunction. This last statement, as to what a court of equity would do, was limited to the facts of

that case, and clearly ought not to be extended to facts of a wholly different character. In the present case the comptroller has not attempted to enforce an assessment contrary to the views so expressed, but, on the contrary, he has acted entirely in accord with the principles there announced. This is made perfectly clear, if we consider the power of the comptroller with respect to the conditions under which he acted, as disclosed by the bill: The comptroller of the currency has jurisdiction to enforce by assessment the individual liability of the stockholders of an insolvent national bank, equally and ratably, and not one for another, to the extent of the amount of their stock in the bank, at the par value thereof. Acting within this clearly-defined authority, an order of the comptroller directing an assessment is absolutely conclusive upon the stockholders of the bank, and cannot be controverted by them in any defense they may seek to interpose against an action based upon such an assessment. The par value of the stock of a national bank is $100 for each share. It appears from the bill in this case that the comptroller, in the progress of the proceedings in liquidation of the Tacoma National Bank, did, on the 27th day of April, 1895, levy an assessment, equally and ratably, upon all the shareholders of the bank, at the rate of $65 per share. This assessment, being $35 per share less than the par value of the stock, did not exhaust the jurisdiction of the comptroller to raise, within that limit, by assessment upon the stockholders of the bank, funds to meet the contracts, debts, and engagements of the bank. On the 30th day of January, 1899, the comptroller levied a second assessment, equally and ratably, on all the stockholders of the bank, at the rate of $17 per share; making a total for the two assessments of $82 per share. These two assessments, being together $18 less than the par value of the stock, were within the jurisdiction of the comptroller to make in the proceedings which he had instituted to wind up the affairs of the bank; and against this second assessment it is no defense, either at law or in equity, to say that the first assessment was more than sufficient to pay the contracts, debts, and engagements of the bank. Kennedy v. Gibson, supra. Whether that assessment was sufficient is a question which the law has placed wholly within the power of the comptroller to determine, and without some showing of fraud, accident, or mistake, it must be deemed by the court to have been insufficient, and the necessity for a second assessment conclusive. The obligations of a stockholder of the bank, as well as the power of the comptroller, representing the rights of the creditors of the bank, to enforce such obligations, are defined by positive rules; and the point at which the right of the stockholder to deny his liability ceases, and the power of the comptroller to enforce it commences, is clearly established. These rules cannot be contravened or varied by the interposition of a court of equity. Adler v. Fenton, 24 How. 407, 411. "Wherever the rights or the situation of parties are clearly defined and established by law, equity has no power to change or unsettle those rights or that situation, but in all such instances the maxim, 'Æquitas sequitur legem,' is strictly applicable." Magniac v. Thomson, 15 How. 281, 299.

It follows that the bill does not state facts sufficient to entitle the complainant to any relief in equity, and the demurrer should have been sustained. There is still the further objection to the bill that it is a collateral attack upon a judicial or quasi judicial decision, and, under the principles announced by this court in Brown v. Tillinghast, 35 C. C. A. 323, 93 Fed. 326, cannot be maintained. The judgment of the circuit court is therefore reversed, and the cause remanded, with directions to sustain the demurrer and dismiss the bill.

McFADDEN v. MOUNTAIN VIEW MIN. & MILL. CO.

(Circuit Court of Appeals, Ninth Circuit. September 11, 1899.)

No. 482.

1. APPEAL—CITATION IN ERROR—WAIVER OF IRREGULARITY.
   Under rule 36 of the circuit court of appeals for the Ninth circuit (31 C. C. A. cxli., 90 Fed. cxli.), providing for the holding of a term of the court at Seattle in September of each year, and that all appeals and writs of error from the circuit and district courts for the district of Washington shall be heard at the Seattle term unless it is stipulated by the parties thereto that they be heard at San Francisco, the making of a citation in error, issued in September, after the holding of the Seattle term, returnable at San Francisco, is at most a mere irregularity, which is waived by a stipulation of counsel that the cause be heard at San Francisco.
2. SAME—METHOD OF TAKING CASE UP FOR REVIEW.
   In an action brought under Rev. St. § 2326, for an adjudication of contested mining claims, there having been conflicting decisions as to whether such suits were at law or in equity, the defeated party is justified in taking the case up for review both by appeal and writ of error, to guard against a possible dismissal.
3. JURISDICTION OF FEDERAL COURTS—SUIT TO DETERMINE CONTEST BETWEEN MINING CLAIMS.
   A federal court has jurisdiction of a suit brought under Rev. St. § 2326, to determine a contest between mining claims, where the alleged value of the property meets the statutory requirements.
4. MINERAL LANDS—SUIT TO DETERMINE CONTEST BETWEEN MINING CLAIMS.
   A suit brought under Rev. St. § 2326, to determine a contest between mining claims is of an equitable nature.
5. PUBLIC LANDS—CONSTRUCTION OF STATUTE—EFFECT OF CONSTRUCTION BY LAND DEPARTMENT.
   The construction placed on an act of congress relating to public lands by the land department, charged with its execution, especially where it is followed uniformly for a number of years, is entitled to great weight, and should not be overthrown except for cogent reasons, and unless it is clearly erroneous.
6. SAME—ACT RESTORING INDIAN RESERVATION—MINING LOCATIONS.
   Act July 1, 1892 (27 Stat. 62), restoring to the public domain a portion of the Colville Indian reservation in the state of Washington, and providing that, subject to the right of individual allotments therefrom to Indians as prescribed therein, the same should be open to settlement and entry by the proclamation of the president, and should be disposed of under the general laws, did not operate of itself, in advance of the proclamation of the president, to give a right to locate mining claims therein under the mineral laws, a contrary construction having been placed upon it by the land department, and also, in effect, by congress, by the passage subsequently of Act Feb. 20, 1896, in terms extending the mineral land laws so as to apply to the lands described in the prior act.

   Gilbert, Circuit Judge, dissenting.

In Error to and Appeal from the Circuit Court of the United States for the Eastern Division of the District of Washington.

Stoll & Macdonald and Albert Allen, for plaintiff in error and appellant.

W. B. Heyburn, for defendant in error and appellee.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

ROSS, Circuit Judge. This action was commenced in the superior court of the state of Washington for the county of Stevens for the purpose of securing an adjudication by a court of competent jurisdiction of the adverse claims of the parties to certain mining ground under and by virtue of the provisions of section 2326 of the Revised Statutes of the United States; the plaintiff in the action claiming under locations thereof made on the 20th day of February, 1896, and the defendant under a location as the "Mountain View Claim," made on the 16th day of October, 1895. On the motion of the defendant, the action was removed into the circuit court of the United States for the district of Washington, Eastern division. In that court the respective parties entered into written stipulations, waiving a jury, and submitting the case to the court upon an agreed statement of facts, which in express terms eliminated every question from the consideration of the court except one, viz. whether or not, at the time of the location of the Mountain View claim, or at any time prior to the 20th day of February, 1896, that portion of the Colville Indian reservation within which the ground in question is situated was open to the location of mining claims. In the court below judgment was given for the defendant to the action. 87 Fed. 154. That court having treated the case as an action at law, the plaintiff in the suit, out of an abundance of caution, not only appealed from the judgment, but also sued out a writ of error. This fact constitutes one of the grounds of the motion made on behalf of the defendant to the suit to dismiss both the appeal and the writ of error. The other ground of the motion is that in and by the citations appearing in the record the appellee and defendant in error is cited to appear, within 30 days from the date of the issuance of the writs, in this court, at the city of San Francisco, Cal., instead of at the city of Seattle, in the state of Washington.

There is no merit in either of these grounds. The latter ground of the motion to dismiss is based upon the third subdivision of rule 36 of this court (31 C. C. A. cxli., 90 Fed. cxli.), providing for the holding of a term of the court in the city of Seattle, in the state of Washington, beginning on the second Monday in September, and also a term each year at the city of Portland, in the state of Oregon, beginning on the third Monday in September; and providing, also, that "all appeals and writs of error from the circuit and district courts for the district of Washington shall be heard at said annual term in the city of Seattle, unless it is stipulated by the parties thereto that they be heard at San Francisco." The citations were issued on the 26th day of September, 1898, and, as no term of the court would be held in Seattle until about one year thereafter, they

were made returnable at the city of San Francisco, at which place the next term of the court after the return day of the writs would be held. In view of these facts it may well be doubted whether the citations were not properly made returnable at the city of San Francisco. On the return day of the writs the court was to be in session at that place, and under the rules of the court the parties were permitted to stipulate for the cause being heard there. The defect, if defect at all, was a mere irregularity, which might be, and which was in this case, waived by the moving party; for the record shows that, not only did its counsel acknowledge service of a copy of each of the citations, and due service of the brief of the plaintiff in error and appellant, without objection, but on the 12th day of November, 1898, entered into a stipulation in writing with the counsel for the plaintiff in error and appellant to the effect that the cause be heard at San Francisco at the then next session of the court, instead of at the city of Seattle. The office of the citation is to give notice to the opposite party of the removal of the cause to the appellate court. The supreme court, in Bigler v. Waller, 12 Wall. 142, said:

"Notice is required by law; and where none is given, and the failure to comply with the requirement is not waived, the appeal or writ of error must be dismissed; but the defect may be waived in various ways,—as, by the consent or appearance or the fraud of the other party. Service of the citation may be made upon the attorney of record of the proper party. Bacon v. Hart, 1 Black, 38. Unquestionably, the attorney of record may also waive service, and acknowledge notice on the citation, and in that behalf he represents the party. Grosvenor v. Danforth, 16 Mass. 74; Adams v. Robinson, 1 Pick. 461."

Referring to the facts in that case, the court continued:

"On the citation in this case is the following indorsement: 'I hereby acknowledge service of the within citation. James Alfred Jones, Counsel for Defendants in this Case in the Circuit Court of the United States of the District of Virginia.' Viewed in any reasonable light, it seems to the court that the attorney knew that the appeal was allowed by the court, and was prosecuted by the appellant, which is the only purpose intended to be effected by the citation. Having been counsel in the case, the party signing that certificate must have known that the suit had been revived, and that proceeding took place before the final decree was entered. Such a service would be sufficient beyond all doubt if there had been no error in the form of the citation, and, as that objection is a merely formal one, we are all of the opinion that it must be considered as waived by the circumstantial language of the certificate signed without objection by the attorney of record in the circuit court."

To the same effect is Tripp v. Railroad Co., 144 U. S. 126, 129, 12 Sup. Ct. 655; Villabolos v. U. S., 6 How. 81, 90; Goodwin v. Fox, 120 U. S. 775, 7 Sup. Ct. 779.

As there have been conflicting decisions of the courts in respect to the character of the action brought in the court below by the plaintiff in error and appellant, he, out of abundant caution, and to guard against a possible chance of dismissal, brought the case here both by appeal and by writ of error. There was, however, but one action in the court below, and but one cause and one record here. The method pursued was the safe one, and has the sanction of the supreme court. Hurst v. Hollingsworth, 94 U. S. 111, 100 U. S. 100; Plymouth Consol. Gold-Min. Co. v. Amador & S. Canal Co., 118 U. S. 264, 269, 6 Sup. Ct. 1034. As the record, however, shows that the action was brought under and by virtue of the pro-

visions of section 2326 of the Revised Statutes, for the adjudication of a contest originating in the land office of the United States, the same question of jurisdiction that was determined by this court in the case of Mining Co. v. Rutter, 31 C. C. A. 223, 87 Fed. 801, is presented. In that case this court, after full consideration, held, in accordance with the rulings of several of the circuit courts of this circuit, as well as of others, that of such an action, where, as here, the alleged value of the property in controversy is sufficient to answer the statutory requirement in that regard, the federal courts have full jurisdiction, and, furthermore, that such an action is of an equitable nature. We adhere to that decision, and deny the motions to dismiss.

The merits of the case are, by the agreement of the respective parties, made to turn upon the question whether or not the ground in controversy was subject to location as a mining claim or claims on the 16th day of October, 1895, when it was located as the "Mountain View Claim" by the grantor of the appellee. If the ground was then subject to such location, it is agreed by the respective parties that the judgment of the court below should be affirmed, since it is stipulated that the location under which the appellee claims was made in compliance with the law, if the ground was then subject to be located under the mining laws. If it was not so subject, it is conceded by the respective parties that the judgment of the court below must be reversed, as it is further agreed that in that event the locations under which the appellant claims are valid. By the act of July 4, 1866 (14 Stat. 86), and subsequent acts, congress provided, among other things, that in all cases lands valuable for minerals shall be reserved from sale, except as otherwise directed by law; and further declared that all valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, are free and open to exploration and purchase, and the lands in which they are found to occupation and purchase, by citizens of the United States, and those who have declared their intention to become such, under regulations prescribed by law, and according to the local customs or rules of miners in the several mining districts, so far as the same are applicable, and not inconsistent with the laws of the United States. Rev. St. §§ 2318, 2319. On the 9th day of April, 1872, an executive order was issued by President Grant, by which was set apart as a reservation for certain specified Indians, and for such other Indians as the department of the interior should see fit to locate thereon, a certain scope of country "bounded on the east and south by the Columbia river, on the west by the Okanagon river, and on the north by the British possessions," thereafter known as the "Colville Indian Reservation." There can be no doubt of the power of the president to reserve those lands of the United States for the use of the Indians. The effect of that executive order was the same as would have been a treaty with the Indians for the same purpose, and was to exclude all intrusion upon the territory thus reserved by any and every person, other than the Indians for whose benefit the reservation was made, for mining as well as other purposes. Kendall v. Mining Co., 144 U. S. 658, 663, 12 Sup. Ct. 779.

That reservation stood unrevoked for many years, and it is not pretended that during that time anybody had any right to locate thereon any mining claim, or otherwise acquire any right to any portion thereof from the government. On the 19th day of August, 1890, congress, by an act of that date (26 Stat. 355), authorized the president to appoint a commission composed of three persons to visit the Colville Indian reservation, and negotiate with the Indians for the cession of such portion thereof as they might be willing to dispose of, and directing the commission to report to the secretary of the interior, and that officer to report the facts to congress. In pursuance of that act, the president appointed a commission consisting of three persons to carry on the proposed negotiations, which commission made its report to the secretary of the interior on June 8, 1891, which was transmitted to congress by the president in a message of date June 6, 1892. The report contains, among other things, this statement:

"That of the portion of the territory ceded it is estimated that about three hundred thousand acres are suitable for agricultural purposes. The remainder is very valuable for grazing purposes and for the timber thereon. Much of the territory ceded is mountainous, and abounds in rich mineral deposits. The southern portion of said reservation—it being the portion of said reservation not ceded—contains the largest proportion of agricultural lands, and the grazing lands upon this portion are, for the most part, fine. The supply of timber here is quite ample. From the best information the commission has been able to obtain, it is believed that there is upon the portion of said reservation not ceded an acreage of land suitable for agricultural purposes very largely in excess of a hundred and sixty thousand acres, the limitation indicated in department instructions dated October 21, 1891. The commission did not deem it advisable to negotiate with the Indians for the purchase of any greater area of territory than that ceded, and are satisfied that the portion of said reservation not ceded contains ample territory for the comfort, security, support, and maintenance of all the Indians upon said reservation in their various avocations of life. From the best information the commission could obtain without incurring the expense of a survey,—and this was not practicable, owing to the scarcity of funds,—there remain of the portion of the Colville reservation not ceded near one million three hundred thousand acres."

The commission negotiated a treaty with the Indians providing for the extinguishment of all of their rights and claims in and to the north half of the reservation in question, which treaty was to become effective upon its approval by congress. The treaty was submitted to congress, and also a proposed bill for enactment to carry the treaty into effect. The message, with the report of the commission and agreement, was, by the house of representatives, referred to its committee on Indian affairs, which reported that the necessity for opening at least a portion of the reservation existed for these, among other, reasons:

"A lessening of the dimensions of the Colville reservation, the planting of active, prosperous, and well-ordered white communities on every side of the Indians, the building of railroads, the creation of towns and cities, the opening of mines, and the consequent establishment of markets near at hand, etc. Further, that the reservation is surrounded on two sides by the Columbia river, on one side by the wilds of British Columbia, and on the other by a portion of Washington that has no outlet by rail, because the reservation itself stands as a barrier to all railroad construction from the east. And, as a third reason why the reservation should be opened, that the reservation, as it

stands to-day, is a great obstacle to the development of the state of Washington, and the general progress of the Pacific Northwest. So long as it continues to be the sporting ground of so sparse, thriftless, and irresponsible a population, its lands will remain untilled, and its mines will remain unopened, being more than the Indians need for sustenance and comfort, yielding no revenue to the general government, and being of no taxable value to the state of which it is an inseparable and essential part. It cuts off communication between the eastern and western portion of the state, and blocks the way to railroads that stand waiting at its boundaries. A railroad company—a local corporation—has constructed a line from the city of Spokane, the metropolis of Eastern Washington, to Marcus, a point on the Columbia river, 100 miles distant, at an expense of over two million dollars, and has surveyed an extension through the reservation to the Okanagon country, an extensive region between the Colville reservation and the Cascade Mountains, rich in mineral and agricultural products, but wholly without railroad transportation," etc.

The bill upon which this report was made was entitled "An act to ratify and confirm an agreement with the Indians residing on the Colville reservation, in the state of Washington, with certain modifications, and making appropriation for carrying into effect the same." This was house bill No. 7,557, introduced in the house and referred to the committee of the whole on April 9, 1892. The bill to carry into effect the proposed treaty with the Indians was not enacted, but congress did enact, on the 1st day of July, 1892, an act, the proper construction of which must control the disposition of the present case. That act is entitled "An act to provide for the opening of a part of the Colville reservation in the state of Washington, and for other purposes," and by its first section provides:

"That subject to the reservations and allotments of lands in severalty to the individual members of the Indians of the Colville reservation in the state of Washington herein provided for, all the following described tract or portion of said Colville reservation, namely: Beginning at a point on the eastern boundary line of the Colville Indian reservation where the township line between townships thirty-four and thirty-five north, of range thirty-seven east, of the Willamette meridian, if extended west, would intersect the same, said point being in the middle of the channel of the Columbia river, and running thence west parallel with the forty-ninth parallel of latitude to the western boundary line of the said Colville Indian reservation in the Okanagon river, thence north following the said western boundary line to the said forty-ninth parallel of latitude, thence east along the said forty-ninth parallel of latitude to the northeast corner of the said Colville Indian reservation, thence south following the eastern boundary of said reservation to the place of beginning, containing by estimation one million five hundred thousand acres, the same being a portion of the Colville Indian reservation created by executive order dated July second, eighteen hundred and seventy-two, be, and is hereby, vacated and restored to the public domain, notwithstanding any executive order or other proceeding whereby the same was set apart as a reservation for any Indians or bands of Indians, and the same shall be open to settlement and entry by the proclamation of the president of the United States and shall be disposed of under the general laws applicable to the disposition of public lands in the state of Washington." 27 Stat. 62.

Section 2 of this act provides for the disposition of the lands to be so opened to settlement, entry, and disposition. By section 3 it is provided that each entryman under the homestead laws shall within five years from the date of his original entry, before receiving a final certificate of the land covered by his entry, pay to the United States for the land so taken by him, in addition to the fees provided by law, the sum of $1.50 per acre, one-third of which shall be paid

within two years after the date of the original entry; but that the rights of honorably discharged Union soldiers and sailors, as defined in certain specified sections of the Revised Statutes, shall not be abridged except as to the sum to be paid as aforesaid. Section 4 is as follows:

"That each and every Indian now residing upon the portion of the Colville Indian reservation hereby vacated and restored to the public domain, and who is so entitled to reside thereon, shall be entitled to select from said vacated portion eighty acres of land, which shall be allotted to each Indian in severalty. No restrictions as to locality shall be placed upon such selections other than that they shall be so located as to conform to the congressional survey or subdivisions of said tract or country, and any Indian having improvements may have the preference over any other person in and to the tract of land containing such improvements, so far as they are within a legal subdivision not exceeding in area the quantity of land that he or she may be entitled to select and locate. All such allotments shall be made at the cost of the United States, under such rules and regulations as the secretary of the interior may from time to time prescribe. Such selections shall be made within six months after the date of the president's proclamation opening the lands hereby vacated to settlement and entry, and after the same have been surveyed, and when such allotments have been selected as aforesaid, and approved by the secretary of the interior, the titles thereto shall be held in trust for the benefit of the allottees respectively, and afterwards conveyed in fee simple to the allottees, or their heirs, as provided in the act of congress entitled 'An act to provide for the allotment of land in severalty to Indians on the various reservations, and to extend the protection of the laws of the United States and territories over the Indians, and for other purposes,' approved February eighth, eighteen hundred and eighty-seven, and an act in amendment and extension thereof, approved February twenty-eighth, eighteen hundred and ninety-one, entitled, 'An act to amend and further extend the benefits of the act approved February eighth, eighteen hundred and eighty-seven, entitled "An act to provide for the allotment of land in severalty to Indians on the various reservations, and to extend the protection of the laws of the United States over the Indians, and for other purposes"': provided, that such allotted lands shall be subject to the laws of eminent domain of the state of Washington, and shall, when conveyed in fee simple to the allottees or their heirs, be subject to taxation as other property in said state."

By section 5 it is provided that all Indians residing on the lands by the act vacated and restored shall have the right, if they so prefer, under the direction of the Indian agent, to occupy and reside upon such portions of the Colville Indian reservation not by the act vacated as are not occupied by or in the possession of any other Indian or Indians. Section 6 of the act makes provisions for land for school purposes, and also for a site for certain mills, and, after making an appropriation for the purpose of carrying out the provisions of the act, it concludes by declaring in section 8 that nothing contained in the act shall be considered as recognizing title or ownership by the Indians of any part of the reservation, whether restored to the public domain or still reserved by the government for their use and occupancy. On the 20th day of February, 1896, congress passed an act entitled "An act to extend the mineral-land laws of the United States to lands embraced in the north half of the Colville Indian reservation," by which it is declared "that the mineral-land laws of the United States be, and are hereby, extended so as to apply to all lands" described in section 1 of the above act of July 1, 1892 (29 Stat. 9). On the 6th day of March, 1896, congress passed

an act entitled "An act granting to the Columbia and Red Mountain Railway Company a right of way through the Colville Indian reservation, in the state of Washington, and for other purposes," and providing:

"That there be, and is hereby, granted to the Columbia and Red Mountain Railway Company, a corporation organized under the laws of the state of Washington, a right of way to the extent of one hundred feet on each side of the center line of said railway across the Colville Indian reservation in the state of Washington, commencing at a point at or near the Little Dalles on the Columbia river, in Stevens county in said state, and running thence in a northerly direction by the most feasible route to the international boundary line between the United States and British Columbia, together with all the rights granted to railroads by the act of congress entitled 'An act granting to railroads a right of way through the public lands of the United States,' approved March third, eighteen hundred and seventy-five; and for the purposes of this grant, and the construction of said railway, all the provisions of said act are hereby declared to be applicable thereto to the same extent as though the lands in said reservation were open to settlement and sale." 29 Stat. 44.

The question in the case is whether or not the act of July 1, 1892, in and of itself operated to restore that portion of the Colville Indian reservation described in its first section to the mass of public lands, so as to admit of the immediate entry thereon by the public, and the location of mining claims upon it under the mining laws of the United States; for it cannot be doubted that, if one man was thereby given the right of entry thereon for the purpose of prospecting and locating mining claims, every citizen of the United States, and every person who had declared his intention to become such, was thereby given the same right. It is undisputed that the officers of the land department have uniformly held that the act did not have that effect. Indeed, the secretary of the interior, when advised that many persons had gone upon that portion of the reservation for the purpose of making mining locations and entries, issued, by direction of the president, a warning to such persons, prohibiting them from going upon the reservation for any purpose in advance of the issuance of the proclamation by the president provided for by the act. It is said in support of the judgment given below that where the words of an act of congress are plain, and their meaning is clear, they must prevail, notwithstanding they have been otherwise construed by the officers charged with the execution of the law. That is perfectly true, but at the same time the rule is firmly established that the contemporaneous construction of a statute by those charged with its execution, especially when it has long prevailed, is entitled to great weight, and should not be disregarded or overthrown except for cogent reasons, and unless it be clear that such construction is erroneous. U. S. v. Johnston, 124 U. S. 236, 253, 8 Sup. Ct. 446; Edwards v. Darby, 12 Wheat. 206; U. S. v. Moore, 95 U. S. 760; Hahn v. U. S., 107 U. S. 402, 2 Sup. Ct. 494; U. S. v. Philbrick, 120 U. S. 52, 59, 7 Sup. Ct. 413; Manufacturing Co. v. Ferguson, 113 U. S. 727, 5 Sup. Ct. 739. Moreover, the legislative construction of its own act is always potent. "If it can be gathered," said the supreme court in U. S. v. Freeman, 3 How. 556, 564, "from a subsequent statute in pari materia, what meaning the legislature attached to the words of a former statute, they will amount to a legislative declaration of

its meaning, and will govern the construction of the first statute." And in the case of Philadelphia & E. R. Co. v. Catawissa R. Co., 53 Pa. St. 20, the supreme court of Pennsylvania said:

"If a contemporaneous construction by the legislature of the same words can be discovered, it is high evidence of the sense intended."

That the acts of July 1, 1892, and February 20, 1896, are in pari materia, is perfectly plain, for they relate to the same subject-matter, and are parts of the same legislative purpose. In respect to such statutes, Sutherland (St. Const. § 283) says:

"All consistent statutes which can stand together, though enacted at different dates, relating to the same subject, and hence briefly called statutes in pari materia, are treated prospectively, and construed together, as though they constituted one act. This is true whether the acts relating to the same subject were passed at different dates, separated by long or short intervals at the same session, or on the same day. They are all to be compared; harmonized, if possible; and, if not susceptible to a construction which will make all of their provisions harmonize, they are made to operate together, so far as possible, consistently with the evident intent of the latest enactment."

And in Endlich on the Interpretation of Statutes, at section 43, it is said:

"Where there are earlier acts relating to the same subject, the survey must extend to them, for all are, for the purposes of construction, considered as forming one homogeneous and consistent body of law, and each of which may explain and elucidate every other part of the common system to which it belongs."

That congress did not intend by the act of July 1, 1892, to open the portion of the Colville Indian reservation thereby restored to the public domain to the operation of the mineral laws of the United States in advance of and without reference to the proclamation of the president therein provided for, is, we think, quite clearly shown by its act of February 20, 1896, in which, as has been seen, it declared "that the mineral land laws of the United States be, and are hereby, extended so as to apply to all lands" described in section 1 of the act of July 1, 1892. If, by the act of July 1, 1892, congress had already brought those lands within the operation of the mineral land laws, there was obviously no need of the act of February 20, 1896, providing, as it did, for precisely the same thing. Idle acts cannot be justly or properly attributed to congress. To the suggestion that the officers of the land department of the government had uniformly held that the act of July 1, 1892, did not open the portion of the reservation restored to the public domain to the operation of the mineral laws in advance of the president's proclamation, and that for that reason congress passed the act of February 20, 1896, the answer is that there is in the language of the latter act no indication whatever of any intention on the part of congress to correct the interpretation that had been put by the officers of the land department upon its previous act of July 1, 1892. If such had been the intention, it could very easily have been expressed, and some expression indicating the intention would very naturally be expected. On the contrary, the language of the act of 1896 is "that the mineral land laws of the United States be, and are hereby, extended so as to apply" to the lands restored to the public domain

by the act of July 1, 1892. The words of the act of 1896 that there "be and are hereby extended," etc., are words of present and future operation, and do not manifest any intent on the part of congress to give to the act in which they appear a retrospective effect, but do clearly indicate that congress did not consider that the lands in question were already within the operation of the mining laws. Retrospective effect is never given to a law unless the language used, properly construed, plainly manifests such intention. Endl. Interp. St. §§ 291–294; Potter's Dwar. St. pp. 60, 70, note. See, also, U. S. v. Southern Pac. R. Co., 146 U. S. 570, 13 Sup. Ct. 152; St. Paul & P. R. Co. v. Northern Pac. R. Co., 139 U. S. 1, 11 Sup. Ct. 389; Schulenberg v. Harriman, 21 Wall. 44.

Recurring to the act of July 1, 1892, we see no good reason to doubt that it was properly construed by the officers of the land department, and by congress itself, as manifested by its act of February 20, 1896. It is true that by the first section of the act of July 1, 1892, that portion of the Colville Indian reservation therein described was, with certain limitations and exceptions, restored to the public domain; but it must be remembered that all of the public domain is not subject to entry or disposal under the mining or other general laws of the United States. Alaska became a part of the public domain of the United States upon its cession by the emperor of Russia; but it was not until July 27, 1868, that the laws of the United States relating to customs, commerce, and navigation were extended to and over that portion of the public domain (15 Stat. 240), and not until March 17, 1884, that the laws of the United States relating to mining claims, and the rights incident thereto, were made applicable thereto, and then only subject to certain conditions and provisions prescribed by congress. 23 Stat. 24. Later, a further extension of the general land laws of the United States were made to Alaska. Act March 3, 1891 (26 Stat. 1095). The public lands of Hawaii, Porto Rico, and other recently acquired territory now constitute a part of the public domain of the United States, but to none of these has congress yet extended the mining or any of the other general land laws of the United States. All of this is the province, and the exclusive province, of the legislative department of the government. It does not, therefore, necessarily follow, from the mere fact that certain territory constitutes a part of the public domain, that the mining laws of the United States apply thereto. They do if congress has so provided, but they do not unless congress has so provided.

Again recurring to the act of July 1, 1892, it is seen that the portion of the Colville Indian reservation thereby restored to the public domain was expressly made subject to the reservations and allotments of lands in severalty to the individual members of the Colville tribe provided for in the act, and the restoration was also accompanied with the express statutory declaration that the portion restored "shall be opened to settlement and entry by the proclamation of the president of the United States, and shall be disposed of under the general laws applicable to the disposition of public lands in the state of Washington." From these provisions it is plain, we

think, that the "opening" to be effected by the president's proclamation was as broad as the "disposition" provided for by the same section and clause; that is to say, that the lands authorized by the act to be disposed of under the general laws applicable to the disposition of the public lands were the same lands, and none other, that the president was, by his proclamation, authorized to open to settlement and entry. The general laws applicable to the disposition of the public lands embrace those relating to mining claims, as well as those relating to pre-emption, homestead, and other entries. "The words 'public lands,'" said the supreme court in Newhall v. Sanger, 92 U. S. 763, "are habitually used in our legislation to describe such as are subject to sale or other disposal under general laws." See, also, Bardon v. Railroad Co., 145 U. S. 535, 12 Sup. Ct. 856; Mann v. Land Co., 153 U. S. 273, 14 Sup. Ct. 820; Doolan v. Carr, 125 U. S. 618, 8 Sup. Ct. 1228. While it is true that the right to mineral lands is initiated by location, after the proper discovery of mineral thereon, and that such claims may be held and worked without purchase, yet the law authorizing their exploration also provides for their location, entry, and purchase. Rev. St. §§ 2319–2350. It necessarily follows that any of the lands of the United States that are by its general laws open to exploration for minerals are likewise open to location, entry, and purchase as such, if they be mineral in character, and mineral be discovered therein. Hence it cannot be true, we think, that the portion of the Colville reservation restored to the public domain by the act of July 1, 1892, was any more open to the public in the exploration of minerals and the location of mining claims thereon, in advance of the proclamation of the president therein provided for, than it was to any other kind of entry, or settlement, or disposition. Such exploration, if generally carried on, might, and very probably would, have resulted in numerous locations, very likely interfering with the allotments to the Indians provided for by the act, and subject to which the restoration was made; to avoid which conflicts was one of the purposes of the provision authorizing the president to provide by proclamation for the opening to settlement, entry, and disposition of the land restored by the act to the public domain. That provision was in harmony with the policy theretofore adopted by congress in the opening of large bodies of land to disposition under the general laws of the United States, such as the opening of Oklahoma and the Cherokee Strip, whereby a certain date in the future was authorized to be fixed for the opening, and all persons thereby put upon an equal footing. This, we think, was the clear intent of the act of July 1, 1892, as shown by its own provisions. That it was so understood and construed by the officers of the land department of the government is conceded, and that it is the interpretation that congress itself put upon the act has been shown by its subsequent act of February 20, 1896, and is further shown by its passage of the act of March 6, 1896, by which it granted to the Columbia & Red Mountain Railway Company a right of way 100 feet in width over the portion of the reservation in question described in section 1 of the act of July 1, 1892, which would have been an entirely useless piece of legislation if that land had been,

by that act, irrespective of the proclamation of the president, restored to the mass of public lands for all purposes except pre-emption, settlement, homestead, and other like entries; for, in respect to the public lands subject to disposal under general laws, the act of March 3, 1875, entitled "An act granting railroads a right of way over the public lands of the United States," applies, and there was no need of any other law for that purpose. The judgment is reversed, and the cause remanded to the court below for further proceedings in conformity with this opinion.

(October 23, 1899.)

GILBERT, Circuit Judge (dissenting). I am of the opinion that the circuit court had no jurisdiction of this cause for the reasons which were expressed in the dissenting opinion in the case of Mining Co. v. Rutter, 31 C. C. A. 223, 87 Fed. 801.

NEVADA SIERRA OIL CO. v. MILLER et al.

(Circuit Court, S. D. California. November 6, 1899.)

No. 858.

1. JURISDICTION OF FEDERAL COURTS—ADVERSE CLAIMS TO PUBLIC MINERAL LANDS—FEDERAL QUESTION.
   Where the allegations of a bill show that the respective parties to the suit are making adverse claims to the same land under the mineral land laws of the United States, and that the proper determination of such conflicting claims necessarily requires the application and construction of those laws, a federal court has jurisdiction of the suit for such purpose, the property in controversy being alleged to be of the requisite statutory value; and having jurisdiction for that purpose, and such suit being equitable in its nature, the court will entertain and determine all incidental questions between the parties growing out of their conflicting claims, and will grant an injunction or appoint a receiver, where such course is proper.
2. SAME.
   A bill asserting rights based on the location of a mining claim under the laws of the United States, which shows that the validity of such location depends on the question whether or not the locators discovered a mineral deposit within the limits of the claim prior to its location, within the meaning of such laws, and which sets out in full the facts relating to such alleged discovery, discloses a question arising under the laws of the United States, which gives a federal court jurisdiction where the requisite statutory amount is involved.
3. MINERAL LANDS—OIL PLACER CLAIMS—DISCOVERY OF MINERAL.
   There can be no valid location of petroleum lands, under the mineral laws relating to placer claims, without a prior valid discovery of mineral within the limits of the claim.

This is a suit in equity to determine conflicting claims to public mineral lands under adverse locations. On demurrer to bill.

Joseph H. Call, W. J. Hunsaker, and Anderson & Anderson, for complainant.

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

ROSS, Circuit Judge. Since the decision of this court on the demurrer to the original bill in this cause, reported in (C. C.) 96 Fed. 1, the complainant therein conveyed its interest in the property involved in the suit to the Nevada Sierra Oil Company, a corporation of the state of Nevada, by which an amended and supplemental bill has been filed, and to which the defendants thereto filed demurrers upon three grounds, the first of which is that the suit is not one arising under the laws of the United States, and hence that this court has no jurisdiction over it; secondly, for want of equity in the bill; and, thirdly, on the ground that the bill is multifarious, and that there is a misjoinder of parties defendant thereto.

The case being one in which the original jurisdiction of the court is invoked, such jurisdiction depends upon the facts as they existed at the commencement of the suit, and must be shown by the complainant's statement of its own cause of action. This has been so frequently decided that a citation of the cases is not necessary. If, however, it appears from the bill that the complainant asserts a right under and by virtue of some law of the United States, and that such right constitutes, in whole or in part, its alleged cause of action, and demands for its determination the construction or proper application of a law of the United States, it is equally clear that jurisdiction is shown, the property in controversy being alleged to be of the requisite statutory value.

The subject of the suit is a piece of land belonging to the government of the United States, which the complainant on the one side, and the defendants on the other, seek to acquire. The bill shows that the present complainant is the successor in interest of the Dewey Mining Company, a corporation organized under the laws of the territory of Arizona and the original complainant in the suit, having succeeded to all of that company's rights in the property involved in the suit by deed executed April 11, 1899; and that the Dewey Mining Company was the successor in interest, prior to the commencement of the suit, of certain named parties who first located the land in controversy, on the 1st day of January, 1893, as a consolidated placer mining claim, under and by virtue of the mining laws of the United States. The bill alleges that at the time of that location the land in question was free public land of the United States, subject to exploration, entry, and purchase under its mining laws, and had theretofore been surveyed and subdivided in accordance with law, and its boundaries and corners marked by proper monuments, and that it was then within a certain mining district which had been regularly organized and established in Fresno county, Cal., where the land is situated, under the name of "Coalinga Mining District," which district, from its organization, prior to May 2, 1890, to the passage of the act of the legislature of California approved March 9, 1897, continued to exist and be maintained as a mining district, and to be authorized and recognized by the laws of the United States. It is alleged that on January 1, 1893, certain named persons, each of lawful age and a citizen of the United States, associated themselves together for the purpose of locating, claiming, holding, and working in common the N. E. ¼ of section 20, town-

ship 19 S., range 15 W., M. D. M., in Fresno county, Cal., as a placer mining claim, and did on that day, as an association of persons, distinctly mark the said claim on the ground with monuments of stone placed one at each of the four corners of the location, with 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 so erected by the locators as well as by the permanent monuments established by the government in its survey of the land, and that on the same day the locators posted upon the claim a notice of 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 legal government subdivision, and designated it as the "Arnold Placer Mining Claim," which notice was on the same day duly recorded in the records of the mining district. It is alleged that, prior to the making of the location mentioned, the said locators discovered valuable deposits of petroleum and mineral oils upon the claim, which discovery consisted of the finding of seepages of oil, and of the residuum of oil, upon the claim, and upon land adjoining the said described tract, upon different sides, and discovering upon the said claim shale and oil-bearing sand rock of a character similar to that in which petroleum in large and paying quantities had been found and developed in the vicinity, and also from the discovery of shale and veins of sand rock similar in character to that upon land known to be valuable for petroleum, which veins and strata extended upon and across the said mining claim; that those discoveries of the said locators clearly indicated the existence of petroleum in the land in controversy in paying quantities, and such as would and did justify the said locators, and the complainant, as their successor in interest, in working the said claim, and in making expenditures thereon, and in protecting their rights thereto, in the expectation that oil in valuable quantities would be found in the said land. The bill alleges that, prior to the making of the location of January 1, 1893, the locators thereof discovered mineral deposits in the land so located; and alleges that the facts above stated, under a proper and true construction of the provisions of sections 2320 and 2329 of the Revised Statutes of the United States, constituted a discovery of mineral deposits within the said land, and that those sections, properly construed, do not mean that prior to location a locator of mining ground thereunder shall actually see or have personal knowledge of the existence of mineral deposits in paying quantities in or upon the claim, but that all that they require is that the locator shall discover sufficient evidences of the mineral character of such land as to justify further expense and exploration; which contentions on the part of the complainant, the bill alleges, are disputed by the defendants, who contend, according to its averments, that the laws of congress contemplate and require, before a valid location of a placer mining claim can be made, that the locator shall actually discover mineral upon the claim in paying quantities, and upon that theory contend that the predecessors of the complainant never made

a discovery of mineral upon the land in question. The bill further alleges that on December 29, 1894, in accordance with the requirements of the act of congress of July 18, 1894, providing for the suspension of the assessment work upon mining claims for that year, the locators of the said claim of January 1, 1893, filed and caused to be recorded in the mining records of the Coalinga mining district a notice stating that the said locators claimed the said N. E. ¼ of said section 20 as a mining claim, and that they intended in good faith to hold and work the same; that since the year 1894 said locators of the said claim and their successors in interest have continued to claim the same as a placer mining claim, but did not 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 said Arnold mining claim, in the year 1898 and prior to the commencement of this suit, conveyed their interest therein to the aforesaid Dewey Mining Company. The bill further alleges that on January 1, 1896, the said mentioned quarter section of land was free public land of the United States, subject to exploration, location, purchase, and claim under the mining laws of the United States, and that on that day certain named persons, each of lawful age and a citizen of the United States, discovered valuable deposits of petroleum upon the said land, which discovery, it is alleged, consisted of the facts hereinbefore stated, and that after such discovery (the sufficiency of which it is alleged the defendants controvert), and on the said 1st day of January, 1896, the said named persons, being eight in number, 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 such association of persons, distinctly mark the said claim on the ground with monuments of stone, placed one at 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; and that on the same day the said locators posted upon the claim a notice of 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 the legal government subdivision of the land, and designated the claim the "Mars Placer Mining Claim"; which notice was on the same day, to wit, January 1, 1896, duly recorded in the mining records of the Coalinga mining district, and on March 4, 1896, in the office of the recorder of the county in which the land is situated. It is alleged that on January 1, 1896, the said locators entered into the peaceable and exclusive possession and enjoyment of the land so located, and that they and their grantees have ever since remained in its exclusive possession, enjoyment, and use, down to the time of the filing of the original bill herein. The bill further alleges that after the said location of January 1, 1896, by the association of persons mentioned,

the secretary of the interior of the United States made a ruling by which it was adjudged that lands containing deposits of petroleum were not mineral in their character, within the meaning of the acts of congress relating to the location of mineral lands, and were not subject to location as such mineral lands. The bill further alleges that by an act of congress approved February 11, 1897 (29 Stat. 526), 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 further enacted thereby "that lands containing such petroleum or other mineral oil which have heretofore been filed upon, 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 was subsequent to the date of the passage hereof." The bill alleges that neither the present complainant nor its predecessors in interest performed any work or labor, or made any improvements, upon its said mining claim, during the year 1897, and that the complainant contends that the said act of congress of February 11, 1897, properly construed, intended to and did dispense with the doing of assessment work for the year 1897 upon the said claim; and that it was thereby intended by the said act, in view of the said decision of the secretary of the interior, made in August, 1896, adjudging that oil and petroleum lands were not subject to location as mining claims under the laws of the United States, and that its effect was, to validate and reinstate such mining locations made prior to the year 1897, with the same effect as if they had been made upon the date of the act of February 11, 1897. It is alleged that the defendants deny that the said act of congress of February 11, 1897, dispensed with the doing of assessment work for the year 1897 upon the said claim of the complainant, and contend that that act cannot be construed as having that effect, and cannot be construed as validating or reinstating the locations under which the complainant claims, or as having any bearing upon their validity. The bill alleges that, by reason of the said decision of the secretary of the interior and of the said act of congress of February 11, 1897, it appeared to said association of persons 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 of persons, without any intention of abandoning said mining claim or any rights thereunder, did, on the 26th day of May, 1898, cause and procure the same persons, each being of lawful age and a citizen of the United States, acting in behalf and at the instance of the association, to enter upon and relocate the N. ½ of said quarter section of land, having previously discovered thereon petroleum, which discovery, it is alleged, consisted of the facts hereinbefore stated, the sufficiency of which it is alleged is disputed by the defendants, and did, pursuant to their agreement, and on the said 26th day of May, 1898, locate said N. ½ of said quarter section of land as a placer mining claim, under the name of the "Manila Mining Claim," and did on that day mark out the boundaries thereof distinctly on the ground by erecting monu-

ments and stakes at short intervals on the side lines between the corner monuments at prominent points, and so that the boundaries of the claim 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 and posting of the notice, the name of the claim, and a description thereof by reference to its monuments, and also to its legal subdivision, and that on May 28, 1898, the said notice was duly recorded in the office of the county recorder of Fresno county. It is further alleged that, within 60 days after such discovery, the complainant and its predecessors in interest took possession of the said N. ½ of the said section, and caused labor to be performed thereon, and dug a tunnel to the depth of about 26 feet, for the purpose of developing and bringing to the surface the oil thereon, expending in the work a sum in excess of $50; and that thereafter the said Dewey Mining Company caused to be filed with the county recorder of Fresno county an affidavit showing such performance of the said work upon the said claim, and the value and kind thereof. The bill alleges that the said 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 this suit, convey all of their right, title, and interest in the said claims, and all their right, title, and interest in said S. E. ¼ of said section 20, to the said Dewey Mining Company, which lands were thereafter, and subsequent to the commencement of the suit, conveyed to the present complainant, and are now owned by it. The bill 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 1895, 1896, 1897, and 1898, unlawfully caused notices to be posted upon said N. ½ of the said quarter section of land, and to be recorded in the mining records of Coalinga mining district, or in the county recorder's office of Fresno county, claiming the same as placer mining ground; and that each of the defendants claims that he has a right to so locate and hold the said land, or some part thereof, under the laws of the United States relating to mining locations, and not otherwise. It is alleged that said location notices so recorded by the defendants constitute clouds upon the title of the complainant to the said N. ½ of the said quarter section of land, and prevent and interfere with the full enjoyment and use thereof by the complainant. The present bill alleges that, since the filing of the original bill herein, the said Dewey Mining Company, predecessor in interest of the present complainant, through its officers and agents, caused $200 worth of work, labor, and improvements to be done and made upon the said mining claim, which work consisted of the laying of iron pipe for the bringing of water from springs on an adjoining section of land to the said mining claim; that the work of laying the pipe was and is necessary for the proper development of the claim, there being no water available for the working of machinery and engines thereon, and water being necessary for that purpose; that, within 30 days after doing the

work and making the improvements, the said Dewey Mining Company caused an affidavit to be filed with the county recorder of Fresno county showing the nature, value, and character of the work and improvements. It is further alleged in the present bill that since the filing of the original bill herein the defendants, by force and violence and threats of bodily injury, have prevented the present complainant and its predecessors in interest from doing further work or labor, or making further improvements, upon its said claim, threatening to kill the servants, agents, and employés of the complainant if they should attempt so to do; that since the filing of the original bill herein, to wit, on October 31, 1898, the defendants, unlawfully and without authority from the complainant, proceeded to construct numerous oil wells upon a portion of the premises comprising about 20 acres, and have taken therefrom and appropriated to their own use a large quantity of oil, the amount of which is unknown to the complainant, and that the defendants threaten to, and, unless enjoined, they will, construct other oil wells, and continue to take oil from the said land, until they have taken the whole thereof, and the said land shall have become worthless; that the defendants, by themselves and through third persons, have made, and are still making, repeated and numerous and successive claims and pretended locations upon the said tract of land under the laws of the United States, and not otherwise, by posting and recording repeated and successive notices of location, sometimes upon one part of the land and sometimes upon another, sometimes making such locations in the name of one person and sometimes in the name of another, and that the defendants, after procuring such locations to be made, procured conveyances thereof to themselves; and that it will be necessary for the court to determine the validity of and construe such numerous locations. It is alleged that all of the locations so made by the defendants were made at a time when the land was reserved from location by the defendants, and that the location of the complainant has not expired. It is alleged that the oil taken from the land by the defendants during the years 1898 and 1899, down to the time of the filing of the present bill, has fluctuated and varied greatly in value, and that the cost of extracting the same has varied, and that the amount taken out by the defendants has during that period varied in quantity, so that an accounting is necessary in order to determine the value of the oil so extracted by the defendants. The bill further alleges that after the commencement of this suit, and on April 1, 1899, the defendant E. O. Miller commenced an action against the Dewey Mining Company, the predecessor in interest of the present complainant, and against certain fictitious defendants, in the superior court of Fresno county, Cal., to quiet title to the E. $\frac{1}{2}$ of said section 20, including the land involved in this suit, and caused process to be served on complainant, and upon the said Dewey Mining Company, on the 21st day of April, 1899, and in the said action the said Miller sought to recover the same land sued for herein, and in his said bill of complaint presented the same issues that are involved in the present suit; that the said action

was brought by the said Miller to hinder, embarrass, and delay this court in proceeding in this cause, and to prevent the complainant from obtaining relief herein; that the defendants threaten to, and, unless enjoined, they will, institute other adverse actions against the complainant and its predecessors in interest, to recover the land involved herein, and to secure an adjudication of the issues presented by this bill. The present bill further alleges that under and by virtue of the laws of the United States relating to placer mining claims, and by virtue of the said discovery of mineral upon the land in controversy by the predecessors in interest of the complainant, and the said locations of the said land by the predecessors in interest of the complainant, and of the making and recording of the notices of location as alleged, and the doing of work and labor and the making of the improvements upon the said claim as alleged, and by virtue of the alleged conveyances to the complainant, it is entitled to hold and work the said mining claim, and to secure a patent therefor from the United States, upon taking the steps required by the laws of the United States; all of which, it is alleged, is disputed by the defendants, who contend that, by a proper construction of the laws of the United States, the complainant has not acquired any right to hold or work the said mining claim or to secure any patent therefor. The prayer is for an accounting between the complainant and the defendants for the value of the oil extracted by the defendants, and that the defendants be required to pay the complainant the value thereof; that, pending a final decree herein, a receiver be appointed by the court to take the possession, care, working, and management of the said mining claim, and that the defendants, and all other persons, be enjoined from in any way interfering with its possession, care, management, and working, or the making of improvements thereon; that the defendants be enjoined from prosecuting, or taking any steps in the prosecution of, the suit brought by the defendant Miller in the superior court of Fresno county, or in any other suit in that or any other court than this court, to recover or quiet the title to the land in controversy herein, or from presenting in any other court any of the issues presented by the present bill; that the cloud now on the title of the complainant to the said N. ½ of the S. E. ¼ of said section 20 be removed, and the complainant quieted in its possession and title thereto; and for such other and further relief as may seem equitable, and for costs.

According to the averments of this bill, there lies, at the very foundation of the case, the question as to whether there was a discovery of any mineral deposit, within the limits of the claim in controversy, prior to its location by the predecessors in interest of the complainant. Rev. St. §§ 2320, 2329. Without a valid discovery of mineral within the limits of the claim, there could be no valid location of the ground as a placer mining claim. That is clear, and no one, I apprehend, will dispute it. That question, therefore, not only enters into the essence of the complainant's alleged cause of action, but constitutes its foundation stone. The facts constituting the alleged discovery are stated at large in the present bill. The statute authorizing the location of a placer mining claim upon the public

land, after discovery of a mineral deposit within its limits, does not declare what shall constitute a discovery. Whether or not the finding of seepages of oil, and its residuum, upon a given piece of public land and upon the lands adjoining it on different sides, and the finding thereon of shale and oil-bearing sand rock of a character similar to that in which petroleum in large and paying quantities had been found and developed in the vicinity, which veins and strata extend to and across the ground in question, manifestly depends upon the application and true construction of the laws of the United States. Nothing can be plainer, I think, than this. It is a question, too, that not only concerns the contesting claimants of the land, but in which the government is also interested. If it be true that the facts alleged in the present bill constitute a valid discovery of a mineral deposit, within the true meaning and intent of the sections of the Revised Statutes cited, then, clearly, it shows a valid location of the ground in controversy by the predecessors in interest of the complainant on the 1st day of January, 1893; and although it also shows that that location was not kept good, by reason of the failure of the locators to perform the annual work required by the laws of the United States, it further shows that the ground continued free public land of the United States, open to exploration, location, and purchase, under the mining laws, to the 1st day of January, 1896, when it was again located by predecessors in interest of the complainant as a consolidated placer mining claim under the laws of the United States and in conformity therewith, and with the local rules and regulations of the mining district in which it is situated, and that from that time forward they and their grantee have held the peaceable and exclusive possession and enjoyment and use of the premises, to the time of the filing of the original bill in this suit. The bill alleges, however, that neither the present complainant, nor either of its predecessors in interest, performed any work or labor, or made any improvements, upon the claim in question, during the year 1897, because of an adjudication made by the secretary of the interior in August, 1896, to the effect that lands containing deposits of petroleum are not mineral in their character, within the meaning of the acts of congress relating to the location of mineral lands, and were not subject to location as such; but this failure and otherwise forfeiture of the claim in controversy by the predecessors in interest of the present complainant, the bill alleges, was cured and avoided by the act of congress of February 11, 1897. Whether or not this is so clearly involves the application and construction of that law. If its true construction be as alleged and contended on the part of the complainant, then obviously, according to the averments of the bill, the location made by the complainant's predecessors in interest on the 1st day of January, 1896, continued valid, notwithstanding their failure to perform any work or labor or to make any improvements upon the claim during the year 1897. The bill shows that, notwithstanding these alleged rights on the part of the complainant, the defendants have committed various acts in the assertion of their claim to the ground in controversy under and by virtue of the laws of the United States; among others, the making

and recording of various mining locations under those laws upon the land in controversy, which, if invalid and the complainant's claims be valid, constitute a cloud on the latter. In Railroad Co. v. Zeigler, 167 U. S. 65, 17 Sup. Ct. 728, the plaintiff alleged in his complaint that on May 1, 1889, he was in possession, as a pre-emptor under the laws of the United States, of a tract of land containing about 80 acres, and had lived thereon the requisite time and had made the improvements and had done all other acts necessary to entitle him to a patent to the land from the United States; that the defendant company, being a corporation of the territory of Washington, on the day mentioned, entered upon and seized a strip of the land 50 feet in width, and appropriated it for railroad purposes, without the consent of the plaintiff, and without having compensated him therefor; and that the entry upon and seizure by the defendant of the land was under and pursuant to the laws of the territory of of Washington authorizing railroad companies to appropriate land for right of way for railroad tracks. The supreme court said:

"We have judicial knowledge that the authority of the territory to legislate in respect to the right of a territorial railroad corporation to enter upon the public lands of the United States was derived from the act of congress entitled 'An act granting railroads the right of way through the public lands of the United States,' approved March 3, 1875 (18 Stat. 482), whereby the right of way through the public lands of the United States was granted to any railroad company duly organized under the laws of any state or territory. The plaintiff's complaint, therefore, discloses the case of a contest between a settler claiming title under the laws of the United States and a railroad company claiming a right under an act of congress, and of such a case the circuit court for the district of Washington clearly had jurisdiction. Doolan v. Carr, 125 U. S. 618–620, 8 Sup. Ct. 1228; Cooke v. Avery, 147 U. S. 375, 13 Sup. Ct. 340."

I think it is impossible to distinguish the case just cited from the present case, which presents a contest between parties each claiming the right to a piece of government land under the laws of the United States, the application and true construction of which, if the averments of the present bill be true, must determine the rights of the respective parties. Moreover, the present bill alleges that since the filing of the original bill the defendants, by force and violence and threats of bodily injury, have prevented the complainant and its predecessors in interest from doing further work or labor, or making further improvements, upon the claim in controversy, threatening to kill the servants, agents, and employés of the complainant if they should attempt so to do. It further shows that the defendants have entered upon a portion of the disputed premises, and extracted large quantities of oil therefrom, and are continuing to do so, and, unless prevented by the process of the court, will extract all of the oil it contains, and leave the land valueless. The court takes judicial knowledge of the fact that the laws of the United States require a certain amount of work to be done, or a certain amount of improvements to be made, upon the claim annually, as a condition to the acquiring of the government title. If it be true that the acts of the contesting parties are of such a nature as to prevent either from doing the work or making the improvements exacted by the law as a condition to the acquiring of the government title, it may very well be that the court should appoint a re-

ceiver of the disputed property, to the end that the required work be done, or improvements made, on behalf of the party to the controversy who may ultimately be adjudged to be entitled to it. It is well settled that where application has actually been made to the land office for the title to a mining claim, and a contest there arises, the circuit court of the United States has original jurisdiction of it. Mining Co. v. Rutter, 31 C. C. A. 223, 87 Fed. 801, which case was approved, with emphasis, by the circuit court of appeals for this circuit, at its last term, in the case of McFadden v. Milling Co. (C. C. A.) 97 Fed. 670, and in such case it was further and again held that such actions are of an equitable nature. And as the right involved grows out of the laws of the United States, and out of those laws only, is not any party who properly alleges that he has acquired such a right, and is desirous of perfecting it, and of acquiring the land from the government, entitled to the protection of a federal court, if he shows that his rights are unlawfully interfered with? It seems clear to me that where, as here, it is shown that the respective parties to the suit are making adverse claims to the same land under the laws of the United States, and that the proper determination of those conflicting claims necessarily requires the application and construction of those laws, it is the duty of the court to entertain jurisdiction for that purpose, when properly invoked; and, having jurisdiction for the purpose of settling the conflicting claims, it will, under well-settled principles of equity, entertain and determine all incidental questions between the respective parties growing out of those conflicting claims, including the granting of an injunction and the appointment of a receiver, where such a course is shown to be proper.

The bill is not, in my opinion, multifarious, nor is there a misjoinder of parties defendant. The demurrer to the amended and supplemental bill is overruled, with leave to the defendants to answer it within 20 days.

ADOUE et al. v. STRAHAN et al.

(Circuit Court, W. D. Arkansas, Texarkana Division. November 14, 1899.)

1. EQUITY—JURISDICTION—QUIETING TITLE—RELIEF AT LAW.
   A plaintiff out of possession of real estate, and holding the legal title thereto, cannot maintain a bill in equity in the courts of the United States against a defendant in possession to cancel a tax deed regular on its face, and which constitutes a cloud upon his title, as the effect would be to draw into a court of equity a controversy properly cognizable at law.

2. SAME—ENFORCING STATE STATUTE.
   Nor will a United States court enforce a statute of a state enlarging the equitable jurisdiction of its courts, if such statute contravenes the distinction rigidly enforced in the courts of the United States between law and equity, or violates section 723 of the Revised Statutes of the United States, which provides that suits in equity shall not be sustained in either of the courts of the United States when a plain, adequate, and complete remedy may be had at law, or if it violates the defendant's constitutional right to a trial by a jury.

(Syllabus by the Court.)

Mr. Cobb and L. A. Byrne, for plaintiffs.
Williams & Arnold and Mr. Orr, for defendants.

ROGERS, District Judge. This bill was filed by the plaintiffs, who owned the property in controversy, against Kent Strahan, who was the purchaser at a tax sale, and Ike Bell, his tenant, to cancel a tax deed, regular on its face, which constitutes a cloud upon the title to the property, and for rents and profits. The bill shows on its face that the defendants are in possession of the property.

On the very threshold we are met with the proposition of law as to whether or not a party out of possession of real estate, and holding the legal title, can maintain a bill in a United States circuit court, against a person in possession, to cancel a tax deed regular on its face, and thereby remove a cloud from the legal title. In the case of Hudson v. Randolph (5th Circuit) 23 U. S. App. 681, 13 C. C. A. 402, 66 Fed. 216, Judge Pardee delivering the opinion of the court, where a demurrer had been interposed to a bill of this character, said:

"If the bill is viewed purely as one brought by the holder of the legal title to real estate against parties in possession, to recover possession, with rents and profits, and to remove clouds from title, the assignment of error is well taken. It has been settled since Hipp v. Babin, 19 How. 271, 15 L. Ed. 633, that the holder of a legal title cannot maintain an action to recover possession of the property, although coupled with a demand for an accounting as to rents and profits. It is also settled that the holder of a legal title, out of possession, cannot maintain a suit in equity in the courts of the United States, against one in possession, to recover the property and to remove clouds from the title. Whitehead v. Shattuck, 138 U. S. 146, 11 Sup. Ct. 276, 34 L. Ed. 873."

See, also, Scott v. Neely, 140 U. S. 106, 11 Sup. Ct. 712, 35 L. Ed. 358; Cates v. Allen, 149 U. S. 451, 13 Sup. Ct. 883, 977, 37 L. Ed. 804.

The same doctrine is held in the case of Davidson v. Calkins (C. C.) 92 Fed. 230.

Counsel for the plaintiffs insist that the case of Rich v. Braxton, 158 U. S. 405, 15 Sup. Ct. 1006, 39 L. Ed. 1022, is authority in support of the bill. The court thinks not. In that case the precise question was not presented at all. Counsel also cite Holland v. Challen, 110 U. S. 15, 26, 3 Sup. Ct. 495, 28 L. Ed. 52, to the effect that United States courts of equity will respect state statutes enlarging equitable remedies. Unquestionably that is true, but it is subject to the limitation that rights created by state statutes will not be administered if they conflict with the distinction strictly observed in said courts between law and equity, or if they contravene section 723 of the Revised Statutes of the United States, which provides that suits in equity shall not be sustained in either of the courts of the United States, where a plain, adequate, and complete remedy may be had at law, or if they violate the constitutional right of parties, in actions at law, of a trial by jury. The conclusion of the court is that this court is without jurisdiction. This conclusion renders it unnecessary to discuss any of the other questions raised on the hearing. The bill will be dismissed, without prejudice.

KILGOUR v. NATIONAL BANK OF PORT JERVIS et al.

(Circuit Court, S. D. New York. October 16, 1899.)

EQUITY PRACTICE—FINDINGS OF MASTER.

The findings of a master on questions of fact will not be disturbed, unless it is manifest upon the evidence that they are wrong.

On Exception to Master's Report.

Wm. S. Bennett, for complainant.
Lewis E. Carr, for defendants.

WALLACE, Circuit Judge. In disposing of the exceptions to the master's report, the principles of Judge Wheeler's decision (86 Fed. 39), when ordering an interlocutory decree for the complainant, ought to be adhered to, but I have encountered some embarrassment because of my uncertainty as to the precise scope of that decision. The decree adjudges merely that the complainant is entitled to a judicial statement of the sum actually due in equity, if any, from the complainant to the defendants, under the agreement of December 14, 1894, "regardless of the releases therein," and orders a reference to the master to ascertain the amount, and does not otherwise disturb the agreement.

When the agreement was made the defendants held in trust for the complainant, and as security for advances made to him by the bank, a considerable amount of real and personal property which had formerly belonged to the complainant, but had been sold under executions against him, and acquired at the sales by the defendants. Besides the property of which the trust estate consisted at that time, the defendants had held other real and personal property in trust for the complainant, had sold it, and had applied the proceeds towards the payment of the indebtedness owing the bank by the complainant; but at the date of the agreement the trust estate then in the hands of the defendants consisted of the Parker Glen property (real and personal), the Passaic property (real estate), and certain real estate in New York, and the defendants claimed that the complainant's indebtedness to the bank was approximately $59,000. By the agreement, the indebtedness was fixed at $61,938, including an advance of $2,100 thereafter to be made to the complainant by the defendants. The complainant covenanted to pay the amount in installments to the defendants, and release them from every liability growing out of past transactions; and it was provided that the defendants should retain the title to the Passaic property until the indebtedness was wholly paid, should transfer the title of all the rest of the trust estate to the complainant or his nominees, and that the complainant or his nominees should secure the payment of $20,000 of the indebtedness by a mortgage on the Parker Glen real estate, and of $5,000 by a mortgage on the New York real estate, the mortgages to be payable, as to principal and interest, at the specified dates. Obviously, the agreement contemplated the termination of the trust relations between the parties, and that when it was performed by the defendants they should be thenceforth merely creditors of the complainant, hav-

ing, as security for their debt, the two mortgages and the Passaic real estate.

When the present suit was brought, the terms of that agreement had been fully carried out on the part of the defendants. They had conveyed and turned over to nominees of the complainant, for his benefit, all the trust estate except the Passaic real estate. His nominees had executed the mortgages for $20,000 and $5,000. He had paid $12,000 upon his indebtedness to the bank. He had, however, failed to pay an installment of $4,000 which had become due, and the interest payable by the terms of the mortgages was also in default. The object of the complainant's bill was to set aside the mortgages, annul the title of the defendants to the Passaic property, and compel the defendants to account as though the agreement had never been made, upon the theory that when it was made he had fully paid his real indebtedness to the defendants, and was misled by their representations as to the amount.

Judge Wheeler's opinion treats the agreement as a security in the nature of a mortgage, "which may be redeemed although the law day is past," and to be enforced only to the extent of the sum found to be owing the defendants after accounting for moneys and property of the complainant which had come to their hands. Reading the decree in the light of the opinion, it appears that, while neither the agreement nor the mortgages are annulled, it is the purpose of the decree not to permit them to be enforced beyond the amount of the real indebtedness of the complainant, and to permit the complainant, upon paying that indebtedness, to be restored to his position at the time of the agreement. He says: "When that sum is ascertained, the plaintiff seems to be entitled to a decree for redemption."

If this is a correct view of the decision, it would seem that the accounting before the master should have been confined to ascertaining the indebtedness of the complainant to the defendants when the agreement of December 14, 1894, was made, as preliminary to a final decree directing the defendants, upon payment of the amount found due, to transfer to the complainant all the property then in their hands, not, of course, including that subsequently transferred to him or for his benefit pursuant to the agreement. Indeed, the interlocutory decree, by its terms, confines the accounting to a statement of the sum actually due, "by reason of the matters and things alleged in the pleadings"; thereby inferentially excluding an accounting in reference to transactions arising after the bringing of the action. But the master, obviously acting with the concurrence of all the parties, has extended the scope of the accounting, not only to include transactions which arose subsequent to the agreement, but also those which arose subsequent to the suit, and has charged the defendants with $17,500 as the value of the Parker Glen property, which was sold on a foreclosure of the $20,000 mortgage, in December, 1896, purchased by the defendant Scott, and resold by him in February, 1898. The defendants, upon the argument of the exceptions in this court, acquiesced in the master's finding upon this point. The complainant, however, insisted that the defendants should be charged with a much larger sum as the value of that property, and for the

value of the use of the property intermediate the purchase upon the foreclosure sale and the resale. As I do not regard either of these items as germane to the account, I cannot consider the exceptions of the defendants which relate to them, but, without passing upon them, will leave them to be disposed of by Judge Wheeler when the cause comes before him for final decree. For the same reasons, the same disposition will be made of the exceptions relating to the items for the personal property at Parker's Glen bought by the defendants of the vendees at execution sales, and of the exceptions relating to the items for the Passaic property. The exceptions to the findings of the master in regard to the Shohola Glen property are based, I think, upon a misconception of Judge Wheeler's opinion. That property was at one time part of the trust estate. It had been sold by the defendants in 1891 for the price of $28,500 (less the amount of the pre-existing mortgages assumed by the purchasers), and the amount realized had been credited in account to the complainant, and the title transferred to the purchasers. The price was a fair price at the time. The complainant had acquiesced in the sale, and thenceforth no trust relation had existed between the complainant and the defendants in regard to that property. Subsequently the defendant Scott acquired the property again at a judicial sale, not with any trust funds of the complainant, but by a purchase with his own funds, and thereafter he sold the property again at an advance. An expression in the opinion of Judge Wheeler implies that the defendants are to account for the Shohola Glen property upon the basis of the price realized at the later sale by Scott. No reason is stated why they should account for this price; the opinion does not intimate that the earlier sale was unfair or invalid; and it is doubtful whether Judge Wheeler regarded the later sale as made while the defendants were still trustees in respect to the property, or whether he supposed that there had been but one sale, and that the true amount of the purchase price at that sale had not been allowed to the complainant in the account. The master thought Judge Wheeler meant to treat the defendants as trustees at the time of the later sale; and upon this theory he not only charged them upon the basis of the price then realized, but also for the rents and profits of the property for a period intermediate the two sales. In this I differ with the master. As I understand the opinion, the learned judge did not intend to charge the defendants for the proceeds of a sale made by Scott after the trust relation had terminated. It seems reasonable to infer that he overlooked the circumstance of the earlier sale, and intended to charge the defendants with the price realized at the later sale, because he understood that to have been the only sale. It cannot be that he intended to decide that, after Scott had ceased to be a trustee in respect to the property, he was not at liberty to buy it, and make a profit out of it if he could. As to that property, the trust relation had been extinguished, and Scott was entitled to deal with it just as he would have been if the trust relation had never existed. That the learned judge misapprehended the facts is apparent, because his opinion states that Scott bought the property at a judicial sale for $28,000, and credited the complainant with the amount of the bid instead of

the price for which he sold it. In this view, the 2d, 5th, 8th, 17th, and 30th exceptions of the complainant should be overruled, subject, however, to the reconsideration of Judge Wheeler at final decree. The defendants excepted to the master's findings, but upon the present hearing have not insisted upon the exceptions. The other exceptions of the defendants relate to the findings of the master as to items of the account in respect to which the evidence is conflicting. After examining the evidence with care, I cannot conclude that it does not justify the findings; much less does it establish them to be clearly erroneous. Without entering upon an analysis, it suffices to say that, so far as the case for the complainant rests upon his own testimony (and as to the most important items it rests wholly upon his testimony), that testimony is disparaged, if not quite discredited, by the admissions of the complainant at the time of making the agreement of December 14, 1894, and at the time of making the earlier agreement. As to these exceptions, the rule, therefore, should be applied that findings of the master upon questions of fact are not to be disturbed, unless it is manifest upon the evidence that they are wrong.

An order may be entered in conformity with this opinion.

SAVINGS & LOAN SOC. et al. v. DAVIDSON et al.

(Circuit Court of Appeals, Ninth Circuit. October 2, 1899.)

No. 399.

1. APPEAL—REVIEW—NECESSITY OF ASSIGNMENTS OF ERROR.
   To entitle an appellant to an examination by the circuit court of appeals of any question, he must file assignments of error presenting such question before the appeal is taken, as required by the rules.

2. EQUITY—CONFORMITY OF RELIEF TO BILL—SUFFICIENCY OF AVERMENTS.
   Where the facts alleged in a bill and shown by the proofs establish a trust, or the existence between the parties of fiduciary relations which entitle the complainant to the relief prayed for, he is not debarred from such relief solely because he did not aver, as a legal conclusion, the existence of a trust or fiduciary relation arising from such facts, but alleged an express trust.

3. REVIEW ON APPEAL—QUESTIONS OF FACT—PRESUMPTION OF CORRECTNESS OF DECREE.
   On appeal to the circuit court of appeals, the findings and decree of a circuit court as to the facts are taken as presumptively correct, and, unless it clearly appears from the record that some mistake has been made in the consideration of the evidence, the decree should not be disturbed.

4. EQUITY—ANSWER AS EVIDENCE—EVIDENCE TO OVERCOME.
   The rule that two witnesses, or one witness and corroborating circumstances, are required to overcome a sworn answer asserting a fact responsively to the bill, does not apply where the reason upon which it is based fails, as when the answer is by a corporation, and is verified by the oath of one who has no personal knowledge of such fact, or where, in case of an answer made by an individual, his testimony as a witness shows that he did not have such personal knowledge, or is in conflict with the answer.

5. RESULTING TRUST—RIGHTS AND DUTIES OF TRUSTEE—DISABILITY TO ACQUIRE ADVERSE TITLE.
   Under the settled rule in California, established first by decision and later by statute, that where property is conveyed to one person, and the

consideration therefor is paid by or for another, a trust is presumed to result in favor of the person by or for whom the payment is made, and under the provisions of Civ. Code Cal. §§ 2229, 2230, 2234, defining the rights and duties of trustees, where a bank loaned to a mortgagor a portion of the money required to redeem property from a foreclosure sale, the remainder being furnished by the mortgagor, and the redemption being effected by acquiring the outstanding certificate of sale, and causing the property to be conveyed to a representative of the bank, the bank held the title as a trustee for the mortgagor, to whom it was bound to the exercise of the utmost good faith in dealing with the property, and it could not, without his knowledge, acquire outstanding titles and interests adversely to him and for its own benefit, but such titles and interests will be deemed to have been procured for his protection.

6. SAME.

Such case differs from an express passive trust, in which the trustee has no duty to perform except to convey to a designated person a specified title, in that the bank was vested by the conveyance with the entire interest of the mortgagor in the property, whatever such interests might be, and the bank was bound to preserve such interest in good faith, and restore it on payment of its claim, unimpaired by any hostile act of its own.

7. MORTGAGES—RIGHTS INTER PARTES—RIGHT OF REDEMPTION.

Even conceding that the bank held title to the property as mortgagee only, such relationship bound it to act with fairness and good faith towards the mortgagor, and it could not purchase an outstanding title, and hold it adversely to him, where it led, or designedly permitted, him to believe that such title was acquired for his protection, and in such case he is entitled to redeem on reimbursing the bank for its expenditures.

8. SAME—RECOVERY BY MORTGAGEE OF TAXES PAID.

In a suit by a mortgagor to redeem from a deed which was, in legal effect, a mortgage, where, under the laws of the state, the mortgage and the equity of redemption were taxable separately to the respective owners, but the mortgagee had procured the property to be assessed to itself as owner, and had paid the taxes thereon, it is entitled to recover from the mortgagor only so much of such taxes as were in excess of the amount it should have paid on its security.

Appeal from the Circuit Court of the United States for the Northern District of California.

John Garber and Robert Y. Hayne, for appellants.
Garret W. McEnerney and W. B. Treadwell, for appellees.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

HAWLEY, District Judge. This is a suit in equity to redeem about 13,000 acres of land situate in Contra Costa county, Cal., known as the "Los Meganos Rancho" or "Marsh Ranch." It has been lingering in the courts for many years. The bill of complaint was filed May 1, 1882. The taking of testimony was continued from time to time, and innumerable delays, from various causes, occurred before the case was finally brought to trial. The circuit court delivered an opinion therein on October 3, 1893, in favor of complainants' right to redeem, and an accounting was then ordered. Thereafter, on February 23, 1897, a final decree was rendered (Sanford v. Society [C. C.] 80 Fed. 54), from which the present appeal is taken. There are 69 formal assignments of error in the record, reduced to

11 in the brief of appellants, which really include every point embraced in the formal assignments.

The transactions out of which the litigation arises date back to 1871, and, in many respects, are complicated. The testimony upon several material points is decidedly conflicting. The record, as brought to this court, contains 2,689 printed pages, and the briefs of counsel cover, in addition thereto, 490 pages, and they cite nearly 400 authorities in support of their respective contentions. The record shows that the suit was originally brought by Harriet A. Sanford and James T. Sanford, as complainants, against the Savings & Loan Society, Albert N. Drown, E. W. Burr, and George Mearns, as defendants. The death of some of the parties accounts for the change that has been made in the parties to the suit.

The bill of complaint, among other things, alleges: That on November 1, 1871, Charles P. Marsh and Alice F. Camron conveyed ninety-one undivided hundredths of the ranch in question to James T. Sanford. That a mortgage was given upon said land to secure the payment of certain promissory notes, amounting to $259,332.23. That Sanford paid upon said notes and mortgage $92,539.44. That the mortgage was foreclosed, and property sold, under decree of foreclosure, January 26, 1875, to Marsh and Camron for $199,183.80. That prior to July 3, 1872, Sanford acquired the title to the nine undivided hundredths of the property, and on that date conveyed to the Brentwood Coal Company, a corporation, the entire land. That the said corporation, on May 10, 1873, executed and delivered to Sanford a mortgage of said land to secure the payment to him of the sum of $90,000. That on May 12, 1873, Sanford assigned this mortgage, and the debt thereby secured, to George S. Bowdoin, in trust to secure the payment of certain sums of money due to various creditors of Sanford. That on July 26, 1875, being the last day on which the premises sold under foreclosure could be redeemed, "Sanford through and in the name of said George S. Bowdoin, and said George S. Bowdoin for the use and benefit of said James T. Sanford, did redeem said mortgaged lands and premises" from the foreclosure sale; "said James T. Sanford furnishing $122,648.23 in gold coin of his own proper money, and $150,000 then and there by him borrowed of said defendant the Savings & Loan Society, for the purpose of making said redemption." That, in order to secure the repayment to the bank of the sum of $150,000 so borrowed, Sanford caused and procured said Bowdoin to assign the certificate of redemption to the defendant E. W. Burr. That on November 9, 1875, the sheriff, who made the foreclosure sale, conveyed to said Burr, as assignee of the certificate of redemption, the property so sold and redeemed, being $^{91}/_{100}$ of said ranch. That on July 29, 1881, by the procurement of Sanford, and for the purpose of better securing said sum of $150,000, said Bowdoin executed and delivered to the defendant Albert N. Drown an assignment of said certificate of redemption, and of all rights accruing to him thereunder, and assigned and transferred to the defendant George Mearns the mortgage of the Brentwood Coal Company which Sanford had theretofore assigned to said Bowdoin, in trust as above stated, and also

conveyed to the defendant Drown the 9/100 part of said ranch, the title to which had theretofore vested in him through Sanford, and also quitclaimed to said Drown all his right, title, and interest of, in, and to the whole of said premises. That the defendant Burr was the president of the defendant Savings & Loan Society. That the defendant Albert N. Drown was the attorney for said society, and the defendant George Mearns its searcher of records. That neither of them had any real interest in any of the assignments or conveyances, or paid any part of the money therefor, but that the same were taken and held by them, respectively, solely as security to the bank for the money advanced by it. That at various times thereafter the bank, at the request of Sanford, and for his benefit, purchased several outstanding titles created by Sanford in the property, some of which conveyances were made to the bank, and others to the other defendants, but for the benefit of the bank. That all of said purchases were made by the bank for the purpose of clearing Sanford's title, and were held by it only as security for the payment of the money so advanced by it. That no written evidence of the said indebtedness to the bank was ever given, but the money was advanced upon the understanding that the same was to bear interest at the rate of 1 per cent. per month. That in the month of March, 1878, the bank agreed to reduce said rate of interest to 10 per cent. per annum. That on December 11, 1875, Sanford conveyed the property to one Harriet Sanford by a deed which, though absolute in form, was designed by the parties thereto as a mortgage, to secure certain indebtedness due to said Harriet Sanford. That on October 12, 1881, whatever title was acquired by Harriet Sanford was then conveyed by her to Harriet A. Sanford. That from the fall of 1876, up to November, 1878, Sanford was in the actual possession of the premises. That about the last-named date, at the request of the bank, he surrendered possession thereof to the bank, and it has ever since been, and still is, in possession of the same, and in receipt of the income arising therefrom. That up to September, 1881, the bank recognized the rights of the complainants, and admitted that it held possession of the lands, and of all title thereto held by it in its name, or in the name of any one else for its benefit, merely as security to secure repayment of the indebtedness of Sanford to it. That about September, 1881, the bank for the first time ignored the rights of complainants, and refused to render an account to Sanford, of his indebtedness, or of the rents, issues, and profits of the property, or of the disbursements attending the same, or of any matter pertaining thereto, and then, for the first time, claimed to be the absolute owner of said property. That the bank has from time to time, in divers ways and manners, made advances for the account of and to said Sanford, and made disbursements and assumed liabilities on his account, the amounts of which are unknown to complainants, and the bank has refused to render the same, or in any way to recognize his rights in the premises. The bill of complaint contains an offer to pay to the bank such sum as may, upon a just and proper accounting, be ascertained to be due it, and prays that an accounting be taken of the amount due from the com-

plainants, or either of them, to the bank; that it be adjudged that the defendants hold the land merely as security for the amount so due; that, upon payment of such amount, the defendants be decreed to convey the premises to the complainant Harriet A. Sanford, and to account for all money realized from the rents, incomes, profits, or otherwise of the property; and for general relief.

The answer is quite lengthy. It admits the deraignment of title, and of the making of most of the conveyances, but denies the character of some of them. It presents two material issues of fact: First, whether or not the redemption made in the name of Bowdoin was made by or for Sanford, and whether or not the $150,000 loaned by the bank was loaned to Bowdoin or Sanford; second, whether or not the subsequent purchases by the bank were made for the benefit of Sanford, or through his procurement, or were made in hostility to him. Upon the first of these issues the answer alleges that said redemption was made by said Bowdoin with the sum of $121,928.27 "furnished by himself," and the further sum of $150,090.34 "then loaned and advanced to him by said Savings & Loan Society." The answer denies that Bowdoin made said redemption for the use or benefit of Sanford, and alleges that the defendants have no knowledge or belief as to whether Sanford furnished to said Bowdoin any money so used in said redemption, or whether he caused or procured Bowdoin to assign the certificate of redemption to Burr, and leaves complainants to make proof of those allegations. It admits that the assignment of the certificate of redemption to the defendant Burr was made "to secure the repayment to said Savings & Loan Society of said sum of $150,090.34 so loaned and advanced by it to said George S. Bowdoin, and also to secure the payment by said Bowdoin to said Savings & Loan Society of interest on said last-named sum from said 26th day of July, 1875, until paid, at the rate of 1 per cent. per month"; and, with reference to the conveyance by the sheriff, the answer alleges "that the said lands were so conveyed in order thereby to continue to said Savings & Loan Society the security granted by said assignment of said certificate of redemption for the repayment by said George S. Bowdoin to said Savings & Loan Society of said sum of $150,090.34 so loaned and advanced by it as aforesaid, and of the interest thereon agreed to be paid as hereinbefore stated, and that said Burr received and held the title to said lands vested in him by said sheriff's deed for said last-mentioned purpose and for none other." Upon the second issue, the answer denies that any of the subsequent purchases were made by the bank by the procurement of Sanford, or for his benefit, but alleges that the same were made in hostility to him and to the whole world, and for the purpose of vesting absolute title in the bank, and that the bank did thereby acquire the complete, legal, and equitable title to the whole premises, subject to no claim on the part of any person. The answer denies that Sanford surrendered possession to the bank at its request, but avers that, after the Eaton sale to the bank, he voluntarily removed, to avoid being dispossessed, and that ever since November 16, 1878, it has been in possession.

With reference to the value of the property, four apparently disinterested witnesses were examined by the complainants. One testified that its fair market value was $500,000, another placed it at $400,000, and the other two at $450,000. The defendants introduced two witnesses, one an employé of the bank, who testified the value to be $350,000, and the other, a director of the bank, who placed it at $300,000. These values were given principally—without reference to the coal deposits—as to its value for agricultural purposes. The decided weight of the testimony exceeds $400,000.

The outstanding titles mentioned in the pleadings are: (1) On March 16, 1878, one F. W. Eaton obtained a judgment against Sanford for $17,932.15, under which there was an execution sale of the 91/100 of the ranch to one Jeremiah Miller, to whom the certificate of sale was given. On November 16, 1878, this certificate of sale was assigned by Miller to the Savings & Loan Society, and on November 18, 1878, the sheriff's deed was made to the bank as the holder of said certificate. (2) In October, 1876, Sanford made a conveyance of all his right, title, and interest of 91/100 of said ranch to the firm of Richardson, Hill & Co., upon an agreement complicated in its character, but which, in effect, might be said to make the transaction a mortgage with power of sale, and the firm advanced money to Sanford on this security, and subsequently, on March 24, 1879, conveyed the premises to the bank in assumed exercise of the power of sale mentioned in the agreement. (3) On November 27, 1878, Russell F. Lord gave a quitclaim deed of his interest in the ranch to the bank in consideration of $10,000. It does not appear that he ever had any title or any interest, except that of possession. (4) The bank purchased the Bowdoin interest or claim for $8,000.

There was a claim of $30,000 by McAllister & Bergin, which Sanford testified the bank was to compromise and settle. The bank did not procure this claim. The amount of the claims secured by the bank was about $122,000. They were purchased for less than $50,000. Appellants contend that these outstanding titles and claims were bought in order to enable the bank to procure a clear title, and get possession of the property, so that it could put the same in marketable shape and realize on it.

The Brentwood Coal Company was a corporation organized for the purpose of developing and working the coal deposits on the Marsh ranch. Its principal stockholders were James T. Sanford and John F. Williams. In controversies and suits between them, it was claimed by Williams that he was the real owner of the property, and that Sanford was a mere mortgagee; and it is argued by appellants that, while Sanford was the president and a director of the corporation, he took advantage of his position, and committed a fraud upon Williams, in making the redemption, and that under no circumstances is he entitled to recover herein, because he does not come into court with clean hands. To determine this question would involve an extended examination of the evidence contained in the record and of the authorities bearing upon this subject. Neither the facts nor conclusions contended for by

appellants are clearly apparent by the record, and it is strenuously contended by the appellees that the facts contained in the record clearly show that Sanford, at the time the redemption was made, was not either the president or a director of the corporation, and that he was not guilty of any fraud, and took no undue or any advantage of Williams in the premises.

We decline to discuss this question, for several reasons: (1) Because there was no issue upon this question presented by the answer. This might have been cured by a timely amendment, if there were any facts that would sustain it. (2) The record does not show that this point was made or relied upon in the court below. (3) There is no assignment of error which presents this point for the consideration of this court, and there is no "plain error not assigned" which would authorize this court to notice it. (Rule 11 of this court, 32 C. C. A. lxxxviii.) The necessity of having assignments of error filed before the appeal is taken, in order to authorize the examination of any question, is fully and clearly stated by this court in Lloyd v. Chapman, 35 C. C. A. 474, 93 Fed. 599. We adhere to the views therein expressed.

Appellants contend that the questions as to whether there were any trust or fiduciary relations existing between the parties, or any fraud, oppression, or unfairness on the part of the bank in any of the transactions, cannot be considered by this court, because the bill of complaint does not contain any averment which presents these questions; and, in this connection, they call the court's attention to the fact that the bill does not allege that the purchase by the bank of the outstanding titles was "wrongful, or in any way in violation of any trust; on the contrary, the bill charges that it was by Sanford's procurement." This point does not seem to have been raised in the court below, and is not specified as error in any of the numerous assignments made by appellants. But the learned counsel have so interwoven this objection into their arguments in discussing the merits that, in connection therewith and as a part thereof, we have deemed it proper to consider the questions in relation to the position taken by counsel that the appellees cannot recover herein in any event, except upon positive, direct, clear, and conclusive evidence of an express agreement between Sanford and Burr that the purchases were made by the bank for Sanford's benefit.

As to this position, we are of opinion, after a careful examination of all the numerous authorities cited by counsel, that the statute of frauds has no application to this case, and that it was not error to admit parol evidence in order to establish the facts in relation to the true character of the various transactions between the parties. The general rule is well settled in equity that a decree must conform to the bill, and be warranted by it, both in the relief and in the grounds of relief; that relief not embraced in the prayer of the bill cannot be decreed, nor can the relief asked for be granted upon grounds not disclosed by the bill. In the present case, the prayer of the bill is certainly broad enough to warrant a decree without any proof as to an express agreement. It is true that it is alleged in the bill that the titles and claims were procured by the bank for the benefit of Sanford. Upon the trial Sanford so testified, and the court so found. But it

does not by any means follow that the appellees would have no right to redeem in the event this court should conclude that there was no positive agreement between the parties to that effect. We do not understand that it is ever absolutely necessary to set forth in a pleading the legal conclusions to be drawn from the statement of the facts concerning any given transaction, or to anticipate the grounds of defense. The facts upon which the pleader relies should be stated in the bill in a clear, plain, and concise manner, without argument or averments as to the conclusions to be drawn therefrom. The bill of complaint in this case sets forth the essential facts as to all of the transactions between the parties concerning the loan made to Sanford by the bank, and the acquisition of the titles by the bank to the Marsh ranch as security therefor, as well as in relation to the purchase of the outstanding titles. If, therefore, regardless of the question whether there was an express agreement as to the purchase of the outstanding titles, the other facts stated in the bill, and proofs established at the trial, show that any trust or fiduciary relations existed between the parties by virtue of such transactions, the complainants would be entitled to relief, although the words "trust" or "fiduciary" or "unfairness" are not mentioned in the bill.

In Texas v. Hardenberg, 10 Wall. 68, 85, it was claimed by counsel that the defendant could not, under the pleadings, be held to account for the proceeds of certain bonds which came into his possession, because the bill only prayed for relief by injunction against his receiving payment of the bonds. Chief Justice Chase, after announcing the general rule "that no relief can be granted under the general prayer, except such as is agreeable to the case made by the bill," and referring to the principal object of the bill, said:

"It may be admitted that these allegations and interrogatories do not assert the right of the complainant to the proceeds with absolute directness and distinctness. The bill might have been better drawn. But we think it would savor of extreme technicality to refuse to see in the bill enough in relation to the proceeds of the bonds to warrant relief in this respect under the general prayer."

In Crawford v. Moore (C. C.) 28 Fed. 824, 827, the principles contended for by the respondents were similar to those urged here. It was there argued that the complainants had failed to make out the case stated in their bill, which was claimed to rest alone upon the averments of a trust, and that, inasmuch as the proofs at the trial negatived these averments, the suit should be dismissed for want of any averments in the bill to support the case attempted to be made by the evidence. The court said:

"The rule that the proof and the pleadings must correspond is a familiar one, but it is to be applied equitably, and not rigidly, especially when it is appealed to on behalf of a party having, all the time of the progress of the cause, the facts in full possession, and therefore not misled by a pleading which, although inaccurate or mistaken as to some of the details, yet contains averments sufficient to support a claim for the relief prayed for."

The decree in this case was affirmed by the supreme court in Moore v. Crawford, 130 U. S. 122, 142, 9 Sup. Ct. 447.

From the views we take of this case, there will be no necessity for

any separate discussion of the rights acquired by the bank under the different interests in the ranch, to wit, 91/100 and 9/100.

Counsel for appellants do not deny the general proposition that, when the title to property is taken in the name of one person and the consideration is paid by another, a resulting trust arises in favor of the person who paid the consideration. Their contention is that the bank never agreed to buy in the outstanding titles for the benefit of Sanford; that the case stands precisely in the condition of an ordinary mortgage given as a mere security; that, as a mortgagee out of possession, the bank had the right to buy in the outstanding titles for its own benefit; that the purchase by it of such incumbrances is unfettered by any inhibition which exists against purchases by active trustees and parties standing in fiduciary relations. Their position is clearly, tersely, and correctly stated in their brief. After making a synopsis of the pleadings, they say:

"From the foregoing it will be perceived that the defense does not rest upon any assertion of right under the redemption of July 28, 1875, for the defendants admit that whatever transfers the Savings & Loan Society received by virtue of that transaction were as security for the loan of $150,000; the only controversy in that regard being as to whether said loan was made to Sanford, as alleged in the bill, or to George S. Bowdoin, as averred in the answer, which is immaterial, except in so far as it has a bearing upon the question of the right of the society to acquire the subsequent titles for its own interests. The defense rests upon the titles subsequently acquired, the main controversy being as to whether, as a matter of fact, such titles were acquired as further security for said loan, and for the benefit of Sanford, as asserted by the bill, or independently of him, and for the sole interest of the Savings & Loan Society, as stated in the answer."

The arguments of counsel upon both sides were made in a double capacity: (1) Upon the facts as claimed by them, and (2) upon the facts as contended for by the opposite party; their respective contentions being that upon either theory they are entitled to a decree.

With reference to the first question, the evidence clearly shows that the redemption was made in the name of Bowdoin for the benefit of Sanford. It shows, beyond question, that the loan of $150,000 made by the bank was procured by Sanford for his own benefit, and that the remaining sum of $121,928.27 necessary to complete the redemption was furnished by Sanford. Sanford testified that in March, 1875, Mr. Burr promised to loan him $130,000 on the ranch towards the redemption on the foreclosure sale; that after he went to New York the loan of $150,000 was obtained from the bank through his representative, Mr. Eaton. F. W. Eaton testified that, with the assistance of S. A. Sharp, he borrowed the $150,000 from the bank for Sanford. The report of the committee of directors on loan to Sanford, June 4, 1875, is as follows: "Report of committee on application No. ———: James T. Sanford, of N. Y., by Eaton, of S. F., $200,000. ——— years, at p. ct. p. yr. Security: Note of S.'d, and deed of trust of Rancho Los Meganos. Dr. John Marsh, confirmee in Contra Costa Co., of 13,306 acres, rated as follows by Mr. Sinclair." Then, after giving the value of the land at $256,000, and a statement as to the condition and character of the land, it concludes as follows: "Hence I cannot doubt that there is ample security for a loan of $150,000,

and recommend it. E. F. Northam, Com'r." In the minutes of the board of directors of the bank, June 4, 1875, the following entry was made: "The committee, on the application by Mr. Sanford for a loan on the Marsh Ranch, recommended a loan of $150,000. On motion, the report was received, and recommendation adopted." Cyrus W. Carmany, cashier of the bank, after reading this entry, testified that:

"The Mr. Sanford there referred to is James T. Sanford, complainant in this suit. * * * The application entertained on June 4, 1875, for the loan of $150,000, was the application of Mr. Sanford, as shown in the entry in the minutes which has been read. * * * The $150,000 referred to in that application is the same $150,000 to which I have referred in speaking of the moneys advanced towards the redemption from the Marsh foreclosure. * * * It was by the direction of Mr. Burr that the loan of $150,000 made to Mr. Sanford, as mentioned in the entry of the minutes on June 4, 1875, was entered in our books under the title of loan 5714, in the name of G. S. Bowdoin. * * * Q. Have you always treated with Sanford in reference to that transaction as his loan? A. Yes, sir. Q. And has not that been the case, Mr. Carmany, from the time of the return of Sanford to the state in 1875 or 1876, that the loan was treated as his loan? A. As Sanford's loan? Yes, sir."

Mr. Bowdoin, in reply to questions upon this point, answered as follows:

"Q. In whose name was the property redeemed? A. It was redeemed in my name. Q. Did you furnish the money with which the redemption was made? A. I did not. Q. Did you borrow the money for the purpose of making the redemption? A. I did not. * * * Q. Did you authorize the borrowing of any money from the Savings & Loan Society for the purpose of making this redemption? A. I did not in any way, shape, or manner. Q. Did you authorize the borrowing of any money from any person or corporation for the purpose of making this redemption? A. I did not."

Upon his cross-examination he answered as follows:

"Q. How, then, are we to understand your statement that you did not furnish the money with which the redemption was made? A. I was informed by my attorney, Mr. Lyon, that if I would authorize the redemption of the property Mr. Sanford would in some way or other furnish the requisite amount of money, and that it was for my interest to do so, as, in the event of Mr. Sanford's making anything more out of the property, it would inure to the benefit of those I represented."

The record shows that Mr. Burr knew all about the loan. He knew that Sanford was the person who procured the loan from the bank, and that the loan was obtained for the express purpose of making the redemption. He had several conversations with Sanford in relation thereto. He knew that the property was examined by some of the directors of the bank, and by a commissioner, to ascertain its condition and report its value. He had himself visited the premises with that object in view. He did not know Bowdoin, and had never conversed with him upon the subject. His testimony to the effect that the bank, in the matter of the loan for the purpose of redemption, was dealing with Bowdoin, while true in a limited sense, falls far short of explaining the whole story. The fact is, and Burr knew it, that Bowdoin's name was merely used in the transactions for the purpose of transmitting the title to the bank for the benefit of Sanford. It would be useless to quote or refer to any further testimony upon this point, or any testimony relative to the balance of the money

having been furnished by Sanford. It is enough to say that the testimony upon both these points is conclusive.

The testimony as to whether the bank, through Sanford, procured the subsequent titles, as alleged in the bill of complaint, for the purpose of protecting its title to the property, and for no other purpose, or whether these outstanding titles or claims were bought by the bank in open hostility to Sanford, as alleged in the answer, is in many respects conflicting. The court below, without any review of the testimony, expressed the opinion that the preponderance of the testimony was in favor of complainants' contention. Preliminary to any discussion of the testimony upon this point, it is urged by appellees that the conclusions arrived at by the circuit court should prevail, unless the record clearly shows that the evidence unmistakably establishes the contrary. The consensus of the opinions of the judges of the court of appeals in the various circuits is to the effect that, in determining this question, the findings and decree of the circuit court must be taken as presumptively correct, and, unless it clearly appears from the record that some mistake has been made in the consideration of the evidence, the decree should not be disturbed. Such was the expression of this court in Tate v. Holmes, 22 C. C. A. 466, 76 Fed. 664, 667.

Substantially the same views have been frequently announced by the supreme court. A review of the authorities is unnecessary, because the contention of appellants is that the conclusion of the circuit court upon the evidence is plainly and manifestly erroneous, and that the great weight of the evidence clearly preponderates in favor of the views for which they contend, and, in support of their contention, it is claimed that the testimony on behalf of the appellees rests solely upon the testimony of one witness (Sanford), and it therefore invokes the rule, frequently announced in equity, that, complainants having required and obtained an answer under oath, they must overcome such answer by the satisfactory testimony of two witnesses, or of one witness and such corroborating circumstances as are equivalent to the testimony of another witness. But this rule can only be relied upon where there is a direct, positive, and unequivocal denial in the answer of the allegations in the bill which the defendants are called upon to answer. It does not apply to allegations in an answer made solely upon information or belief, nor to averments made without knowledge of the facts, for the mere purpose of compelling the complainants to make some proof in regard thereto. Blair v. Silver Peak Mines (C. C.) 93 Fed. 332, 334; Earle v. Publishing Co. (C. C.) 95 Fed. 544, 548; Reigel v. Insurance Co., 153 Pa. St. 134, 143, 25 Atl. 1070.

Going back to the early cases, we find certain principles which are necessary to be observed in the application of the rule to the present case.

In Clarke's Ex'rs v. Van Riemsdyk, 9 Cranch, 153, 160, the court said:

"The general rule that either two witnesses, or one witness, with probable circumstances, will be required to outweigh an answer asserting a fact responsively to a bill, is admitted. The reason upon which the rule stands is this:

The plaintiff calls upon the defendant to answer an allegation he makes, and thereby admits the answer to be evidence. If it is testimony, it is equal to the testimony of any other witness; and, as the plaintiff cannot prevail if the balance of proof be not in his favor, he must have circumstances in addition to his single witness, in order to turn the balance. But certainly there may be evidence arising from circumstances stronger than the testimony of any single witness. The weight of an answer must also, from the nature of evidence, depend, in some degree, on the fact stated. If a defendant asserts a fact which is not and cannot be within his own knowledge, the nature of his testimony cannot be changed by the positiveness of his assertion. The strength of his belief may have betrayed him into a mode of expression of which he was not fully apprised."

In Carpenter v. Insurance Co., 4 How. 185, 218, the court said:

"Where an answer is responsive to a bill, and, like this, denies a fact unequivocally and under oath, it must in most cases be proved, not only by the testimony of one witness, so as to neutralize that denial and oath, but by some additional evidence, in order to turn the scale for the plaintiff. * * * The additional evidence must be a second witness or very strong circumstances."

The issue involved in the present case does not rest alone upon the testimony of Sanford. There are other witnesses and innumerable circumstances in addition to his positive testimony that tend directly to sustain the contention of appellees. These circumstances amount to more than the testimony of any single witness. Upon this point alone the facts are sufficient to take the case out of the rule; or, more properly speaking, the appellees have brought the case within the rule, and have overcome the weight which should be given to the averments in the answer, by producing one witness, and circumstances, exhibits, and facts more than the equivalent of another witness. But there are other, and perhaps stronger, reasons why the rule sought to be applied cannot be held controlling in the present case. The verification to the answer upon the part of the bank was made by Carmany, who was its cashier. It was verified by Burr, Mearns, and Drown, for themselves. When an affidavit is made on behalf of a corporation, it does not necessarily follow that all the allegations contained in the answer are within the knowledge of the individual person who makes the affidavit.

In Story, Eq. Pl. § 849a, note b, it is said that:

"An answer upon oath is not evidence for the defendant, which must be overcome by two witnesses, in the following cases: * * * (5) When the answer itself shows, or it is apparent from the defendant's situation or condition, that, though the answer is positive, he swears to matters of which he could not have personal knowledge."

See, also, Berry v. Sawyer (C. C.) 19 Fed. 287, 290; Garrow v. Carpenter, 1 Port. (Ala.) 359, 373; Adams, Eq. 363; 1 Enc. Pl. & Prac. 947, and authorities there cited.

The testimony of Mr. Carmany clearly shows that he had no personal knowledge of many of the transactions which Sanford testifies occurred between himself and Mr. Burr, the president, and Mr. Drown, the attorney, of the bank. In the very nature of his position as cashier, his knowledge is confined and limited to such matters as the entries in the bank's books and minutes of the board of directors would show, and in his testimony he states that most of the transactions were conducted by Mr. Burr, and that the busi-

ness was of such a character as came within the official duties of the president of the bank to transact. Among other things, he said:

"While president of the bank, Mr. Burr was in the habit of taking all the applications for loans, and, whenever there was any consultation with regard to the business of the bank, he attended to it. * * * He directed the business of the bank. * * * You might say that, substantially, Mr. Burr ran the bank while he was president. * * * I personally took no part in or about the negotiations of that loan ($150,000 loan to Sanford), or anything connected with it. * * * Those are matters which Mr. Burr determined. * * * He was the one who governed and directed with regard to that. It was by the direction of Mr. Burr that the loan of $150,000 made to Mr. Sanford, as mentioned in the entry of the minutes of June 4, 1875, was entered in our books under the title of loan 5,714, in the name of G. S. Bowdoin."

Speaking of the entries made in the books concerning the amounts paid by the bank in the purchase of the outstanding titles, this witness said:

"With reference to various items of money paid, concerning which I have spoken in my testimony, I speak from the entries appearing in our books and the vouchers introduced in evidence. I, personally, did not give any directions in regard to any payments. Those were directed by the president. The negotiations of the transactions themselves were all conducted by Mr. Burr, and I attended to the payments, and to the making of the entries in the books, in accordance with his directions. Personally, I took no part in the negotiations myself."

Moreover, appellants did not rely upon their answer. Carmany, Burr, and Drown went upon the witness stand, and were sworn and examined in regard to the various transactions. It is earnestly argued by appellees that the testimony of these witnesses, when properly digested, analyzed by judicial tests, and weighed by legal scales, amounts to a denial of the averments in the answer. It is undoubtedly true that an answer may be overcome by the testimony of the witness who verified it, or by the testimony of the other defendants testifying in their own behalf or on behalf of the other defendants.

In Morris v. White, 36 N. J. Eq. 324, 329, the court said:

"The rule applies where the reason for it is found. The reason for the adoption of this rule by courts of equity is because, there being a single deposition only against the oath of the defendant in his answer, the denial of facts in the answer is equally strong with the affirmation of them by the deposition. * * * This rule has been referred to the equitable principle on which it is grounded, namely, the equal right to credit which a defendant may claim when his oath, positively, clearly, and precisely given, and consequently subjecting him to the penalty of perjury, is opposed to the oath of a single witness. But, when the witness who opposes the answer is the defendant himself, the reason of the rule fails."

Much of the evidence given by Sanford is positively denied by Burr and Drown in their examination in chief. Among other things, Burr testified that all the negotiations and purchases of the outstanding titles were kept quiet as a matter of policy, and so managed that Sanford had no knowledge of the transactions; that the purchases were all made in hostility to Sanford. While denying the truth of many of the statements made by Burr, appellees confidently assert that "the admissions of Mr. Burr, distinctly made upon the stand, are sufficient to establish the truth of Mr. Sanford's testimony

in that behalf." Especial stress is laid upon the proposition that, conceding the facts to be as claimed by appellants, that the bank bought in the outstanding titles without any express agreement with Sanford that he should have any benefit therefrom, and that all the purchases were really made in hostility to him, it is manifest from the testimony of Mr. Burr that he allowed Sanford to believe that the bank was making these purchases under some arrangement with him. If this be true, it adds a strong link in the chain of evidence, which tends to show that in whatever relation the bank may finally be placed by the court, whether as a trustee or a mortgagee, it was not at all times acting "in good faith" towards Sanford. In the consideration of Burr's testimony upon this point, it must constantly be kept in mind that he knew that in making the loan of $150,000 he was dealing with Sanford in the name of Bowdoin. In the light of this situation, we will examine his testimony in relation to the purchases of the outstanding titles and claims against Sanford.

In weighing the testimony, we have not overlooked the fact of the deep personal interest of both sides. It may be presumed that the principal witnesses were naturally inclined to tell their story most favorably to themselves. A little coloring, here and there, is liable to convey different impressions, sometimes false ones, and it requires much time, deliberate thought, and careful consideration upon the part of the court, as well as of counsel, to discover the truth, which is the object, end, and aim of all judicial investigations. Most of the evidence contained in the voluminous record centers around the testimony of Sanford upon one side and Burr upon the other. The testimony of Mr. Burr is in many respects supported by the testimony of Mr. Drown, who was the attorney for the bank. They both declare, in positive terms, that there was never any agreement between them or the bank with Sanford that the outstanding claims and titles were procured at the request of, or for the benefit of, Sanford. But, while their testimony is positive in that direction, it appears very clearly that their conduct and action was such as to lead Mr. Sanford to believe that they were acting for him, for the purpose of protecting his interests as well as their own. Although claiming to have bought the titles in hostility to Sanford, a careful perusal of the whole testimony unmistakably shows that they scrupulously withheld from Sanford any information that such was their object and purpose. The facts in this regard are permeated throughout the entire record of Burr's testimony, and can only be gleaned, with entire satisfaction, from the perusal of the whole thereof. A statement in narrative form would be inadequate to convey the full force and effect of his testimony. It requires the questions as well as the answers. A brief quotation must, however, suffice for the purposes of this opinion. In answer to questions upon his cross-examination, Burr testified as follows:

"Q. I again ask you if the truth, in fact, concerning these payments, be not that they were thus paid by the bank because of, and in accordance with, an understanding had with Mr. Sanford on the subject. A. Not at all; but hostile to Mr. Sanford,—in opposition to Mr. Sanford entirely; all about that

time, for about six or seven months, the negotiations were without his knowledge. Q. Do you mean to say that you were then at war with Mr. Sanford? A. No; I mean to say that Mr. Sanford had fiddled around, and had so many projects where he was going to do great things that he never did, that the bank had got tired of having any talks with him. He came in there all the time, and always had some new project—some new plan—that he had seen that would relieve him, and put him back the owner of that ranch. Q. Well, seemingly, however, he had some plan to get you to pay these debts? A. Yes, sir. Q. And you did pay them? A. Yes, sir. * * * Q. I will ask you if the moneys paid to Lord in settlement, as appears by the papers in evidence here, were not paid merely for the purpose of getting possession of the property, which the bank could have easily secured through a writ of assistance from the court in which the mortgage was foreclosed, but because there was an understanding, or an informal talk, as you call it, between yourself and Mr. Sanford, according to which Lord was to be settled with, and the moneys paid in such settlement, upon final settlement of the $150,000, should be reimbursed to the bank. A. I don't remember any understanding with Mr. Sanford, or any settlement with Mr. Lord, except as is in this paper, a copy of which appears in the testimony of Mr. Carmany. Q. Do you undertake to deny that there was such informal understanding between you and Mr. Sanford? A. I don't deny it, but I don't remember of it. * * * Q. Mr. Burr, have you any doubt that the bank was not getting anything from the Marsh ranch, either by way of interest, or by way of rent, or in any other way, from the time payment of interest stopped on the Bowdoin loan up to the 14th of December, 1878? * * * A. If that was the fact, I have no recollection of it that it was the fact or that it was not the fact. Q. Well, now, Mr. Burr, isn't it a little strange that you would not have some recollection of a matter like that? A. No; for this reason: the bank felt perfectly secure in this loan, that it was accumulating satisfactorily, and there was no apprehension to cause them to be disturbed. If anything came in, they took it, and, if it didn't, they did not. * * * The security was so abundant that there was no uneasiness felt about it. * * *"

During his examination Burr was shown complainants' Exhibit Q, which was an agreement between one Grumauer, of the first part, and Sanford, of the second part, relative to the sale by Sanford of two lots to Grumauer in Brentwood, dated October 16, 1878, wherein G. agreed to "deliver at the office of the Savings & Loan Society in San Francisco, for the use and benefit of the party of the second part [Sanford], the principal sum of $250," at certain times. Indorsed upon the back of this agreement is, "$50, rec'd Oct. 16, 1878, fifty dollars. E. W. Burr." Mr. Burr acknowledged the receipt of this money.

"Q. Didn't you receive it on the purchase price of the property described in that document? A. I could not go back that far, and say. * * * Q. Mr. Burr, evidently Mr. Sanford was in communication with you in connection with the property? A. Mr. Sanford was then on the ranch, and we were preparing to move on his works, and the next month we did. Q. Do you mean to say, Mr. Burr, that while you were were holding friendly relations with Mr. Sanford, and communicating with him in respect to the disposition of this property, as this document Exhibit Q would imply, you were secretly maturing some scheme by which he would be swept out of all his rights in the property? A. No, sir; we were quietly proceeding to get Mr. Lord and Mr. Eaton out of the way, without consulting Mr. Sanford, and in a few days it was consummated, and then these payments were made. Q. Do you mean to say that these proceedings were hostile to Mr. Sanford, and that he so understood it? A. I mean to say that they were hostile, and were done without his knowledge. Q. That is, while you were in friendly treaty with him, you were quietly maturing and carrying out a plan under which he would be stripped of all his rights in the property,—is that it? A. We were under no treaty with him, or under no arrangement. * * * Q. You gave him no reason to be-

lieve that you were acting in any way hostile to his interest, did you? A. We had no reason to do that. Q. Well, as a matter of fact, you didn't do so? A. No, sir; as a matter of fact, we did not do it. Q. You never did or said anything to him to let him believe that you were acting in hostility to his interests, did you, Mr. Burr? A. I had no occasion to. Q. Well, I don't ask you about 'any occasion to.' I ask you about facts. A. Well, I had nothing to do with it, and it wasn't in my hands. * * * Q. You never said or did anything to let Mr. Sanford believe or think that you were doing anything hostile to his interests, did you? A. I didn't consider he had any interest."

With reference to the laying out and platting the town of Brentwood:

"Q. Didn't Mr. Sanford employ, and did not you pay for, the surveyor for laying it out? A. Yes, sir; paid the surveyor, but I don't know who employed him. Q. Wasn't it Mr. Sanford who employed him? A. I don't know. We did not pay Mr. Sanford; we paid the surveyor. Q. Didn't you pay him on the order of Mr. Sanford? A. I don't know; you will have to find that out. * * * Q. Mr. Burr, in speaking of what took place about the settlement with Lord and with Eaton, you say that it was all conducted quietly, and without the knowledge of Mr. Sanford, and I would like to know what was the occasion of withholding knowledge of it from Mr. Sanford. A. It was in the hands of Mr. Drown, and he advised that I should not make any communication to Mr. Sanford about it; it did not concern him at all. Q. You say that about that time, for about six or seven months, the negotiations were without his knowledge, and elsewhere you say that we kept quiet 'as a matter of policy'; what was the policy to be subserved, or what was the occasion of keeping it from Mr. Sanford? A. To avoid any more obstructions in the obtaining of the quiet possession of the property. Q. How did you apprehend that Mr. Sanford could throw any obstacles in the way of the bank getting possession, if he had desired? A. Well, he might have made common cause with Mr. Eaton and Mr. Lord. As Mr. Lord was in possession, he might have made us a great deal of difficulty. Q. You at that time, Mr. Burr, held the sheriff's deed under the decree of foreclosure, to which Mr. Sanford was a party, and on application to that court, under the terms of its decree, as well as the well-settled rules of law, could have been placed in possession on summary application. How, then, could Mr. Sanford have made any trouble or interposed any obstacle to the bank getting possession of the property, assuming that there were no arrangements between the bank and Mr. Sanford touching the possession of the property? A. The bank was quietly waiting and hoping for a year that Mr. Sanford, through some of the various projects that he had inflated, would be enabled to benefit himself, and pay the bank its debt, and be restored to the possession. Failing in that, he moved his family up on the ranch, and talked about negotiating for the possession, and we did not negotiate."

Mr. Drown, in reply to the question, "From the time that your connection with this business began, down to the time of the assignment by Richardson, Hill & Co., to what extent did you advise with Mr. Sanford in regard to what was being done?" said:

"The things that were done, whenever Mr. Sanford made any inquiry of me about them, I told him the truth about them. I did not confer with him at all about the negotiations with Mr. Eaton. They were taken wholly independent of Mr. Sanford, and, so far as I knew, without his knowledge. He was in the city here a good deal, and came to the bank occasionally, and met me sometimes, and whenever he asked me about any matter, as far as I told him, I told him just as it happened. I did not, however, confer with him to any extent."

The weight of the circumstances attending the transactions is, in our opinion, decidedly in favor of the position contended for by appellees. It is true that there are some circumstances that tend the other way. It is seldom an easy task to follow men in their daily thoughts and business affairs for so many years, and in such

varied transactions, and find their expressions and conduct absolutely free from controversy. When men disagree as to their understanding and intention in regard to certain business transactions, it is usually the case that many things have occurred which tend, in a greater or less degree, to support both sides of the controversy.

We have made these extended references to the pleadings, the contentions of the respective parties, and the evidence in regard thereto because the case, as conceded by both parties, virtually rests upon the conclusions reached as to the facts. We shall now proceed to state our views with reference to the legal and equitable principles, which have been elaborately and thoroughly discussed by counsel. The redemption having been made by Bowdoin with money which Sanford procured and furnished, and the bank having acquired the title for the benefit of Sanford with knowledge that he, instead of Bowdoin, was the real party in interest in said transaction, it follows, as a matter of law, that by that redemption and the delivery of the sheriff's deed to the bank, or to its officers for the bank, there was vested in the bank the legal title in trust for Sanford, subject only to a lien in favor of the bank to secure it for the repayment of the money it had loaned and advanced, and upon the repayment of this money it would become the duty of the bank to convey the property to Sanford.

The law in California is well settled that if title to land is taken in the name of A., and the purchase money is paid by B., the title is held by A. upon a resulting trust in favor of B. Hidden v. Jordan, 21 Cal. 92, 99; Millard v. Hathaway, 27 Cal. 119, 139; Sandfoss v. Jones, 35 Cal. 481, 489; Hellman v. Messmer, 75 Cal. 166, 169, 16 Pac. 766; Walton v. Karnes, 67 Cal. 255, 256, 7 Pac. 676; Campbell v. Freeman, 99 Cal. 546, 34 Pac. 113; Sayward v. Houghton, 119 Cal. 545, 549, 51 Pac. 853, and 52 Pac. 44.

Under the law of California, a trust may arise either by virtue of an express written agreement, or by operation of law. Civ. Code Cal. § 852. It will be observed that all the transactions between the parties hereto occurred after the adoption of this Code, which enacts the rule previously declared in Hidden v. Jordan and other cases decided by the supreme court before its adoption and adhered to in all of the subsequent cases.

Section 853 of the Code declares that:

"When a transfer of real property is made to one person, and the consideration therefor is paid by or for another, a trust is presumed to result in favor of the person by or for whom such payment is made."

In Campbell v. Freeman the court said:

"The rule is familiar that when, upon a purchase of real property, the purchase money is paid by one person, and the conveyance is made to another, a resulting trust immediately arises against the person to whom the land is conveyed, in favor of the one by whom the purchase money is paid. The real purchaser of the property is considered as the owner, with the right to control the title in the hands of the grantee, and to demand a conveyance from him at any time. The same rule prevails if the money paid by the party taking the title is advanced by him as a loan to the other, and the conveyance is made to the lender for the purpose of securing the loan. But in the latter case the purchaser cannot demand the conveyance until he has paid the money advanced and for which the land is held as security. In such a case, the grantee holds

a double relation to the real purchaser. He is his trustee of the legal title to the land, and his mortgagee for the money advanced for its purchase, and, as in the case of any other mortgage which is evidenced by an absolute deed, is entitled to retain the title until the payment of the claim for which it is held as security, and he may also enforce his lien by an action of foreclosure. * * * Equity looks beyond the form of a transaction, and shapes its judgments in such a way as to carry out the purposes of the parties to the agreement, and to protect each of them against any unconscionable advantage to be derived from the apparent form in which their transaction has taken place."

The bank, being a trustee for Sanford, could not, while holding that relation, buy in the outstanding titles and claims with the intent to deprive Sanford of his equitable estate and interest in the premises. Certainly not while secretly concealing from him its intention, and so acting as to induce him to believe that the titles and claims were purchased by the bank for his benefit. This is explicitly declared, not only by the provisions of the Civil Code, but by the decisions of the supreme court before and after its adoption. Page v. Naglee, 6 Cal. 241, 245; Price v. Reeves, 38 Cal. 457; Janes v. Throckmorton, 57 Cal. 368, 386; Cavagnaro v. Don, 63 Cal. 227, 231; Eversdon v. Mayhew, 65 Cal. 163, 166, 3 Pac. 641; Raynor v. Mintzer, 67 Cal. 159, 162, 7 Pac. 431; O'Connor v. Irvine, 74 Cal. 435, 439, 16 Pac. 236; Scrivner v. Dietz, 84 Cal. 295, 297, 24 Pac. 171; Wickersham v. Crittenden, 93 Cal. 17, 29, 28 Pac. 788.

The Code, in treating of the obligations and duties of trustees, among other things provides as follows:

"Sec. 2229. A trustee may not use or deal with the trust property for his own profit, or for any other purpose unconnected with the trust in any manner.

"Sec. 2230. Neither a trustee nor any of his agents may take part in any transaction concerning the trust in which he or any one for whom he acts as agent has an interest, present or contingent, adverse to that of his beneficiary, except as follows: (1) When the beneficiary, having capacity to contract, with a full knowledge of the motives of the trustee, and of all other facts concerning the transaction which might affect his own decision, and without the use of any influence on the part of the trustee, permits him to do so. * * *"

"Sec. 2234. Every violation of the provisions of the preceding sections of this article is a fraud against the beneficiary of a trust."

We are well aware that there are numerous kinds of trusts, and that distinctions are constantly being drawn in cases where the trustee may or may not acquire an adverse title in his own behalf. Counsel for appellants have cited from 2 Perry, Trusts, §§ 520, 521, and from Pom. Eq. Jur. §§ 162, 163, 368, 374–376, 957, 958, to show that, where the trust is a purely passive one, the disability as to the acquisition of other titles does not arise. This would be so in cases where the trustee of an express, passive trust has no duty to perform, except to convey to a designated person a specified title. Why? Because the acquisition by him of such other title does not, in any way, shape, form, or manner, contravene his duty. It does not prevent the complete performance of his trust. In such cases the trustee has not obtained by the transaction any power over his beneficiary, and hence the beneficiary of the trust is not placed under any disadvantage. There are cases of express trust in which no disability exists against the trustees, and there are cases of constructive trusts in which the disability exists.

In the consideration of this case, we shall not attempt to discuss the different kinds of trusts created by statute, express agreements, or by operation of law, but will endeavor to confine ourselves to the particular relations existing between the bank, Burr, and Drown upon the one side, and Sanford upon the other. Whatever Burr and Drown did, and whatever conveyances they received, were for the bank, and hence the relation to which we refer exists solely between the bank and Sanford. The question, therefore, is whether the bank was under any binding obligation in equity to abstain from purchasing any titles to the Marsh ranch in hostility to Sanford, because such acts would be in direct violation of its duty to execute the trust created by the transactions between the parties.

The legal title was invested in the bank. Sanford had no written agreement as to the trust. Does not the law declare that confidence in such cases is imposed upon the trustee holding the title? Was the bank not bound to return the property to Sanford upon the payment of the money due, free and unimpaired from any hostile acts on its part? Sanford was at the mercy of the bank. He relied upon the bank to stay with him, and, above and beyond this, to act openly, honestly, and fairly with him. He was placed in such a position that he had to rely upon his trustee. But whether there was any absolute confidence reposed may, to a certain extent, be immaterial upon this branch of the case, because, in any event, as is shown by a mere recital of the facts, it is apparent that the purchases made by the bank in alleged hostility to Sanford were made in direct contravention of its duty to execute its trust.

Illustrative of the cases where the transactions between the parties have been held to be a trust, and in support of the views we have expressed, we quote from two of the cases previously cited.

In Raynor v. Mintzer there was only a constructive trust. Raynor was the owner of four-sevenths of certain real property. By certain transactions claimed to be fraudulent, the defendants, who were his co-tenants, obtained a conveyance from him of his interest in the property, and thereby became vested with the legal title to the whole. The trial court decreed, upon the facts, that they should convey the property which they had received by the conveyance to Raynor upon the payment by him of the amounts of money which they had expended thereon. From this decree the defendants appealed. After the appeal was taken, they induced the creditors of Raynor to bring suit, which they did, and obtained judgments, advertised the property, and one of them bought the property, and assigned his interest to the defendants, who had in the meantime organized themselves into a corporation. Judgment in the original case of Colton Land & Water Company against Raynor having been affirmed, the defendants contended that they were entitled to hold the property under the title which they had acquired from the purchaser at the sheriff's sale, because they bought the same in hostility to Raynor, and were not his trustees. Upon these facts the court said:

"When title to real property has been acquired by fraud, the true owner is entitled to be relieved against the fraud, and to be reinvested with his owner-

ship, upon such terms as may be just. The terms upon which the relief was granted were just. By its decree the court undid the wrong which had been done, and left all the parties to the transaction in possession of their legal rights as they were before the assignment of the certificate of purchase. Raynor was restored to his original position as a tenant in common with his co-tenants in the property, upon paying to them the moneys which they had paid to Clyde for his interest in the property. Upon receiving that money, they had no longer any right in his property which they could in conscience retain; for it is conceded that, originally, Raynor was a tenant in common with them in the property, and when they assumed the exclusive possession of it under the transactions with him and the instruments in writing executed by him, adjudicated in the case of the Colton Land & Water Company against Raynor, they held the apparent legal title to his interest in the common property in trust for him. This title, whether held by him or by them in trust for him, vested him with the right to his share in the property, and in the proceeds derived from it, under the arrangement between the tenants in common as to the management and disposition of the property, as adjudged in that case. The fact that the co-tenants, in exclusive possession, cloaked themselves in the garb of a corporation, and conveyed the property to themselves in the corporate name, did not devest Raynor of his rights. His co-tenants were still, in the shape which they saw fit to assume, the trustees of his legal title; and that fiduciary relation continued to exist, binding them, in all their transactions with the property, to the observance and practice of good faith to their co-tenant and cestui que trust. From the obligations of that relation they could not relieve themselves by any transfer of the property to themselves in the name of a corporation into which they changed themselves, nor by a transfer to any other person who knew of the existing relation, nor by indirect and crooked attempts to acquire the trust property for themselves. Nor did the judgment of the court in the case of the Colton Land & Water Company against Raynor relieve them from their trust as to the plaintiff's title. That judgment established the trust, and decreed its performance; but before performance, and while proceedings were pending to revise the decree itself, they attempted to avoid performance by the acquisition of the trust property to themselves by means of the judgment and execution sale. Against such proceedings the plaintiff was entitled, upon every principle of equity, to be relieved."

In O'Connor v. Irvine the court said:

"The evidence shows that the defendant acted as the agent of Fair and Selover in purchasing the property and in holding it, and that he so considered himself up to a certain period, when, having had some misunderstanding with Fair, he resolved to assume the right of ownership in the property. Fair furnished the money with which the purchase was made. It was not necessary for the plaintiff to show the defendant agreed, in formal or express language, that he would make the purchase for Fair and others, and hold it for their benefit. It is sufficient if it was mutually understood between the parties that he was so acting in their behalf. What was said and done by the parties, so far as the evidence shows, is capable of only one interpretation, and establishes a perfect understanding between the parties, as above stated. Under such circumstances, although the language used may not of itself show an express promise, it is the duty of the party whose services are sought, if he does not mean to act in accordance with the evident expectation of the parties with whom he is dealing, to expressly declare that he will not; otherwise, his silent acquiescence is a fraud. * * * The evidence shows that defendant rendered an account for the money advanced, and received the amount thereof, prior to the execution and delivery of the sheriff's deed. It would appear, therefore, that he ought not now to be heard to say that it was not a loan, and, if it was a loan, the facts created a resulting trust."

The views we have expressed are conclusive of the case upon its merits; but we are of opinion that the same result would necessarily follow if the transactions between Sanford and the bank should be treated only as a mortgage. Speaking generally, with reference

to an ordinary mortgage, where there is no trust relation between the mortgagor and the mortgagee, the mortgagee does not owe the mortgagor any duty to protect the equity of redemption, because there is no relation created between them analogous to that of trustee and cestui que trust by the mere execution and delivery of the mortgage. In all cases of this character, where there is no fraud, unfairness, or undue advantage taken of the mortgagor, the mortgagee is not prevented, by any rule or principle of law or equity, from buying in any outstanding claims or titles to the property, and holding the same adversely to the mortgagor. In such cases, as was said in De Martin v. Phelan (C. C.) 47 Fed. 761, 763:

"The mortgagee can at all times deal with the mortgagor in respect to the property mortgaged precisely upon the same footing as any other person, and may purchase liens or claims against the property for less than their face value, and hold them against the mortgagor for the full amount."

The principles enunciated in that case are well settled and supported by authorities in nearly every state in the Union, and in England. But it will be noticed, by a careful reading of that opinion, that special pains were taken to show that, in the transactions which there took place, there was no fraud, "unfair, or grossly oppressive advantage of complainant's necessities," or any "undue or improper influence" on the part of the defendant.

The case of Harrison v. Roberts (decided in 1856) 6 Fla. 711, 714, which appears to have been selected by appellants as the strongest case in their favor, is simply an authority in favor of the rule announced in De Martin v. Phelan, supra. It was evidently cited for the purpose of calling our attention to the expression used by the court that, "in such case, there is no room for oppression or opportunity for taking advantage of the necessities of the mortgagor." An examination of the facts in that case clearly shows that there was no oppression, and, if there was any opportunity for taking any advantage of the necessities of the mortgagor, the defendants did not avail themselves of the opportunity. Whether there is "any room" for such action in any case can be best determined by an examination of the peculiar facts of each particular case. It is enough here to say that in all of the numerous authorities cited by appellants, as well as those cited by the appellees, where there is any discussion upon this point, it is held that in such transactions there must be no unfairness on the part of the mortgagee.

The right of redemption is a favored right in equity. Courts always view with jealousy and suspicion any dealing between the mortgagor and mortgagee to extinguish the equity of redemption. The mere fact of this relation, independent of any trust, in transactions of this character, induces the courts to guard with zealous care the rights of the mortgagor, and tends to shed light upon the question whether there has been any unfairness, oppression, or undue advantage, especially where there is a gross inadequacy of price and other circumstances tending to show any fraud. It is only in cases where the transactions are fair and honest, without fraud, and where no unconscionable or undue advantage has been

taken of the mortgagor's position by the mortgagee, that the purchase of outstanding titles by the mortgagee can be upheld and sustained. Russell v. Southard, 12 How. 139, 148; Villa v. Rodriguez, 12 Wall. 323, 339; Peugh v. Davis, 96 U. S. 332, 337; Brick v. Brick, 98 U. S. 514, 516; Oliver v. Cunningham (C. C.) 7 Fed. 689, 694; Chapman v. Mull, 42 N. C. 292, 295; Remsen v. Hay, 2 Edw. Ch. 535, 542; Shaw v. Walbridge, 33 Ohio St. 1, 6; Walker v. President, etc., 6 Del. Ch. 81, 91, 10 Atl. 94; Moore v. Titman, 44 Ill. 367, 371; Seymour v. Mackay, 126 Ill. 341, 352, 18 N. E. 552; Hinkley v. Wheelwright, 29 Md. 347, 349; Tant v. Guess, 37 S. C. 489, 499, 16 S. E. 472; Perkins v. Drye, 3 Dana, 170, 177; Stoutz v. Rouse, 84 Ala. 309, 311, 4 South. 170; Peagler v. Stabler, 91 Ala. 309, 9 South. 157; Jones, Mortg. § 711.

In Villa v. Rodriguez the court said:

"The law upon the subject of the right to redeem, where the mortgagor has conveyed to the mortgagee the equity of redemption, is well settled. It is characterized by a jealous and salutary policy. Principles almost as stern are applied as those which govern where a sale by a cestui que trust to his trustee is drawn in question. To give validity to such a sale by a mortgagor, it must be shown that the conduct of the mortgagee was, in all things, fair and frank, and that he paid for the property what it was worth. He must hold out no delusive hopes; he must exercise no undue influence; he must take no advantage of the fears or poverty of the other party. Any indirection or obliquity of conduct is fatal to his title. Every doubt will be resolved against him. Where confidential relations and the means of oppression exist, the scrutiny is severer than in cases of a different character. The form of the instruments employed is immaterial. That the mortgagor knowingly surrendered, and never intended to reclaim, is of no consequence. If there is vice in the transaction, the law, while it will secure to the mortgagee his debt, with interest, will compel him to give back that which he has taken with unclean hands. Public policy, sound morals, and the protection due to those whose property is thus involved, require that such should be the law."

In the light of all the facts, transactions, circumstances, and surroundings in the present case, it cannot be said that no advantage was taken of the condition of the mortgagor, or that the purchases were made in such an open, frank, and fair manner as to deprive Sanford of his right to maintain this suit.

The suit, as before stated, can be maintained independent of the question whether there was any direct agreement between the parties that the purchases should be made for Sanford's benefit, not only upon the ground that the bank was the trustee of a trust resulting from the original transaction,—the payment of the purchase money by Sanford, and the acquisition by the bank of the apparent title to the property,—but also upon the ground that the bank, if treated as a mortgagee, was incapacitated from purchasing the outstanding titles for itself, because it withheld from Sanford the fact that it was purchasing the same in hostility to him, and, on account of their previous existing relations, induced him to believe that it was, in these transactions, acting in his interest, and thereby obtained an undue and unfair advantage.

Finally, it is claimed that the court erred in refusing in its final decree to allow the bank credit for all the taxes paid by it upon the property involved herein, since the adoption of the present constitution of California. The master to whom the case was referred for

the purpose of taking an account held that the interest of the bank in the property was a mortgage, and should have been assessed as such, and that, under the provisions of sections 4 and 5 of article 13 of the constitution of the state of California, the bank was only entitled to be reimbursed for such proportion of the taxes paid by it as exceeded the amount of the tax which should have been levied on the value of its security. The court sustained the views expressed by the master. Sanford v. Society (C. C.) 80 Fed. 54, 57. Appellants contend that this ruling is erroneous, because no tax was levied upon the security. This contention cannot be maintained. The bank was liable, under the laws of California, for the amount of the tax on the value of its security. It was its duty, as the owner of the mortgage, to pay the tax to the extent of the value of its security. The owner of the property is required to pay the tax upon the excess. The fact upon this point, as reported by the master, is as follows:

"The mortgage interest of the Savings & Loan Society in the Los Meganos Rancho has never been separately assessed; but the Savings & Loan Society has from year to year had the entire property, except the lots sold in the town of Brentwood, assessed to itself as the owner thereof."

It is clear to our minds that, upon the facts of this case, the bank is not entitled to be reimbursed for the proportion of the tax it should have paid upon the security it held. It makes no difference whether the security held by the bank was a trust deed or a mortgage.

In Locke v. Moulton, 96 Cal. 21, 30, 30 Pac. 957, the court said:

"It was defendant Moulton's duty to have listed his land subject to the mortgage, while it was equally the duty of the plaintiff to have returned his mortgage security for taxation, and Mr. Moulton would have been liable only for the tax upon any excess of the assessed value of the land over the amount of the mortgage."

In Hibernia Savings & Loan Soc. v. Behnke, 121 Cal. 339, 343, 53 Pac. 812, which appellants claim is conclusive in their favor, the owner of the property paid the entire tax, and sought to obtain a reduction in the judgment obtained in the foreclosure suit by the bank for the proportion of the tax that should have been, but was not, levied against the security. Upon those facts the court said:

"It is only the tax 'levied upon the security' that the owner may pay, and have the amount deducted from the amount of the security (Const. art. 13, § 4); and, as there was no assessment of the security, the defendant was not authorized to have this payment deducted."

It will be noticed that the facts in that case presented an entirely different question from the one involved in this case. The relations between the parties were not similar. There neither party owed the other any duty. There was no question as to any trust or confidential relations. There was no dispute as to the ownership of the property. Here the bank paid the entire tax. It was not the real owner of the property. It had the possession and control of the property, but, under the views we have expressed, it could only hold whatever title it had by virtue of the various transactions between the parties, for the benefit of Sanford, subject only to the extent of its security for the moneys it had advanced. The fact that it had the property assessed to itself instead of having it assessed as provided for in the constitution gave it no additional rights. It cannot be

allowed to take advantage of its own wrong. The principles announced in the Hibernia Case are not, when the difference in the facts is considered, in opposition to the conclusions we have reached. The decree of the circuit court is affirmed, with costs.

RICE, County Treasurer, et al. v. JEROME.

(Circuit Court of Appeals, Eighth Circuit. November 6, 1899.)

No. 1,231.

1. TAXATION—PROPERTY OF CORPORATION—EFFECT OF INSOLVENCY.
   The insolvency of a private corporation, or the appointment of a receiver therefor at the suit of creditors, does not affect the status of its property as to taxation or the lien of a purchaser at tax sale thereon; and where the taxes were legally assessed and due, and the sale was regular, the corporation or its receiver can only extinguish such lien in the same manner as an individual owner, which, under the statutes of Colorado as construed by its supreme court, is by payment to the holder of the tax certificate of the amount for which the property was sold, together with the interest and penalties provided by law. The holder of the certificate is not required to file his claim with the receiver, as a creditor.
2. FEDERAL COURTS—FOLLOWING STATE DECISIONS.
   The decisions of the supreme court of a state, construing its revenue laws, are binding on the federal courts in that state.[1]
3. TAXATION—REDEMPTION FROM TAX SALE—EFFECT OF IRREGULARITY.
   The fact that a tax sale is irregular, where the property was legally assessed and the taxes due, does not relieve the owner from the obligation to pay the interest and penalties prescribed by statute in order to redeem from such sale.
4. SAME—SUIT TO CANCEL TAX-SALE CERTIFICATE—NECESSITY OF TENDER.
   In the federal courts the payment or tender by the owner of land of the amount of taxes for which it was sold, together with the interest and penalties to which the holder of the tax certificate is entitled under the state laws, is an indispensable condition precedent to his right to maintain a bill in equity to cancel such certificate.
5. SAME—RIGHT OF PURCHASER TO TAX DEED—PROPERTY IN HANDS OF RECEIVER.
   The fact that lands are in the possession of a receiver of a federal court, as a part of the assets of an insolvent corporation, does not affect the right of a purchaser of such lands at tax sale to demand and receive a deed therefor, where entitled thereto under the state laws.

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

Henry K. Pomeroy and Cornelius B. Gold filed their bill in equity in the circuit court of the United States for the district of Colorado, alleging, in substance, that they were creditors of the Colorado Coal & Iron Development Company, a Colorado corporation; that the company was insolvent, and unable to pay its taxes and other debts; that it owned a large amount of property, which would be sacrificed unless the court would appoint a receiver of its property, to "hold, manage, and control the same subject to its orders and directions." The bill prayed, among other things, that all the creditors of the company might be enjoined from collecting, or taking any steps to collect, their debts against the company, or to enforce their liens upon its property,

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[1] For state laws as rules of decision, see notes to Griffin v. Wheel Co., 9 C. C. A. 548; Wilson v. Perrin, 11 C. C. A. 71; and Hill v. Hite, 29 C. C. A. 553.

and that, after adjusting the equities and priorities of the creditors in the company, all the property of the company be sold, "and its affairs settled in full." The company confessed the bill. John L. Jerome, the appellee, was appointed receiver in accordance with the prayer of the bill, and on the 1st day of October, 1898, filed the bill in this case, alleging, in substance, that on the 16th day of December, 1895, certain lands belonging to the company, situated in Pueblo county, Colo., were sold by the then treasurer of the county for the taxes levied and assessed thereon for the year 1894, and purchased by Abel Kidd, one of the appellants; that the treasurer executed and delivered to Kidd tax certificates of sale for the lands purchased by him; and that he is now the owner and holder of the same. It was further alleged that Kidd had not presented his claim to the receiver under the order of the court requiring all creditors of the company to present their claims against the company within a given time, and that he is intending to demand, and, if possible, obtain, from Ward Rice, one of the appellants and the present treasurer of the county, a tax deed conveying to Kidd the lands of the company purchased by him at the tax sale. It is alleged that the required notice of the sale of the lands for taxes was not given, and that the tax sales were irregular and void. The prayer of the bill was that it be decreed that Kidd was not entitled to assert any claim against the lands, by reason of his failure to present his claim to the court in compliance with its orders requiring the creditors of the company to present and file their claims, or if, in the judgment of the court, he had not for this reason forfeited all right to assert any claim against the lands, then that the court ascertain the amount lawfully due him, to the end that steps might be taken, under direction of the court, to raise the funds necessary to clear the title to the lands from any claim arising out of the tax sales, and that the appellant Kidd be enjoined from demanding, and the appellant Ward Rice from executing, a tax deed to Kidd for the lands. An injunction was issued in accordance with the prayer of the bill. The answer denied that the tax sale was invalid for any reason, and asserted that the sale was valid and regular, and that the appellant Kidd was entitled to a tax deed for the lands. The answer further alleged "that, at the time of the delivery by the treasurer of Pueblo county to respondent Abel Kidd of the several certificates of purchase for the lots and parcels of land described in said bill of complaint, said Abel Kidd paid to the said treasurer in cash the several amounts bid for said lots and parcels of land, which said sums of money amounted in the aggregate to five thousand seven hundred and two and $^{39}/_{100}$ dollars. And respondents further allege that, under the revenue laws and the statutes of the state of Colorado, the real property so sold to said respondent Kidd is subject to redemption, by the person having by law the right to redeem, only upon payment of the amount for which the same was sold, with interest thereon from the date of sale at the rate of thirty-six per cent. per annum for the first six months, thirty per cent. per annum for the subsequent six months, and for the remaining period at the rate of twenty-four per cent. per annum; that there is due to said respondent Kidd upon the certificates of purchase so held by him the sum of five thousand seven hundred and two and $^{39}/_{100}$ dollars, being the amount paid at said sale, together with the sum of four thousand six hundred and eighteen and $^{91}/_{100}$ dollars for interest to December 15, 1898, under the provisions of the statute in that behalf provided, no part of either of which said sums of money has ever been paid to said respondent Kidd, nor has the complainant or any other person or persons whomsoever at any time ever tendered to said respondent Kidd, or offered to pay to him, or to said respondent Ward Rice, as treasurer of Pueblo county, for the use of said Kidd, either the amount for which said parcels of property were sold, or any part thereof, or the interest on said sum due as aforesaid, or any part or portion thereof." Upon final hearing the court decreed that the receiver should within 15 days from the date of the decree pay to the defendant Kidd, or his solicitor, the sum of $5,691.69, with interest thereon at 8 per cent. since the 16th day of December, 1895, up to the date of such payment; and, upon such payment being made, the defendant Kidd was required to surrender his tax certificates to the receiver for cancellation, and was perpetually enjoined from demanding or receiving a tax deed for the lands embraced in the tax certificates, and the de-

fendant Ward Rice and his successors in office were perpetually enjoined from making or issuing a tax deed to Kidd for such lands. From this decree the defendants appealed to this court.

John S. Macbeth, for appellants.

Thomas H. Hood, for appellee.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

CALDWELL, Circuit Judge, after stating the case as above, delivered the opinion of the court.

It is conceded that the lands of the company purchased at the tax sale were subject to taxation; that the taxes thereon had been legally levied and assessed, and were due and unpaid at the date of the tax sale. In the view we take of the case, it is not necessary to determine whether there are any irregularities in the tax sale which would avoid it. The circuit court did not, as is erroneously assumed by counsel in their briefs, decree that the tax sale was irregular or void. The decree is silent upon that subject.

The Colorado Coal & Iron Development Company was a private corporation, formed for pecuniary profit, and owing no duty to the public. In the matter of taxation, such a corporation stands on the footing of a natural person. Its insolvency does not exempt its property from taxation or from the operation of the revenue laws of the state, or in any manner interfere with the due execution of those laws, or with the rights of persons acquired under them. Nor does the appointment of a receiver for such a corporation operate to annul or extinguish the lien acquired by a purchaser of its lands at a tax sale. The holder of the tax certificates was not, therefore, required to present his certificate to the court, under its order requiring the creditors of the company to present their claims. The insolvency of the company, and the appointment of a receiver of its property, in no manner affected the validity and force of valid liens on its property, whether such liens were acquired by purchase of its lands at a tax sale or otherwise. The legal and equitable right acquired by the purchaser of the company's lands at a tax sale, and which might have been successfully asserted against the company, may be asserted against the receiver of its property.

It is the settled construction of the statutes of Colorado that before lands sold at a tax sale for taxes legally assessed and due can be recovered from the holder of the tax title, or his lien thereon for the taxes and penalties canceled, the owner must pay to the holder of the tax title the amount for which the lands sold at the tax sale, together with the interest and penalties provided by the laws of the state. Morris v. Bank, 17 Colo. 231, 29 Pac. 802; Mitchell v. Arkell, 3 Colo. App. 253, 32 Pac. 720; Knowles v. Martin, 20 Colo. 392, 393, 38 Pac. 467; Crisman v. Johnson, 23 Colo. 264, 47 Pac. 296; Charlton v. Kelly, 24 Colo. 273, 50 Pac. 1042; Rustin v. Tunnel Co., 23 Colo. 350, 47 Pac. 300. In the case of Charlton v. Kelly, supra, the supreme court of Colorado said:

"When the recovery of possession is by an action, or where, as in the case at bar, the object of the action is to remove a cloud or to quiet title, it is only fair, where it appears the taxes were legally assessed and due, for which the

sale was made, that the owner should, before receiving a decree in his favor, pay, not only taxes paid by the defendant after the sale, together with interest, but also the amount for which the same was sold at the tax sale, together with the interest and penalties provided by law."

In the case from which we have quoted, the court points out that the amount of the interest and penalties which the holder of a tax title is entitled to receive is definitely fixed by sections 3904 and 3905 of Mill's Annotated Statutes of Colorado. The taxes on the company's lands, for which they were sold, being "legally assessed and due," this case falls exactly within the rule laid down in Charlton v. Kelly, supra. The circuit court disregarded this rule, and only required its receiver to pay the sum paid for the lands at the tax sale, and 8 per cent. interest, whereas it should have required the payment of the interest and penalties specified in the sections of the statute hereinbefore referred to. The decisions of the supreme court of a state, construing and expounding its revenue laws, are binding upon the federal courts in that state.

Assuming, but not deciding, that the tax sale was irregular, that fact—the taxes on the land being legally assessed and due—does not exempt the owner from the obligation to pay the interest and penalties prescribed by the statute. The fact is recognized that the titles acquired at tax sales are frequently—we might say generally—invalid for some irregularity in the sale. This is so well known that there would be few bidders for lands sold at tax sales if the purchasers had to rely solely on maintaining the validity of the sale, and lost their investment when that proved to be invalid. Such a rule would encourage delinquency, and discourage the sale of delinquent lands, and practically deprive the state of her taxes on lands whose owners chose not to pay them. It is therefore the policy of the state to encourage the purchase of delinquent lands at tax sales by giving the purchaser who pays the taxes of the delinquent owner a lien on the land for the taxes paid, with liberal interest and penalties, whether the sale be valid or invalid. The delinquent owner who fails to discharge his obligation to the state by paying the taxes on his lands is not to be rewarded for his delinquency, and his obligation to pay the taxes and the interest and penalties thereon is not affected by any irregularity in the sale. This policy is not confined to the state of Colorado. It prevails in other states. In Coats v. Hill, 41 Ark. 149, the supreme court of Arkansas says:

"By our law, taxes are glebæ ascripti,—serfs of the soil,—a charge which follows the land in whosesoever hands it may go. And if the tax sale may be invalid to devest the title of the former owner, by reason of irregularities and failure of the officers properly to discharge their duties, yet the purchaser is subrogated to the lien of the state."

And it is held in a long line of cases in that state that this subrogation extends to and includes the interest and penalties prescribed by law, and that it extends, also, to taxes subsequently paid on the land by the holder of the tax title.

The circuit court erred in entertaining the bill at all. The plaintiff did not pay or offer to pay the taxes, interest, and penalties to which the holder of the tax certificates was clearly entitled on the face of

the bill. In the federal courts such payment or tender is an indispensable condition to the right of the owner to maintain a bill in equity to cancel the tax-sale certificates, or remove the cloud cast by them upon his title. Whitehead v. Trust Co. (C. C. A.; decided at the present term) 98 Fed. 10, and cases there cited. The case last cited disposes, also, of the contention that the holder of the tax certificates should not be permitted to demand and receive the deed for the lands embraced therein, because they were, in contemplation of law, in the custody of the receiver. Without repeating it, we affirm what is there said on this point. The decree of the circuit court is reversed, and the cause is remanded, with instructions to dismiss the bill for want of equity.

MURPHY et al. v. ARKANSAS & L. LAND & IMPROVEMENT CO., Limited, et al.

(Circuit Court, W. D. Arkansas, Texarkana Division. November 24, 1899.)

1. CORPORATIONS—POWERS—ACCOMMODATION PAPER.
   A private corporation, by the consent of all of its stockholders and directors, may execute accommodation paper by which it will be bound.
2. SAME—NEGOTIABILITY.
   A promissory note, executed by a private corporation, made payable at a time certain, to the order of "B., or his assignee," is a negotiable promissory note, and remains a negotiable promissory note into the hands of whomsoever it may pass, notwithstanding B., the payee, indorses it to a third person without using the words, in the indorsement, "to his order" or "to bearer."
3. ACCOMMODATION PAPER—TRANSFER.
   A transferee of negotiable accommodation paper, who acquires the same for a reasonable consideration, before its maturity, in the regular course of business, holds the same free from a set-off originating out of collateral matters, and which set-off would be good against his transferror and the original payee, even though the transferee acquired the note with notice of the existence of such set-off, for the reason that a set-off is not an equity which applies to negotiable paper; and the general rule is qualified and restricted to those equities arising out of the bill or note transaction itself.
4. SAME.
   For further particulars, see the decision.

(Syllabus by the Court.)

Cantrell & Loughborough, for plaintiffs.
John M. Moore, for defendants.

ROGERS, District Judge. This is a bill brought to foreclose a deed of trust executed to W. C. Rodgers, as trustee, by the Arkansas & Louisiana Land & Improvement Company, Limited, afterwards, for convenience, called the "Land Company," to secure a promissory note executed by said Land Company to said "John D. Beardsley or his assignee." The facts will sufficiently appear from the opinion.

Paul F. Beardsley, who is a brother of the defendant John D. Beardsley, owned a one-third interest in a certain judgment in favor of the Arkansas & Louisiana Railroad Company against John D. Beardsley for about $30,000. In order to rid himself of Paul F.

Beardsley's part of this judgment, John D. entered into a written agreement with Paul F. to pay the latter $6,000 cash, and execute to his order a note for $4,000, secured by a deed of trust on certain property at Nashville, Ark. The land at the time stood in the name of the Arkansas & Louisiana Land & Improvement Company, Limited, a corporation organized under the laws of the state of Louisiana; and in consideration of this Paul F. agreed to satisfy in full his one-third interest in said judgment. In pursuance to this agreement, the Land Company executed its note in the following form:

"$4,000.00. Homer, La., Nov. 22nd, 1895.

"One year from December 5th, 1895, for value received, the Arkansas & Louisiana Land & Improvement Company, Limited, promises to pay to J. D. Beardsley or his assignee four thousand dollars ($4,000.00), with interest from Nov. 5th, 1895, at the rate of 8% per annum, payable semiannually. This note is payable, principal and interest, at the office of John M. Moore, Little Rock, Arkansas, and is secured by deed of trust of even date herewith upon lots, blocks, and lands in and about the town of Nashville, Ark.

"[Signed] Jno. A. Richardson,

"Pres't Arkansas and Louisiana Land & Improvement Company, Limited."

This note was secured by deed of trust on the land at Nashville, Ark., executed by the Land Company to Rodgers, as trustee, as agreed upon. Exchange for $6,000, also the note and deed of trust, accompanied by a blank power of attorney to be executed by said Paul F. to said Rogers, authorizing the latter to cancel his one-third interest in the $30,000 judgment against John D., was sent by the attorney of John D. to a bank in New York, which was directed to deliver the exchange for $6,000 and the note and deed of trust to Paul F. upon the latter executing the power of attorney authorizing said Rogers to cancel his interest in the $30,000 judgment; all of which was done about the 1st of December, 1895. On the 10th of December, 1895, Paul F. caused the deed of trust to be recorded at Nashville, Ark., and on the 17th of the same month Paul F., by a separate writing, assigned the note and deed of trust to his attorney, Edward H. Murphy. The deed of trust is in the usual form, and, among other things, contains the following recital:

"On motion it was resolved that this company will give J. D. Beardsley its bond of obligation for four thousand dollars, secured by a deed of trust on its property in Howard county, state of Arkansas, said bond or obligation to bear interest at 8% per annum from November 5, 1895, and to run one year from December 5, 1895: provided, however, that before delivery of such bond and deed of trust said J. D. Beardsley shall deposit, or cause to be deposited, with the president of this company, the stock of this company heretofore issued to him, to the amount of twenty thousand dollars. And whereas, the said J. D. Beardsley has deposited with the president of this company the aforesaid stock of the par value of twenty thousand dollars, and has received the note of this company of even date herewith for the sum of four thousand dollars, falling due one year from the 5th day of December, 1895, and bearing interest, payable semiannually, from the 5th day of November, 1895, and to secure the same this deed is made."

At the trial it was agreed that the Arkansas & Louisiana Land & Improvement Company, Limited, executed the note and mortgage with the full assent of all its directors and stockholders, and that it owned then and now ample property to pay its debts, including the note and deed of trust it had executed in pursuance of the resolution

embraced in the deed of trust, which resolution was passed at a regular directors' meeting, all the directors and stockholders being present. It is shown that the only stockholders were the directors, and that all the stock belonged to John D., except some nominal shares held by the other two directors,—one being his son, and the other his attorney,—and that both these directors held the stock merely in order to comply with the law which required them to hold stock in order to be officers and directors of the company. In short, that in truth and in fact John D. owned all the stock and the company owed practically nothing then or now. It is further agreed that the directors of said Land Company knew at the time that the note was executed for what purpose John D. wanted the note, and that he claimed a set-off then in litigation against Paul F., which, if sustained by the courts, he intended to use to satisfy the $4,000 note. It is further agreed that the said set-off claimed by John D. against Paul F. was a judgment in the United States circuit court for the Eastern district of Arkansas, the enforcement of which the latter had enjoined in August, 1891, and which was finally decided in favor of John D. at the October term, 1897, of the court of appeals of the Eighth circuit. 29 C. C. A. 538, 86 Fed. 16.

It is a question as to whether the note sued on is accommodation paper. The Land Company, to all intent and purpose, belonged to John D. Beardsley. It executed this note; all of its stockholders, in the opinion of the court, understanding for what purpose it was to be used. It was made payable to John D. Beardsley, or his assignee, and by him indorsed to Paul F. Beardsley as part consideration of one-third of the judgment Paul F. held against John D. It was all one transaction. John D. secured the satisfaction of the one-third interest in the judgment which Paul F. held, and, in consideration of it, gave a note made by a corporation, in which he, in fact, owned all the stock, which note was made payable to himself, and indorsed by him to Paul F. To all intents and purposes, therefore, it was John D. who gave the note and $6,000 in money to Paul F. as consideration for the satisfaction of the latter's interest in the judgment. I incline strongly to the opinion that the transaction should be viewed from that aspect, and, if so, the note was not accommodation paper, However, I have not been able to find any authority directly on that point, and hence I do not rest the case at all on that aspect of it. For the purposes of the decision it will be assumed that the note was accommodation paper, and that Paul F. and Edward Murphy knew it, for I think the note, taken in connection with the resolution of the Land Company recited in the face of the deed of trust, would carry conviction to any intelligent business man or attorney, who did not shut his eyes to the facts, that it was accommodation paper, provided, of course, the Land Company be treated as a separate and distinct entity from John D. This note and deed of trust were in the hands of both Paul F. and Edward Murphy prior to their transfer to Murphy. Moreover, Murphy, prior to that time, had a contingent interest in the judgment in part owned by Paul F., as shown by his own evidence and the instrument of writing fixing his compensation for services for the collection of the same. I think, too, it is fair to as-

sume that Murphy knew that John D. claimed to have an offset against this note, and that it became manifest to him before he purchased the note that John D. was struggling to make a settlement with Paul F. for his interest in the $30,000 judgment in such a way as to get the benefit of that set-off, and that he knew the set-off claimed was a judgment in the circuit court of the United States for the Eastern district of Arkansas, in chancery, for $7,756.29, which the said Paul F. had restrained the said John D. from collecting. Around this question of set-off was carried on the maneuvering between the two brothers, beginning as early as the summer of 1895,—John D. striving to get the benefit of his set-off in any settlement made between them, and Paul F. striving to defeat him in that effort; Mr. Murphy having become the attorney of Paul F. in 1893 for the collection of Paul F.'s interest in the $30,000 judgment; that relation continuing until after the transfer of the note and deed of trust by Paul F. to Murphy in December, 1895. It can scarcely be conceived that Murphy did not understand the situation, and know what differences were in dispute between these brothers. This conclusion is confirmed by this significant circumstance: Paul F., on the 2d of September, 1895, wrote to John D. Beardsley a letter, in which he says:

"Yours of the 9th and 14th ultimo both duly received and noted. I return herewith Mr. Moore's letter as requested. I would have returned it sooner, but Mr. Murphy, my attorney, has been away taking his vacation; hence the delay."

This letter shows that Mr. Moore's letter had been retained by Paul F. for the purpose of showing it to Mr. Murphy, who was off on his vacation. It is shown by the proof that this letter of Mr. Moore's was a letter written to John D. Beardsley, and which the latter had forwarded to Paul F., who had detained it longer than he otherwise would in order to show it to Mr. Murphy. A copy of this letter of Mr. Moore's is in evidence. It is dated August 12, 1895, and addressed to John D. Beardsley. In this letter Mr. Moore strongly advises his client, John D., not to make any settlement with Paul F. for his one-third interest in the $30,000 judgment which would deprive him of the right to avail himself of several grounds of set-off which he had against Paul F., and adds:

"In my negotiations with Mr. Beardsley [meaning Paul F.] I advised him distinctly that I would not entertain any proposition, or advise you to entertain any proposition, that would in any manner impair your legal or equitable rights and remedies to use any counterclaim or set-off you might have against him or the railway company. This was distinctly understood between us."

After this letter of Mr. Moore's was put in evidence, the deposition of both Paul F. and Murphy were taken. Paul F. was unable to state what letter of Mr. Moore's was referred to by him in his letter to John D., above referred to; and Mr. Murphy makes no statement in regard to the Moore letter at all, and does not deny that he saw it. I conclude, therefore, that he did see it, and, if he did, he knew that John D. had been advised before the note and deed of trust were assigned to him—indeed, before they were executed—that he should not settle the interest of Paul F. in the judgment in such a way as to deprive himself of any equities or set-offs he might have against Paul

F. Mr. Murphy then became the assignee of the note with the knowledge that it was accommodation paper, and that John D. claimed a set-off against it.

I have also reached the conclusion, after a careful investigation of the authorities, that the note is, in form, negotiable. Daniel, Neg. Inst. §§ 99, 1496; Tied. Com. Paper, par. 21; Wilson Co. v. National Bank, 103 U. S. 773, 26 L. Ed. 488; Porter v. City of Janesville (C. C.) 3 Fed. 619; Story, Prom. Notes, § 44. The indorsement of the note by John D. to Paul F. is in these words:

"Pay to Paul F. Beardsley, protest and notice of nonpayment being hereby waived. J. D. Beardsley, by J. M. Moore, Agent and Attorney."

It is insisted that this indorsement was restrictive, and did not authorize Paul F. to indorse the note to a third person. In the opinion of the court the contention cannot be sustained. A note negotiable in form, as between maker and payee, is not deprived of its negotiable character by a restrictive indorsement, and hence Paul F. took it just as if it had been indorsed to him or his order. Daniel, Neg. Inst. § 663.

It is urged that the Land Company had no authority to execute accommodation paper, and hence the execution of the note was ultra vires. I incline to think that the charter of the Land Company is broad enough to authorize it to execute accommodation paper, but it makes no difference as to that. The Land Company is a private corporation. It owed no debts. The paper was issued by the consent of all the stockholders, and it has been accepted, and the consideration parted with by Paul F. for it. Can it now be permitted to take shelter under the plea of ultra vires? I think not. In 1 Cook, Corp. § 3, the author says:

"A private corporation may become an accommodation indorser, distribute its assets, issue its notes, stock, or bonds below par, or, for no consideration whatever, give away its assets, or may mortgage its property for the personal benefit of a part or all of its stockholders or officers, provided, always, that all the stockholders assent, and provided that corporate creditors are not injured, and provided that no statute forbids such acts. The doctrine of ultra vires is no longer held to forbid such acts by a private corporation under such circumstances. * * * The theory of a corporation is that it has no powers except those expressly given or necessarily implied. But this theory is no longer strictly applied to private corporations. A private corporation may exercise many extraordinary powers, provided all of its stockholders assent, and none of its creditors are injured. There is no one to complain except the state, and, the business being entirely private, the state does not interfere. Thus, fifty years ago the courts would have summarily declared it illegal for a business corporation to become an accommodation indorser of commercial paper, but to-day there is no rule of public policy which prohibits a private corporation having a capital stock from becoming the accommodation indorser of commercial paper, providing such indorsement is made with the knowledge and assent of all the directors and stockholders, and provided corporate creditors are paid."

In the subsequent discussion of the author it is shown that whatever is done by a private corporation with the assent of all of its stockholders, and where no creditor is injured, although it may be ultra vires, is lawful, and will be enforced by the courts. The principle does not apply to railroad corporations or quasi public corporations.

It is insisted that Murphy, being aware of the vice in the origin of the note, must show that he bought in good faith, for a valuable consideration, and without notice. In short, that if Murphy knew, when the note was assigned to him, that it was accommodation paper, and that John D. Beardsley had a set-off against it, he could stand upon no better footing than his assignor, Paul F. In short, that the holder must acquire the instrument without notice of fraud, defect of title, illegality of consideration, or other fact which impeaches its validity in its transferror's hand. It is true that knowledge of fraud or illegality impeaches the bona fides of the holder, or at least destroys the superiority of his title, and leaves him in the shoes of his transferror. But is this principle applicable where there is no vice in the origin of the paper except that it is accommodation paper, and where the defense against the holder is a set-off against his transferror, the existence of which he knew at the time he purchased the paper? Daniel, Neg. Inst. § 790, says:

"It is to be observed, however, that knowledge of the mere want of consideration as between the original parties alone will not prevent the purchaser from becoming bona fide holder and occupying a better position than his transferror. Accommodation paper is daily placed in market for discount or sale, and an indorsee or purchaser who knows that a bill or note still current was drawn, made, accepted or indorsed without consideration is as much entitled to recover as if he had been ignorant of the fact, and even where he acquires it overdue."

In 1 Am. & Eng. Enc. Law (2d Ed.) p. 360, the general doctrine is stated as follows:

"It follows, therefore, that one who has, in good faith, taken an accommodation bill or note, before maturity, for value, and in the regular course of business, may enforce it against prior accommodation parties, whether acceptors, drawers, makers, or indorsers, although he knew when he received the instrument that it was accommodation paper."

At section 1435 of Daniel on Negotiable Instruments it is said:

"The doctrine of set-off has but a limited application to negotiable paper, it being a distinguishing characteristic of negotiable securities that when they have passed into the hands of third parties for value no set-off admissible in pleadings between original parties is available. The rule that a party taking an overdue bill or note takes it subject to the equities to which the transferror is subject does not extend so far as to admit set-offs which might be available against the transferror. A set-off is not an equity, and the general rule stated is qualified and restricted to those equities arising out of the bill or note transaction itself, and the transferee is not subject to a set-off which would be good against the transferror arising out of collateral matters."

The author says this was the English rule, and, while there is some conflict of decision in the American states, "it seems to be the uniform ruling everywhere that, although the paper be transferred after maturity, no set-offs between antecedent parties which arose after the transfer will be available against the indorsee."

It is also contended that the note and deed of trust sued on is not the property of the plaintiff Murphy, but is the property of Paul F. Beardsley, and that it was not assigned to Murphy for a valuable consideration. This is a question of fact to be determined by the evidence. Both Mr. Murphy and John D. Beardsley have testified emphatically that the note and deed of trust were assigned to Murphy in writing on the 17th of September, 1895. The instrument of writ-

ing was produced and read in evidence. They both testify that the consideration paid for the note by Murphy was $500 in cash and his services as an attorney for Paul F. Beardsley, the value of which is estimated by Mr. Murphy at $3,000. Mr. Murphy has also produced and read in evidence a written agreement by and between him and Paul F. Beardsley, assigning the note and deed of trust to him. The note also appears to be indorsed by Paul F. Beardsley, by E. H. Murphy, agent and attorney, and also indorsed by Paul F. Beardsley himself. When these indorsements were made does not appear, but there is a recital of indorsement in the instrument assigning it. That they were not made at the time the written instrument was executed is, I think, established by the proof, because at that time the note was in the hands of John D. Beardsley, in Louisiana, for the purpose of having his indorsement of it corrected. John D. Beardsley has also produced and read in evidence a contract between him and Paul F. whereby it appears that as early as 1893 he had entered into a written agreement with Paul F. to collect the $30,000 judgment, and stipulating the consideration he was to be paid therefor. By the terms of that agreement the professional services of Mr. Murphy were procured for the collection of Paul F.'s one-third interest in the $30,000 judgment, either by further prosecution of the suit, or in any other manner; and also for the collection of a certain other sum of money which was allowed Jones & Martin, as attorneys, against the Arkansas & Louisiana Railroad Company, which had become the property of the said Paul F.; and for the performance of these services, thereafter to be rendered, the said Murphy was to obtain 10 per cent. upon the actual sum realized and collected on the judgment, which was to have the approval of the said Paul F., provided there was no litigation; and, in the event of further litigation, the said Murphy was to have 20 per cent. Mr. Murphy also testifies that Paul F. had verbally agreed with him to assign and transfer to him a sufficient amount of his interest in the $30,000 judgment to pay his fee. This settlement of John D. and Paul F., when consummated, had the effect of wiping out all the security Murphy had for his fee, and it seems but natural that in making it Murphy would look after and provide for its payment. The transaction, therefore, was natural, and the amount paid reasonable, under the circumstances. It must be remembered the note was not due for a year. It had to be collected. The services of Murphy had already continued two years prior to the transfer, and litigation in collecting the note might reasonably have been expected under the circumstances, coupled with the possibility of entire loss. I think, therefore, the consideration was reasonable.

Opposed to these facts are circumstances and the statements contained in Murphy's letters to Mr. Moore and John D. Beardsley. They are circumstances creating a strong suspicion that the transfer was merely colorable. They are, however, not irreconcilable with the bona fides of the assignment. In seeking to have John D. correct the indorsement on the note, Murphy wrote a letter, after the assignment was made, the effect of which was to make the impression on John D. Beardsley that Paul F. still owned the note. It is quite

probable he thought that John D. would be more apt to correct the note in accordance with the contract between him and Paul F. than he would if he knew the note was assigned to a stranger. Moreover, it is quite probable that Murphy was in doubt as to the negotiability of the note, and thought it probable that the suit would have to be brought in the name of Paul F. At all events, in taking the assignment, he provided for that contingency; or he may have been in doubt as to what remedy he would invoke,—whether to hold the note, and sue upon it and the deed of trust, or to file a bill to vacate the settlement, or for correction of the note and for specific performance. At all events, the letter is not irreconcilable with his sworn evidence. Still later Paul F. wrote a letter to John D., leaving the impression on the latter that he still held the note. But no admissions of his made after the transfer of the note could affect Murphy's title, or be made evidence against his title. It was competent to impeach the credibility of the evidence of Paul F., and tended to do so. But the title of Murphy did not depend on the evidence of Paul F., but rather on that of Murphy and the corroborating circumstances detailed. I think, therefore, the weight of the evidence, fairly considered, is in favor of the validity of the transfer. The result is, the deed of trust must be foreclosed, and it is so ordered.

Counsel on both sides have urged other questions upon the attention of the court, but, in the opinion of the court, their determination is not necessary to a correct decision of the case. Decree for the plaintiff Edward H. Murphy.

KNOWLES LOOM WORKS v. RYLE et al.

(Circuit Court of Appeals, Third Circuit. November 6, 1899.)

No. 11.

MORTGAGES—AFTER-ACQUIRED PROPERTY.

A mortgage which includes "all the machinery now or hereafter to be placed" on the mortgaged premises, covers machinery subsequently acquired by the mortgagor under a contract held to be one of sale, and not of bailment, and placed on the premises, as against a lease subsequently executed to the seller by the mortgagor, for the purpose of reserving title to such machinery until payment of the price.

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

J. Martin Rommel and John G. Johnson, for plaintiff in error.

Robert B. Honeyman, for defendants in error.

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

ACHESON, Circuit Judge. When this case was here upon a former writ of error this court said:

"Regarding the two instruments of March 16, 1895, and July 12, 1895, as parts of one and the same transaction,—which is the most favorable view that can be taken for the Knowles Loom Works,—the conclusion is irresistible that the transaction was not a bailment, but a sale of the machinery, with a lease se-

curity for the price." Ryle v. Loom Works, 59 U. S. App. 653, 669, 31 C. C. A. 340, 343, 87 Fed. 976, 980.

At the first trial of the case the plaintiff (the Knowles Loom Works) put in evidence the written instrument or order of March 16th. At the second trial, however, the plaintiff did not offer that paper, but examined Charles H. Hutchins, the president of the plaintiff company, and John D. Cutter, the president of the Cutter Silk-Manufacturing Company, who conducted the antecedent negotiations with respect to the machinery, and a third person, who was present thereat, to show what these negotiations were, and what was then verbally agreed on; the plaintiff claiming that this testimony established an oral contract not to sell the machinery, but to lease it upon the terms afterwards embodied in the instrument of July 12th, and that the machinery was delivered, not under the written order of March 16th, but under the alleged prior oral contract. But Mr. Hutchins himself testified that at the close of the negotiations, after "the arrangement was made on that plan, he [Hutchins] asked Mr. Cutter if he would write a memorandum of this plan, and Mr. Cutter wrote a letter under date of March 16th, which embodied the essential features that I had in my mind." Now, this letter was the instrument or order of March 16th, which we here reproduce:

"New York, March 16th, 1895.

"Knowles Loom Works—Gentlemen: Please build for us one hundred silk looms 35 in. 20 harness 4x4 box, with multiplier and angular drive ½ each right and left with jacquards 600 hooks rise and fall, three levers, price two hundred and eighty dollars each. Terms of payment, notes bearing interest at six per cent. per annum, and maturing twelve months from the average date of delivery, but to be written 'six months' for convenience, and renewed as above. The Knowles Loom Works to own the machinery until paid for as per their usual form, and to hold also in first mortgage bonds of the Cutter Silk-Mfg. Co. fifteen thousand dollars as collateral security toward the payment of said notes. Cutter Silk-Mfg. Co., by John D. Cutter, Prest."

Under the evidence it is indisputable that immediately after this order was written it was delivered by the president of the Cutter Silk-Manufacturing Company, acting for his company, to the president of the Knowles Loom Works, and was accepted by the latter on behalf of his company. There is not a particle of evidence tending to show that anything was omitted from this written memorandum of the agreement, or order then delivered and accepted, which the parties intended it should contain. To the contrary of this, the president of the plaintiff company has testified that it "embodied the essential features that I had in my mind." In disposing of the case upon the reserved point, the trial judge, in his opinion, said:

"I have read the notes of both trials, and see no essential difference between what appeared then and what appears now. There was a larger volume of testimony upon the second trial, but there is nothing to take the case out of the decision of the court of appeals. The letter of March 16th summed up the preliminary negotiations between the parties, and constituted, as the court of appeals has said, 'the original contract relating to this machinery.'"

We have attentively read and carefully considered all the evidence, and we are entirely satisfied with the conclusion of the trial judge. It is, however, here contended by the counsel for the plaintiff in

error that what the contract really was, upon the basis of which the machinery was delivered, was one of fact for the determination of the jury alone. But this argument is not open to the plaintiff in error. This record shows that the parties agreed that the only question the jury should consider was that concerning the value of the machinery, and that the questions of ownership and title should be determined by the court under the reserved point. Moreover, the only assignments of error are: First, that the court erred in entering judgment for the defendant upon the point of law reserved, notwithstanding the verdict; and, second, that the court erred in that it did not enter judgment for the plaintiff upon the verdict. That any question of fact was improperly withdrawn from the jury is not assigned for error. In view of the uncontradicted evidence, the proposition advanced by the plaintiff in error that the looms did not become fixtures, and hence that no title passed to the mortgage trustee, cannot be sustained. The trust mortgage of May 18, 1895, in express terms included "all the machinery now or hereafter to be placed" on the mortgaged premises. Now, the transaction of March 16th, as we have seen, being a sale, undoubtedly the trust mortgage attached to and bound the looms prior to the execution of the lease of July 12, 1895. We find no error in this record, and accordingly the judgment of the circuit court is affirmed.

GEER v. SCHOOL DIST. NO. 11, OURAY COUNTY, COLO.

(Circuit Court of Appeals, Eighth Circuit. October 30, 1899.)

No. 1,163.

MUNICIPAL BONDS—VALIDITY—EFFECT OF RECITALS.

Where the statute under which municipal bonds are issued does not authorize the board or officers issuing them to determine whether the proposed issue would, in fact, exceed the limit prescribed by law, and there is no recital in the bonds that they do not exceed such limit, and each bond on its face, when taken in connection with the assessment roll, shows the limit to have been exceeded, a general recital that all the requirements of the law have been complied with will not estop the municipality issuing them from showing that the bonds issued exceed the legal limit; and, when that is shown, they are void in the hands of every one. Whether the limit is imposed by the state constitution or by general statute is immaterial.

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

A. E. Pattison, for plaintiff in error.

J. P. Cassedy, for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

CALDWELL, Circuit Judge. This action was brought by Robert C. Geer, the plaintiff in error, against school district No. 11, in the county of Ouray and state of Colorado, the defendant in error, on 160 interest coupons cut from negotiable bonds issued

by the defendant in error. Each of the bonds from which the coupons were cut contains the following recitals:

"This bond is one of a series of twenty bonds of like tenor and date herewith, numbered consecutively from No. 1 to No. 20 (both numbers inclusive), amounting in the aggregate to ten thousand dollars, which the board of directors of said school district number eleven has issued for the purpose of erecting and furnishing school buildings for the purpose of education in said school district number eleven, under and by virtue of chapter 97 of the General Statutes of the state of Colorado, entitled 'Schools,' the same being an act of the general assembly of said state of Colorado entitled 'An act to establish and maintain a system of free schools,' approved March 20, A. D. 1877, as amended by subsequent acts of said general assembly up to and including the year 1883, and under and by virtue of another act of said general assembly of said state of Colorado, entitled 'An act to amend chapter 97 of the General Statutes, entitled "Schools,"' approved April 4, A. D. 1887. * * * And it is hereby certified that all of the requirements of said laws have been fully complied with by the proper officers in issuing this bond, and all of said series of twenty bonds."

On the back of each bond the several provisions of the law of the state of Colorado referred to in the body of the bonds are printed. Among other provisions is the following: "In no case shall the aggregate amount of the bonded indebtedness of any school district exceed 3½ per cent. of the assessed valuation of such district." The answer, among other defenses, set up that the bonds were absolutely void, for the reason that at the time of the issue of the bonds the total assessed valuation of all the taxable property in the school district did not exceed the sum of $72,000, and that in the year prior thereto—in 1891—it did not exceed $77,000, and that at no time since the organization of the district did it exceed $80,000, and that at no time could said district have lawfully issued more than $2,700 of bonds, which is 3½ per cent. of the assessed valuation of the taxable property of the district at any time from its organization up to the issue of the bonds; and that for this reason, this issue of bonds, as appears from the recitals in the bonds themselves, being for $10,000, they are absolutely void. To this answer the plaintiff interposed a demurrer, which was overruled, and, the plaintiff electing to stand on his demurrer, judgment was rendered for the defendant, whereupon the plaintiff sued out this writ of error.

The contention of the plaintiff in error is that the recital in the bonds that "all of the requirements of said laws have been fully complied with by the proper officers in issuing these bonds, and all of said series of twenty bonds," estops the defendant from setting up the defense that there was an overissue of nearly four times the amount these laws authorized this district to issue. As each of the bonds recites on its face that it is one of a series of 20 bonds of $500 each, every purchaser was charged with full notice that the district had issued $10,000 of these bonds, and, as the demurrer admits that this was nearly four times as much as the defendant had, under the laws, authority to issue, the only question to be determined is whether the recital in the bonds that "all the requirements of said laws have been fully complied with," relieved the purchaser from examining the record of the assessment for the

purpose of ascertaining whether the $10,000 indebtedness thus incurred did not exceed the 3½ per cent. of the assessed valuation of all the taxable property in the district at the time the bonds were issued. That it is the duty of the purchaser upon this state of facts to make such examination is settled by repeated decisions of the supreme court of the United States. Dixon Co. v. Field, 111 U. S. 83, 4 Sup. Ct. 315, 28 L. Ed. 360; Lake Co. v. Graham, 130 U. S. 674, 9 Sup. Ct. 654, 32 L. Ed. 1065; Sutliff v. Commissioners, 147 U. S. 230, 13 Sup. Ct. 318, 37 L. Ed. 145. The latest exposition of the law applicable to this class of cases is contained in the opinion of the supreme court in the case of Board of Com'rs of Gunnison Co. v. E. H. Rollins & Sons, 173 U. S. 255, 19 Sup. Ct. 390. The court there enters into an exhaustive review of all its former decisions on this subject. From the classification of the cases and reasoning of the court in that case these two rules may be deduced: (1) That where the statute under which the bonds are issued authorizes the board or officer empowered to issue them to determine whether the proposed issue of bonds would in fact exceed the limit prescribed by the statute, the recital in the bond to the effect that such determination has been made, and that the statutory limit has not been exceeded, and the bonds on their face do not show such recital to be false, then in a suit brought by a bona fide holder of the bonds the county or municipality issuing the bonds is estopped from saying such recitals are not true; and (2) that, where the statute under which the bonds are issued does not authorize the board or officer empowered to issue them to determine whether the proposed issue would in fact exceed the limit prescribed by law, and there is no recital in the bonds that they do not exceed such limit, and each bond on its face, when taken in connection with the assessment roll, shows the limit has been exceeded, then the general recital that all the requirements of the law have been complied with in issuing the bonds will not estop the county or municipality issuing them from showing that the bonds exceed in amount the statutory limit, and, when that fact is shown, they are void in the hands of every one. The leading cases supporting the first rule are Chaffee Co. v. Potter, 142 U. S. 355, 12 Sup. Ct. 216, 35 L. Ed. 1040, and Board of Com'rs of Gunnison Co. v. E. H. Rollins & Sons, 173 U. S. 255, 19 Sup. Ct. 390, and the leading cases establishing the second rule are Dixon Co. v. Field, supra, Lake Co. v. Graham, supra, and Sutliff v. Commissioners, supra. The case at bar falls under the second rule. Each bond shows on its face the whole amount of bonds issued, and the recorded valuation of the property of the district subject to taxation showed that amount to be largely in excess of the statutory limit, and the board of directors of the school district were not authorized by law to determine whether the proposed issue of bonds would in fact exceed the statutory limit, and the bonds contain no recital or certificate on that subject. Upon this state of facts the bonds are void in the hands of every one. Cases will probably arise not covered by either of these rules, or any of the existing decisions of the supreme court. It will be time enough to decide such cases when

they arise. It is very clear that this case, upon its facts, is ruled by the cases we have cited, the doctrine of which, as shown by the opinion of the supreme court in Board of Com'rs of Gunnison Co. v. E. H. Rollins & Sons, supra, has not been shaken by any of the later decisions of that court. We are therefore spared any discussion of the numerous cases cited by the learned counsel for the plaintiff in error, which are supposed to establish a contrary doctrine. The contention that the case at bar can be distinguished from Dixon Co. v. Field, and the other cases we have cited, by reason of the fact that in those cases the limitation was created by the constitution, while in this case it is created by a statute, is not tenable. The statutory limitation was as obligatory and binding upon the school district as if it had been contained in the constitution. The statute was a public statute, of which all persons were bound to take notice. The judgment of the circuit court is affirmed.

STRAHORN-HUTTON-EVANS COMMISSION CO. v. QUIGG et al.

(Circuit Court of Appeals, Eighth Circuit. October 23, 1899.)

No. 1,243.

1. CHATTEL MORTGAGES—VALIDITY OF UNRECORDED MORTGAGE—WHAT CONSTITUTES DELIVERY OF POSSESSION.
   A written statement, delivered by a mortgagor of personal property by an unrecorded mortgage to the mortgagee, that possession of the property is thereby delivered to the mortgagee, accompanied by an order for its delivery on a bailee having it in his possession, does not constitute a delivery which will take the place of the record, and render the mortgage valid as against an attachment against the mortgagor which is delivered to the marshal before the mortgagee has taken actual possession of the property, or delivered the order to the bailee, under the laws of the Indian Territory, which provide that chattel mortgages shall be invalid unless recorded, and which make a writ of attachment a lien on the property of the defendant subject to levy thereunder from the time of its delivery to the officer.

2. SAME—POSSESSION.
   The possession of a mortgagee, which will validate an unrecorded mortgage, must be actual, open, and public, so that creditors who inquire with reasonable diligence of those in actual possession of the mortgaged property will receive notice of the control and lien of the mortgagee.

3. SAME—DELIVERY TO MORTGAGEE.
   Where mortgaged personal property is in the possession of the bailee of the mortgagor, notice to him is indispensable to a delivery of the possession to the mortgagee that will be effectual against creditors and purchasers.

In Error to the United States Court of Appeals in the Indian Territory.

William T. Hutchings, for plaintiff in error.

N. B. Maxey, S. S. Fears, J. W. Hocker, and Zol. J. Woods, for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

SANBORN, Circuit Judge. Is the written statement of mortgagors of personal property by unrecorded chattel mortgages that the possession of the property is delivered to the mortgagee, and their order on the bailee thereof to deliver it to the agents of the mortgagee, a sufficient delivery of possession to sustain the mortgages against attaching creditors whose writs come to the hands of the marshal in the Indian Territory before any actual change of possession is effected, and before the bailee receives the order, or any notice of the transaction? This is the question which this case presents. The United States court in the Indian Territory answered it in the affirmative, and the United States court of appeals in that territory answered it in the negative, and this is the error assigned. The question arose in this way: In January and February, 1895, J. R. Ingram and H. A. Ingram made some chattel mortgages upon 225 steers which they owned to secure debts of about $3,400 and interest, and on August 20, 1895, when this litigation commenced, these mortgages were owned by the plaintiff in error, Strahorn-Hutton-Evans Commission Company, a corporation. On that day the cattle were in the possession of one Alex. Yargee in his pasture in the Indian Territory, and the mortgages had never been filed or recorded in that territory. J. R. Ingram was about 45 miles distant from the cattle, in the territory of Oklahoma. At about 8 in the morning he executed and delivered to the agents of the mortgagee a written instrument in which he stated that the possession of the cattle was delivered to them, as such agents, under the terms of the mortgages, and he gave them a written order on Yargee to turn the steers over to them. In the evening of that day, and before these agents had the actual possession of the cattle, before they presented their order to Yargee, and before he was in any way notified of the attempted change of possession, the defendants in error commenced actions in the United States court in the Indian Territory against J. R. Ingram, and issued and placed in the hands of the marshal writs of attachment against his property, which were subsequently levied upon some of these mortgaged cattle. Judgment was subsequently obtained against Ingram in these actions. In each of these attachment suits the mortgagee filed an interplea, and claimed the attached cattle under its mortgages and the paper possession we have described. The two suits were consolidated, and tried together by the court without a jury. Upon this trial, objection was made and exception was taken to the introduction in evidence of the mortgagors' written statement of August 20, 1895, to the effect that possession of the cattle was delivered to the agents of the mortgagees, and to oral testimony of the contents of the order on Yargee. The trial court received this evidence, held that the paper delivery of the cattle was sufficient to validate the mortgages without further change of possession, and awarded the cattle to the interpleader. The court of appeals in the Indian Territory reversed these rulings, and at the request and pursuant to the agreement of the parties and subject to the opinion of this court rendered judgment for the plaintiffs in the attachments against the interpleader. 48 S. W. 1066. This is the ruling challenged by the writ of error.

Under the statutes of the state of Arkansas, which are in force in the Indian Territory, "an order of attachment binds the defendant's property in the county which might be seized under an execution against him from the time of the delivery of the order to the sheriff or other officer," and every chattel mortgage is required to be recorded, and it becomes a lien upon the mortgaged property when it is filed for record, and not before that time. Mansf. Dig. Ark. §§ 325, 4742, 4743; Cross v. Fombey, 54 Ark. 179, 181, 182, 15 S. W. 461. The mortgages here in question were never recorded in the Indian Territory, and hence they never became a lien upon the property attached unless they were validated, and that lien was created by the possession taken by the mortgagees. The purpose of recording acts is to prevent the frauds upon creditors and subsequent purchasers that are sometimes perpetrated by means of secret liens and claims, and to compel owners and lien holders to give plain and public notice to creditors and purchasers of their claims upon property, to the end that the latter may not be deceived into giving credit to or into buying of an apparent owner when the beneficial interest or the real title in his property is held by another. One of the strongest indicia of ownership of or of a lien upon personal property is possession, and for this reason it is that the delivery of the possession of personal property to the mortgagee has been universally held to validate an unrecorded mortgage, and to be an effectual substitute for its record. The change of possession, however, which may have this effect must be of a character to accomplish the full purpose of the recording acts. It must be calculated to give a notice of the claim of a mortgagee as open and effectual as a record of the mortgage. It must be so open, public, actual, and apparent that the creditor or purchaser who undertakes to deal with the property would be likely to receive notice of the possession of the mortgagee, and through that of the lien of the mortgage, before he loaned his money or bought the property. A mere secret written or verbal statement made by or between the mortgagor and mortgagee, and known only to them or to their agents, to the effect that the mortgaged property is delivered to the mortgagee without any apparent or actual change of the immediate control over the property, has no such effect. And it ought to have none, because it tends, not to serve the purpose, and give the notice of a record, but to foster the very fraud which the record was designed to prevent, and to deceive creditors and purchasers into a reliance upon the apparent title of the mortgagor when the beneficial interest in the property is concealed in the mortgagee.

There are two reasons why the written statement of the delivery of possession made by the mortgagors in this case and their order on the bailee of the property did not constitute such a change of possession as will validate and sustain these mortgages against the creditors and purchasers of the mortgagors. The first is that they were not accompanied with an open, public delivery of the possession, such as was calculated to notify creditors and purchasers of the change of possession and control of the cattle, and the property was of the kind where such actual delivery was both possible and

convenient. They were mere paper recitals of a change of possession, while no actual change took place until after the marshal received the writs. The cattle were in Yargee's pasture, subject to the order and control of the mortgagors, when the writs were received by the officer, just as they had been during the entire summer. A creditor or purchaser who had then examined them, or had inquired of Yargee or of any other person in the actual control of them, would not have learned that the mortgagee had either a lien upon or a possession of them. The written declaration and order were in one of the pockets of some agent of the mortgagee, miles away from the stock and from the marshal when the writs came to his hands, and they gave no notice to him or to the creditors he represented of their existence, or of the facts they recited. They constituted no substitute for the record of the mortgage which the statute required. Our conclusion is that a mere verbal or written statement of, or order for the delivery of, the possession of mortgaged personal property to the mortgagee, unaccompanied with any actual change of possession or control thereof, will not sustain an unrecorded mortgage against attaching creditors or purchasers of the mortgagor. In order to accomplish this result, the possession of the mortgagee must be actual, open, and public, so that creditors and purchasers who inquire with reasonable diligence of those in actual possession of the mortgaged property will receive notice of the control and lien of the mortgagee. Jones, Chat. Mortg. §§ 186, 187; Cobbey, Chat. Mortg. §§ 497, 560, 640; Steele v. Benham, 84 N. Y. 634, 638, 640; Rogers v. Pierce (Neb.) 10 N. W. 535; Porter v. Parmley, 52 N. Y. 185, 189; Bank v. Sprague, 20 N. J. Eq. 13, 27; Wilson v. Hill (Nev.) 30 Pac. 1076, 1078; Thompson v. Yeck, 21 Ill. 73, 75.

The other reason why the attempted delivery to the mortgagee was insufficient to sustain the mortgages in this case is that the property was in the possession of the bailee, Yargee, and he was not notified of the order upon him, or of the attempted change of possession, until after the marshal had received the writs, and their liens had been fastened upon the property. Where personal property is in the actual possession of a bailee, notice to him is indispensable to a delivery of the property to a mortgagee that will be effectual against creditors and purchasers, because he is in the actual possession of the property, and there is no change of such possession until he receives notice of it. Whitney v. Lynde, 16 Vt. 579, 586; Tuxworth v. Moore, 9 Pick. 347, 348; Carter v. Willard, 19 Pick. 1, 11; Lanfear v. Sumner, 17 Mass. 110, 114.

The judgment of the United States court of appeals in the Indian Territory is affirmed.

EMMERLING v. FIRST NAT. BANK OF PEMBINA, N. D., et al.

(Circuit Court of Appeals, Eighth Circuit. November 6, 1899.)

No. 1,245.

1. BAILMENT—EVIDENCE OF REDELIVERY—ESTOPPEL OF BAILOR BY ACCEPTING RECEIPT OF ANOTHER.

In a suit against a national bank and its receiver to recover the value of securities claimed by plaintiff to have been held by the bank as her agent, it appeared without contradiction that plaintiff, who was a German woman, 60 years old, and with little knowledge of business, had caused the securities to be delivered to the bank, whose cashier receipted for them to her agent, under a verbal agreement with the president that they should be collected when due, and the proceeds kept reinvested by the bank for plaintiff, for a term of five years; that, after obtaining the securities, the bank notified plaintiff that it was necessary for her to indorse them, and that she had her brother come from her home in Manitoba for that purpose. The question at issue was as to whether at that time the bank redelivered the securities to plaintiff, and she turned them over to the president as an individual; and on such question there was some conflict of testimony. The securities were assigned by plaintiff as directed by the cashier, the assignments, so far as appeared, being in blank as to the assignee. The receipt then given plaintiff was on the letter head of the bank, but purported to be made by the president individually. Plaintiff and her brother testified that such receipt was handed to plaintiff in an envelope, and was at once sealed by the brother, and taken for safe-keeping, without being read, and that nothing was said about any change in the previous verbal agreement. The subsequent correspondence was conducted entirely between plaintiff and the bank through its cashier. On her request, he from time to time remitted her money from interest collected, sent her statements of the taxes paid for her by the bank, and one renewal note, subsequently taken, and sent to plaintiff, was made payable to and indorsed by the bank. *Held* that, the securities having admittedly been in the possession of the bank, it had the burden of proving a redelivery and intentional acceptance of them; that the receipt was not conclusive on plaintiff, but, if it was not read to her, and she was induced to accept it in the belief that it was the receipt of the bank, her rights against the bank were not prejudiced thereby; and the direction of a verdict for defendant based thereon was erroneous, the entire question of whether there was an actual redelivery of the securities and change of depositary being one of fact for the jury, to be determined under all the facts shown.

2. CORPORATION—CONTRACTS—DEFENSE OF ULTRA VIRES.

The fact that a contract made by a national bank to receive and collect securities and reinvest the proceeds for the owner contained provisions which were ultra vires does not relieve the bank of the legal obligation to return the securities or account to the owner for their value.

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

Amelie Emmerling, the plaintiff in error, was a German woman, who, it was stated at the bar, talked and understood the English language somewhat imperfectly, and was inexperienced in business affairs and methods. She was 60 years old, and a widow. She was possessed of real-estate mortgages, notes, and bank stock of the par and of the actual value of $8,283.64. These securities were in the hands of Charles W. Andrews, who had given no security to Mrs. Emmerling, and, being uncertain as to his responsibility, and believing that she would incur less risk of loss if her securities were placed in the First National Bank of Pembina, N. D., she went from her home near Winnipeg, Manitoba, to Pembina, N. D., in August, 1889, for that purpose. Soon

after her arrival there, she was introduced to L. E. Booker, president of the bank, and she testifies that: "I spoke to Mr. Booker. I asked him if he wanted to take the business in hand as president of the bank. I addressed him as president of the bank. I told him that. He asked me why I was taking it out of the hands of Mr. Andrews, and I told him Mr. Andrews would not give me security, and I found myself unsecured, so I intended to put myself in the hands of the bank, and he, as president, to give it over to the bank, and to fix things as it ought to be. He asked me why I did not do it myself, and I said I was not a business woman, and could not do it. I told him in that conversation that under my arrangement with Mr. Andrews I was to have 8 per cent. on investments, and all over 8 per cent. Mr. Andrews was to have. Mr. Booker told me the bank would not take the stuff under five years, and during the five years, if I needed any money out of the interest, I could have it. Nothing was said to the effect that I was going to deal with him personally. I did not know Mr. Booker. I could not tell him to take my things personally, because I did not know him any more than I did Mr. Andrews." At the conclusion of their interview, Mrs. Emmerling executed and delivered to the bank the following order on Mr. Andrews:

"Charles W. Andrews, Esq.: Please deliver to First National Bank of Pembina any and all moneys, books, papers, deeds, notes, securities, and any other property of every kind and nature now in your hands or under your control belonging to me; the said First National Bank being hereby duly authorized by me to receipt for the same, and to make a full settlement with you for any business or other transaction previously done by you on my account.

"Amelie Emmerling."

The bank presented this order to Mr. Andrews, and in compliance therewith, on the 15th day of August, 1889, he delivered the securities to the bank, taking the bank's receipt therefor. After arranging to have the bank take charge of her securities, and the execution of the order on Mr. Andrews to deliver the securities to the bank, Mrs. Emmerling returned to her home, where she remained for two months, and until informed that it was necessary to the proper conduct of her business for her to indorse or assign the securities, when she returned to Pembina for that purpose. Up to this point there is no testimony whatever in conflict with that of Mrs. Emmerling. There is some conflict as to what took place after Mrs. Emmerling went into the bank to indorse and assign the papers. Mr. Mager, her brother, who was with her in the bank at the time, testifies: "I was present during the time my sister was in the bank with Ryan and Booker. I have heard the testimony relative to notes, mortgages, and other papers turned over by plaintiff to the bank, and saw them all there at that time in the bank. Saw them on the table or desk in the bank room. Mr. Ryan produced the papers, and laid them on the table, and told my sister that she had to indorse them, and opened them up, and showed her where she had to sign, and she did so. He laid them on the table, and said, 'Here are all the papers,' and opened them up, turn about, for her signature. * * * After the papers were all signed, Mr. Booker handed the receipt over to Mrs. Emmerling. When handed over, the document was inside the envelope, but not sealed. Mr. Booker told Mrs. Emmerling, 'Here, Mrs. Emmerling, is your receipt.' She handed it right over to me. She sat right near the end of the table; said, 'John, you take care of this.' Q. Was that document read at that time by any one? A. No, sir; positively not. I sealed the envelope, and took it home, and put it in my safe. Exhibit D is the identical envelope this paper was in. Mr. Booker gave it to my sister, and she gave it to me. The indorsement was put on there a day or two after,—just as soon as I got home,—and I then put it in my safe. [The indorsement on the envelope reads as follows: "Receipt and order of Mrs. E. and from First Nat. Bk., Pembina."] I think the envelope was sealed in the bank by me. I did not read it at any time before I put it in my safe. I first opened the envelope five or six years ago, about four years after the transaction. I think the paper was in the envelope when Booker handed it to my sister. I am sure it was not taken out of the envelope at any time while my sister, Booker, Ryan, and myself were in the bank that day. It was not read to my sister or me, or either of us. During the time we were there in No-

vember, when the notes and mortgages were being signed, during the whole conversation had with Ryan and Booker, or either of them, regarding the notes or mortgages, nothing was said about their being turned over to Mr. Booker." When the envelope referred to by the witness was opened, it was found to contain a receipt reading as follows:

"L. E. Booker, President. "J. La Moure, Vice President. "G. W. Ryan, Cash'r. "J. K. Musselman, Asst. Cash'r.	Directors	L. E. Booker. Judson La Moure. O. H. Johnson. J. Bookwalter. T. C. Shaw. H. L. Holmes.

"First National Bank.

"Capital, $50,000.00.

"Pembina, Dak., Nov. 4th, 1889.

"Received from Amelie Emmerling real-estate mortgage notes, chattel-mortgage notes, and bank stock in Cavalier County Bank, in all eight thousand two hundred and eighty-three and $^{64}/_{100}$, which I agree to account for and guaranty (8) eight per cent. per annum upon all of said notes, mortgages, and bank stock which are good and collectible, and guaranty Amelie Emmerling against loss from any loans made by me after the amt. is collected upon the loans already made. L. E. Booker."

Mrs. Emmerling corroborates her brother in every respect, and testifies: "They told me they wanted me to assign some of the papers. None of those papers, mortgages, notes, or other papers were handed to me. They were on the table when I saw them. Somebody brought them and put them on the table. They were handed to me one at a time to sign. I signed certain assignments. Nothing was said that day, while I was at the bank, about my dealing with Booker personally. There was no agreement or understanding at the time that I was dealing with Booker personally. I was dealing with the bank. While I was there, there was a receipt given, but I don't know where it is. I can't remember who handed it to me. * * * It was not read to me. When it was handed to me it was not opened up so that it could be read by me. I think it was folded up. They put an envelope over it. I handed it over to my brother when he came. He was not there at the time. I did not take it out of the envelope. At that time I had no knowledge whatever that any claim was made that I was dealing with Booker personally. I did not at that time consent to deal with Booker personally."

G. W. Ryan, the cashier of the bank, testifies that: "I delivered them [the securities] to Mrs. Emmerling just as I received them from Mr. Andrews, in an envelope. When she came into the bank, I gave those papers to Mrs. Emmerling in a bunch, in an envelope. I showed her where to sign on the assignments, but as to the other signatures I can't say. Some of the assignments were left blank at that time, but would not say whether all were or not. I would not be positive that the assignee's name was put in any of the assignments. Mrs. Emmerling simply told me she was turning those papers over to Booker. Nothing said about the bank nor president. I understood the order was given to the bank in the first instance, and was told that it was in pursuance of an arrangement with Booker. I understood from the order the papers were to be delivered to the First National Bank, and I gave the receipt of the First National Bank for them. While Mrs. Emmerling and Mr. Booker were in the bank, I did not know anything about a new contract. There was a contract being made between them at that time for those papers."

Mrs. Emmerling returned to her home, and from time to time thereafter would request the bank to send her funds out of the collections made on her securities. These requests, beginning February 4, 1890, and continuing until July 16, 1896, were always honored by the bank sending her its check for the amount desired by letter. These letters were written on the letter heads of the bank, and signed officially by G. W. Ryan, the cashier of the bank. They are alike except as to dates and amounts. The following is a copy of one of them:

"L. E. Booker, President.
"J. La Moure, Vice Prest.
"G. W. Ryan, Cashier.
"J. K. Musselman, Ass't Cash'r.

Directors { L. E. Booker. Judson La Moure. O. H. Johnson. J. Bookwalter. T. C. Shaw. H. L. Holmes. H. Charlton.

"First National Bank.
"Capital, $50,000.00.

"Pembina, Dak., Aug. 19, 1891.

"Mrs. A. E. Emmerling—Dear Madam: As requested in yours of the 17th, herewith inclose our check for $100.

"Yours, G. W. Ryan, Ca."

The bank also paid taxes for Mrs. Emmerling, and reported the payment by letter written on the bank's letter head, and reading as follows:

"Pembina, N. Dak., July 16, 1896.

"Mrs. Emmerling—Dear Madam: The bank has paid taxes as follows for you: * * *. G. W. Ryan, Ca."

From 1889 until the failure of the bank there was no suggestion made by the bank or any one to Mrs. Emmerling that Booker personally had anything to do with her securities, and she rested secure in the belief that the bank had them, and that they were safe there. There was some other testimony, but what we have set out comprises the most material part of the evidence, and is quite sufficient to dispose of the case in this court. After the bank failed, Mrs. Emmerling presented her claim for her securities to the receiver of the bank, who refused to allow the same. She thereupon brought this suit against the bank and its receiver to recover the value of her securities. The answer of the defendant was a general denial of the averments of the complaint. At the trial the defendants made two contentions: First, that the securities were not left with the bank, but with L. E. Booker, the president of the bank, in his individual capacity; and, second, that, if they were left with the bank, the contract was ultra vires the bank, and the bank was not liable either to return the securities or to account for their value. At the close of the testimony in the case, the court, on motion of the defendants, "directed the jury to return a verdict in favor of defendants and against the plaintiff upon the grounds stated by the court: First, that the evidence submitted showed that the contract referred to in plaintiff's complaint and in the testimony was made personally with L. E. Booker, and not with the defendant bank; and, second, that the contract referred to in the complaint and the evidence was ultra vires the bank, and therefore not binding on the defendants,—to which ruling the plaintiff duly excepted." The jury returned a verdict in accordance with the instructions of the court, and the plaintiff sued out this writ of error.

Tracy R. Bangs (Charles J. Murphy, on the brief), for plaintiff in error.

Guy C. H. Corliss (W. J. Kneeshaw and J. M. Cochrane, on the brief), for defendants in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

CALDWELL, Circuit Judge, after stating the case as above, delivered the opinion of the court.

At the threshold of this case we find some very important facts established by uncontested testimony; among them these: That Mrs. Emmerling made a contract with Booker, as president of the bank, for the bank to take and handle her moneys and securities on certain terms, and that in pursuance of that contract she gave the bank an order on Andrews for the securities, and that the bank obtained the

securities on that order. These facts are not contested in the evidence. Booker does not come forward to deny them, for the reason, as was stated at the bar, that he has fled the country to escape punishment for his fraudulent and illegal use of the funds of the bank, which brought about its failure. That the contract made by Mrs. Emmerling with Booker, as president of the bank, contemplated that the bank was to do much more than merely to receive the securities for safe-keeping, is shown by the terms of Mrs. Emmerling's order on Andrews to turn the securities over to the bank. This order not only authorized the bank to receipt to Mr. Andrews for the securities, but "to make a full settlement with you [Andrews] for any business or other transaction previously done by you on my account." Excluding the receipt, which we will consider later, the overwhelming weight of evidence is against the defendants' contention that Mrs. Emmerling wittingly and knowingly revoked the bank's agency, and withdrew her securities from its possession, and appointed Booker her agent, and turned the securities over to him individually. We are brought at once, therefore, to the consideration of the question whether the delivery of the receipt signed by Booker to Mrs. Emmerling, under the circumstances detailed in the evidence, estops her from showing that she never did withdraw her securities from the bank, and place them in the hands of Booker. The fact being clearly established that the bank received and had possession and control of these securities for Mrs. Emmerling, and as her agent, the burden of proof rested upon the defendants to show that this agency had been revoked, and the securities returned by the bank to Mrs. Emmerling. Mrs. Emmerling did not go into the bank to make any change in the custody of her securities, but to indorse them in blank, for the purpose, as she supposed, of enabling the bank to collect them. It is now apparent that the purpose of the bank officers in procuring these indorsements was to enable the bank, or its officers, to make fraudulent use of her securities, as was done. Down to the time these indorsements were made, Mrs. Emmerling had received no receipt from the bank for her securities. She was entitled to such receipt, and had a right to expect it; and when the president of the bank said to her, "Here, Mrs. Emmerling, is your receipt," she had a right to suppose it was the receipt of the bank, and no one else. She had not delivered her securities to Booker, but to the bank. She was impressed with the idea that her securities and money would be much safer in the bank than in the hands of any private individual. It was this notion that induced her to transfer the securities from Andrews to the bank. Booker was a stranger to her.. She knew nothing about him or his responsibility. It is highly improbable, therefore, that, after taking the securities from Andrews, and putting them into the possession of the bank for greater security, she would immediately take them out of the bank's possession, and place them in the hands of an individual of whose honesty and responsibility she knew nothing, and who, as subsequent events proved, was wholly untrustworthy. She and her brother testified that the receipt was not read by or to her at any time; that it was handed to her in an envelope, and handed by her to her brother, who sealed the envelope, who

took it to his home, and placed it in his safe, first making an indorsement on the envelope to the effect that it contained the receipt of the bank to Mrs. Emmerling for the securities. It is true, Ryan, the cashier of the bank, testifies that when Mrs. Emmerling came into the bank he "delivered" the securities to her; but she did not go into the bank to have the securities "delivered" to her, but to indorse them, and, if they were handed to her at all, it was for that purpose. They were immediately spread out upon the table, and Ryan himself proceeded to instruct and direct Mrs. Emmerling where and how to sign her name to blank indorsements. It is obvious that, if the papers were handed to her as testified to by Ryan, they were not "delivered" to her in the sense that she received them in execution of a purpose to revoke the agency of the bank, and take the papers out of its possession. If the papers were handed to her at all, it was not for any such purpose as that. The cashier could not have understood that the bank had ceased to be Mrs. Emmerling's agent, for he dealt and corresponded with her about the business connected with these securities in the bank's name, and in his official capacity, for years thereafter. The name of Booker was never used. Any other view lays the cashier open to the suspicion that, knowing that the individual receipt of Booker had fraudulently been palmed off upon Mrs. Emmerling as the receipt of the bank, he continued to carry on the business in the name of the bank and in his official capacity for the purpose of keeping Mrs. Emmerling from discovering the fraud. In a case where it was claimed that a paper had been "delivered" to a party, somewhat after the manner of the alleged delivery of this receipt to Mrs. Emmerling, the supreme court of Vermont said:

"This presents the question as to what is a delivery. It is, in its legal acceptation, something more then merely change of manual capacity or possession. That may or may not be a delivery, according to the intent of the parties. It is a question of intent and purpose; of mutual intent and purpose, implying an acceptance as well as delivery." King v. Woodbridge, 34 Vt. 565.

This business was done in the bank, with an officer of the bank, concerning securities previously placed in the possession of the bank, and for which Mrs. Emmerling was entitled to a receipt from the bank. The receipt was written in the bank, by an officer of the bank, with whom individually Mrs. Emmerling had never had any business relations whatever. It was written on a gorgeous letter head of the bank, and signed by the president of the bank. Under these circumstances, few business men, to say nothing of an old lady having no knowledge or experience of business, would have thought it necessary to examine the receipt critically, even if it had been shown to them, to see if the president of the bank had followed his signature with the title of his office, which appeared at length and conspicuously at the head of the receipt.

It is highly probable that Mrs. Emmerling's and Mr. Mager's version of what was said and done with reference to this paper is the true one. But, however that may be, upon the evidence the court should have left it to the jury to say whether the bank had delivered the securities to Mrs. Emmerling, and she had accepted them with the mutual intent and purpose on the part of the bank and Mrs.

Emmerling to revoke the bank's agency, and to permanently withdraw the securities from its possession and control. The court should have told the jury that, if the receipt was not read to her, and she was induced to take it in the belief that it was the receipt of the bank, then the fact that it was signed by Booker in his individual capacity would not prejudice her claim against the bank. Cases similar to this have frequently arisen, and the rule of law applicable to them is well settled.

In the case of Strohn v. Railway Co., 21 Wis. 562, the plaintiff had a verbal agreement with the defendant railway company as to the terms of shipment of a quantity of freight. The freight was delivered to the railway company, and afterwards, upon demand, the company delivered to the plaintiffs bills of lading therefor. These bills of lading contained conditions of shipment inconsistent with the verbal agreement of the parties. The plaintiffs having received and retained these bills of lading without reading them or knowing their contents, the railway company insisted that they were bound by the conditions contained in the bills of lading, which had been received without objection. In answer to this contention, the court said:

"Of course, possession of the paper by the party is evidence, more or less strong, according to the particular circumstances, of his assent to the conditions contained in it. In most cases it may be absolutely conclusive. If it should appear that he examined it, and knew the contents, and then kept it, instead of returning it or offering to return it to the company, or notifying the company of his dissent, such acquiescence would, no doubt, be construed as conclusive evidence of his assent. But where the paper is not examined, and the contents not known, I do not think the same circumstances follow. Nor do I think that the party is bound to examine the paper at once, and know the contents, and return it to the company, or give immediate notice of his dissent, at the peril of being held concluded on the ground of acquiescence or neglect. Having previously entered into a special verbal agreement, he may rightfully assume, in the absence of notice to that effect, that it is embodied in the paper or receipt, or at least that the receipt contains nothing contrary to it. It is in the nature of a direct fraud or cheat for the company or its agents, after having entered into a verbal agreement, thus wrongfully to insert a contract of an entirely different character, and present it to the party, without directing his attention expressly to it, and procuring his assent. It is no answer for the company in such a case to say that the other party should have been more diligent and watchful, and should have detected the fraud. So long as he is ignorant of the new conditions, and does not assent to them, the contract in writing is not consummated, and parol evidence may be received."

And to the same effect is Boorman v. Express Co., 21 Wis. 154. And where the plaintiff took his money to a bank, and handed it to the cashier for deposit in the bank, and the cashier gave him a certificate of deposit in the name of a firm in which the bank officers were largely interested, the court said:

"When the plaintiff took his money to the First National Bank of Allentown, and handed it to the cashier for deposit, the bank became responsible therefor. The cashier was the executive officer of the bank, and authorized, by the very nature of his office, to receive money on deposit. After receiving it, no trick or fraud on his part, by means of which the money was passed over to Blumer & Co., a firm in which the bank officers were largely interested, and appeared to have had the control, could absolve the bank from its liability. No class of men have the confidence of the people to a greater extent

than bank officers. Depositors do not deal with them at arm's length, and can be imposed upon with the greatest ease by such officials. It would be monstrous to allow them to take advantage of the ignorant and unwary by reason of their position and the confidence which it inspires. It was doubtless a misfortune to this bank to have unworthy officials, if such should prove to be the case. It certainly was unwise to permit its chief officers to occupy a dual position, with divided interests; but the consequences resulting therefrom cannot be visited upon those who dealt in good faith with the bank. . It was error to reject the evidence contained in plaintiff's offer. The facts offered to be proved amounted to a fraud upon the plaintiff, and he was entitled to have that question passed upon by a jury." Ziegler v. Bank, 93 Pa. St. 397.

In a similar case against the same bank the court said:

"We must assume that the jury would have found the facts as testified to by the plaintiff Steckel. The facts established, we have a case of palpable fraud. It is not an answer to say the plaintiffs ought not to have been deceived, and, with ordinary care, would not have been. The fact that the Blumers were respectively president and cashier of the national bank, as well as leading members of the banking house of Blumer & Co., was calculated to mislead and deceive; and when told in positive terms that the certificates, although signed by Blumer & Co., were the certificates of the bank, the plaintiffs may readily have believed it was all right. * * * The question of fraud should have been submitted to the jury." Steckel v. Bank, 93 Pa. St. 383.

And in a case where the cashier of a bank had signed his name to a receipt without the addition of the word "cashier," and the money was credited to the cashier's private account, and the bank denied liability, parol evidence was permitted to prove that in fact it was a bank transaction, and the court said:

"A question is made that Pomeroy, by signing his name to the receipt for the $1,300 without the addition of the word 'cashier,' implied that it was his individual contract. But, as it was dated at the bank, it was, at most, a case of doubt, upon the face of the receipt, whether it was a private or official act. In such a case parol evidence was admissible to show that it was an official act, though the money was credited on the books of the bank to the cashier's private accounts. Mechanics' Bank of Alexandria v. Bank of Columbia, 5 Wheat. 326, 5 L. Ed. 100. And it was properly left to the jury to decide, under the circumstances of the case, whether the contract was that of the bank or of the cashier in his individual capacity. The evidence, on the face of it, therefore, predominates in favor of its being a bank transaction." Caldwell v. Bank, 64 Barb. 350.

Where the lower court took a case from the jury, saying, "There was very little discrepancy in the testimony," the supreme court reversed the judgment, and said:

"The judge also tells us that there was very little discrepancy in the testimony; but where there is any discrepancy, however slight, the court must submit the matter to which it relates to the jury, because it is their province to weigh and balance the testimony, and not the court's." Barney v. Schmeider, 9 Wall. 248, 19 L. Ed. 648.

In the case at bar a peremptory instruction to the jury to find for the plaintiff would have accorded with the evidence much better than the instruction that was given. But the case should have gone to the jury, whose exclusive province it is to determine controverted questions of fact.

The court erred also in instructing the jury that the plaintiff could not recover because the contract was ultra vires the bank.

Assuming that the contract by which the bank received the plaintiff's securities, and agreed to collect them and reinvest the money for five years, and accept as its compensation therefor all interest received in excess of 8 per cent., was ultra vires the bank, the bank is nevertheless under obligation to the plaintiff to return the securities, or account for their value. American Nat. Bank of Denver v. National Wall-Paper Co., 40 U. S. App. 646. 23 C. C. A. 33, 77 Fed. 85, and authorities there cited. As was said by this court in the case cited, "This doctrine has become familiar learning." The doctrine as here applied is not at all shaken by the late decisions of the supreme court. On the contrary, in one of those cases that court, speaking by Mr. Justice Gray, says:

"A contract ultra vires being unlawful and void, not because it is in itself immoral, but because the corporation, by the law of its creation, is incapable of making it, the courts, while refusing to maintain any action upon the unlawful contract, have always striven to do justice between the parties, so far as could be done consistently with adherence to law, by permitting property or money parted with on the faith of the unlawful contract to be recovered back, or compensation to be made for it." Central Transp. Co. v. Pullman's Palace-Car Co., 139 U. S. 24, 60, 11 Sup. Ct. 478, 35 L. Ed. 55.

The judgment of the circuit court is reversed, and the cause remanded, with instructions to grant a new trial.

SANBORN, Circuit Judge. I concur in the result in this case, not because Mrs. Emmerling was ignorant of the contents of the receipt which Booker gave her, for I think she was charged under the law with knowledge of its contents (Railway Co. v. Belliwith, 55 U. S. App. 113, 119, 28 C. C. A. 358, 361, 83 Fed. 437, 440; Green v. Railway Co., 35 C. C. A. 68, 70, 92 Fed. 873, 876, and cases there cited), but because, while that receipt is persuasive, it is not conclusive, evidence that a contract with the individual Booker was substituted for the original agreement with the bank, in view of the letters which the bank wrote, and the reports and remittances which it made to Mrs. Emmerling after the receipt was given, and in view of the facts that Mrs. Emmerling's Laidlaw note was renewed in December, 1889, by a note payable to the bank, and this renewal was subsequently indorsed by the bank, and delivered to the plaintiff in error. These acts of the bank subsequent to the delivery of the receipt tend so strongly to show that it was still the depositary of the securities and the trustee of Mrs. Emmerling that the question whether it was or not should have been submitted to the jury.

GILBERT v. ERIE R. CO.

(Circuit Court of Appeals, Sixth Circuit. November 13, 1899.)

No. 720.

1. RAILROADS—INJURY AT CROSSING—CONTRIBUTORY NEGLIGENCE.
A petition in an action to recover for the death of plaintiff's decedent by being struck by a train on defendant's railroad at a crossing, which alleges that the decedent, while approaching the crossing in a covered buggy, and when 135 feet distant therefrom, saw the approaching train,

and drove upon the crossing, without again looking in that direction, discloses such contributory negligence on his part as to preclude any recovery, although it alleges negligence on the part of defendant's servants in running the train at an unusual rate of speed, and in failing to give the proper signals.

2. NEGLIGENCE—RULE AS TO EFFECT OF CONTRIBUTORY NEGLIGENCE.
The rule that a plaintiff who, by his own negligence, placed himself in a dangerous position, where an injury was likely to result, may still recover for such injury where the defendant, with knowledge, or such notice as is equivalent to knowledge, of plaintiff's danger, failed to exercise reasonable care by which the injury might have been avoided, has no application to a case where the injury was the result of the concurrent negligence of both parties.

In Error to the Circuit Court of the United States for the Eastern Division of the Northern District of Ohio.

O. C. Pinney, for plaintiff in error.

Before LURTON and DAY, Circuit Judges, and THOMPSON, District Judge.

DAY, Circuit Judge. This case was decided in the court below on demurrer to the petition, and the sole question presented for determination here is, did the court err in sustaining the demurrer? The petition, omitting formal parts, is as follows:

"Plaintiff says: That she is the duly appointed, qualified, and acting administrator of the estate of Calvin Gilbert, now deceased. That the defendant is a corporation, operating railroads within the state of Ohio, and was so doing at all the times herein mentioned, and among which was a railroad running from Cleveland, Ohio, southeasterly, and passing through the village of Solon, about twenty miles from Cleveland, and containing about six or seven hundred inhabitants. That said Calvin Gilbert, when in full life, and on or about the 3d day of November, 1897, was residing in said village of Solon, on the first street crossing the tracks of the said defendant southeasterly from its depot. That he resided on the westerly side of said street, and southerly side of said railroad track, and only a short distance therefrom. That on or about the 3d day of November, at one o'clock p. m., said Calvin Gilbert, riding in a covered buggy, with the side curtains on, passed out of his yard, driving a horse, turned northerly to cross said track. That when not more than 135 feet from said track, and while looking out of his buggy southeasterly, saw the train approaching, operated by said defendant, its officers, agents, and servants, at which time said train blew a long whistle, and was between 2,600 and 3,000 feet in a southeasterly direction from said crossing, and was coming in the direction of said crossing. That said Calvin Gilbert then continued to approach said crossing at a rate of six miles an hour, and, as he approached, looked in a northwesterly direction, along the tracks of said company, to discover if any trains were coming from that direction. That said defendant, at the time, maintained two tracks at said crossing. That about 600 feet easterly from the crossing on which said Gilbert was driving was another parallel crossing, which said train had to pass before reaching the crossing of said street on which said Gilbert was driving. That said Gilbert proceeded to approach and cross said tracks, and did not again look in the direction from which said train was coming, and had only time to observe as to whether any train was coming from the other direction, and reached said track on which said train was coming in not more than twenty-four seconds from the time that he saw the said train. The agents and servants of said defendant, in operating said train, did not blow any whistle for the crossing six hundred feet easterly from the crossing on which said Gilbert was driving, and did not blow any whistle for the crossing on which said Gilbert was driving; neither did said agents and servants cause any bell to ring from the time that they sounded said whistle, 3,000 feet away, until the time it hit the buggy in which

said Gilbert was driving, as herein described. That it was the duty of said agents and servants operating said train to cause a distinct and sharp whistle to be blown before crossing either of said streets, and said Calvin Gilbert could have distinctly heard either of the same had it been blown, and would have been warned by said whistles, and escaped injury. Said Calvin Gilbert lived at said place ever since said railroad was constructed, and had crossed the same a great many times, and was familiar with the speed at which the train of said railroad company ran when passing upon said track in the vicinity of said crossing. That the ordinary and u.ual rate of speed at which said train ran would have required forty-five or fifty seconds in which to reach said crossing, and all of which said Calvin Gilbert knew, and which he believed it would require this train to occupy before said crossing was reached. Said Calvin Gilbert, not hearing any of said whistles, was therefore unaware of the rapid approach of said train, which was at the time going at the reckless rate of speed of more than ninety miles an hour. That said train was the fastest train upon said track, as per the time table issued by said defendant, and on said day was behind time, and had aboard some of the executive officers of said defendant, and was running at a terrible rate, and much faster than it had ever run when passing along said track in this vicinity. That, at the time said train approached this crossing, the engineer did not see the approach of Calvin Gilbert, and neither did the fireman on the engine of said train see him, and it was the duty of both to have seen him, and to have done all that could be done to avoid any accident. Said Calvin Gilbert was at all times after said whistle in full view of said engineer and fireman, and had he been seen by either, and had they exercised reasonable care in the management of the train after seeing him, said accident could have been avoided. The said defendant was not at said time maintaining any watchman at said crossing, which is in a thickly-settled part of Solon, and where teams frequently cross, and it was the duty of said defendant to have maintained a watchman at said crossing. Plaintiff says that, as the buggy of said Calvin Gilbert was upon the track upon which said train was coming, said train came into collision therewith, and struck said Calvin Gilbert, and caused his death. Plaintiff says that she is a widow and only heir of said Calvin Gilbert, and brings this action on behalf of herself as such heir and in her capacity as such administrator. Plaintiff says that the death of said Calvin Gilbert was caused by the negligent, careless, and reckless manner in which the agents and servants of said defendant managed its train, and by the failure of said defendant to maintain a watchman at said crossing, and was not caused by the carelessness or negligence of said Calvin Gilbert that in any way contributed to his death. That by reason of the premises she has been damaged in the sum of $10,000, for which she asks judgment against said defendant."

From the opinion of the learned judge who heard the case in the circuit court, it is apparent that it was decided, and the demurrer sustained, upon the theory that the statements of the petition show the deceased, Calvin Gilbert, to have been guilty of contributory negligence, and as a consequence there can be no recovery from the resulting injury or death.

The duty of one driving upon a public highway, and approaching a railway crossing, has been the subject of adjudication in the supreme court of the United States in a number of cases. In Railroad Co. v. Houston, 95 U. S. 697, Mr. Justice Field, delivering the opinion of the court, says:

"If the position most advantageous for the plaintiff be assumed as correct, that the train was moving at an unusual rate of speed, its bell not rung, and its whistle not sounded, it is still difficult to see on what ground the accident can be attributed solely to the 'negligence, unskillfulness, or criminal intent' of the defendant's engineer. Had the train been moving at an ordinary rate of speed, it would have been impossible for him to stop the engine when within four feet of the deceased. And she was at the time on a private right of way of the company, where she had no right to be. But, aside from this fact, the

failure of the engineer to sound the whistle or ring the bell, if such were the fact, did not relieve the deceased from the necessity of taking ordinary precautions for her safety. Negligence of the company's employés in these particulars was no excuse for negligence on her part. She was bound to listen and to look, before attempting to cross the railroad track, in order to avoid an approaching train, and not to walk carelessly into the place of possible danger. Had she used her senses, she could not have failed to both hear and to see the train which was coming. If she omitted to use them, and walked thoughtlessly upon the track, she was guilty of culpable negligence, and so far contributed to her injuries as to deprive her of any right to complain of others. If, using them, she saw the train coming, and yet undertook to cross the track, instead of waiting for the train to pass, and was injured, the consequences of her mistake and temerity cannot be cast upon the defendant. No railroad company can be held for a failure of experiments of that kind. If one chooses in such a position to take risks, he must bear the possible consequences of failure. Upon the facts disclosed by the undisputed evidence in the case, we cannot see any ground for a recovery by the plaintiff."

In Schofield v. Railway Co., 114 U. S. 615, 5 Sup. Ct. 1125, the facts are somewhat analogous to those set up in the petition in the present case. Mr. Justice Blatchford, in speaking for the court, on page 617, 114 U. S., and page 1126, 5 Sup. Ct., says:

"The ground upon which the circuit court directed a verdict for the defendant (2 McCrary, 268, 8 Fed. 488) was that the plaintiff, by his own showing, was guilty of contributory negligence, whatever negligence there may have been on the part of the defendant. Applying the test that if it would be the duty of the court, on the plaintiff's evidence, to set aside, as contrary to the evidence, a verdict for the plaintiff, if given, the court had authority to direct a verdict for the defendant, it considered the case under the rules laid down in Improvement Co. v. Stead, 95 U. S. 161, and especially in Railroad Co. v. Houston, Id. 697, and arrived at the conclusion of law that neither the fact that the train was not a regular one, nor the fact of its high rate of speed, excused the plaintiff from the duty of looking out for a train; that the fact that it did not stop at the depot could avail the plaintiff only on the view that, hearing a whistle from it, as it was south of the depot, he supposed it would stop there, and so failed to look; but that, in such case, he would have been negligent, because it was not certain the train would stop at the depot, and he would have had warning that the train was approaching; and that the neglect of the train to blow a whistle or ring a bell between the depot and the crossing did not relieve the plaintiff from the duty of looking back, at least as far as the depot, before going on the track; and that in view of the duty incumbent on the plaintiff to look for a coming train before going so near to the track as to be unable to prevent a collision, and of the fact that he was at least 100 feet from the crossing when the train passed the depot, and could then have seen it if he had looked, and have avoided the accident by stopping until it had passed by, he was negligent in not looking."

In a very late case (Railroad Co. v. Freeman, 174 U. S. 379, 19 Sup. Ct. 763) the same doctrine is applied, and again enforced.

The principle settled in these cases is that the failure on the part of the railway company to give signals, when approaching a highway crossing, although the train may be moving at an unusual rate of speed and the company be guilty of negligence in the running and management thereof, does not absolve the traveler from the duty of listening and looking before attempting to cross such railroad track, in order to avoid the approaching train. In such cases, if the traveler uses his senses, and the view of the approaching train is unobstructed, he cannot fail to be aware of its approach. If, failing to exercise this care, the traveler thoughtlessly drives upon the track without seeing the approaching train, he so far contributes

to his injury as to deprive him of the right of recovery. If, using the senses of sight and hearing, the traveler sees the train approaching, and yet attempts to cross the track, instead of waiting for the train to pass, or taking proper precautions to preserve his safety, the consequences of such negligence cannot be charged to the railroad company. From the facts in the present case, as stated in the petition, it appears that the deceased was approaching the track of the defendant company in a covered buggy; that he had a full view of the track in a southeasterly direction, and that he saw the approaching train at a distance of from 2,600 to 3,000 feet, rapidly nearing the crossing; that this discovery was made by the decedent when he was 135 feet from the track; that he proceeded to approach, and attempted to cross the track without looking in the direction from which the train was coming; that he reached the track in not more than 24 seconds from the time he saw the train. During this time the train was in full view. There was nothing to prevent decedent from checking or stopping his horse in time to avoid the injury. He did not see fit to do so, but, looking away from the train, he drove in his covered buggy upon the track and was killed. The statement in the petition is that he did not look at the train after his first discovery of its approach. In thus experimenting upon the chances of crossing in safety, we think the decedent was guilty of negligence; and, admitting the allegations of the petition as to the negligence of the company, it still appears that the negligence of the decedent, continuing up to the time of the injury, directly contributed thereto, and consequently prevents a recovery in this case.

It further appears that a cause of action is sought to be made under the rule, recognized in a number of cases, which permits a recovery where, notwithstanding the negligence of the plaintiff, there was negligence on the part of the company, after it became aware of the negligence of the plaintiff, in failing to exercise reasonable care to avoid the consequences of the plaintiff's neglect. This rule was applied in this court in the late case of Railroad Co. v. Hellenthal, 60 U. S. App. 156, 31 C. C. A. 414, and 88 Fed. 116. Judge Clark, in delivering the opinion of the court, uses this language:

"There is, however, a qualification of this general rule as thus stated, as fully established by decisions of the highest authority as the rule itself. This qualification is expressed in the proposition that, if it be shown that the defendant, after becoming aware of the plaintiff's negligence, might, by the exercise of reasonable care and prudence, have avoided the effect of the plaintiff's negligence or trespass, the defendant is liable for the injury. The qualification of the rule is thus stated in Railway Co. v. Ives, 144 U. S. 408, 429, 12 Sup. Ct. 687: 'Although the defendant's negligence may have been the primary cause of the injury complained of, yet an action for such injury cannot be maintained if the proximate and immediate cause of the injury can be traced to the want of ordinary care and caution in the person injured; subject to this qualification, which has grown up in recent years (having been first enunciated in Davies v. Mann, 10 Mees. & W. 546), that the contributory negligence of the party injured will not defeat the action if it be shown that the defendant might, by the exercise of reasonable care and prudence, have avoided the consequences of the injured party's negligence.' "

This rule, as applied in the supreme court of the United States in cases of contributory negligence, has had reference to cases where

the defendant, after knowledge of the dangerous position in which the negligence of the plaintiff has placed himself, might, by the exercise of reasonable care, have avoided the consequences of the injured party's negligence. In such cases recovery has been permitted. Coasting Co. v. Tolson, 139 U. S. 551, 11 Sup. Ct. 653.

Shearman & Redfield, in their work on Negligence (5th Ed. § 99), state the doctrine as follows:

"It is now perfectly well settled that the plaintiff may recover damages for an injury caused by the defendant's negligence, notwithstanding the plaintiff's own negligence exposed him to the risk of injury, if such injury was more immediately caused by the defendant's omission, after becoming aware of the plaintiff's danger, to use ordinary care for the purpose of avoiding injury to him. We know of no court of last resort in which this rule is any longer disputed, although the same rule, in substance, but inaccurately stated, has been made the subject of strenuous controversy. But, furthermore, the plaintiff should recover, notwithstanding his own negligence exposed him to the risk of injury, if the injury of which he complains was more immediately caused by the omission of the defendant, after having such notice of the plaintiff's danger as would put a prudent man upon his guard, to use ordinary care for the purpose of avoiding such injury. It is not necessary that the defendant should actually know of the danger to which the plaintiff is exposed. It is enough if, having sufficient notice to put a prudent man on the alert, he does not take such precautions as a prudent man would take under similar notice. This rule is almost universally accepted. The most reckless persistence, on the part of one exposed to danger, will not justify another in consciously refraining from using care to avoid injury to him. This qualification of the doctrine of contributory negligence, often called the 'rule in Davies v. Mann,' from the leading case on this subject, has been much criticised. But those criticisms turn mainly upon the language used by Baron Parke in that case, which is, perhaps, too broad, and which has not been here adopted, although it has been literally repeated in the highest court of England as well as in that of the United States. It is possible, too, that the application of the principle in Davies v. Mann was erroneous, but that does not affect the validity of the principle which lay at the foundation of the case. That principle is that the party who has the last opportunity of avoiding accident is not excused by the negligence of any one else. His negligence, and not that of the one first in fault, is the sole proximate cause of the injury."

As we understand the rule to be deduced from these authorities, it amounts to this: That where the plaintiff, by his own negligence, has placed himself in a dangerous position, where injury is likely to result, the defendant, with knowledge, or such notice as is equivalent thereto, of the plaintiff's danger, is bound to use reasonable care and diligence to avoid injuring the plaintiff; and where, by the exercise of such care he could do so, fails to avoid the injury, this negligence introduces a new element into the case, and renders the defendant liable, because such negligence becomes the direct and proximate cause of the injury. We do not think the principle settled in these cases applies to a case where it clearly appears that the injury is the result of the concurrent negligence of the plaintiff and defendant. There is no averment in the petition that the engineer or fireman saw the decedent upon the track, or in a place of imminent danger, in time to have avoided the injury. Taking the allegations of the petition together, it seems to us to be a case of concurrent negligence on the part of the decedent and the railway company. Assuming it to be true that the defendant was guilty of the negligence charged in the petition, the deceased was guilty of negligence which directly contributed to the injury. In this view

of the case, we do not think it is brought within the principle laid down in Railroad Co. v. Hellenthal, above cited, and similar cases. As the petition fails to disclose a cause of action in favor of the plaintiff, the demurrer was properly sustained, and the judgment of the court below is affirmed.

TAYLOR v. SCHOOL DIST. OF GARFIELD, LYON COUNTY, IOWA.

(Circuit Court, N. D. Iowa, W. D. October 6, 1898.)

No. 624.

SCHOOL-DISTRICT BONDS—VALIDITY—ESTOPPEL TO CONTEST.

An Iowa school district, created by the division of a larger district, which, in accordance with the provisions of the statute, as its equitable portion of the indebtedness of the original district assumed the payment of certain bonds issued by such district in satisfaction of a judgment against it, as authorized by law, and the validity of which it was precluded from contesting by the rendition of the judgment, is also precluded from defending against such bonds, or against other bonds of its own which it subsequently issued in exchange therefor, although the amount of such bonds exceeded the limit of indebtedness which it could constitutionally contract.

This was an action to recover on bonds issued by the defendant school district.

From the evidence submitted in the above case, a trial by jury being waived in writing, the court finds the facts to be as follows:

(1) The plaintiff, J. C. Taylor, when this suit was brought, was a citizen of the state of South Dakota; the defendant, the school district of Garfield, was a municipal corporation created under the laws of the state of Iowa for school purposes in Lyon county, Iowa; and the amount involved in this controversy exceeds the sum of $2,000, exclusive of interest and costs.

(2) The territory included within the boundaries of the present school district of Garfield was originally included within the boundaries of the district township of Doon, as the same was created at the time of the organization of Lyon county, in 1872, and so continued up to the year 1882, when the district township of Garfield was created. By statute it was subsequently provided that district townships should be called and known as "school districts."

(3) On the 12th day of August, 1873, there was rendered in the district court of Lyon county, Iowa, a judgment in favor of James H. Wagner against the district township of Doon in the sum of $3,000 and costs. In 1880, in payment of this judgment, the district township of Doon issued to James H. Wagner bonds in the sum of $5,200, the receipt of which in satisfaction of the judgment is acknowledged upon the record of judgments in the district court of Lyon county under date of September 4, 1880.

(4) The Wagner bonds, issued as above stated, were sold for full value to George B. Provost, and in 1884 were exchanged for and were taken up by the bonds in suit, which bear date December 1, 1883, and which were duly signed and executed by the president and secretary of the district township of Garfield, the said bonds and coupons now being owned by the plaintiff, J. C. Taylor.

(5) The judgment rendered in the district court of Lyon county, Iowa, in favor of James H. Wagner and against the district township of Doon was based upon contracts for the building of school houses in Doon township, the amounts of which contracts were exorbitant, and, as between James H. Wagner and the district township of Doon, were fraudulent; and by a proper defense the amount of the judgment rendered might have been greatly reduced.

(6) When the school district of Garfield was set off from the district of Doon,

the former district assumed, as part of the indebtedness equitably chargeable against it as part of the old district of Doon, the bonds issued in payment of the Wagner judgment, amounting to $5,200, and subsequently exchanged therefor the bonds now in suit, amounting to $5,000, and coming due December 1, 1893.

(7) That when the bonds in suit were issued by the district township of Garfield the total amount of the taxable property within its boundaries, as shown by the last preceding state and county tax lists, was the sum of $92,430.

(8) That at the time of the division of the territory originally forming the district township of Doon into the district townships of Doon and Garfield the original district township of Doon was indebted in an amount in excess of 5 per cent. on the assessed valuation of the taxable property embraced within the boundaries of the original district township of Doon, and was indebted in an amount in excess of 5 per cent. upon the assessed valuation of the property in Doon and Garfield townships, as shown by the state and county tax lists for the year 1883, and this indebtedness was outstanding and unpaid when the bonds in suit were issued.

(9) That the total valuation of the taxable property within the boundaries of the district township of Doon from 1872 to 1882, both inclusive, as shown by the state and county tax lists for the several years, is as follows: 1872, $133,844.74; 1873, $242,108.40; 1874, $240,582.60; 1875, $253,226.74; 1876, $225,825.39; 1877, $209,034.34; 1878, $109,197.19; 1879, $118,214; 1880, $131,038; 1881, $136,927; 1882, $137,646.06.

(10) The bonds sued on and numbered 1, 7, 20, 22, for the sum of $1,000 each, and numbers 4 and 6, for $500 each, are fully due and unpaid, and there are attached to each bond 17 interest coupons, all of which are due and unpaid.

(11) The total amount due October 1, 1898, on the bonds and coupons sued on, is $11,045.37, as follows:

Bonds, face amount	$ 5,000 00
Coupons, face amount	2,975 00
Interest on bonds from maturity, Dec. 1, 1893, to Oct. 1, 1898, at 6%	1,450 00
Interest on coupons after maturity at 6%	1,620 37
Total	$11,045 37

J. M. Parsons, for plaintiff.

H. G. McMillan, for defendant.

SHIRAS, District Judge (after stating the facts). Upon the foregoing facts I hold as a matter of law that the plaintiff is entitled to judgment for the amount due upon the bonds and coupons declared on. The evidence shows that when the district township of Garfield was segregated from the district township of Doon it assumed the payment of the Wagner bonds as part of the indebtedness equitably chargeable to it, this being done in accordance with the provisions of section 2821, McClain's Code of Iowa, which provides that upon the division of an existing district into two or more new districts an equitable division of the assets and liabilities shall be made. The Wagner claim, having been put into judgment against the district township of Doon, became a valid and enforceable debt against that district, which then included the territory subsequently set apart as the district township of Garfield. This judgment was satisfied by the issuance to Wagner of $5,200 of the bonds of the district township of Doon, and the payment thereof was assumed by the district township of Garfield upon its separation from the parent township. If there existed a defense to the claim of Wagner against the district township of Doon because of the exorbitant prices

charged for the erection of the school houses in the township, or because the district had reached the limit of indebtedness which it could lawfully incur under the provisions of the constitution of the state of Iowa, these defenses should have been availed of to prevent the rendition of the judgment entered in the district court of Lyon county. The rendition of the judgment established the validity of the claim sued on, and, when the district township refunded the judgment in bonds issued for that purpose, the latter were not open to a defense which might have been urged against the original Wagner claim. As already stated, the payment of these bonds, which had passed into the hands of innocent holders, was assumed by the district township of Garfield, which in turn, under the provisions of the laws of Iowa, refunded the same by exchanging therefor the bonds in suit. This exchange did not increase the indebtedness of the district township of Garfield, the facts bringing the case within the exception recognized by the supreme court in Doon Tp. v. Cummins, 142 U. S. 372, 12 Sup. Ct. 220, to the effect that an actual exchange of bonds for a pre-existing indebtedness would not be held to increase the indebtedness of the municipality. See, also, City of Huron v. Second Ward Sav. Bank, 30 C. C. A. 38, 86 Fed. 272. As the evidence fails to show that the Wagner bonds were invalid when payment thereof was assumed by the defendant district, and as it does not appear that a defense could have been successfully made thereto by the present defendant after it had assumed payment thereof, it follows that no defense is made out by showing that the bonds in suit were exchanged for those assumed by the defendant district. Judgment for the plaintiff.

LOOMIS v. CHICAGO, M. & ST. P. RY. CO.

(Circuit Court, S. D. New York. October 14, 1899.)

RAILROAD BONDS—OPTION OF HOLDER TO EXCHANGE FOR STOCK—EXPIRATION.

A railroad company issued coupon bonds maturing in 30 years, to each of which was attached a certificate of "scrip preferred stock" equal in amount to the bond, and which, by a provision of the company's articles of association, and also of the bonds, the holder had the option of exchanging for an equal amount of the company's full-paid preferred stock at any time within 10 days after a dividend on such stock had been declared and had become payable, on delivery to the company of the accompanying bond and unmatured coupons and surrender of the certificate. *Held*, that such option did not extend beyond the time when the bonds matured, at which time the liability of the company for their payment and the obligation of the holder to receive such payment became absolute.

This was an action to recover damages for breach of a contract contained in bonds issued by defendant giving the holder an option to exchange them for an equal amount of defendant's preferred stock. On motion by defendant for a new trial.

Wheeler H. Peckham, for the motion.

Howard Van Sinderen, opposed.

WALLACE, Circuit Judge. The plaintiff became owner, before maturity, and for a valuable consideration, of eight bonds made by

the defendant, dated July 1, 1867, for the payment of $1,000 each, part of an issue of $4,000,000, and known as "First Mortgage Seven Per Cent. Convertible Bonds." The bonds were payable on the 1st day of July, 1897, with interest semiannually at the rate of 7 per cent. per annum on the 1st day of January and July in each year upon the presentation and surrender of the coupons annexed. Annexed to and accompanying each bond was a certificate for 10 shares of the capital stock of the defendant, known as "Scrip Preferred Stock." The articles of association of the defendant contained the following provision:

"Our capital stock shall not exceed, except as hereinafter provided, $4,200,000, divided into 42,000 shares, which said shares shall be subdivided as follows: An amount not exceeding $3,450,000, or 34,500 shares, shall be set apart and designated as 'Preferred Stock,' and the full sum of $100 per share we hereby declare and acknowledge to be paid thereon, except on so much of this class as is hereinafter designated as 'Scrip Preferred Stock'; and on this scrip stock we hereby declare and acknowledge the sum of one dollar per share to be paid. Of $3,450,000 preferred stock, an amount not exceeding $2,200,000 at par, or 22,000 shares, shall be set apart and designated as 'Scrip Preferred Stock.' The scrip preferred stock here named or hereafter named shall not at any time exceed the amount of outstanding mortgage bonds hereinafter named. The scrip preferred stock shall not be subject to any assessment, and shall entitle the holder in whose name it stands upon our books to all the rights and privileges of other stockholders, except that it shall not entitle the holder to any dividend or other profit or increase from the income or assets of this company. It shall be issued in certificates of five and ten shares each, and shall accompany each mortgage bond of the company. The holder thereof shall have the right, at any time within ten days after any dividend shall have been declared and become payable on the preferred stock, to make the scrip preferred stock attached to his bond full-paid stock upon the surrender to the company of the mortgage bond named by its number in his scrip certificate, and upon surrendering said scrip certificate and bond he shall be entitled to receive therefor the same number of shares of preferred full-paid stock, and entitled to dividends."

The bonds contained the following covenant:

"The obligors also agree to transfer to the bearer, at his option, ten shares of one hundred dollars each of its preferred stock at any time within ten days after any dividends shall have been declared and become payable on said preferred stock, upon delivery in the city of New York of this bond and the unmatured coupons, and upon the transfer to the obligors of the ten shares of scrip stock accompanying this bond."

For many years the defendant had regularly paid dividends on the preferred stock. At the date of the maturity of the bonds it was ready to pay the amount due thereon of principal and interest at the place of presentation. A dividend on the preferred stock having been paid by the defendant October 21, 1897, the plaintiff, on October 22, 1897, duly presented his bonds and scrip-stock certificates at the office of the company for conversion into preferred stock, and duly demanded the preferred stock. The market value of the preferred stock was at that time $140 per share. The demand was refused, and he has kept his tender good. Upon these facts a verdict was ordered for the plaintiff upon the trial, and the question of the law involved was reserved for further consideration upon a motion for a new trial.

The question in the case is whether it is the meaning of the contract embodied in the bonds that the holders shall be permitted to

exercise the option of conversion after the maturity of the bonds. If that were its meaning, they would be at liberty to decline receiving payment of their bonds at maturity, and at any future time insist upon converting them into stock; and this would impose upon the defendant the burden of retaining indefinitely stock which it might otherwise convert into money, and of keeping funds constantly on hand sufficient for the payment of the bonds. Such a contract would be so disadvantageous to a promisor that it cannot be supposed to have been contemplated by the parties, in the absence of language clearly manifesting such an understanding. It is said to be found here because of the words "at any time." But the contract does not read that the promisor will transfer to the bearer "at his option, at any time, ten shares," as the words "at any time" refer to any time within the 10 days after the declaration of a dividend. The inquiry whether the dividend is not one to be declared during the life of the principal obligation, before the date of the maturity of the bonds, remains unsolved. The primary obligation of the contract is the undertaking for the payment of the principal and interest specified, the whole being payable at the expiration of 30 years from the date of the instrument. The optional conversion covenant is an accessory of that obligation. The promise of the defendant to pay the bonds at a specified time implies a reciprocal engagement on the part of the holders to accept payment on that date. It implies the existence of the right to tender payment and extinguish the primary obligation. It seems quite inconsistent with that implication that the option is to survive, and be exercised at a subsequent period. The provision for surrendering the unmatured coupons with the bonds as a condition of the conversion also suggests that the option is to be exercised before all the coupons have matured. Reading the whole instrument together, the fair interpretation is that the option may be exercised at any time before the promisor is at liberty to pay off the bonds,—while there are unmatured coupons,—and that thereafter its obligation is satisfied by paying the bonds.

At all times after the maturity of the bonds the measure of the defendant's liability is the amount due of the principal and interest upon them. After the extent of its liability became fixed, it could not thereafter be enlarged by any act of the plaintiff, and the right of election was gone.

The motion for a new trial is granted.

In re MEYERS.

(District Court, S. D. New York. November 16, 1899.)

1. BANKRUPTCY—PARTNERSHIP PETITION—AMENDMENT.

Where a voluntary petition in bankruptcy by partners prays that "the petitioners" may be adjudged bankrupt, instead of "the said firm," but otherwise follows the official form for a partnership petition, describing the petitioners as the members of the firm, and the schedules show that all their debts are firm debts, and the order of adjudication corresponds with the petition, the defects of form in the petition and adjudication are

not material on opposition to the application for discharge, but may be amended nunc pro tunc.

2. SAME—SEPARATE DISCHARGE OF ONE PARTNER.
Where a firm has been adjudged bankrupt on the voluntary petition of the partners composing it, either partner, without reference to the others, may present his individual petition for a separate discharge.

3. SAME—FORM OF APPLICATION.
Where one member of a bankrupt firm desires to apply separately for his discharge, the petition therefor should recite the adjudication of the firm and of the petitioner as a member of it, and should pray for a discharge from both firm and individual debts, and the notice to creditors should advise them of the same facts.

In Bankruptcy. On bankrupt's application for discharge and opposition thereto by creditors.

Stillman F. Kneeland, for bankrupt.

Platzek & Stroock and Black, Olcott, Gruber & Bonynge, for opposing creditors.

BROWN, District Judge. A discharge of the above bankrupt having been refused in a prior case, because there were apparently firm assets (In re Meyers [D. C.] 96 Fed. 408) a new petition was filed on September 19, 1899, by George H. Meyers and Amelia A. Meyers jointly, alleging that they were members of the firm of Meyers Bros., composed only of the petitioners; that the firm have no assets other than as stated in the schedules, and that the schedules state all of their debts as co-partners and all their individual debts and assets, the individual debts being none, and the firm assets being stated as outstanding book accounts amounting to $9,530.29. The petition concludes with the prayer

"That the petitioners may be adjudged by the court to be bankrupts within the purview of said acts."

A trustee having been appointed at the first meeting of creditors, a petition was thereafter filed by Amelia A. Meyers on October 24th, praying that she

"May be decreed by the court to have a full discharge from all debts provable against her estate under said bankrupt acts, except such debts as are excepted by law from such discharge."

On the return day of the petition for discharge, preliminary objections to any further proceedings have been made by various creditors who proved their claims, on the grounds (1) that there has been no firm adjudication as is necessary with partners having assets; and (2) that all the debts scheduled are firm debts, which cannot be discharged upon merely individual adjudications.

The previous ruling of the court in this case ([D. C.] 96 Fed. 408, 411) that in order to secure a discharge from firm debts there must be an adjudication of the firm as bankrupt, and a firm trustee appointed, where there are firm assets, is settled by the authorities for this district, and apparently by the supreme court in Amsinck v. Bean, 22 Wall. 395, 405; In re Winkens, 2 N. B. R. 349, Fed. Cas. No. 17,875; In re Shepard, 3 N. B. R. 172, Fed. Cas. No. 12,754; Crompton v. Conkling, 15 N. B. R. 417, Fed. Cas. Nos. 3,407, 3,408. I have no doubt that the petition in the present case was designed to procure

a firm adjudication and the discharge of both bankrupts from the firm debts. The petition for adjudication is in the form prescribed by the supreme court for partnership cases, except that in the final prayer it does not ask that said "firm" may be adjudged bankrupt, but only that the petitioners may be adjudged bankrupt. In the petition, however, they are described as the members, and the only members, of the firm of Meyers Bros.; and the schedules show that all their debts were debts as co-partners in that firm. The order of adjudication follows the petition, and does not adjudicate the firm bankrupt, but only the two petitioners. In the notice for the first meeting of creditors, the two petitioners are described as "formerly trading as Meyers Brothers." A trustee was appointed of the bankrupts' estate and effects, which under the petition must include their joint and several estate. I am of the opinion, therefore, that the defect of form in the petition and adjudication is not a material one, but one which may be amended nunc pro tunc by inserting a prayer for an adjudication of the firm as well as of the individuals as bankrupts, without prejudice to the subsequent proceedings. In re Little, 1 N. B. R. 341, Fed. Cas. No. 8,390; General Order 11 (32 C. C. A. xiv., 89 Fed. vii.).

It is argued that under section 5 of the present act, an individual petition for a separate discharge after an adjudication of the firm, cannot be maintained. I do not appreciate the force of this contention, and must overrule it. If it were sound, it would follow that in no case of a firm adjudication could an honest partner be discharged, if a discharge was denied to his co-partner on account of the latter's wrong, though the former was in no way privy to it. This would be plainly contrary to the evident purpose of the sections of the act relating to discharges, and no such construction of section 5 seems in the least necessary.

I am not satisfied, however, with the forms adopted in the proceeding for Mrs. Meyers' individual discharge. In her petition for discharge there is no reference to any firm proceeding, to firm debts, or to any joint or firm adjudication. The petition states that on the 19th of September she was duly adjudged bankrupt; that she has duly surrendered all his (her) property, etc., and prays discharge from all debts provable against her estate. This suggests only a separate, individual proceeding from the start. The notice to creditors is headed in her name only; it states that Amelia A. Meyers has filed her petition praying discharge from all her debts, and that all creditors are ordered to attend, etc. To persons not previously informed of the proceedings, and not knowing that Amelia A. Meyers was one of the old firm of Meyers Bros., the notice to creditors would not afford the least hint that they were required to attend in order to oppose, if they desired to oppose, a discharge of Mrs. Meyers from the debts of Meyers Bros.

The petition for discharge should, therefore, be amended so as to agree with the facts, by stating an adjudication of the firm of Meyers Bros., and of George H. and Amelia A. Meyers, the members composing the firm, as bankrupts; and praying for her discharge from the firm and individual debts; and the notice to creditors should be in substantially that form.

In re SCHROM.

(District Court, N. D. Iowa, E. D. November 23, 1899.)

1. BANKRUPTCY—RECEIVERSHIP—PROPERTY IN FOREIGN JURISDICTION.
Where the court of bankruptcy, upon the filing of a petition in involuntary bankruptcy against an absconding debtor, has appointed a receiver to take charge of his property within its territorial jurisdiction, pending the proceedings on the petition, it will not, before any adjudication has been made, authorize or direct such receiver to bring suit in another state to obtain possession of property of the bankrupt there situate.

2. SAME—REMEDY OF CREDITORS.
The proper course in such circumstances is for the petitioning creditors to apply to the proper court, federal or state, in such other state, setting up the pending proceedings in bankruptcy as the basis of their action, and asking for protection for their rights in the property of the debtor within that state by injunction, receivership, or other appropriate remedy, in which proceedings the trustee in bankruptcy, subsequently appointed, may appear, and take charge.

In Bankruptcy. Submitted on petition for direction to receiver to bring suit.

Rozenthal, Kurz & Heischl, for bankrupt.
Henderson, Hurd, Lenehan & Kiesel, for petitioners.

SHIRAS, District Judge. In this case it appears that H. B. Claflin & Co., a corporation created under the laws of the state of New York, Bell Bros. Company, an Iowa corporation, and the Gage Down Corset Company have filed a petition in this court asking that Henry Schrom be adjudged a bankrupt, and the hearing upon this petition is set down for a day in the future, after due service has been had. Accompanying these proceedings, the petitioning creditors filed an application for the immediate appointment of a receiver to take charge of the property of the alleged bankrupt, it appearing that the property consisted mainly of a stock of goods situated at Waterloo, Iowa, and another stock at Galesburg, Ill. This court granted an order appointing a receiver to take charge of the property at Waterloo, sufficient ground being shown for such appointment. The present application is for an order authorizing the receiver then appointed to bring suit in Illinois to obtain possession and control of the property situated in Illinois, the alleged bankrupt having absconded. In my judgment, this application should not be granted. The property is not within the territorial jurisdiction of this court. The adjudication in bankruptcy has not yet been had, and this court has not yet been clothed with the full jurisdiction over the property of the alleged bankrupt that will accrue after the adjudication has taken place. Of course, no trustee has yet been appointed. Under these circumstances it is difficult to see how this court can exercise jurisdiction or control over the property in Illinois, or can confer any authority on its receiver to bring suit in Illinois against third parties to obtain possession of the property. The proper course to pursue is for the petitioning creditors to take proceedings in the proper court, state or federal, in Illinois, in their own name, setting up the proceedings now pending in bankruptcy in this court as the basis of

their action, and asking that court to protect the rights of creditors in the property situated in Illinois, either by the appointment of a receiver, by injunction, or any other appropriate remedy. If the adjudication in bankruptcy is had, then the trustee who will be appointed can then appear in that case on behalf of creditors, and take control of the proceedings.

In re BASCH.

(District Court, S. D. New York. November 25, 1899.)

1. BANKRUPTCY—FIDUCIARY DEBTS—COMMISSION MERCHANT.
   A debt due by a bankrupt in the character of a commission merchant, arising out of his failure to account for the value of goods consigned to him for sale on commission, on a contract to return the goods or their specific proceeds, is not a debt created by the bankrupt's "fraud, embezzlement, misappropriation, or defalcation while acting in a fiduciary capacity," and therefore will be released by his discharge in bankruptcy.
2. SAME—STAY OF SUITS BEGUN AFTER ADJUDICATION.
   A court of bankruptcy has jurisdiction to stay the prosecution of an action against the bankrupt in a state court, on a debt from which his discharge would be a release, pending the determination of the question of his discharge, though the action was begun after the filing of the petition in bankruptcy.

In Bankruptcy. On application for stay of proceedings in state court.

William Riley, for bankrupt.
Benjamin & Loeser, opposed.

BROWN, District Judge. A motion is made in behalf of the bankrupt to stay prosecution of a suit in the state court to recover the value of goods consigned to the bankrupt for sale upon commission upon an alleged contract to return the goods or their specific proceeds, and a conversion thereof.

Under the prior bankruptcy acts of 1841 and 1867, after conflicting adjudications in the courts below, it became definitely settled by the decisions of the supreme court, that debts excepted from the effect of a discharge in bankruptcy on the ground that they were created by fraud, or defalcation, or while acting in a fiduciary capacity, did not embrace debts arising in commercial dealings between principal and agent or factor for the sale of goods on commission. Loveland, Bankr. pp. 625–627; Chapman v. Forsyth, 2 How. 202; Neal v. Clark, 95 U. S. 704; Hennequin v. Clews, 111 U. S. 676, 4 Sup. Ct. 576; Upshur v. Briscoe, 138 U. S. 365, 11 Sup. Ct. 313; Ames v. Moir, 138 U. S. 306, 11 Sup. Ct. 311. See, also, In re Smith, 9 Ben. 494, 22 Fed. Cas. 388; Keime v. Graff, 17 N. B. R. 319, 14 Fed. Cas. 218; Owsley v. Cobin, 15 N. B. R. 489, 18 Fed. Cas. 929; Zeperink v. Card (C. C.) 11 Fed. 295.

The provisions of section 17 (4) of the present bankrupt act as to the debts excepted from the operation of the discharge, are so nearly identical with the language of the preceding acts, that these provisions must be deemed to be used in the sense adjudicated by the above

decisions, so as not to except a debt or claim for a technical conversion, or sale on commission, like the claim of the present creditor.

The term "misappropriation" in the present act, is even less appropriate to the transaction sued on, than the term "fiduciary capacity"; and the reasoning in the cases cited that excludes the latter, excludes the former also.

The stay of suits against the bankrupt pending the bankrupt proceedings, is absolutely necessary to give effect to the bankruptcy act. Section 11 expressly extends the power to stay proceedings to suits even that were commenced before the petition was filed; and this in connection with section 2 (15), necessarily includes suits on provable debts commenced after the petition was filed and while the bankruptcy proceedings are pending, as the greater power includes the less.

The debt being contracted prior to the adjudication, the creditor is a party to the proceedings in bankruptcy. If the bankrupt obtains his discharge, the creditor will be bound by it, and his debt barred. The creditor cannot acquire any preference, or an exemption from the operation of the discharge, merely by commencing a suit after the adjudication and obtaining judgment. To permit such suits could not possibly, therefore, subserve any useful purpose, while it would involve additional costs, and might be the source of complication and embarrassment to the bankrupt upon the specious contention that the prior debt was merged in the judgment subsequent to the adjudication, and that consequently the judgment was not barred; or the bankrupt's property, acquired after the adjudication, might be illegally sought to be levied upon under it. As the permission of such suits can be of no lawful use to the creditor, but can lead only to the annoyance of the debtor or the obstruction of the bankrupt act, such suits should be enjoined where the claim would be barred by the bankrupt's discharge. Loveland, Bankr. p. 79. The stay is granted.

In re BYRNE et al.

(District Court, S. D. Iowa, E. D. November 25, 1899.)

1. BANKRUPTCY—PRIORITY OF PAYMENT—LABOR CLAIMS.

Where the laws of the state give a preference to the wages of employés, to the extent of $100 to each person, for labor performed within 90 days before the seizure of the employer's property on judicial process, or its sequestration in the hands of a receiver or trustee for the purpose of paying his debts, and the courts of the state hold that this preference or charge outranks any liens on the property created by contract, such a labor claim, to the amount of $100, will be entitled to priority of payment out of the estate of the employer in bankruptcy, in preference to a landlord's statutory lien for rent of the premises in which the bankrupt's business was carried on.

2. SAME—LANDLORD'S LIEN FOR RENT.

A landlord to whom rent is due for the use of the premises by the bankrupt as a store will not be required to bring an action in a state court for the establishment of his lien, as provided by the state statute, as a precedent step to the assertion of his rights against the bankrupt's property in the hands of the trustee, but may at once prove his debt, and be heard in the court of bankruptcy in support of his claim to priority.

In Bankruptcy. On appeal from ruling of referee upon the question of the right of W. P. Byrne to claim payment of claim in preference to lien of L. M. Runyan.

Blake & Blake, for Byrne.
E. S. Huston, for Runyan.

SHIRAS, District Judge. From the record and the certificate of the referee in this case it appears that there is in the hands of the trustee for distribution the sum of $112.77, money realized from the sale of a stock of boots and shoes belonging to the bankrupt firm. There has been proved up and allowed a claim on behalf of L. M. Runyan in the sum of $78.33, as rental due from the firm for the use of a storeroom owned by Runyan, but leased to the firm, and in which room were kept the boots and shoes which passed into the possession of the trustee after the adjudication in bankruptcy; and the facts show that Runyan is entitled to a landlord's lien, for the rental due him, upon the stock of goods which were taken possession of by the trustee, the lien being created by the provisions of section 2992 of the Code of Iowa. On behalf of W. P. Byrne a claim in the sum of $100 has been filed and allowed for wages due him, as a clerk or employé of the bankrupt firm, for work by him done within 90 days next preceding the initiation of the proceedings in bankruptcy; and on his behalf it is claimed that, under the provisions of section 4019 of the Code of Iowa, Byrne becomes a preferred creditor for this amount, and therefore, under section 64 of the bankrupt act, he is entitled to payment in full out of the funds in the hands of the trustee before any part thereof can be applied to the discharge of the landlord's lien existing in favor of Runyan.

The Code of Iowa (section 4019) provides that:

"When the property of any company, corporation, firm or person shall be seized upon by any process of any court, or placed in the hands of a receiver, trustee or assignee for the purpose of paying or securing the payment of the debts of such company, corporation, firm or person, the debts owing to employés for labor performed within ninety days next preceding the seizure or transfer of such property, to an amount not exceeding one hundred dollars to each person, shall be a preferred debt and paid in full. * * *"

In the case of Reynolds v. Black, 91 Iowa, 1, 58 N. W. 922, the question was presented to the supreme court of the state whether this section gave the employé a preference in the order of payment out of the proceeds of property upon which an express lien in the form of a mortgage rested when the property was taken under judicial process, and the conclusion reached was that the statutory preference created in favor of the employé gave him priority over the existing mortgage lien. It thus appears that, under the laws of this state, when an insolvent estate is being closed up through the medium of a receiver, trustee, or assignee, the wages due employés, up to the amount of $100 to each person, for work done within 90 days next preceding the seizure by judicial process, or the transfer to the receiver, trustee, or assignee of the property of the insolvent, will be given preference in order of payment over contract liens existing thereon; and the same preference must be given to wages due employés over liens cre-

ated by statute, such as the landlord's lien claimed on behalf of Runyan.

On behalf of Runyan it is contended that the trustee takes the property of the bankrupt subject to the liens and equities existing in favor of third parties, and that therefore the landlord's lien created by the statute of Iowa must be held to apply to the proceeds of the property in the hands of the trustee. Marshall v. Knox, 16 Wall. 551; Jerome v. McCarter, 94 U. S. 734. If the present contest was between the trustee, as the representative of the creditors at large, and Runyan, as the landlord of the bankrupt, the general rule contended for would be applicable; but the contest now before the court is between two creditors, who each make a special claim to the fund in the hands of the trustee, and as between these parties the trustee stands indifferent.

On behalf of Byrne it is urged that Runyan cannot be heard to assert that he is entitled to a landlord's lien, because he did not institute an action for the establishment of his lien under the provisions of the state statute, but simply proved up his claim as a money debt in the bankruptcy proceedings. Under the express grant of jurisdiction at law and in equity conferred upon the district courts in bankruptcy by the provisions of the second section of the bankrupt act, it cannot be questioned that in dealing with the questions that arise in the administration of bankrupt estates the court has the power to, and ordinarily will, exercise its equitable jurisdiction in order to be enabled to deal with the rights of parties upon the basis of the merits, rather than to be controlled by legal forms. No good reason exists for the adoption of the rule that in bankruptcy cases, when the property of the bankrupt has passed into the possession of the trustee, and under the control of the bankruptcy court, parties who may have or claim liens upon or equities in the property may not at once appear in the bankruptcy court and case, and there be heard on behalf of the claim they assert; and I therefore hold that Runyan was not required to bring an action in the state court for the establishment of his lien, as a precedent step to the assertion of his right against the property of the bankrupt or the proceeds in the hands of the trustee. The facts show that Runyan is entitled to a landlord's lien upon the stock of goods that passed into the hands of the trustee, and the question is whether Byrne is entitled to a preference in the order of payment.

On behalf of Runyan it is contended that section 4019 of the Code of Iowa does not create in favor of Byrne a lien upon the funds in the hands of the trustee. But is the contention well founded? In Bouvier's Law Dictionary a lien is defined to be "a hold or claim which one has upon the property of another as a security for some debt or charge." In Peck v. Jenness, 7 How. 612, it is said:

"At common law there can be no lien without possession. It is there defined,—a right in one man to retain that which is in his possession, belonging to another, till certain demands of him (the person in possession) are satisfied. Hammonds v. Barclay, 2 East, 235. In maritime law liens exist independently of possession, either actual or constructive. In courts of equity, the term 'lien' is used as synonymous with a charge or incumbrance upon a thing, where there is neither jus in re, nor ad rem, nor possession of the thing."

Can there be any question that section 4019 of the Code of Iowa, in cases wherein the property of an insolvent has passed into the possession of a receiver, trustee, or assignee, creates in favor of employés a charge or incumbrance thereon which is given priority over other claimants? Can there be any question that under this section Byrne is entitled to the funds in the hands of the trustee, up to the amount of $100, as against the general creditors of the estate? Is it not, therefore, clear that Byrne has a charge, an incumbrance, in essence and in fact an equitable lien, upon the fund in question, which he is entitled to assert as against all parties except those who are able to show priority of right? In fact both Runyan and Byrne have a right to the fund in the hands of the trustee which is superior to that of the general creditors; the right in each case being created by the provisions of the statutes of Iowa, and of such a nature that in equity they constitute a lien upon the fund in the possession of the trustee. The question of the relative rank of their liens must be determined by the construction given to the statutes of Iowa which create the liens; and, as already pointed out, the supreme court of Iowa, in Reynolds v. Black, supra, has expressly held that the charge created in favor of employés by the provisions of section 4019 of the Code is superior and prior to mortgage and other like liens. Under the rule thus established by the state supreme court, it must be held that Byrne has the prior right to payment out of the fund in the hands of the trustee; and, as this was the conclusion reached by the referee, his ruling must be, and is, affirmed.

In re HEADLEY.

(District Court, W. D. Missouri, S. D. November 13, 1899.)

No. 32.

1. BANKRUPTCY—PROOF OF CLAIMS—POSTPONEMENT FOR FRAUD.
   Where a national bank bought a judgment of record against one of its debtors, paying much less than its face value, and caused execution to be issued thereon and levied on the debtor's goods, under a secret arrangement between the parties that the execution, after reimbursing the bank for the amount actually advanced, should be managed for the benefit of the debtor, so as to protect him against his other creditors, and with the result of delaying and defrauding the latter, and within four months thereafter the debtor was adjudged bankrupt, and the bank proved a claim against his estate for the whole amount of the judgment, and had the same allowed, *held*, that such allowance should be set aside, and the claim of the bank postponed to the claims of other creditors.

2. SAME—SETTING ASIDE ALLOWANCE OF CLAIM—FRAUD.
   The allowance of a claim against a bankrupt's estate, in favor of an assignee thereof who acquired it after the adjudication, but from an innocent and bona fide holder, in whose hands it was valid and provable, will not be set aside upon an allegation by other creditors that such assignee bought the claim for the purpose of acquiring a majority interest in the estate, of controlling the bankruptcy proceedings in the interest of the bankrupt and himself, and of hindering and defrauding the other creditors, when it does not appear that such fraudulent purpose has actually been carried out, to the injury of other creditors.

3. SAME—SECURED CREDITORS.
   Where judgment is recovered against two co-defendants, and execution thereon is levied upon the property of one of them, and the other is ad-

judged bankrupt, the judgment creditor may prove his claim against the bankrupt as unsecured.

In Bankruptcy. On review of decision of referee in bankruptcy.

Massey & Tatlow, for plaintiff.
James R. Vaughan, for defendant.

PHILIPS, District Judge. In the progress of the administration of this estate, the referee allowed a claim against the estate, amounting to $12,524, in favor of one W. H. Rosenow. This claim was predicated of two judgments—one in favor of the Market & Fulton National Bank of New York, and the other in favor of the Phœnix National Bank of New York—against said Headley rendered some time prior to the proceedings in bankruptcy against said Headley. The assignors of said judgments are the petitioning creditors, at whose instance said Headley was adjudged a bankrupt; and the assignment was made to said Rosenow after the adjudication in bankruptcy. The consideration for this assignment was the sum of $2,750, claimed to have been paid by said Rosenow. The fact is found by the referee, on the hearings of evidence touching this transaction, that this purchase of said judgments was in fact made in the interest and for the benefit of the National Exchange Bank of Springfield, Mo. The court is satisfied, on examination of the whole evidence and surrounding circumstances of the transaction, that the National Exchange Bank was the real purchaser, and that said Rosenow was used by the National Exchange Bank as the mere instrument for accomplishing by indirection what it hesitated to do directly, the reason for which is to be found, doubtless, in two facts:

First, out of an apprehension of the bank that the purchase of a claim against an insolvent bankrupt estate was not in the usual and ordinary course of business of a national bank, whose powers are defined by section 5136, Rev. St. U. S., which authorizes national banks to discount and negotiate promissory notes, drafts, bills of exchange, and other evidence of indebtedness. It is quite inferable from the contradictory statements of said Rosenow and the president of the bank, on examination before the referee touching this transaction, that the purchase of these judgments was not a matter passed upon formally by the discount board of the bank, and it was the purpose of the president of the bank that the bank should not be known primarily in the transaction between the assignors and the assignee of the judgments; and for that reason the assignment was taken in the name of Rosenow, with the understanding that, while Rosenow may have ostensibly paid the purchase money, he was to be reimbursed or made whole by the bank. As confirmatory proof of this conclusion, since the allowance of the claim in favor of said Rosenow he has made a formal assignment thereof to the National Exchange Bank. Exactly why a national bank should engage in the purchase of such paper by such indirect methods is not made clear by the bank. The charge is made by Lucy A. James, one of the creditors of said bankrupt estate, who has filed a motion before the referee to have said allowance in favor of said Rosenow set aside and postponed to

her claim, that the object of the bank was to control the proceedings in bankruptcy in the interest of said bank and said Headley, the bankrupt, and for the purpose of hindering, delaying, and defrauding the other creditors of said bankrupt, including the petitioner. The referee set aside said allowance and disallowed the claim on the ground that the bank was the real party in interest, and that the object of Rosenow and the bank was to enable the bank to control the proceedings in bankruptcy, and to hinder and delay the other creditors of the bankrupt. This action of the referee has been certified to this court for review.

To properly understand this issue of fact and law, it is important to consider it in connection with the history of the claim of the National Exchange Bank for $37,486.20, which was first allowed by the referee, and afterwards set aside by him on petition of Lucy A. James, a creditor of the bankrupt, except the sum of $2,500 allowed by the referee as equitable, which action of the referee has also been certified to this court for review. A brief recitation of the history of the dealings between said bank and the bankrupt, as found by the referee and reasonably deducible from the evidence, discloses substantially the following state of facts: Beginning back in 1897, the bankrupt, F. E. Headley, was president and a large stockholder of the Headley Grocery Company, a corporation doing a wholesale grocery business in the city of Springfield, Mo. At that time said Headley was indebted to said bank in the sum of about $10,000, for which the bank held his note, with one W. W. Coover, an officer and stockholder in said grocery company, as security thereon, which note was indorsed by O. M. Headley, a brother of F. E. Headley. Later, F. E. Headley and said grocery company being hard pressed, it was arranged between F. E. Headley and the president of said bank that this note should be replaced and taken up by the substitution of a note signed by said Headley Grocery Company and F. E. Headley and W. W. Coover; leaving O. M. Headley, indorser of the original note, out of the new note. Shortly thereafter the president of said bank obtained a deed of trust on said grocery company's property, making said bank and another bank preferred creditors, and thereafter said grocery company made a general assignment for the benefit of creditors. One F. R. Massey was named as trustee under the deed of trust, and Charles A. McCann was made assignee in said deed of assignment. Both said Massey and McCann were intimate friends and business associates of the president of said bank, and were also stockholders in the concern of Keet-Rountree Shoe Company, a corporation doing business in Springfield, Mo.; the said Keet being president of said bank. The said trustee took possession of the stock of goods of the Headley Grocery Company, and, after selling at retail a part of the stock, sold the residue in bulk to the Springfield Grocery Company, another business corporation of Springfield, of which said Keet, president of said bank, was vice president and a large stockholder. Keet, representing said Springfield Grocery Company, sold the goods so obtained to F. E. Headley, M. L. Middleton, and E. D. Seaman, within three days after said trustee's sale, at a profit of $1,000, out of which stock said F. E. Headley, on a division between him and said

Middleton and Seaman, obtained $4,000 worth of goods and $1,928 in cash; and out of the goods and real estate of said Headley Grocery Company the said bank obtained and applied as a credit on said note of $10,000 the sum of $8,500. Afterwards the bank brought suit in the circuit court of Greene county, Mo., and obtained judgment against said Headley Grocery Company for the balance of said note, leaving out of said suit said F. E. Headley and said Coover. The result of these proceedings was that the grocery company, a corporation, was induced to execute its note for a debt of said F. E. Headley, for which the said grocery company was in no wise primarily liable; and the property of the grocery company was taken to apply to the payment of F. E. Headley's individual liability, whereby F. E. Headley and his brother, the indorser, were entirely let out of this debt. This action on the part of the corporation was clearly ultra vires, and there can be but one conclusion drawn therefrom, and that is that the bank and F. E. Headley were acting in concert for the protection and benefit of said F. E. Headley in his individual capacity. The assets of the grocery company were thus absorbed by the bank and F. E. Headley, and the assignee, Charles A. McCann, obtained nothing under the assignment, and the general creditors of the grocery company were left wholly unprovided for. The trustee, Massey, under said deed of trust, thereafter obtained judgment against F. E. Headley in the circuit court of Greene county, Mo., in favor of the beneficiaries of said deed of trust, in the sum of $37,000. This judgment said Massey sold at public auction, and said National Exchange Bank became the purchaser thereof at the sum of $2,000.

After F. E. Headley withdrew from the Middleton-Seamans concern, the evidence discloses that he set up another grocery concern in Springfield, in the name of his brothers. His interest in this concern was concealed from the public. In the fall of 1898 the objecting creditor herein, and other creditors of said Headley, caused executions to be issued on their judgments against him. It is quite inferable from all the facts and circumstances in evidence that F. E. Headley became apprehensive that his concealed interests in said concerns might be uncovered by these execution creditors; and therefore his attorney, who seems to have also sustained the relation of attorney or adviser to the bank, entered into an understanding with the president of the bank that an execution should issue on said judgment of $37,000 held by the bank against Headley, and levy it on all of Headley's interests, and so manage it that after the bank should obtain therefrom the sum of $2,000 and interest, which it paid at the trustee's sale for said $37,000 judgment, the balance should inure to Headley's benefit. Accordingly, execution on this $37,000 judgment was issued, and levied upon the capital stock of the Headley Bros. Grocery Company; and said Middleton and Seaman were garnished, and funds of theirs in another bank were tied up by this proceeding. The conclusion cannot be resisted that the attorney of F. E. Headley was managing and controlling this execution in the interest of said Headley, and that the bank was merely lending itself, through this proceeding, to accomplish the result of obtaining for itself the money it had paid for said judgment, while consenting that the execution

might thus be employed to protect Headley against his other creditors. This execution in favor of the bank was levied on the Headley Bros. Grocery Company on October 8, 1898, under which nothing was immediately done by way of sale, whereupon the objecting creditor herein caused an execution to be levied on the same capital stock. Thereupon the stock, under the bank's execution, was advertised and sold on the 30th of December, 1898, and the bank became the purchaser. Headley was left in possession of the goods after this sale, and ran the business, apparently without let or hindrance, in his own way, until the trustee under the bankruptcy proceedings on the 11th day of March, 1899, took possession thereof. It does not appear that Headley during his pretended agency made accountings to the bank. The evidence tends to show that the amount of said stock of goods which passed into the control of Headley for the bank was $5,000, and at the time the trustee in bankruptcy took charge was reduced to about $500, and which the bank bought in at trustee's sale in bankruptcy.

While the transactions had between the bank and this bankrupt, antedating the enactment of the bankrupt law, cannot be, in and of themselves, held to be a fraud upon the bankrupt act, yet it is competent to investigate and develop the same, as bearing upon the question of a fraudulent combination between the bank and the bankrupt after the adoption of the bankrupt act, and within four months preceding the adjudication in bankruptcy. It may be conceded to the contention of the bank in this controversy that it had a right to purchase the judgments amounting to $37,000 against said Headley, if it was done in the usual and ordinary course of business of the bank, or to better secure its claims against the bankrupt. But it is inconceivable that a national banking institution would take out of its bank the sum of $2,000 in money to invest in a judgment against a man known at the time to be bankrupt, and whose assets were of such character as to make any dividend among the creditors of his estate a very uncertain quantity. Such a purchase on the part of a national bank must excite grave suspicion, and should devolve upon the bank the most satisfactory explanation and proof to show that it was free from any purpose to assist the debtor in hindering and delaying his other creditors. And even if this acquisition of the judgment against the bankrupt was made in the ordinary course of legitimate banking business, while the bank had the right, in the race of diligence between creditors, to take any and every legitimate step to obtain its debt from the debtor, the very moment it employed, or suffered to be employed, the execution in its favor to protect the property of the common debtor against the just claims of other creditors, by hindering them in the interest of the debtor, it was a misuse of its claim, and was in fact and law a fraud upon the other creditors. Taking the whole history of the dealings between the bank and the bankrupt, with the practical results, it is difficult for an honest mind to escape the conclusion that the bank, throughout, while protecting itself, was likewise aiding and abetting the debtor to prevent other creditors from obtaining anything from his property, and that, while apparently employing the judgment of $37,000 and

the execution thereon to obtain a preference in favor of the bank over the other creditors, the secret understanding existed between the bank's president and the bankrupt that when the bank obtained out of the proceeds of the execution its purchase money of $2,000, with interest, the bankrupt's attorney was free to employ the execution for the whole sum, so that the residue, after paying the bank the $2,000, interest, and expenses, should inure to the benefit of the bankrupt. Under all the authorities, this was a fraudulent combination and scheme, which should postpone the claim of said bank for the amount of said judgment against the bankrupt estate. The bankrupt law is administered upon lines of equity jurisprudence, and, as between contending creditors, the bankrupt court, in the interest of fair dealing and good conscience, has the unquestioned power to postpone the claim of such a creditor in favor of the other creditors. "When a creditor by fraud will attempt to defeat the claims of other creditors, there is no hardship in postponing his demand, although a just one, to those which he has endeavored to defeat." State v. Hope, 102 Mo. 431, 14 S. W. 990. It is the established doctrine of this state that the priority of an execution creditor who acts in collusion with the execution debtor may be avoided on motion after the return of the execution. "This doctrine results from the principle that the levy devested the property from the defendant, and to leave such property in the possession of the defendant by the connivance or request of the plaintiff in the execution would be a fraud upon subsequent executions." Wise v. Darby, 9 Mo. 133; Field v. Liverman, 17 Mo. 218; Parker v. Waugh, 34 Mo. 340. So, Bump (Fraud. Conv. p. 504) says:

"The statute avoids all executions issued or kept on foot with intent to delay, hinder, or defraud creditors. The intent may be inferred from circumstances, and, if it is established, the execution loses its preference."

The action of the referee in setting aside the allowance in favor of the bank of this claim of $37,000 is sustained by the court, at least to the extent of postponing it to the claims of other creditors of the estate. In view of the grounds of such conclusion, it would be illogical to allow the bank, as was done by the referee, any part of this claim. This case is therefore returned to the referee, with directions to set aside the allowance of $2,000 on this claim in favor of the bank.

The recitation of facts aforesaid makes it apparent what was the second and underlying motive of the bank in obtaining control of the judgments in favor of the petitioning creditor in involuntary bankruptcy in this case. Why a national bank, with the full knowledge of the condition of this Headley estate, after an adjudication in bankruptcy, when it already held an unsatisfied judgment of $37,000 against him, would take out of its assets $2,750 in money, and invest it in other judgments against the bankrupt, which it knew could not be paid, necessarily excites grave suspicion as to the integrity of the transaction. If, however, it were found that the object of the bank was to obtain by such means control of a majority of the claims against the bankrupt estate, and that it was further induced thereto in order to work out some advantage to the bankrupt, it is not apparent from the facts before the court how such design, if unaccom-

plished, could disentitle the allowance of this claim in favor of the legal holder thereof. No question is made of the validity of the judgments in favor of the New York banks. There is no charge or claim that said judgment creditors were in collusion with said Rosenow or the National Exchange Bank to assist them in accomplishing any fraud upon the other creditors of the bankrupt. It is an established rule of law that a purchaser with notice of a fraudulent scheme may protect himself by purchasing the title of a bona fide creditor without notice. The reason of this rule is stated by Chancellor Kent in Bumpus v. Platner, 1 Johns. Ch. 220, to be "to prevent a stagnation of property, and because the first purchaser, being entitled to hold and enjoy, must be equally entitled to sell." See, also, Funkhouser v. Lay, 78 Mo. 458. As taker under the judgment creditors, the purchaser succeeded to all the rights and equities of the judgment creditors against Headley. If the judgment creditors had remained the owners of the claims, and presented them for allowance against the bankrupt estate, no valid objection could have been interposed against their allowance in full. The transfer of the claims to Rosenow, and their allowance, in no wise altered the condition of the other creditors of the estate. How, then, can it be held that the mere fact that the assignee of the judgments intended to use them in some improper way affect his right to participate in the dividends of the estate, unless such fraudulent purpose was carried out to the injury of the other creditors? As a purchaser, acquiring all the rights and equities of the innocent judgment creditors, the assignee had a right to do what he pleased with the judgments, provided he did not in fact fraudulently employ them to the injury of other creditors of equal right. The action, therefore, of the referee in disallowing this claim is disapproved, and the case is returned to him with directions to set aside his last order vacating the allowance of this claim.

In respect of the suggestion of counsel for the objecting creditor that the New York judgment creditors also held judgments against W. W. Coover, as co-defendant, under which there had been a levy upon the stock of said Coover in certain companies, it is sufficient to say that such fact does not make the judgment creditors secured creditors, within the meaning of the bankrupt act. A "secured creditor shall include a creditor who has security for his debt upon the property of the bankrupt of a character to be assignable under this act, or who owns such a debt for which some endorser, surety, or other persons secondarily liable for the bankrupt has such security upon the bankrupt's assets." Bankr. Act, c. 1, § 1, subsec. 23. Accordingly it is laid down in Coll. Bankr. p. 283, that:

> "No matter how great may be the security which one may have, if it be the surety of another than the bankrupt, the creditor may prove his entire claim against the bankrupt's estate, and receive a dividend thereon, and thereafter institute proceedings to enforce the claim upon the security for the balance."

As the creditor's claim exceeds $12,000, and the alleged claim against Coover is $4,500, it is hardly probable that his dividend out of the bankrupt's estate in any event would cover the difference.

In re MATTHEWS.

(District Court, S. D. Iowa, E. D. November 29, 1899.)

1. BANKRUPTCY—FEES AND COSTS—FILING FEE.
   General order No. 10, in bankruptcy, providing that the clerk, marshal, or referee, before incurring expenses of certain kinds, may require the bankrupt or other person in whose behalf the duty is to be performed to furnish indemnity for such expenses, and that money advanced by the bankrupt or other person for this purpose shall be repaid him out of the estate, does not apply to the fee of $25 which the clerk is directed to collect upon the filing of a voluntary petition in bankruptcy; and this money is not to be returned to the bankrupt.
2. SAME—ATTORNEY'S FEE PAID BY BANKRUPT.
   A bankrupt is not entitled to be reimbursed, out of the funds in the hands of his trustee, for money paid by him to his attorney before the filing of the petition, as a fee for professional services rendered in preparing the petition and schedule and in connection with the property.

In Bankruptcy.

Payne & Sowers, for bankrupt.

SHIRAS, District Judge. In the application filed on behalf of the bankrupt it is averred that, at the time he filed his petition to be adjudged a bankrupt, he was required to deposit with the clerk the sum of $25, to meet the costs and fees of officers in the proceeding; and he now asks that the trustee may be ordered to repay this amount to him, under the provisions of general order No. 10, which provides that before incurring expense in publishing or mailing notices, or in traveling, or in procuring attendance of witnesses, or in perpetuating testimony, the clerk, marshal, or referee may require from the bankrupt, or other person in whose behalf the duty is to be performed, indemnity for such expense, and the money advanced for the purposes named shall be repaid out of the estate, as part of the cost of administration. The provisions of general order No. 10 do not apply to the deposit of $25, which the clerk, under section 51 of the bankrupt act, is required to collect from the bankrupt when he files his petition. The money thus collected by the clerk is intended to cover the statutory fees to be paid to the clerk, referee, and trustee as compensation for their services; and being paid to the clerk when the petition is filed, the amount of the estate passing to the trustee is lessened by that sum, and, if this amount should be now returned to the bankrupt, he would be receiving part of his estate as it belonged to him before he filed his petition, which estate by the adjudication became in fact the property of the creditors. The provisions of general order No. 10 are intended to cover money which the bankrupt or some third party may be called upon to furnish after the initiation of the proceedings in order to meet expenses incurred by the officer for the purposes specially recited in the order, which purposes do not include the money deposited with the clerk to meet the fees (not expenses) of the clerk, referee, and trustee. Money thus advanced, if the bankrupt has met the requirements of the law with respect to turning over his estate to his creditors, is deemed to have been obtained from sources other than the estate

belonging to the creditors, and therefore provision is made for its repayment out of the estate. The purpose of the order is to protect the officers from personal loss in the performance of their duties under the bankrupt act, but it is not the intent of the order that the bankrupt shall be repaid the money which presumably he took out of his estate to pay the fees of officers before he filed his petition in bankruptcy.

It is further averred in the application of the bankrupt that he was compelled, by threats of attachment, to take the benefit of the bankrupt act, in order to preserve his estate for equitable distribution among his creditors, and to that end he was compelled to employ counsel to prepare his petition, and perform other services in connection therewith, which resulted in securing his estate to his creditors for distribution under the bankrupt act, and that for these services he paid his attorneys the sum of $150; and he now asks that this amount be repaid him out of the estate, relying upon the provisions of general order No. 10 and of section 64 of the bankrupt act as grounds for the order asked. According to the showing made, the bankrupt, before the filing of his petition in bankruptcy, took out of his estate the sum of $150 to pay his attorney for legal services rendered in preparing his petition and schedules in bankruptcy, and possibly for other legal services which it may be admitted were of value to the creditors. These services have been paid for, however, and the payment was made out of the estate of the bankrupt; so that, in effect, the creditors have already made good the amount. If the bankrupt had not paid this sum to his attorney, it would have formed part of his estate, which he would have been in duty bound to transfer to his trustee. Instead of so doing, he took it out of his estate and paid it to his attorney, but by so doing he did not create any legal or equitable right to demand a repayment thereof out of his estate. Under the provisions of section 64 of the bankrupt act, the court may allow, as part of the cost of administration, a reasonable fee to an attorney for professional services rendered to a voluntary bankrupt; but this provision is intended to secure to the bankrupt proper professional aid after he has, by conveying his estate for the benefit of creditors, possibly put it out of his power to secure the services of an attorney, but this case, under the facts set forth in the application of the bankrupt, is not one coming within the meaning of this section. The orders asked by the bankrupt are therefore refused.

In re JONES.

(District Court, E. D. Wisconsin. November 18, 1899.)

1. BANKRUPTCY—EXEMPT PROPERTY—WEARING APPAREL—WATCH.
   Where the state statute (Rev. St. Wis. § 2982) exempts from execution "all wearing apparel of the debtor," a bankrupt who owns a gold watch and chain, which he habitually carries upon his person in the ordinary mode of use, will be entitled to have the same set apart to him as exempt.
2. SAME—MASONIC UNIFORM.
   Under a state statute exempting from execution "all wearing apparel of the debtor," a bankrupt will be entitled to claim as exempt a Masonic

uniform, although he does not wear it as an ordinary and usual dress, but on special occasions only.

In Bankruptcy.

The referee certifies a question of exemption claimed by the bankrupt, of "one gold watch, chain, and charm," and of "a certain uniform and paraphernalia," further described as a "Masonic uniform." The certificate states that "the watch and chain were carried upon the person, in the mode of ordinary usage," and that "the Masonic uniform was not used as ordinary or usual wearing apparel," and that the referee held the articles not exempt, and ordered their delivery to the trustee.

Howlands & Elholm and Hand & Hand, for creditors.

Walker & Richards, for bankrupt.

SEAMAN, District Judge. The question certified is one of difficulty, in the absence of any definition by the supreme court of Wisconsin of the term wearing apparel as employed in the statute (Rev. St. § 2982) exempting "all wearing apparel of the debtor and his family," and in view of the diversity of decisions in other jurisdictions on the inquiry whether a gold or silver watch is included in such designation of exemptions. See cases pro and con collated in 12 Am. & Eng. Enc. Law (2d Ed.) 117, 118. The bankruptcy act adopts the exemptions of the state statute, which includes their construction by the supreme court of the state, and the rulings of that court are uniform in favor of the utmost liberality for such interpretation. Heath v. Keyes, 35 Wis. 668, 672; Cunningham v. Brictson, 101 Wis. 378, 383, 77 N. W. 740. In the well-considered case, In re Steele, 2 Flip. 324, Fed. Cas. No. 13,346, it is held that a watch usually carried upon the person of the debtor constitutes wearing apparel, within the exemption statute; and this view is approved in Stewart v. McClung, 12 Or. 431, 8 Pac. 447, and in Brown v. Edmonds (S. D.) 59 N. W. 731. Without attempting to review the authorities one way and the other upon this point, I am of opinion that such construction is in accord with the Wisconsin doctrine, and should be adopted here. It is true that Judge Hopkins, of the Western district of Wisconsin, held otherwise in an early case in bankruptcy under the act of 1867 (In re Graham, 2 Biss. 449, Fed. Cas. No. 5,660), but without discussion in the opinion, or reference to the authorities in Wisconsin or elsewhere; and, however persuasive as a ruling by that eminent judge, it cannot be regarded as controlling in the light of later interpretations. In reference to the "Masonic uniform," it appears to be owned for occasional wearing apparel, and the statute imposes no requirement of "ordinary and usual" service. If so held in good faith, the exemption applies. Vide Frazier v. Barnum, 19 N. J. Eq. 316. Let the exemptions be allowed accordingly.

NOTE. Since filing the foregoing opinion, the case of Sellers v. Bell, 36 C. C. A. 502, 94 Fed. 801, 811, has come to my notice; and the circuit court of appeals, Fifth circuit, therein holds that a watch is exempt, within the statutory designation of wearing apparel.

In re HIGGINS.

(District Court, D. Kentucky. November 20, 1899.)

1. BANKRUPTCY—DISSOLUTION OF LIENS—LIMITATION OF TIME.
Bankr. Act 1898, § 67c, providing that an adjudication in bankruptcy shall dissolve "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 the bankrupt within four months prior to the filing of the petition, does not refer, necessarily, to the beginning of the action or suit itself, but to the beginning of that part or branch of the proceedings whose special object is to secure a lien on property of the debtor.

2. SAME—ATTACHMENT.
Where an attachment is sued out in a pending suit, upon the filing of an affidavit and bond as required by the state statute, and is levied on property of the debtor, within four months prior to the filing of a petition in bankruptcy by or against him, the lien so acquired will be dissolved by his adjudication as a bankrupt, if it appears that such lien was obtained while the defendant was insolvent, and that its enforcement would work a preference, notwithstanding the fact that the original action had been pending for more than a year.

In Bankruptcy. On review of decision of referee in bankruptcy.

Charles Grubbs, for W. A. Pinkerton.
Wheeler & Worten, for bankrupt.

EVANS, District Judge. The petition in this case was filed January 18, 1899, and the adjudication was made on the 20th,—two days later. After the selection of a trustee, W. A. Pinkerton, a creditor, proved, as a preferred claim, a demand in his favor against the bankrupt for $353.98. The claim of preference made by this creditor was based upon the fact that he had commenced an action at law against the bankrupt in the Marshall circuit court, to recover his debt, on May 31, 1897; that it was pending and undetermined on January 12, 1899, and that on that day, but not before, said Pinkerton had made an affidavit setting up grounds of attachment under the Kentucky Code of Practice, and had filed it in said action, and therein prayed that an order of attachment might then issue, that such an order was issued accordingly on that day, and levied on the assets of the bankrupt which afterwards came to the hands of the trustee. Upon the hearing before him, the referee sustained the claim of this creditor to a preference, and the trustee has brought the matter here for review. The action of the court must depend upon the proper construction of certain clauses of section 67 of the bankrupt act, which read 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 persons 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," etc. "(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 af-

fected 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."

If the language of clause "c," regardless of all other considerations, is to be construed as referring to the date of the institution of the action in which the attachment was long afterwards obtained, no difference what might be the date of the attachment itself, or the application therefor, there must be a decision of the question in favor of the creditor. A case has been referred to which supports this view, but I have found it impossible to agree with it. There does not seem to me to be any sound reason for supposing that congress could have intended to refer to anything except the beginning of that part of the proceeding which secured the writ under which there was a seizure of, and consequent lien upon, some of the debtor's property, whereby it was put in a position where other creditors could see that a lien was being claimed upon it to the exclusion of their otherwise equal right to share in it. Here a suit had been quietly but slowly progressing in the state court for nearly two years, but no attachment had been sued out, nor had anything equivalent to a lis pendens respecting this property been brought about, nor had anything been done by Pinkerton to entitle him to claim any exclusive right to have these assets appropriated to the payment of his demand. No lien existed, nor was any claimed, up to that time, nor did the right to any exist. Under section 196, and other sections, of the Kentucky Civil Code of Practice, an order of attachment may be obtained at any time before final judgment, upon the filing of an affidavit stating the statutory grounds therefor, and upon the execution of a bond, etc.; and under section 201 other orders of attachment may subsequently issue without additional affidavit or bond. While the issual of the attachment, or the obtaining of the order therefor, is not the commencement of the action itself, under the Kentucky Code, it is the beginning of the claim for a lien; and the whole reason of the thing seems to me to demand such a construction of the foregoing clauses of the bankrupt act as will make the time of beginning the proceedings for the attachment, instead of the beginning of the action itself (at which time there was no claim for, or reference to, an attachment), as the period when the four months must begin. The mere letter of the statute must yield to the reason and spirit of it. End. Interp. St. § 258; U. S. v. Kirby, 7 Wall. 486, 487, 19 L. Ed. 278. The rule established by the supreme court is that, "in whatever language a statute may be framed, its purpose must be determined by its natural and reasonable effect." Collins v. New Hampshire, 171 U. S. 34, 18 Sup. Ct. 768, 43 L. Ed. 60; Henderson v. Mayor, etc., 92 U. S. 259, 23 L. Ed. 543; Morgan's Louisiana & T. R. & S. S. Co. v. Louisiana Board of Health, 118 U. S. 462, 6 Sup. Ct. 1114, 30 L. Ed. 237; Washington & I. R. Co. v. Cœur d'Alene Ry. & Nav. Co., 160 U. S. 100, 101, 16 Sup. Ct. 239, 40 L. Ed. 355; Lau Ow Bew v. U. S., 144 U. S. 59, 12 Sup. Ct. 517, 36 L. Ed. 340.

Under the Kentucky practice, the suing out of an attachment is the beginning of the action, as to that part of the remedy; and until this is done there can be no attachment, however long the action which confines itself to an effort to obtain a mere personal judgment may have been previously pending. Suppose that on January 1, 1899, some other creditor had instituted an action upon his claim, and had obtained an attachment, and had caused it, after being issued, to be levied upon this same property; and suppose that afterwards, on January 12, 1899, the attachment of Pinkerton had been sued out and levied, as it in fact was; can it be possible that congress intended that there should be worked out the anomalous and unjust, not to say absurd, result that the attachment first sued out and levied, and thereby acquiring indubitable priority, should be dissolved, under the statute, because the action itself was begun within four months of the filing the petition, while the second attachment, applied for, sued out, and levied more than ten days later, should stand, although the proceeding for the attachment was not begun until a few days before the bankruptcy? The contention does not seem to be maintainable. See Lau Ow Bew v. U. S., 144 U. S. 59, 12 Sup. Ct. 517, 36 L. Ed. 340, and cases there cited to the proposition that "nothing is better settled than that statutes should receive a sensible construction, such as will effectuate the legislative intention, and, if possible, so as to avoid an unjust or an absurd conclusion." In the case above supposed, the state law, if there had been no bankruptcy, would have given unquestionable priority to the first attachment regardless of the mere date of the institution of the actions; and we could not reconcile section 67 of the bankrupt act with clause 5 of section 64 otherwise than by the construction I have given. That clause gives priority to "debts owing to any person who by the laws of the state or the United States is entitled to priority." The case In re De Lue (D. C.) 91 Fed. 510, manifestly supports the view of the referee in this matter; but as the learned judge, in passing upon this case, at least to some extent, finally put his judgment upon the mistaken ground that clause "f" of section 67 only applied to cases where there was the filing of the petition in bankruptcy against the debtor, and not where there was the filing of a petition in bankruptcy by a debtor, thus overlooking clause 1 of section 1 of the act which makes the one phrase include the other, it is not impossible that, had not this been the fact, a fuller investigation might have led Judge Lowell to a different conclusion, although in other respects he puts his opinion upon grounds diametrically opposed to the views I have expressed. That seems to be the only case in which this section of the statute has been construed in that way, although the cases In re Easley (D. C.) 93 Fed. 419, and In re Richards (D. C.) 95 Fed. 258, may have some bearing upon the question.[1]

For the reason suggested, however, the decision of the referee in this case is disapproved and set aside; and inasmuch as it manifestly appears from the record that the lien of said attachment was ob-

[1] Note by the Court: Since the announcement of this opinion, the judgment of the circuit court of appeals of the Seventh circuit in the case of In re Richards, 96 Fed. 935, has been published.

tained and permitted while the defendant was insolvent, and that its existence and enforcement will work a preference to Pinkerton, the judgment of the court is that said attachment should be, and is, dissolved. The claim of Pinkerton may be proved as an ordinary debt, —subject, of course, to objection. It is obviously desirable that this question should be reviewed by the circuit court of appeals.

In re RUPPEL.

(District Court, W. D. Pennsylvania. October 27, 1899.)

No. 60.

BANKRUPTCY—BANKRUPT TENANT—LANDLORD'S LIEN FOR RENT.

Where a tenant of realty, holding under a lease which contains a clause of forfeiture and right of re-entry for breach of conditions, becomes bankrupt, and the leasehold interest is sold by the trustee in bankruptcy, the landlord of the demised premises has no lien, under the laws of Pennsylvania or at common law, upon the proceeds of the sale of the leasehold, for the rent overdue at the time of the bankruptcy.

In Bankruptcy. On question certified by W. R. Blair, referee in bankruptcy.

Robert B. Petty, for landlord.
Joseph Stadtfelt, for trustee.

BUFFINGTON, District Judge. The referee's certificate involves the question whether, on a trustee's sale of a leasehold, the landlord of the demised premises has a lien on the proceeds for overdue rent. It is clear he has none under the Pennsylvania statute of June 16, 1836; for the lien there given only extends to "the goods and chattels being in and upon" the premises. It is urged, however, such a lien exists by virtue of the re-entry clause in the lease before us, which is as follows:

"Upon the breach of any or all the conditions of this lease, or at any time thereafter, at the option of the lessors, all the rights of the lessee shall fully cease and determine, and the lessors may proceed to gain possession of the said premises, with or without any writ or legal process, and without notice (the lessee hereby waiving all notices in regard to gaining possession), the same as if the full term, or any of its renewals, had fully ended, using such and so much force as may be needed to that end."

We are unable to agree with this contention, and find no Pennsylvania decisions warranting it. In Bantelon v. Smith, 2 Bin. 146, a lien by virtue of a re-entry clause was given, but that was a sale of land subject to ground rent, and the right of re-entry was not a right of forfeiture, as in the present case, but a right to re-enter and "hold the land until the arrearages of rent should be fully paid." In analyzing that case in Bank v. Heilner, 47 Pa. St. 458, the supreme court said:

"The ruling in Bantelon v. Smith turned upon the special covenant of the deed. There is no such covenant in this mining lease. There is no power reserved to enter and hold the premises for arrears of rent, but there is a general right of entry to declare a forfeiture of the lease for breach of any of the numerous conditions of the lease. Now, it seems to me very illogical to argue

from a covenant of re-entry, merely to hold for arrears of rent, to a covenant of forfeiture, which extinguishes the term. In the one instance, a lien may exist, for there is an estate to be bound by it; but in the other the power is to destroy the estate, and liens cannot, of course, survive the estate bound by them. Forfeiture under this lease would not give the landlord his rent. It would be like the old remedy of the feudal lord against his unfaithful vassal, before the milder invention of distress, which, instead of securing the reditus, extinguished the feud."

It is true cases are found where liens have been sustained on leases where there was a simple right of re-entry in the nature of a forfeiture, but such cases concern mining leases. Moreover, their authority has been questioned in later cases (see criticism of Spangler's Appeal, 30 Pa. St. 277, in Bank v. Heilner, 47 Pa. St. 459); and it has been held, also, in Dickinson v. Beyer, 87 Pa. St. 278, "that rent reserved in a coal lease was analogous to a ground rent."

In the absence of any decision by the supreme court of Pennsylvania giving, in an ordinary lease of a building, the effect here contended for to a re-entry forfeiture clause, we hold no such lien exists, since such is the common law. This question was so determined by the court of appeals of South Carolina in Hamilton v. Reedy, 3 McCord, 38; and, we are informed, by all of the judges of common pleas No. 3, of Allegheny county, in the case of the Phœnix Brewing Company against John A. Lyons (not reported).

The referee will distribute accordingly, costs of taking testimony to be paid by landlord claimant.

ROWE v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. October 30, 1899.)

No. 1,124.

CRIMINAL LAW—EVIDENCE OF GOOD CHARACTER—WEIGHT AND EFFECT.

Evidence of the good character of a defendant is to be considered by the jury in all cases, in connection with all the other evidence, in determining his guilt or innocence of the crime with which he is charged, and an instruction that such evidence can only be considered in case the other evidence leaves the question of guilt or innocence in doubt is erroneous.

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

Ben T. Du Val and William M. Cravens, for plaintiff in error.

F. A. Youmans, for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

CALDWELL, Circuit Judge. Cul Rowe, the plaintiff in error, was tried for murder committed in the Indian Territory, and convicted of manslaughter. At the trial evidence was introduced tending to show the bad character of the deceased and the good character of the defendant. The trial judge instructed the jury on that question as follows:

"Evidence has been given tending to show the bad character of the deceased and the good character of the accused. In cases where the facts them-

selves establish either guilt or innocence, character is not admissible, and cannot avail; but, in cases where the facts leave the case involved in doubt, good character is admissible, as tending to show who most probably began the conflict, if that point is left in doubt by the evidence; or as to whether the accused, when he shot and killed the deceased, believed, and had reasonable ground to believe, that he was in danger of losing his life, or in danger of receiving great bodily harm, if that point is left in doubt by the evidence. And the bad character of the deceased, if that is shown, is admissible as tending to show who most likely began the combat, if that point is left in doubt by the evidence, or as tending to show the nature and character and purpose of any assault he may be shown to have made. So that, if the case is left in doubt upon any of the points just suggested, evidence with reference to good and bad character may be considered by you, and given such weight as, in your judgment, under all the circumstances in the case, it is justly entitled. But if the evidence makes clear the truth of the facts, establishing either the guilt or innocence of the accused independent of the character of the parties, then you should discard the question of character, as having no bearing upon the case whatever."

Proper exception was saved to this part of the charge, and is now assigned as error. When the court told the jury that, "where the facts themselves establish either guilt or innocence, character is not admissible and cannot avail," it, in effect, withdrew from the consideration of the jury all the evidence tending to show the good character of the accused. This was clearly erroneous. Evidence of the good character of an accused may itself produce in the minds of the jury a reasonable doubt as to his guilt. In U. S. v. Babcock, 3 Dill. 581, 620, Fed. Cas. No. 14,487, Judge Dillon, in his charge to the jury, said:

"The defendant has produced an impressive array of witnesses, of the highest character, who have testified to his previous uniform and general good reputation as a man of unquestioned integrity. This is competent evidence, and the good character of the defendant in this respect is a fact to be weighed and considered by the jury, in the light of which they should view all the evidence, and determine the question of his innocence or guilt of the crime charged against him in the indictment. The above is the settled rule of the law in all criminal cases, as well in those in which direct and positive evidence is relied on as those in which the proof is circumstantial, but in cases of the latter kind the evidence of previous good character has more scope and force than in cases where the proof of the offense is positive and direct. In the language of an eminent judge, speaking upon this point: 'There may be cases so made out that no character can make them doubtful; but there may be others in which evidence given against a person without character would amount to conviction, in which a high character would produce a reasonable doubt; nay, in which character will actually outweigh evidence which might otherwise appear conclusive.' So that, we repeat, the evidence on the subject of character is a fact fit and proper, like all the other facts in the case, to be weighed and estimated by the jury, who, when forming their conclusions upon the various facts and circumstances relied on against the defendant, will inquire and determine whether a person whose character is such as the defendant's has been stated to be by the witnesses testifying on that subject has or has not committed the particular crime for which he is called upon to answer. 1 Whart. Cr. Law (7th Ed.) §§ 643, 644."

Without referring to the numerous authorities which may be found in the books upon this subject, it is sufficient to say that the supreme court of the United States in a late case holds that a charge like that given by the trial judge in the case at bar is erroneous. Edgington v. U. S., 164 U. S. 361, 364, 17 Sup. Ct. 72, 73. In that case the trial court had charged the jury as follows:

"Some testimony has been given you touching the good character of the defendant. When a man is charged with crime, the courts of the United States permit this question of good character to be introduced to go to the jury. The theory, as I view it, is a wise one. If a man, in the community where he lives, by his incoming and outgoing among his neighbors, has built up in the years of his life, be they comparatively few or many, a character among them for good morals, which includes the uprightness and excellency of our general citizenship, it is right that the jury should know that fact. It is of value to them in conflicting cases in determining points in the case; and yet, gentlemen, I have to say to you that evidence of good character is no defense against crime actually proven. If the defendant in this case is proven guilty of crime charged, any good character borne by him in his community is no defense. It must not change your verdict; for the experience of mankind—of all of us—teaches us that men reputed to be of good moral character in a community unfortunately sometimes we find they are sadly different from that which they are reputed to be, and that they are committers of crime; yet the good character goes to the jury with special force wherever the commission of the crime is doubtful. If your mind hesitates on any point as to the guilt of this defendant, then you have the right and should consider the testimony given as to his good character, and it becomes, as I have suggested, or may be, of great importance in the minds of the jury in the matters of doubt."

The supreme court of the United States held this charge to be erroneous, and said:

"Whatever may have been said, in some of the earlier cases, to the effect that evidence of the good character of the defendant is not to be considered unless the other evidence leaves the mind in doubt, the decided weight of authority now is that good character, when considered in connection with the other evidence in the case, may generate a reasonable doubt. The circumstances may be such that an established reputation for good character, if it is relevant to the issue, would alone create a reasonable doubt, although without it the other evidence would be convincing."

If the jury are not convinced of the guilt of the defendant beyond a reasonable doubt, then it is their duty to render a verdict of not guilty, without any evidence as to his good character. The object of introducing evidence of the good character of the accused is for the purpose of raising a reasonable doubt in the minds of the jury as to whether a man who has built up such a character in the community in which he lives is likely to be guilty of the crime with which he stands charged. The circuit court erred in its charge to the jury upon this subject, and its judgment is reversed, and the cause remanded, with instructions to grant a new trial.

PETROLIA MFG. CO. v. BELL & BOGART SOAP CO. et al.

(Circuit Court, S. D. New York. August 30, 1899.)

1. TRADE-MARKS—ARBITRARY NAMES.
   The name "Coal Oil Johnny's Petroleum Soap," as applied to a particular manufacture of soap to distinguish it from others, may constitute a valid trade-mark.

2. SAME—ASSIGNMENT.
   The assignment of a trade-mark by the originator and owner to a corporation organized by him to succeed to the manufacture and sale of the article is valid.

3. SAME—NOTICE OF OWNERSHIP BY ASSIGNEE.
The ownership of a trade-mark by an assignee or transferee is sufficiently indicated by its placing its name as manufacturer on the article sold under such trade-mark.

Manierre & Manierre, for complainant.
Francis M. Eppley, for defendants Bell & Bogart Soap Co., W. H. Bell, and W. H. Bogart.
Ruford Franklin, for defendant J. H. Griffin.

TOWNSEND, District Judge. Demurrer to bill for infringement of the registered trade-mark "Coal Oil Johnny's Petroleum Soap," commonly known as "Coal Oil Johnny's Soap." Defendants' brief states 12 points in support of the demurrer, which will be stated and considered in their order.

Point 1:

"The plaintiff is not entitled to protection in this court, for the reason that the words 'Coal Oil,' 'Petroleum,' 'Nature's Petroleum Gift,' contained in the trade-mark, are generic terms or words in common use, and are employed by plaintiff to indicate and describe to the public the ingredients, characteristics, and quality of the soap."

The complainant is not entitled to claim, and does not claim, any exclusive right to the use of the adjective "Petroleum" or "Coal Oil," standing alone, but to the fictitious or fanciful name "Coal Oil Johnny," invented and adopted by its predecessor. That such arbitrary names, when so applied to distinguish one's manufacture from that of others, are valid as trade-marks, has been decided in several cases. Thus "Roger Williams" has been applied to cotton cloth, "Bismarck" to paper collars, and "Falstaff" to tobacco. Browne, Trade-Marks, § 216. That names suggestive of the nature or composition of articles may be valid trade-marks, if not actually descriptive, and may be thus adopted or appropriated, is settled. Thus, "Cocoaine" was applied to cocoanut oil, "Cottolene" to cottonseed oil, and "Maizena" to cornstarch. N. K. Fairbank Co. v. Central Lard Co. (C. C.) 64 Fed. 133; Manufacturing Co. v. Myers (C. C.) 79 Fed. 87. The case of Caswell v. Davis, 58 N. Y. 234, cited and relied on by defendants' counsel, as distinguished and explained by the court of appeals in Keasby v. Chemical Works (N. Y. App.) 37 N. E. 476, affords no support to his contention.

Point 2:

"The plaintiff is not entitled to equity, for the reason that it is guilty of misrepresentation, and cannot come into court with clean hands."

The principal statements in defendants' brief in support of this point are not found in the complaint. The demurrer admits the allegation of the bill that petroleum is one of the ingredients used in the manufacture of the soap. The trade-mark does not necessarily indicate that petroleum is the largest ingredient in said soap.

Point 3:

"The plaintiff has not an exclusive right to the matter alleged in the bill or such interest in the subject-matter of the action as to authorize it to bring this suit."

Defendants' main contention here is that as it is alleged that the Coal Oil Johnny Soap Company has not ceased to exist, and it necessarily has the right to manufacture soap and to use its own name in so doing, therefore complainant has not and cannot have exclusive right to use of said name. It appears from the bill that said company assigned to said receiver all right, title, and interest in said trade-mark, and that said right, title, and interest are now in complainant and said Griffin. It appears from the bill that the Coal Oil Johnny Soap Company has been enjoined from "dealing in soap under the name, brand, or trade-mark of 'Coal Oil Johnny's Petroleum Soap.'"

Point 4:

"The transfer by Jenkins of the trade-mark to the Coal Oil Johnny Soap Company, by assignment, without including the good will or right to use the name of Maross Jenkins, or right to manufacture or sell the soap in question, or without a description of the product, formula, or transfer of the machinery, in conjunction with the assignment, carried no property rights with it."

The bill alleges that Jenkins was the inventor of the trade-mark, and a producer of, and dealer in, said soap, or who had caused said soap to be manufactured or produced for him, and that he "organized a corporation, under the laws of the state of New Jersey, named the 'Coal Oil Johnny Soap Company,' for the purpose of manufacturing and selling said soap," and assigned said trade-mark to said company, subject to a certain condition subsequent. This is not a sale of a trade-mark, as distinct property separate from the article or the manufacturer, but a transfer by the producer of the right to use the trade-name in connection with the corporation and place of business which he has organized and established to manufacture and deal in the article. In Chemical Co. v. Meyer, 139 U. S. 547, 11 Sup. Ct. 628, the supreme court, reviewing Kidd v. Johnson, 100 U. S. 617, and Chadwick v. Covell, 151 Mass. 190, 23 N. E. 1068, cited by defendant, says:

"There are a few cases indicating that the mere right to use a name is not assignable, notably Chadwick v. Covell, 151 Mass. 190, 23 N. E. 1068, but none that it may not be assigned to an outgoing partner, or to a successor in business, as an incident to its good will."

This case also answers the further claim under this point that the trade-mark is a personal one.

Point 5:

"The defendants are not charged in the bill with unfair business competition by palming off their goods as those of the plaintiff."

The bill, after alleging a contract between complainant's assignors and defendants, that they, the defendants, should put up and ship a certain size of said soap as directed by said assignors, states that defendants have repudiated said contract, have sold all sizes of such soap to the trade, "stamped, boxed, wrapped, and labeled in the same manner and style as used by your orator, * * * all in willful and unlawful violation and infringement of your orator's exclusive rights under said trade-mark."

Point 6:

"The contract of March 28th is merged in the judgment."

Said contract was alleged in the complaint in giving an account of the manner in which complainant obtained its present rights. So far as these defendants are concerned, the bearing of this point is not apparent.

Point 7:

"The defendants had a right to rescind their contract with Jenkins after his refusal to purchase soap from them, subsequent to April 30, 1897."

The right of complainant does not rest upon defendants' contract with Jenkins. For the purpose of showing that defendants have no right under that contract, and therefore have no right to manufacture even the eight-ounce bars of soap which Jenkins and the Coal Oil Johnny Company were allowed in said injunction to buy of them, the complainant has alleged that defendants have repudiated the contract, and this point in the brief seems to confirm said allegation.

Point 8:

"The owner of a trade-mark may abandon his rights to it, and others may appropriate it."

The complaint alleges an assignment of the trade-mark by its owner. Jenkins was in no position to abandon it, and the facts alleged do not show an abandonment by him, even if he were competent to make one.

Point 9:

"The complainant has no standing in court, for the reason that it is guilty of misrepresentation and fraud, in that it has used the trade-mark of 'Coal Oil Johnny's Petroleum Soap,' without indicating to the public, in the use of the same, that complainant is, or claims to be, the owner or transferee of said trade-mark."

The complaint alleges that complainant places its own name on its wrappers, and this sufficiently indicates that it claims to be the owner and transferee of said trade-mark, if any such indication is necessary. Browne, Trade-Marks, §§ 144, 145, 697. Godillot v. Harris, 81 N. Y. 263; Lichtenstein v. Goldsmith (C. C.) 37 Fed. 359; Baking-Powder Co. v. Raymond (C. C.) 70 Fed. 376; Feder v. Benkert, 18 C. C. A. 549, 70 Fed. 613.

Point 10:

"The receiver abandoned all rights to the trade-mark and cause of action by discontinuing his cause of action."

This point is not well taken.

Point 11:

"The sale by receiver conveyed no title to Griffin."

The reasons urged by defendants under this point are covered by the former discussion.

Point 12:

"A demurrer only admits facts that are well pleaded."

The bill alleges that Jenkins assigned his trade-mark to the Coal Oil Johnny Company, with reversion to him if that company ceased

to exist; that that company has not ceased to exist; and that the trade-mark has been assigned to defendant Griffin. Under the well-pleaded allegations, complainant has now the exclusive right to use this trade-mark, and I think is entitled to relief in this court, even if "the defendant Griffin is also the purchaser, assignee, and owner of any and all interest in said trade-mark remaining in said Jenkins, or reserved to him by the hereinbefore mentioned assignment by him to the Coal Oil Johnny Soap Company, of date on or about June 14, 1894, and also any other interest remaining in said Jenkins." The demurrer is overruled.

CENTAUR CO. v. MARSHALL et al.

(Circuit Court of Appeals, Eighth Circuit. October 23, 1899.)

No. 1,239.

1. TRADE-MARKS—SUIT FOR INFRINGEMENT—PRELIMINARY INJUNCTION.
It is not an abuse of discretion for a court in a suit for infringement of a trade-mark or for unfair competition to refuse to grant a preliminary injunction against the use by defendants of wrappers the use of which they have abandoned, or of advertising matter which they agree at the hearing that they will not use pending the suit, since the court may at any time consider a renewed application, should the defendants act in bad faith.

2. SAME—UNFAIR COMPETITION—SIMILARITY OF WRAPPERS.
Every suit to restrain the simulation of dress of merchandise is based on the fact that the defendant will thereby deceive the purchaser into buying his goods as those of the complainant, to the latter's legal damage; and, where the parties have an equal right under the law to the use of the same name for their products, purchasers must be presumed to know such fact, and the defendant cannot be required to see to it that a careless or indifferent purchaser of his product knows that it is not complainant's, but discharges his full legal duty if he so dresses his product that one who seeks to know whose manufacture it is can readily learn by a reasonable examination.[1]

3. SAME—LABELS COMPARED.
The trade wrappers and labels used by defendants on the bottles of Castoria made and sold by them compared with those in use by complainants, and *held* not to show such similarity as would deceive ordinary purchasers.

4. SAME—INJUNCTION—INTENTION OF DEFENDANT.
The intention with which a defendant adopted a particular dress for the merchandise made and sold by him does not alone afford any ground for an injunction against its use, and is immaterial where the dress itself is not calculated to deceive purchasers to the complainant's damage.

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

Frank H. Scott and Daniel B. Holmes (Edward Wetmore, on the brief), for appellant.

Henry Wollman (Benjamin F. Wollman, on the brief), for appellees.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

[1] As to unfair competition in trade, 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.

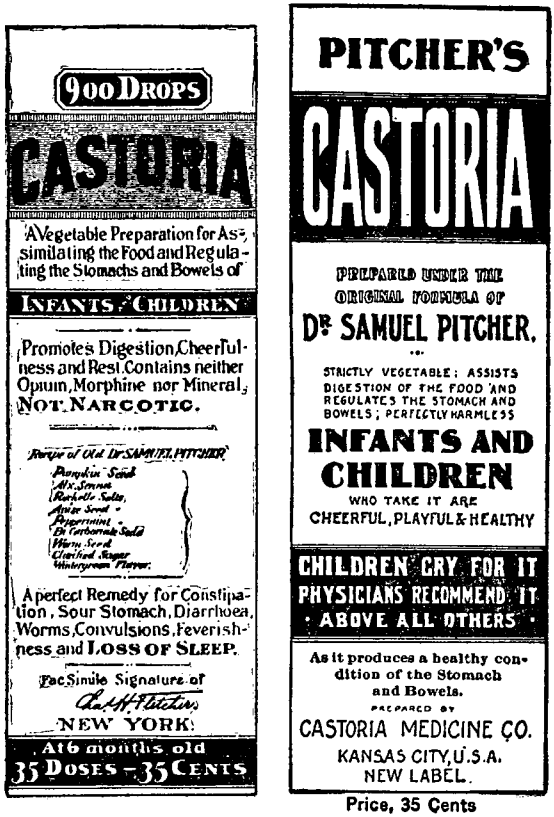
SANBORN, Circuit Judge. Upon the motion of the appellant, the Centaur Company, a corporation, the court below enjoined the appellees, George W. Marshall and the Marshall Medicine Company, a corporation, during the pendency of this suit, from using the words "New Label" on the wrappers in which they inclosed the medicine called "Castoria" which they were manufacturing and selling, and denied the prayer of the appellant that a preliminary injunction should issue forbidding them to use the word "Castoria," to use two or three wrappers whose use they had abandoned before the hearing, to use as an advertisement a certain extract from Hall's Journal of Health whose use they agreed in writing to discontinue, and to use a certain wrapper which they were still using and which they insisted they had the right to use. From this order the Centaur Company appealed, and it insists that the temporary injunction should have restrained the appellees from the use of all their wrappers, and from the use of the extract from the Journal of Health; but it concedes that it did not ask the court below to issue any preliminary injunction against the use of the word "Castoria," in view of the decision of this court in Centaur Co. v. Heinsfurter, 84 Fed. 955, 28 C. C. A. 581, 56 U. S. App. 7, to the effect that any one has the right to manufacture and sell "Castoria" under that name.

The purpose of a preliminary injunction is to prevent irremediable injury to some of the parties to the suit during its pendency, and before their claims can be investigated and adjudicated. The burden is on the moving party to show that such an injury is threatened, and will probably be inflicted, before the case can be finally decided, unless the injunction issues. The granting or withholding such a temporary injunction rests largely in the sound judicial discretion of the court, and much latitude is and ought to be allowed for the exercise of that discretion, in view of the fact that the personal acquaintance with and observation of the parties at the hearing, which the trial court enjoys, are of great assistance in reaching a just conclusion. The presumption always is that the decision of that court is right, and, unless it appears from the record with reasonable clearness that it has made a mistake in its apprehension of the facts or has fallen into some error of law, its conclusion should not be disturbed by an appellate court. In view of these familiar rules of equity jurisprudence, the question here is whether or not this record shows that the appellant will probably suffer an "injury," in the legal sense of that term, on account of the withholding of a more sweeping injunction, before its case can be heard and decided upon its merits.

One of the complaints of the appellant is that the court below did not restrain the appellees from using certain wrappers whose use the record shows they had abandoned before the hearing upon the application for the injunction. Another is that it did not forbid them to use as an advertisement the extract from Hall's Journal of Health, which they agreed in writing at the hearing to cease to use. It may be that it would not have been reversible error for the court below to have issued such an injunction, since it could not have injured the appellees. But, on the other hand, there is no evidence or proof that

this refusal inflicted, or that it will inflict, any injury upon the appellant. There is no intimation in the record that the appellees have broken, or are likely to break, faith with the trial court; that they are using, are likely to use, or that they threaten or intend to use, the abandoned wrappers or extract. The circuit court, whose knowledge of the acts and characters of the parties to this suit was necessarily more intimate and complete than ours can be, was satisfied, by their written agreement and affidavits, that they would not do so, and we cannot presume, in the absence of proof, that its conclusion was not justified or that its discretion was not wisely exercised here. If, at any time since the hearing below, the appellees have resumed the use of these abandoned wrappers or of this extract, the trial court has been open at all times for a renewal of the motion of the appellant upon proof of these facts, and its power to give adequate relief has been ample, so that we can conceive of no circumstances under which serious injury can have been entailed upon the appellant by the order of the court in this regard. There was, in our opinion, no error and no abuse of discretion in the refusal of that court to enjoin the use of the abandoned wrappers and the advertisement, and, except as evidence of the intent of the appellees, we here dismiss this portion of this case.

The question remains whether or not the continued use, during the pendency of this suit, of the wrapper with which the appellees dressed their goods at the time of the hearing below, without the words "New Label," will probably inflict injury upon the appellant. The claim of the appellant that it will do so rests upon the proposition that this wrapper is a simulation of that which the appellant used long before the appellees commenced to make or sell Castoria, and which it still uses; that it is calculated to deceive purchasers, and to induce them to buy the appellees' Castoria under the mistaken belief that it is that made and sold by the appellant; and that its use constitutes unfair competition in trade. There is no evidence in the record that any one has been deceived by the appellees' wrapper, or that any purchaser ever was induced by it to buy their Castoria in the belief that it was the medicine made by the appellant, so that the question whether or not it is calculated to and will be likely to work such a deception is susceptible of determination only by an examination of the wrappers used by the respective parties to this suit. These wrappers cover the four sides of the bottles in which the medicine is contained, but the covers of the sides and of the backs of the bottles which the two wrappers of the respective parties furnish are so dissimilar that no claim of probable deception can possibly be sustained upon them, and we shall not reproduce or consider them here. Besides, the fronts of the bottles are generally the only portions noticed or examined by purchasers, and by their likeness or difference the question at issue must be answered. Here are the faces of the bottles of the appellant and of the appellees as they appear when dressed in their respective wrappers, ready for sale, except that the paper used by the appellant is slightly tinged with yellow, while that used by the appellees is white:



The appellees have been enjoined from using the words "New Label" on their wrapper, so that the question is whether or not this wrapper, without these words, will probably induce purchasers to buy their Castoria in the mistaken belief that it is the appellant's.

Every suit to restrain the simulation of the dress of merchandise is based on the fact that the defendant will thereby deceive the purchaser into buying his goods as those of the plaintiff, to the latter's damage. The deceit, or the probable deceit, of the purchaser, so that he buys, or probably will buy, the articles of one manufacturer or vender in the belief that they are those of another, is a sine qua non of such a suit, because every one has the undoubted right to sell his own goods or goods of his own manufacture as such, however much such sales may damage or injure the business of his competitors. The diminution, injury, even the destruction, of the business of a competitor by such sales is not an injury, in the legal sense, and will warrant no relief, because it is the effect of the exercise of an unquestioned right. In cases to restrain unfair competition by the simulation of trade dresses, it is only when the likeness deceives, or will probably deceive, the buyers into the purchase of the goods of one manufacturer or vender as those of another, and only to the extent

that it thus deceives, that any legal injury results, or that a court of equity may grant any relief. Kann v. Steel Co., 89 Fed. 706, 707, 32 C. C. A. 324, 330, 61 U. S. App. 22; Manufacturing Co. v. Spear, 2 Sandf. 599, 606; Canal Co. v. Clark, 13 Wall. 311, 322, 20 L. Ed. 581; Gorham Co. v. White, 14 Wall. 511, 528; McLean v. Fleming, 96 U. S. 245, 255, 256, 24 L. Ed. 828; N. K. Fairbank Co. v. R. M. Bell Mfg. Co., 77 Fed. 869, 876, 23 C. C. A. 554.

The case in hand differs from an ordinary suit to restrain the use or simulation of a trade name, in this: that in such a case the duty is imposed upon a defendant of distinguishing the name of his product from the name of the complainant's product, so that a purchaser may not be misled into buying his article as that of his competitor, while in the case at bar the appellees have the same right as the appellant to sell their medicine under the name by which that of the appellant is described and known. The name of the appellant's product is "Castoria," and the conceded law of this case, upon this preliminary hearing, is that every one has the right to make and sell Castoria under the very name which the appellant uses to describe and advertise its medicine. Every one is presumed to know the law, and, in this state of the case, if the appellees sell their Castoria to those who seek this medicine simply, but who are careless or indifferent whose manufacture they purchase, they may thereby prevent the appellant from making sales and gaining profits which it would otherwise have obtained, but they inflict no remediable injury upon it, and furnish no ground for relief, because they deceive no one, and they violate no duty which they owe to the appellant or to the public, but merely exercise a commercial right which they possess. Every purchaser is charged with knowledge of the fact that any one may make and sell Castoria, and, if he seeks that made by one manufacturer rather than that prepared by another, it is his duty to examine the wrapper with such a degree of care as would ordinarily ascertain who the manufacturer of the article which he purchases is. The law imposes no duty upon the appellees to see to it that the careless and indifferent know that the Castoria which they buy is made by the appellant and not by another. They discharge their full duty to the appellant if they so dress their product that one who seeks to ascertain whose manufacture it is can readily learn, by a reasonable examination of their wrappers, whether it is made by the appellant or by themselves. Coats v. Thread Co., 149 U. S. 564, 567, 572, 573, 13 Sup. Ct. 966, 37 L. Ed. 847.

Turn now to the wrapper, and see if, in view of these rules of law, a purchaser who sought the appellant's Castoria, and who made an ordinary or even a cursory examination of the wrapper of the appellees, would probably be deceived into buying their product in the belief that it was the appellant's. The Centaur Company is a corporation of New York, and its medicine comes from that state. The wrapper of the appellees gives fair warning that the product which it contains is not made by the appellant, and that it is not manufactured in New York. It carries on its face the statement "Prepared by Castoria Medicine Co., Kansas City, U. S. A.," and the words and letters, "Castoria Medicine Co., Kansas City, U. S. A.," are printed in

large black letters, which would readily catch the eyes and fasten the attention of any buyer who examined the product to learn its manufacturer. The radical differences between the wrappers are so marked and striking that such a purchaser can hardly mistake the one for the other. The dissimilarities are carefully noted and enumerated in the opinion of the court below in 92 Fed., at page 610, and we will not recite them again here. Suffice it to say that whether the wrapper of the appellees is taken by itself or in comparison with that of the appellant, whether its general appearance to the inquiring glance of a purchaser who seeks the Centaur Company's product is considered, or it is subjected to a careful and critical analysis of the resemblances and differences between it and the wrapper of the appellant, the result is the same. The conclusion is irresistibly forced upon the mind that such a buyer cannot be deceived by it into the purchase of the product of the appellees for that made by the appellant, and that there was no error in the refusal of the court to enjoin its use before the final hearing of the case.

The arguments of counsel, that a more sweeping injunction should have been issued because the appellees were manufacturing spurious Castoria, because they were promoting its sale by fictitious testimonials, because they were using on their wrappers the catch sentence, "Children cry for it, physicians recommend it," which the appellant had so advertised that the public recognized it as referring to Castoria, and because their acts disclosed an intent to pirate the business of the appellant, have not been overlooked. But the gravamen of the charge in the bill is not that the appellees are selling spurious Castoria, nor that they are using fictitious testimonials, nor that they are publishing the catch sentence of which complaint is made, but it is that they are selling Castoria under wrappers which deceive the purchasers into the mistaken belief that it is the appellant's product. The vital question, on this preliminary hearing, is whether or not the use of the wrapper with which the appellees are permitted to clothe their product, under the existing injunction, will probably effect this deceit, and in this way seriously injure the appellant, before this case can be brought to a hearing on its merits. If it will probably have this effect, the injunction should be broadened; if it will not, there is no just ground for its modification. This question has already been carefully considered, and the conclusion has been reached that the use of this wrapper is not calculated to, and probably will not, injure the appellant. This conclusion is decisive of the question now before us. It leaves no basis for a more sweeping injunction, and it must control this appeal. In view of the fact that this main charge of the bill is not sustained by the proof, it will be soon enough to consider the minor questions presented when the issues in the suit have been framed and the evidence has been taken. Nor is the fact that the appellees intended by the use of their abandoned wrappers, by the publication of the extract from Hall's Journal of Health, by the use of the words "New Label," and by other acts, to deceive the public, and to engage in unfair competition with the appellant, sufficient to overcome the controlling fact that the wrapper which they now use is not calculated to deceive, and probably will

not mislead, buyers. If the use of these means of advertising was proof of an intent to deceive the public and to pirate the business of the appellant, the discontinuance of their use is evidence of the abandonment of this intent. Moreover, the intent is only material when the effect of the means used to accomplish it is doubtful. When, as in this case, it clearly appears that the dress used will not deceive, the purpose with which it is used furnishes no sufficient ground for an injunction. A wrong done or threatened, and consequent injury or probable injury to the complainant, are indispensable elements of every cause of action. Neither actual nor probable "injury," in the legal sense of that word, results from the use of a trade dress that is not calculated to mislead the public or to deceive purchasers, and hence one of the essential elements of a good cause of action is wanting. The intention on the part of an alleged infringer to induce purchasers, through the use of a simulated trade mark or dress, to buy his goods under the belief that they are another's, furnishes no ground for relief, unless the similarity between the two trade marks is of a character "to convey a false impression to the public mind, * * * and to mislead and deceive the ordinary purchaser." McLean v. Fleming, 96 U. S. 254, 24 L. Ed. 828; N. K. Fairbank Co. v. R. W. Bell Mfg. Co., 77 Fed. 869, 876, 23 C. C. A. 554, 561; Kann v. Steel Co., 89 Fed. 706, 713, 32 C. C. A. 324, 330, 61 U. S. App. 22.

Our conclusion is that the dress now used by the appellees upon their Castoria after the elision of the words "New Label" is not calculated to mislead the public, that it probably will not deceive purchasers who examine it with ordinary care to ascertain who the manufacturers of the medicine it covers are, and that there was no error in the decision of the court below upon the motion for a preliminary injunction. The order from which this appeal was taken is accordingly affirmed.

GIMBEL et al. v. HOGG.

(Circuit Court of Appeals, Third Circuit. November 14, 1899.)

No. 8.

1. DESIGN PATENTS—PENALTY FOR INFRINGEMENT.
   A defendant cannot be subjected to more than one penalty of $250, under the provisions of Act Feb. 4, 1887 (24 Stat. 387), for the infringement of a design patent for a carpet, although the patent covers the design for the body of the carpet and for the border in different claims, and defendant sold both carpet and border, made in accordance with the patented design, where the sale was a single transaction.

2. SAME—KNOWLEDGE BY SELLER OF INFRINGEMENT.
   Under Act Feb. 4, 1887 (24 Stat. 387), which makes it unlawful for any person to apply a patented design, or any colorable imitation thereof, to any article of manufacture for the purpose of sale, without license from the owner, or to sell or expose for sale any article to which such design or colorable imitation shall have been applied, without the license of the owner, "knowing that the same has been so applied," such knowledge cannot be imputed to the seller from the "notice to the public" by the marking required of the patentee by Rev. St. § 4900; and where he buys the article from the manufacturer, and resells it in good faith, without any knowledge of infringement, he is not subject to the penalty imposed by the statute.

Appeal from the Circuit Court of the United States for the Eastern District of Pennsylvania.

John G. Johnson, for appellants.
Louis Southgate, for appellee.

Before ACHESON, DALLAS, and GRAY, Circuit Judges.

ACHESON, Circuit Judge. The bill charged the defendants below (here the appellants) with infringement of letters patent No. 25,907, issued on August 4, 1896, to Frederic M. Parker, assignor to William James Hogg (the complainant), for a design for carpets. The case was heard on bill and answer, and the circuit court, being "of opinion that a decree must be entered imposing the statutory penalty of $250, under Act Feb. 4, 1887 (24 Stat. 387; Supp. Rev. St. 533), for each of the two acts of infringement," decreed accordingly. (C. C.) 94 Fed. 518. By the "two acts of infringement" is meant the infringement of the first and second claims of the patent.

The first section of the act of February 4, 1887, provides that, during the term of letters patent for a design, it shall be unlawful for any person, other than the owner of the letters patent, "without the license of such owner, to apply the design secured by such letters patent, or any colorable imitation thereof, to any article of manufacture for the purpose of sale, or to sell or expose for sale any article of manufacture to which such design or colorable imitation shall, without the license of the owner, have been applied, knowing that the same has been so applied"; and that any person "violating the provisions, or either of them, of this section, shall be liable in the amount of $250"; and, in case his total profit from such infringing manufacture or sale shall exceed that sum, he shall be further liable for the excess of such profit over and above the sum of $250. And the second section provides that nothing contained in the act shall prevent, lessen, impair, or avoid any remedy, at law or in equity, which the owner of a design patent aggrieved by infringement might have had if this act had not been passed, but such owner shall not twice recover the profit made from the infringement.

In response to the allegations of the bill, the answer of the defendants explicitly denied that they ever applied the complainant's said design to carpeting, denied that they manufactured the carpeting complained of in the bill, and denied that the defendants ever exposed for sale or sold any carpeting knowing that the design thereof had been applied thereto without the license of the complainant, or with knowledge that in design or in any other respect it infringed upon any right of the complainant possessed by him under letters patent or otherwise. In respect to the transaction complained of, the answer sets forth that the defendants were not manufacturers of carpets, but dealers therein, as merchants, and buying from manufacturers or owners; that, having procured from the treasury department of the United States a contract to supply it with Brussels carpet for the fiscal year ending June 1, 1898, they obtained bids from various manufacturers to supply them with the carpets

needed, and the lowest bidder was James W. Barker, of Norristown, Pa.; that the defendants accepted his bid, and on or about September 1, 1897, gave him an order for the carpets needed, and asked for samples, which he furnished, and which the defendants submitted to the government officials; that among these samples was one containing the design here in question, and which design, among others, the government officials accepted, and directed the defendants to furnish the government about 1,500 yards of carpet, and about 200 yards of border, embodying said design; that thereupon the defendants instructed Barker, under his contract with them, to make and ship to Washington about 1,500 yards of carpet and 200 yards of border of said design; and that accordingly Barker furnished a portion of the carpet and border thus ordered, but, by reason of his business failure in December, 1897, did not complete the delivery. The answer avers that in giving this order to Barker the defendants "acted in entire ignorance of the fact that the carpet and border infringed upon the complainant's right in any way," and that they "were ignorant of any patent, or claim to patent, upon such design held by complainant." And, further answering the bill, the defendants averred as follows: "The carpeting and border sold by us of which complaint is made was not manufactured by us. It was sold by us in absolute ignorance that it infringed in any way upon any design owned by the complainant, or by any other person. It was sold by us in entire good faith, after having received the same from the manufacturer by whom it was manufactured without any knowledge or information by us as to the source of its design or the method of its manufacture." The answer also denies that any damages accrued to the complainant by reason of what was done, or that the defendants derived any profit whatever from the use of his design. All the above-recited denials and averments made by the defendants are responsive to the bill, and are to be accepted as true, in the absence of evidence to the contrary. There is none here. The complainant set the case down for hearing on bill and answer.

Under the act of February 4, 1887, the fixed sum of $250 is in the nature of a penalty. Now if, upon the facts of the case, the defendants are amenable to the penal provisions of this act, one penalty only, we think, is recoverable here. The patent is for a single design. It is true that, in order to protect the patentee from any form of infringement, the patent has three claims,—the first claim covering the design as applied to the body of the carpet, the second claim covering the design as applied to the border, and the third claim reading thus: "The design for carpets, consisting of the body, A, and the border, B, substantially as shown." Here there was infringement of the third claim. As is usual in the purchase of carpeting, the order and sale in question embraced the body of the carpet and its border. There was, however, only one order and sale. It was a single transaction. In no view, then, that can be taken of the case, are the defendants to be subjected to two penalties.

But are the defendants amenable at all to the penal provisions of the statute? They were not manufacturers of this carpeting.

They did not apply the patented design thereto. Barker, who was a manufacturer of carpets generally, made this particular carpeting, and applied to it the complainant's design. Undoubtedly, he incurred the pecuniary penalty imposed by the act. He was the sole manufacturer, and the defendants were his vendees, and nothing more. There is no basis for the argument that the defendant and Barker stood to each other in the relation of principal and agent. Under the circumstances, the defendants are not responsible for Barker's unlicensed act in applying the complainant's design, by reason of their having given the order to him to make and ship 1,700 yards of carpeting according to the pattern the government officials had chosen out of the samples Barker had submitted. The case is the same as if the carpeting had already been made and was in stock when ordered. In law and in fact, the defendants were simply purchasers from the manufacturer and sellers to the government. In making the sale, the defendants acted in perfect good faith, in utter ignorance of any infringement of any patent rights, and without any knowledge whatever that the manufacturer had applied to the carpeting the complainant's design without license. We are, then, of opinion that the defendants are not chargeable with any penalty, under the act of February 4, 1887.

By the plain terms of the statute, the penalty is incurred by the seller of an article to which a patented design has been applied without license, only where he sells "knowing that the same has been so applied." The statutory punishment is for infringing knowingly. Clearly, it was not intended to subject to a penalty a vendor acting in good faith, and selling in entire ignorance of any infringement perpetrated by the manufacturer. For the infliction of the penalty, the statute contemplates and requires knowledge by the seller of the unauthorized use of the design by the manufacturer. Such knowledge is not to be imputed to the seller from the "notice to the public" by the marking required of the patentee by section 4900, Rev. St. It may be reasonable enough to hold such constructive notice sufficient as against the manufacturer who applied the design; for, if he did so without license, he must have known the fact. Pirkl v. Smith (C. C.) 42 Fed. 410, 411. But the public notice by marking, under section 4900, gives no information whatever to a seller of an infringement committed by the manufacturer, and that section has no such purpose. Certain cases to which our attention has been called, namely, Dunlap v. Schofield, 152 U. S. 244, 14 Sup. Ct. 576, Smith v. Stewart (C. C.) 55 Fed. 481, and Stewart v. Smith, 7 C. C. A. 380, 58 Fed. 580, 17 U. S. App. 217, were suits against manufacturers. We find nothing decided or declared in those cases to justify a decree for a penalty, under the act of February 4, 1887, against the defendants in this bill, upon the undisputed facts.

The decree of the court below is reversed, with costs of the appeal to the appellants; and the case is remanded to the circuit court, with directions to enter a decree against the defendants for an injunction and nominal damages, with costs of the suit in the court below.

KING AX CO. et al. v. HUBBARD.

(Circuit Court of Appeals, Sixth Circuit. October 3, 1899.)

No. 680.

1. PATENTS—VALIDITY—MACHINE FOR FORGING AXES.
   The Taylor patent, No. 500,084, for an improvement in the manufacture of axes, which covers a new machine for making the body of the ax, consisting of a closed die with a yielding bumper or plunger which acts as an anvil against the head of the ax in forging, preserving its form while yielding to permit the die to adapt itself to the slightly varying quantities of metal used, and preventing the formation of fins, is valid; the invention being novel, not anticipated, and of great utility, as attested by its general use.
2. SAME—INFRINGEMENT.
   One who appropriates the substance of a patented invention cannot avoid a claim of infringement, by deliberately impairing the function of one element without destroying the substantial identity of the structure, operation, and result.
3. SAME—LIBERAL CONSTRUCTION AS TO EQUIVALENTS.
   The more meritorious a patent, the more liberal will a court be in applying the doctrine of equivalents to cover devices adopted to avoid a claim of infringement while obtaining the substantial benefit of the invention.

Appeal from the Circuit Court of the United States for the Eastern Division of the Northern District of Ohio.

Chester Bradford, for appellants.

Clarence Byrnes and Thomas W. Bakewell, for appellee.

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

TAFT, Circuit Judge. This is an appeal from a decree in a patent case in which the circuit court found the patent of the complainant to be valid, and to be infringed by the defendant's machine. 89 Fed. 713. The patent was No. 500,084 and was granted on June 20, 1893, to C. W. Hubbard, as assignee of James Taylor, for an improvement in the manufacture of axes. The answer set up the defenses of invalidity for want of novelty, public use for more than two years before the application, and abandonment and noninfringement.

The patentee, in his specifications, says:

"My invention relates to the manufacture of axes and other similar eye tools, and is designed to produce a much truer, neater, and better finished article than has hitherto been possible; and, to that end, it consists in a pair of dies having a hole therethrough, and a plunger or hammer head which enters this hole and is yieldingly pressed against the ax as it lies in the mold. It also consists in the construction and arrangement of the parts as hereinafter more fully described and set forth in the claims. In the drawings, 2, 2, represent the vertical guides of a die press, the cross head, 3, of which reciprocates between these guides and bears the upper die, 4. The lower die, 5, is carried upon the bed of the machine, and at one end of the dies their meeting faces are correspondingly recessed to form a hole within which fits the plunger or hammer head, 7, which is carried at the inner end of a sliding bar, 8, passing through one of the guides, 2, and pivoted at its outer end to a weight, 9, which bears against the same and presses it inwardly. A shoulder, 10, is formed upon the plunger, which prevents it entering too far into the mold cavity; and, as seen in Fig. 2, the hole through which it passes is of about the same size as the end of the matrix or cavity. The weight is suspended and held in place by a link, 11, and serves to press the squared inner end of the

Fig. 1.

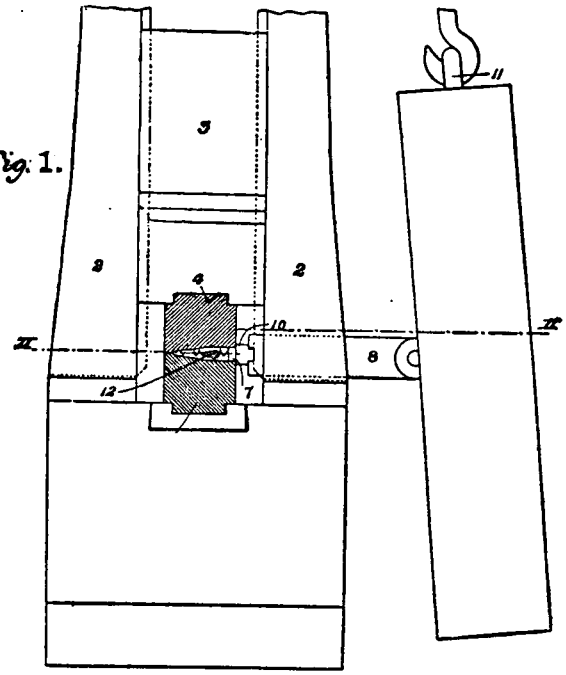
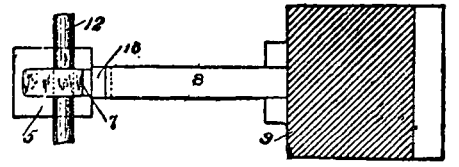


Fig. 2.

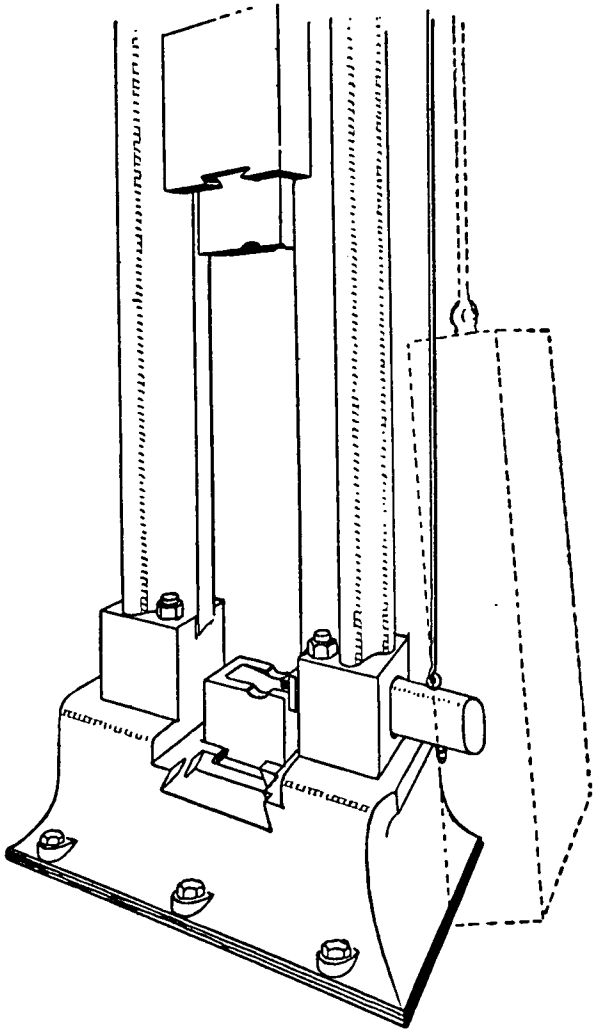


plunger against the rear end of the ax lying in the dies. The dies have the usual side recesses to receive the mandrel 12, around which the ax poll is formed, and, with the exception of the end recesses for the plunger, are similar to those commonly employed. The operation is as follows: The ax with the mandrel still passing therethrough is placed in the cavity in the lower die, with the plunger butting against the rear end of the poll, and the upper die is reciprocated. As the ax lies in a box die, it is compressed in all directions by the blow of the upper die, and is forced into the exact form desired, with a finely finished surface and a squared end to the poll, while the formation of fins between the dies is prevented by the plunger, which will give sufficiently to allow the flow of the metal endwise. The plunger or hammer head will not, however, allow sufficient endwise flow of the metal to distort the ax on account of the quickness of the blow, it acting in the manner of an anvil. The plunger will adjust itself automatically to an ax having too little or too much metal therein, and finish the same as perfectly as one having exactly the right amount; and a spring may be employed to hold the same in place, though I prefer the weight shown. The advantages of my invention will be appreciated by those skilled in the art. The flowing of the metal sidewise, and the lengthening of the eye portion, which always takes place when open dies are used in finishing, are entirely obviated, as well as the fin formation which always occurs when ordinary box dies are employed. The surface of

the ax is compressed and given a high polish, and its edges are made sharp and exact. Many variations will suggest themselves to those skilled in the art without departure from my invention, since what I claim is: (1) A pair of dies having a hole, a plunger movable within the hole, and means for continuously forcing in said plunger with a yielding pressure, substantially as described. (2) A stationary die and a reciprocatory die having mating recesses at one end forming a hole opening into the die cavity, a plunger within the hole, and means for exerting a continuous yielding pressure upon said plunger, substantially as and for the purposes described. (3) A stationary die and a reciprocatory die having mating matrix cavities, a hole leading through the die to the matrix, a plunger in the hole, and a weight arranged to exert a constant pressure upon said plunger, substantially as described."

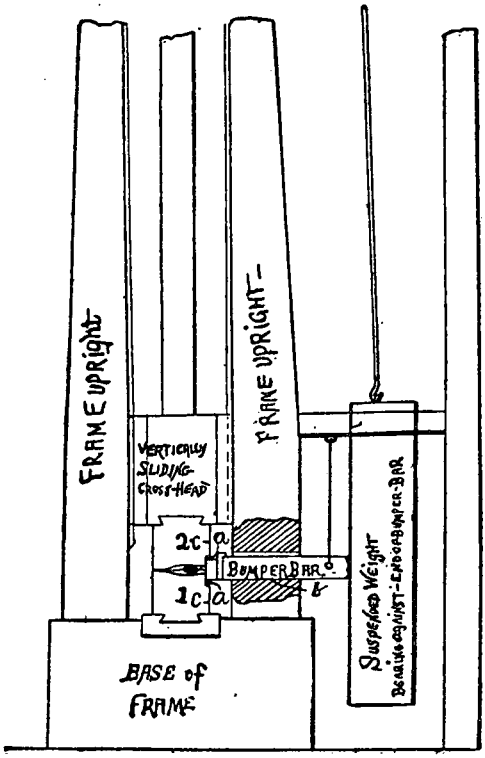
The following sketch aids in understanding the machines:

TAYLOR PATENT.



The device of the defendant, as shown by a sketch of defendant's expert, is as follows:

Dayton's Sketch of Defendants Machine



1 LOWER AND FIXED DIE — 2 UPPER AND MOVABLE DIE — 3 BUMPER.

a-a-spaces above & below Bumper ——

b, Bottom of passage through frame Upright supporting Bumper Bar & Bumper-3. —

c, c, Surplus metal on the Dies 1 & 2. —

Defendant's Exhibit Dayton's sketch of Defendants machine.

The usual method of making axes is to cut off for the ax poll a sufficient piece from a bar of iron, and to form the hole for the handle or the eye by bending the bar double over a mandrel. After the poll is forged, the steel edge or bit is welded to it. Before the Taylor invention, polls were first forged roughly into shape by hand hammering. Subsequently small trip hammers were used in forging, and much increased the output per day. In this process, the poll was forged by three or four or more blows of the trip hammer on an open die. A box die is distinguished from an open die in the fact that, when the upper and lower faces of the box die are together, the die cavity of the box die is entirely closed, while in an open die the sides are open. An improvement in the manufacturing of axes by the use of box dies was patented by Palmer & Hubbard in 1871. The method consisted in taking the poll in its roughest shape, and putting it in a box die, and then dropping upon it a hammer in which was the other half of the die. This operation was repeated two or three times, then the bit was welded to the poll, and that again was subjected to the operation of another box die and drop hammer. The objection to the use of the box die, as shown in the Palmer & Hubbard invention, was the difficulty of adjusting the quantity of metal so exactly that the operation of the die upon the metal in the rough would not result in the excess of metal appearing in large and obstinate fins all around the ax poll at the line of contact between the two faces of the dies. The removal of the fins required costly sawing and finishing, and rendered the process impracticable. It was possible by the nicest measurement and weight of the material to produce a good poll, but for commercial purposes such nice adjustments were not practicable. The box die was therefore abandoned, and recourse had to forging with the open dies and the small drop hammers before referred to. The Taylor invention is shown by the expert evidence on both sides to produce exactly the effect which the specifications describe. No fins form at any place on the poll, except sometimes at its head, and these are so slight as to be easily removed in the finishing process. The same number of men can make 2,500 ax polls in a day by using the Taylor device, when by earlier methods they could make but 500, and the cost of making axes has thus been reduced about 15 cents per dozen.

One of the defendant's experts attempted to show that the Taylor patent is invalid for want of novelty. Dayton, the other expert for the defendant, does not say so, but only seeks to limit the scope of the patent by prior devices in the art. Box dies in the manufacture of axes were old. The drop hammer in the forging of axes was old. In the Hammond patent and in the Cole patent, closed dies had been formed by bringing together more than two pieces. In the Cole patent, and possibly in the Hammond patent, springs or cushions were used to permit one of the bases making up the die to yield where there was an excess of metal in the ax poll. This was, as stated in the patents, for the purpose of preventing a breaking of the machine. In neither the Cole nor the Hammond patent was the compression of the metal in the dies effected by a blow, but only by grad-

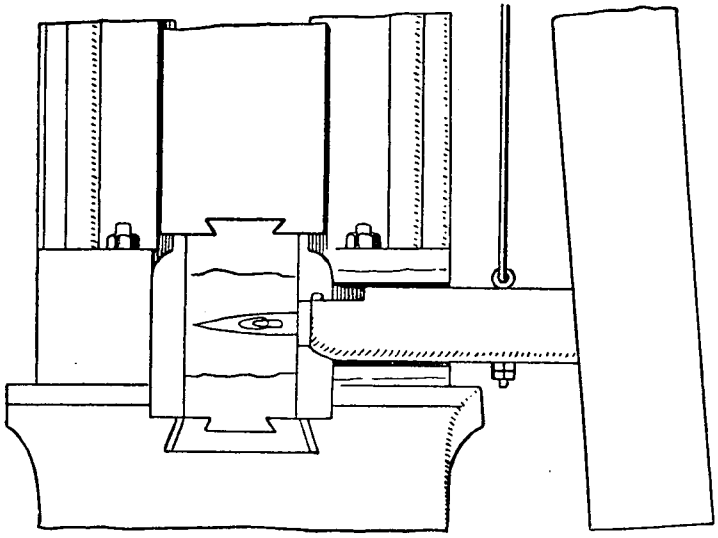
ual approximation; and herein is the difference between the older machines and Taylor's in principle, and herein is the reason why Taylor succeeded, and the older machines were but paper patents, which never went into use. The novelty and success of the Taylor device is the anvil effect of the blow of the hammer, and the inertia of the bumper bar or plunger forming the rear wall of the die and abutting the head of the poll, which result in driving the outflowing red metal back around the mandrel, thus forming a perfect eye, in squaring or "upsetting" the outflowing metal in the head of the poll making a smooth and flat head, and in yet yielding sufficiently to permit a flow of the excess of metal beyond the die cavity to form the head, and thus to avoid the formation of fins all around the poll. It thus has all the advantages of a rigid box die when the amount of metal used is nicely weighed and measured exactly to fill the die, and yet does not require the nice weighing or measuring of the metal. This had never been accomplished before the Taylor invention. Mr. Dayton, defendant's expert, when asked the following question: "As far as shown by the prior patents in this suit, was Taylor the first to provide an end wall which was yieldingly held so as to close the end of the matrix cavity in the stationary die while the upper die moves downwardly?"—answered, "Yes." Mr. Hood, defendant's second expert, said: "So far as I know, Taylor seems to have been the first to have used box dies, one of which was acted upon externally to forge the metal, and a third die which was continuously and yieldingly pressed forward to form a portion of the die cavity."

In the light of these facts and admissions, we think the case presents very little room for discussion of the meritoriousness or novelty of the invention, and that the only issue of serious moment is that of infringement. The question is whether the defendant's machine comes within the three claims of the patent or any one of them. For the sake of clearness we repeat the claims:

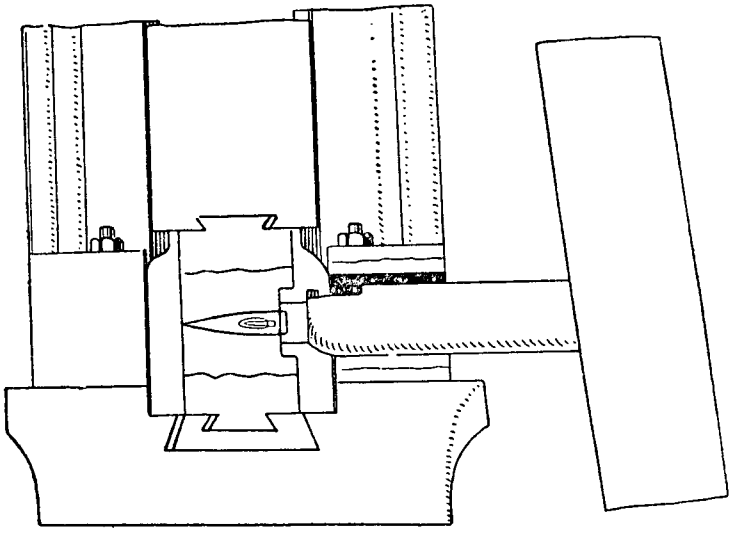
"What I claim is: (1) A pair of dies having a hole, a plunger movable within the hole, and means for continuously forcing in said plunger with a yielding pressure, substantially as described. (2) A stationary die and a reciprocatory die having mating recesses at one end forming a hole opening into the die cavity, a plunger within the hole, and means for exerting a continuous yielding pressure upon said plunger, substantially as and for the purposes described. (3) A stationary die and a reciprocatory die having mating matrix cavities, a hole leading through the die to the matrix, a plunger in the hole, and a weight arranged to exert a constant pressure upon said plunger; substantially as described."

It is conceded by the defendant's witnesses that, when the defendant first began to use a machine of this character, it used the Taylor machine, constructed exactly as the patent directs; that the defendant's officers were warned by Hubbard that they were infringing his patent; that they took the infringing machine, and for the purpose of avoiding the claims of the patent they made some changes, and produced the defendant's present machine. A comparison of the sketch of the defendant's machine and the patent will show how slight these changes were. The comparison may be made by reference to the following illustrations:

TAYLOR PATENT DIES.



DEFENDANTS' DIES.



The only change made by the defendants was to shorten the hole at the back of the die. They planed away the rear of the ends of the dies transversely to a point substantially flush with the head end of the matrix cavity, but left this end open as before. They then made a bumper die of larger cross section than the hole, which was yieldingly pressed against the end of the dies to close the hole. When asked why this rear recess was planed out in the dies, Oliver King, one of the officers of the defendant company, answered, "We planed

the recess in order not to have any trouble with Mr. Hubbard." And when asked whether he considered that by the recess he evaded the Taylor patent, and avoided trouble with Mr. Hubbard, he replied, "That is what we were trying to do." Now, it is pressed on the court that the defendant's machine does not infringe the claims of the Taylor patent, because the bumper die forming the rearward end of the matrix cavity is not a plunger, and is not in a hole of the die. It is conceded that the bumper die of defendant performs every function of the plunger in complainant's machine by closing up the hole of the matrix cavity, and yieldingly resisting the flow of the excess of metal, and thus avoiding the fins on the poll, except that it does not perform the function of avoiding the fins quite so well in this, to wit, that slight fins will sometimes form around the rim of the ax head at the point of intersection between the bumper die and the rearward hole of the matrix cavity, whereas such fins are better prevented when the hole extends beyond the matrix cavity and the plunger is within the hole. The general function of the hole beyond the matrix cavity in the complainant's machine is that of a guide for the bumper die or plunger so as to keep it in the position where it forms the rearward end of the matrix cavity. This function in the defendant's machine is performed by guides in the upright frame of the trip hammer somewhat removed from the dies. The contention on behalf of defendant is that the hole to the rearward of the matrix cavity with its sides has, in the complainant's patent and claims, the function not only of guiding the plunger, but also that of restraining the formation of fins at the edge of the ax head, and that the defendants eliminate the element of the hole, and dispense with the function of preventing the rearward fins. They thus avoid infringement, it is said, by omitting one element of the combination claims of the patent. The preventing the rearward fins is not a necessary function of the sides of the hole and plunger. There is nothing in the claims which limits the size of the hole extending rearward from the matrix cavity, and nothing which limits the size of the plunger, except its description as a plunger. If this term be taken to indicate that the plunger must be small enough to fit in the hole, as claimed for defendant, then any device would be literally within the patent, the plunger of which should fit in the hole, however large the hole might be. If now the hole to the rear of the matrix cavity were made larger than the cavity itself at its rearward end, making a shoulder above and below the matrix cavity, and just outside of it, and the plunger fitted in this hole, we should have a device exactly and literally within the terms of the claims, though evidently, from the specifications, not the preferred form of the device. In such a form the hole would not perform the function of preventing fins at the edges of the matrix cavity any better than does the arrangement in the defendant's device. The main function of the hole would then, as now, be that of a guide for the movement of the plunger or bumper bar so as to keep it flush with the rearward end of the matrix cavity, but it would not discharge as well the other function of preventing fins at the edge of the ax head. Can it be doubted that the bumper bar and guides in the upright or die housing of the defendant's machines are the exact

equivalents of the hole and plunger in a machine thus constructed, within the letter of the claims of the Taylor patent? This is an instance, not infrequent in patent litigation, where the infringer has sought to evade the claims of a patent, the substance of which he is appropriating, by deliberately impairing the function of one element, without destroying the substantial identity of structure, operation, and result. Sewall v. Jones, 91 U. S. 171; Coupe v. Weatherhead, 16 Fed. 673; Machine Co. v. Binney, 24 Fed. Cas. 653. This court, following the supreme court, has pointed out in a number of cases that, the more meritorious the patent, the more liberal will the court be in applying the doctrine of equivalents to cover devices adopted for the purpose of appropriating all that is good in a patent without rendering the tribute which the patent law was intended to secure, for a temporary period, to those who by their ingenuity have made possible real progress in the industrial arts. Bundy Mfg. Co. v. Detroit Time Register Co., 94 Fed. 524; McCormick Harvesting Mach. Co. v. Aultman, Miller & Co., 37 U. S. App. 299, 16 C. C. A. 259, and 69 Fed. 371; Wells v. Curtis, 31 U. S. App. 123, 13 C. C. A. 494, and 66 Fed. 318; Miller v. Manufacturing Co., 151 U. S. 186, 207, 14 Sup. Ct. 310.

The defenses of prior use and abandonment can very easily be disposed of. This patent was applied for in 1892. There is evidence that an experiment was made by complainants to test the practicability of such a device in 1887, but that only half a dozen ax polls were made in the course of the experiment, and it was not taken up again by the complainant and put into practical operation until 1892; that the fire in the complainant's works prevented an earlier development of that which the experiment of 1887 indicated might become a useful improvement. Under the doctrine of the case of Manufacturing Co. v. Sprague, 123 U. S. 249, 8 Sup. Ct. 122, it is clear that the evidence here does not make a case of public use, within the meaning of the statute. Nor is there any more weight in the defense of abandonment. Taylor thinks he conceived of the patent some time between 1883 and 1887. Nothing was done by him or any one else with respect to it until the attempt was made by Hubbard to follow Taylor's directions in the experiment in 1887, and subsequently by the successful manufacture and operation of the machine in 1892. Taylor then applied for the patent. There is here no evidence of abandonment, but simply delay in the development of the conception by practical application. If, as between Taylor and some other inventor, the question were of prior invention, and the other inventor had conceived of the invention some time after 1883, and had perfected it before Taylor, it might be contended that Taylor's conduct constituted laches, giving the other priority, but here there is no prior inventor claiming a right to the patent. At least, upon the question of abandonment, no such issue arises.

Evidence has been introduced of a man named Estep, who claims that he first conceived of this device, and that the invention was his, and not Taylor's. This is denied by Taylor and Hubbard, both of whom had full knowledge of all the facts. In view of the failure of Estep for many years after his alleged conception, and after Taylor

had taken the patent, to claim the invention as his own, we have only to say that we cannot credit Estep's evidence. Other witnesses are called upon to corroborate him, but they fail to do so. The decree of the circuit court is affirmed, with costs.

CUTTER ELECTRICAL & MANUFACTURING CO. v. ANCHOR ELECTRIC CO. et al.

(Circuit Court, S. D. New York. September 12, 1899.)

1. PATENTS—INVENTION—ELECTRICAL SWITCHES.
   The Cutter and Stanley patent, No 437,667, for an electrical switch, shows nothing more in the combination therein described in claims 4 and 5, in view of the prior art, than mechanical skill applied to the newly-developed exigencies of the electrical art, and such claims are void. *Held*, also, not infringed, conceding their validity.
2. SAME—SUCCESSIVE SUITS TO ESTABLISH VALIDITY.
   Where one court has thoroughly examined a patented device, and has found the patent invalid on its face, or in view of the prior art, another court should not be asked, in a new and independent suit, to exhaustively examine and discuss the same questions, without some reason shown.

This was a suit in equity by the Cutter Electrical & Manufacturing Company against the Anchor Electric Company, Mildred B. Stanley, and George L. Patterson, for infringement of a patent.

Cravath & Houston, John P. Croasdale, and John W. Houston, for complainant.

Edward P. Payson and Anthony Gref, for defendants.

TOWNSEND, District Judge. Final hearing on bill and answer raising questions of validity and infringement of patent No. 437,667, issued September 30, 1890, to complainant's assignors, Henry B. Cutter and Lucius T. Stanley, for an electrical switch. The patentees of the patent in suit stated in their specifications:

"Our main purpose has been to produce a neat and ornamental switch mechanism, which may be applied and used in any house or room without disfigurement; * * * and our further object has been to improve the construction and mechanical details of the switch mechanism itself."

Thereupon they claimed, in the first three claims of the patent, a contact bar as described, said contact bar in combination with an electric switch, and the special combination of the specific elements as shown in the drawings. It is not contended that these claims are infringed. The fourth and fifth claims cover the general combination of said parts. It is unnecessary to consider the fourth claim, as it is inartificially drawn, as it only differs from the fifth claim in the omission of one of the elements covered thereby, and as it is anticipated by the Giesborn English patent, No. 1,378. The fifth claim is as follows:

"A spring-actuated electric switch adapted to be inserted in a recess in a wall, and a pivoted lever for operating the same, in combination with a face plate for covering said recess and inclosing said switch, and push buttons passing through said face plate, and connected with the lever of the switch mechanism, whereby the switch may be set in action or operation to make or break circuit by pushing one or the other of said buttons."

Complainant's anchor switch comprises a combination of push buttons pivotally attached to a pivoted rocking lever or bar having an extended arm in which there is a slot, through which slot a pin passes, which pin is connected with a centrally-pivoted contact or lever. This pin, and a pin at the upper end of the slotted extended arm, are connected by a spiral spring. The guide holes in the face plate cause the push buttons to move in and out in a straight line. When a button is pushed in, it actuates the lever, which, being moved inwardly, causes said extended arm and contact lever to move in the arc of a circle from one side to the other, so as to make or break contact. When the contact lever passes over the center, the tension of the spring completes the movement, and holds the contact lever in place. Defendants' switch comprises a movable contact member or bar which is pivotally and rigidly connected with a disk provided with detents which are engaged by spring-actuated pawls on either side, and which disk also has a lug projecting from its upper face. A rocking bar, adapted to be actuated by push buttons, as in complainant's patent, is also provided with a lug, and has a spring coiled about its axis, the ends of which bear in the form of an X against said lugs. When one of the buttons is pushed in, said lug on the rocking bar pushes against one of the ends of said spring, and carries said end over to the right or left; and when the arm of the rocking bar, revolving in the arc of a circle, has proceeded far enough, it pushes aside one of the detents which engages the pawl and disk, and thus permits the other end of the X-spring to operate on the lug on said disk, thus throwing said disk to one side, and, with it, the contact bar to make or break contact. This switch is made in accordance with defendants' patent to Marshall. Its push buttons and rocking lever were old in the art. It is not operated by means of an over the center movement, such as is employed by complainant. It is admitted that this device comprises certain advantages not found in complainant's invention. It is clear that this construction does not infringe unless a broad scope is given to the fifth claim of complainant's patent. The complainant itself admits that defendants' switches have not "a rocking lever, N, pivoted to a stud, R, which has an extended arm, P, in which is a slot, O, through which passes the pin, K." Counsel for complainant admits, or it is practically proved, that each of the elements of its combination was old, and that defendants' structure comprises different elements differently combined and differently operated. Complainant's over the center mechanical movement is old, as shown by the Combs and Rhodes patent. The push-button idea, combined with such movement in electrical switches, is illustrated in the drawings and described in the specifications of the Egge British patent of 1887. The identical connection between slot and pin on cam is shown in the Rice and Thompson patent of 1885, and, in order to operate the latter device with a push button, it would only be necessary to affix the handle there shown to complainant's rocking-bar lever. The Cleveland patent of 1888 shows a connection between actuating device and contact bar by a spring extending from the arm, C, to a pin on the contact-making arm, which is the mode of operation shown in complainant's patent.

In these circumstances, even if this collecting together of elements, as claimed in the fifth claim, is not a mere aggregation, it is clear that no invention was involved therein. The limitations upon the invention as stated by the patentees, the language of the claims alleged to be infringed, and the history of the art show that in the device of the complainant there is nothing more than mere mechanical skill applied to the newly-developed exigencies of the electrical art. It may be true that this apparatus is better designed than other contrivances to be inserted in the wall of a room; and that the previous push buttons have been generally used to control electric gas-lighting devices, rather than for making and breaking contact; but it is clear that any skilled mechanic, having before him the patents already referred to, would have been able to adapt them to these new uses as soon as the problem was presented to him by the development of the electrical art. Furthermore, even if the patent were valid, defendants do not infringe. And now that several days have been wasted in the argument of this case and in an exhaustive examination of the various patents, it is only fair to state that no reason for bringing this suit has been shown. The only possible ground for any claim of patentability is that this push-button device relates to the operation of the mysterious agent electricity. But it appears from the case of This Complainant v. Cleverly (C. C.) 65 Fed. 94, that Judge Dallas examined this patent and the prior art in a suit where infringement was alleged of the same claims as are in issue here, and that the learned judge found the patent void for want of invention. The writer has recently felt obliged to condemn this growing evil of thus retrying cases in order to bolster up patents already declared invalid in one circuit by a new suit in another circuit, instead of by settling the question by appeal from the original decision, and those suggestions are pertinent here. This is not a case where newly-discovered evidence has been introduced to invalidate a patent already held to be valid; nor one where, by a previous decision, the bill was dismissed on account of noninfringement; nor is this even a case, so far as appears from the record, where it is sought to validate a patent by newly-discovered evidence. In the 41 pages of complainant's brief no reference is made to Judge Dallas' opinion, and no attempt is made to explain how or why he was mistaken in his statement that "it is unnecessary to refer to any of the several patents which have been produced in detail. Suffice it to say that investigation of all of them constrains the conclusion that the inventive faculty could not reasonably be said to have been exercised in forming the construction for which protection is now asked." There seems to be an increasing tendency on the part of counsel for patentees who have been defeated at final hearing in one circuit to try to secure a rehearing on the same questions in another circuit upon various frivolous excuses. The writer has thus been called upon in four cases during one month to listen to extended explanations of mechanical combinations, and to long arguments on questions of law at final hearing, only to reach the conclusion, after patient independent investigation, that his views in these cases were in accord with those of the court which had already fully examined said questions, and stated its opinion thereon. Where it ap-

pears from its opinion that a court has thoroughly examined a patented device, and has found it invalid on its face, or in view of the prior art, another court should not be asked to exhaustively re-examine and discuss such questions without some reason shown. Let the bill be dismissed.

SPROULL v. PRATT & WHITNEY CO.

(Circuit Court, S. D. New York. August 21, 1899.)

1. PATENTS—CONSTRUCTION OF LICENSE—ROYALTIES.
   A license to manufacture and sell articles under a number of patents owned by the licensor, "during the unexpired term thereof," also such other improvements therein as might be made or acquired by the licensor during the continuance of the agreement, where the articles related to the same art, and were ordinarily used conjointly, is an entire agreement for a single license, and binds the licensee to pay the royalty stipulated on all the articles manufactured and sold during the time any one of such patents remains in force.
2. SAME—ACTION FOR ROYALTIES—DEFENSES.
   A licensee who agreed to manufacture an article under a certain patent, who stamped the article with the date of such patent, and advertised and sold it as made thereunder, and who regularly paid the royalties thereon under the license for a number of years, is estopped to set up as a defense to a claim for further royalties that the article as made was not covered by the patent.

This was a suit for an accounting for royalties under a license to manufacture and sell articles under certain patents.

J. Edward Ackley and Paul N. Turner, for complainant.
Saunders, Webb & Worcester, for defendant.

TOWNSEND, District Judge. Final hearing on bill for an accounting, and answer denying liability, under the provisions of the following contract:

"This agreement, made and entered into this 26th day of May, 1888, by and between De Lancy Kennedy, of the city of New York, party of the first part, and the Pratt & Whitney Co., a corporation organized under the laws of the state of Connecticut, located and doing business in Hartford, county of Hartford, in said state, witnesseth, that whereas, the said party of the first part is sole owner of letters patent of the United States for improvements in gripping and cutting tools, punches, &c., numbered and dated as follows, viz.: No. 148,566, dated March 17, 1874; No. 161,968, dated April 13, 1875; and No. 376,009, dated Jan'y 3, 1888; and No. 267,751, dated November 21, 1882,—and has granted licenses to several parties to make for their own use in their own works only, but not for sale to others, the punches for punching metals as patented under patent No. 161,968, dated April 13, 1875, but no other rights or privileges; and whereas, the said party of the second part is desirous, for itself, its successors and assigns, of manufacturing and selling the machine, punches, &c., under said letters patent, and under such letters patent as may hereafter be acquired by said party of the first part for improvement in the said machines and punches, and is desirous, also, of having the exclusive right to said manufacture and sale during the unexpired term of said patents, except in so far as license to make said punches has been already granted by said party of the first part as aforesaid: Now, therefore, in consideration of the former agreement and covenants of each party hereinafter set forth, the party of the first part hereby gives and grants unto the party of the second part, its successors and assigns, the sole and exclusive right, except as to parties above named, to whom license to manufacture has already been granted,

to manufacture in the United States of America, and sell in the United States and other countries, the machines, punches, &c., under the aforesaid letters patent, during the unexpired term thereof; also, such other improvements therein as he may make or acquire during the continuance of this agreement. Said party of the first part further agrees to devote and use his whole time for twelve months from the signing of this instrument, and no longer, unless upon the request of the party of the second part, to the introduction and sale in the United States and Canada of the above-mentioned articles manufactured by the party of the second part; to accept, as full compensation for his time, services, and traveling expenses for said twelve months, one hundred and thirty-five dollars per month, payable monthly in advance. The party of the second part promises and agrees to manufacture at its own cost and expense, in such reasonable quantity as shall meet the demand of the market of the United States and other countries, the said machines, punches, &c., and make earnest endeavor to sell them; to employ said party of the first part for twelve months from the signing of this instrument to introduce and sell in the United States and Canada the said machines and punches manufactured by it, and to pay him for said services one hundred and thirty-five dollars per month, payable monthly in advance; to render to said party of the first part a full and correct report on or about the first day of the months of July, October, January, and April in each year of sales, wherever made, of said machines and punches, &c., during the preceding three months, and to pay said party of the first part during said four months twenty (20) per cent. of the proceeds of such sales as royalty, excepting upon sales of punches numbers 10, 11, 12, upon which three sizes the royalty to be paid is only fifteen (15) per cent."

Another patent claimed to be for an improvement was taken out by Kennedy in 1891. The material facts, in addition to those which appear from said contract, will be stated in the course of the discussion. The chief question involved is as to the interpretation of said contract.

The defendant contends "that it obtained, as to each of the four patents named, the exclusive right to make and sell during the unexpired term of that patent, and no longer, the invention covered by that patent, and any improvement which Kennedy might make or acquire on that invention," and that it was only bound to account for and pay royalties on sales made under each patent or improvement thereon during the life of said patent, and no longer; and, in support of this contention, insists that it appears from the contract that the tools, machines, and punches were separate articles, to be used separately, and that it should therefore be presumed that the licensee could not have intended to pay a license to manufacture any article after the expiration of the patent therefor.

The complainant's contention is as follows:

"By the agreement in suit the defendant bound itself to pay Kennedy or his representatives a fixed percentage of all sales of all machines, punches, and couplers sold by it until the termination of the patented improvement of 1891, or at least until the expiration of the youngest patent mentioned in the agreement."

Defendant agreed to manufacture said machines and punches to meet the demand of the market; to employ said patentee to introduce and sell them; to pay him in each year a certain royalty on the proceeds of sales thereof, wherever made. The only time limit stated is, "during the unexpired term [not terms] of said patents," or, as to improvements, "during the continuance of this agreement."

In the absence of any stated apportionment of time or royalty,

the contract is, in its nature, entire, and it is doubtful whether the court would have the right to make it divisible, at least without proof by defendant of a substantial amount of separate use of said patented articles. The advertisements of said machines and tools showing conjoint use; defendant's admission that the machine, coupling, and punch are ordinarily operated together; the fact that, while the rights conferred were of unequal value, the defendant did not apportion the royalties in the payments under the agreement, but actually accounted for and paid the same in a lump sum, and continued so to pay for a considerable time after two of the patents had expired; the fact that the youngest patent, in a certain sense, controlled the punch and machine, because it coupled them together, and that the grant of the right to manufacture all improvements which Kennedy might make or acquire, not during the unexpired term of any single patent, but "during the continuance of this agreement," gave a contingent right of great possible value,—all support the construction of the agreement as an entire agreement for a single license for several patents, expected to be ordinarily used conjointly; and this construction gives effect to all the clauses of said agreement, and is supported by the doctrine of contra proferentem. In view of these conclusions, I am inclined to think that defendant should pay the agreed royalty, based on the whole price of all of said articles, and of any combination of said articles containing any part of the patented inventions during the life of any of said patents.

The defendant contends that it is not liable to account for the punch manufactured by it, and marked "Patented Nov. 21, 1882," the date of one of the patents covered by said agreement, and on which it regularly paid royalties, because said punch corresponds with a construction shown by a drawing in said patent, which was disclaimed by the patentee, and differs in minor details from the construction claimed by the patentee. If this defense were satisfactorily shown, it would be so inequitable that it should not be sustained. Having agreed to manufacture under said patent, having stamped said punch with the date thereof, having advertised and asserted that it did manufacture the Kennedy punch, and having accounted and paid royalties on said theory, it should now be estopped to make said defense. Andrews v. Landers (C. C.) 72 Fed. 670. There is no evidence that defendant manufactured under the Kennedy 1891 patent, issued subsequent to the making of said agreement, or did anything in reference thereto by reason of which it should be liable to account.

A decree may be entered for an accounting in accordance with the views herein expressed. If it shall appear upon said accounting that a considerable part of said articles have been sold separately, and not to be conjointly used, that fact may be found by the master, and the parties may be further heard on the coming in of the report.

MUNICIPAL SIGNAL CO. v. NATIONAL ELECTRICAL MFG. CO.

(Circuit Court, D. Connecticut. November 2, 1899.)

No. 950.

PATENTS—INFRINGEMENT—MUNICIPAL SIGNAL APPARATUS.

The Noyes patents, Nos. 359,687 and 359,688, for municipal signal apparatus, construed, and *held* not anticipated, valid, and infringed.

This was a suit in equity by the Municipal Signal Company against the National Electrical Manufacturing Company for infringement of certain patents.

Dyer, Edmonds & Dyer, for complainant.
Briesen & Knauth, for defendant.

TOWNSEND, District Judge. Final hearing on bill and answer, raising questions of validity and infringement of complainant's patents Nos. 359,687 and 359,688, both granted March 22, 1887, to Bernice J. Noyes, for municipal signal apparatus. Prior to 1890 the Municipal Signal Company of New Hampshire was the owner of these patents, and had brought suit thereon in the First circuit. In 1890 it gave complainant, the Municipal Signal Company of Maine, an exclusive license thereunder, with an assignment of right to damages; and in 1898, after the installation of the plant herein alleged to infringe, it assigned the patents in suit to complainant. In the suit in the First circuit, the patents were sustained by the circuit court and court of appeals; Judge Putnam, in the court of appeals, dissenting as to the validity of No. 359,688. Municipal Signal Co. v. Gamewell Fire-Alarm Tel. Co. (C. C.) 52 Fed. 464; Gamewell Fire-Alarm Tel. Co. v. Municipal Signal Co., 10 C. C. A. 184, 61 Fed. 948. On a motion for leave to file a supplemental bill in the nature of a bill of review, on the ground of newly-discovered evidence, the court granted the petition in part, and thereupon, by stipulation, the suit was discontinued.

The construction of said patents adopted by the courts in the First circuit will be followed here, except in so far as it may be affected by new evidence. This new evidence chiefly consists of patent No. 359,686, granted to said Noyes, and of what are termed the Henry and the Siemens-Halske anticipations. The two latter alleged anticipations were offered on said application for a supplemental bill, but the court denied the motion to introduce them, on the ground that it did not appear that they were not known or might not have been discovered by the use of reasonable diligence before the close of the original hearing. They will not be here considered. They are not discussed by counsel for defendant in his brief, except by means of a quotation from the briefs of counsel in said former suit, and they were not pressed by him on the argument. They do not, either singly or taken together, sufficiently disclose the principles of the Noyes selective signaling system, or a system capable of practical use for municipal signaling.

Patent No. 359,686 was not put in evidence in the Massachusetts suits. No satisfactory explanation of this omission is offered by

either party. Said patent was included in said original assignment to complainant in 1890.

The defendant claims as follows: (1) That this bill should be dismissed upon the ground that the infringements shown were since the complainant acquired title to the patents in suit, and therefore its remedy, if any, is at law for damages; (2) that there is no proof of infringement upon any construction of the patents in suit; (3) that in view of the alleged anticipations, and especially of patent No. 359,686, the invention covered by the patents in suit is so narrow that the defendant's construction, as proved, does not infringe.

The first claim need not be considered, because defendant's counsel admits that he does not wish to have the case disposed of on this technical point, because, if necessary, the defect may be remedied by joining the owner of the naked title to the patent; and because it sufficiently appears from the evidence that the defendant corporation has, since the acquisition of title to these patents by the complainant, maintained the apparatus alleged to infringe, through its employés, and that it threatens, by its circulars, to construct other similar apparatus in other cities. If, therefore, the patents are valid, and infringement is proved, there is sufficient to warrant a decree for an injunction and accounting against the defendant.

The patents herein relate to a system of selective signaling, by means of which signals are so transmitted, from boxes located in various parts of a city to a central station, that ordinary patrol calls, not requiring any action on the part of the central officers, are registered in one way, while emergency calls, such as those for a telephone, ambulance, etc., are announced by a different signal and by a gong. The character of the invention covered by the patents in suit is stated by the court in the First circuit to be as follows: "The essence of the Noyes invention is that every message of a certain kind must be accompanied by an alarm, while every message of a different kind shall never be accompanied by an alarm." Generally, the difference between the two patents in suit is this: Patent 359,687, by the use of auxiliary pens in connection with a revolving disk, either interposes or cuts out a resistance, and thereby so varies the current that when it is weak it operates only the patrol call, and when it is strong, by not having the resistance interposed, it operates the emergency call. It is unnecessary to discuss the other details of its construction. This system depends upon certain relays in the circuit which are operated by means of an armature with a spring. A strong current is sufficient to overcome the spring which holds the circuit open or closed, while a weak current is not sufficient to overcome such a spring. Consequently, when the message is transmitted by the use of the pen, it either, by means of the full current, registers a call and rings a bell through one line, or, by means of the weak current, only registers the ordinary call from the box; this arrangement of alternating resistances making two different circuits. The system of 359,688 differs from this system, in that it contains a clock device, having a lever so arranged as to engage the teeth of a moving wheel, carried continuously by

a suitable motor, arranged so as to produce a series of short changes in the circuit or a prolonged change; that is, an emergency message transmitted from the signal box, by means of a long and uninterrupted current, causes a lever engaging in the teeth wheel of the clockwork to be carried upward by the clockwork so as to make a long, continuous line, and to fall enough so as to drop a catch, close the local circuit, and cause the gong to be continuously sounded, while for ordinary calls the pencil or lever is intermittently moved back and forth, and makes a series of short dots instead of a prolonged dash, and does not ring the bell. This system is best illustrated by the ordinary Morse system.

Patent No. 359,686 is numbered first, but bears the same date as the patents in suit. Counsel for defendant claimed that it was the foundation patent in the system of selective signaling, and that, being earliest in number, it is part of the prior art; that there was no invention in the later patents; that as the complainant is now the owner of said patents, and has failed to bring suit thereon, the defendant is constructively licensed thereunder; and that the patents in suit are for mere modifications of the 359,686 patent not in suit. It also is for a multiple signaling device for transmitting various signals, and an audible alarm, and a message-receiving signal at the central station, responsive to all signals. It has a contact pen, an arm, and co-operating devices, which constitute a circuit controller to change the condition of a current of different character from that employed by the multiple transmitter for transmitting the signals.

Defendant's counsel, while contending for the foregoing propositions upon the argument, failed to introduce any proof of the construction or operation of said patent No. 359,686, other than by the following statement by his expert:

"Patent 359,686, March 22, 1887, to B. J. Noyes, for municipal signal apparatus (the same party who has patented the complainant's devices), represents a main-line circuit, signal station, ground connection, a call instrument, and a recording instrument in the local circuit, and this patent provides for transmitting different signals from the substation to a central station, and recording the same. For these reasons, the system was thoroughly understood of transmitting two or more signals, recording the same, and bringing into action an alarm, and it was shown by the same patentee in a prior patent."

On cross-examination, said expert, being asked to define in what patents he found the invention of the patents in suit, on his theory of the case, namely, that such inventions cover a system of signaling rather than instrumentalities employed therein, answered as follows:

"My opinion is that the most convenient references in connection with the patents of complainant are the Henry patent, 295,249; Wilson, 344,476; and the Siemens & Halske construction. Of course, there are other patents, showing details of construction, that might be referred to in connection with specific claims, especially in the second patent; but, as to the broad features of the system, the devices named and patents, in my opinion, cover the system claimed by the first patent of the complainant." "X-Q. In other words, the patents which you have mentioned in the last answer are those upon which you rely to anticipate the invention of the complainant's patent, as it is broadly stated; for instance, in claims 1 and 2 of patent 359,687. Is that true? A. Yes; including the Siemens & Halske construction."

For this reason complainant's expert "paid no attention to this patent" No. 359,686. He stated that said patent was for a specific construction of mechanism and arrangement of circuits to carry out the broad invention of selective signaling shown, described, and claimed in patent No. 359,687. The other expert for defendant concurred in this view, and, in the opinion of the court, this view is correct.

In this case, which involved the consideration of complicated mechanism bearing on the construction, operation, and scope of said patents, expert testimony was necessary for the purpose of enlightening the court. In the absence of such light, the court will accept the view of defendant's expert that patent No. 359,686 is not among those relied upon to defeat the broad construction of patent No. 359,687, and will follow the decision of the courts in the First circuit. The evidence shows that patent No. 359,686 does not anticipate either of the patents in suit, and that both involve invention.

The proof of infringement is indefinite. It was sufficient, however, to establish a prima facie case, and to put the defendant upon its denial, under the settled rule. Machine Co. v. Binney, 24 Fed. Cas. 653; Celluloid Co. v. Arlington Mfg. Co. (C. C.) 85 Fed. 449; Peifer v. Brown (C. C.) 85 Fed. 780; Conover v. Mers, 6 Fed. Cas. 322; Dreyfus v. Schneider (C. C.) 25 Fed. 481.

The defendant introduced no evidence to disprove the facts testified to by complainant's witnesses, or as to the construction of the claimed infringing device. Infringement may be considered as proved. Let a decree be entered for an injunction and an accounting.

NATIONAL FOLDING-BOX & PAPER CO. v. GAIR.

(Circuit Court, E. D. New York. October 16, 1899.)

PATENTS—INFRINGEMENT—FOLDING PAPER BOXES.

The Wilson patent, No. 286,360, for improvements in folding paper boxes, which covers a box with the bottom extended to form an end piece, which passes up, and is folded down over the inturned ends of the side pieces, into which it locks by means of tongues passing into slits cut in such inturned ends, construed, and *held* not anticipated and infringed.

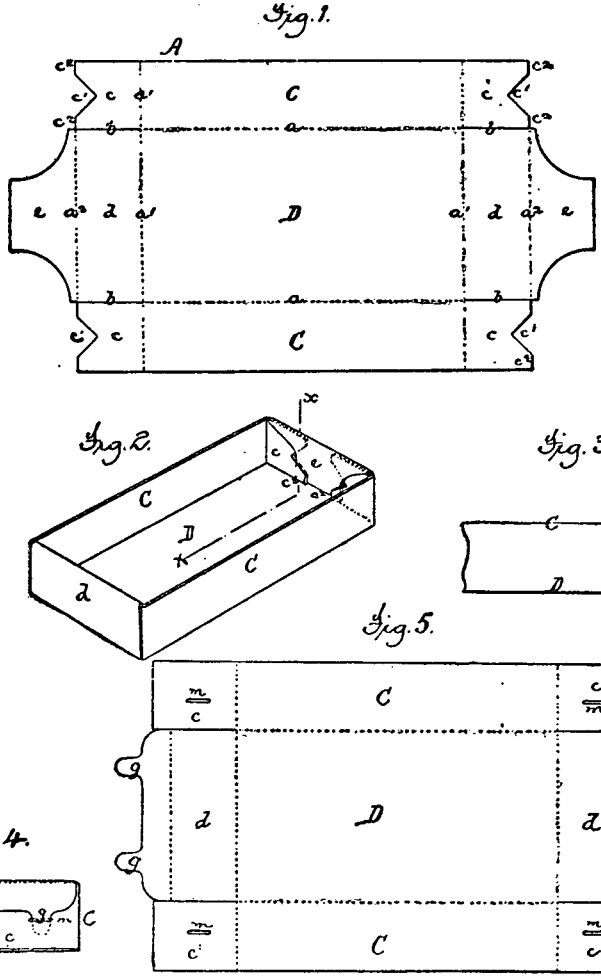
This was a suit in equity by the National Folding-Box & Paper Company against Robert Gair for infringement of a patent.

Walter D. Edmonds, for complainant.

Dickerson & Brown, Mr. Brown, and Mr. Goldsborough, for defendant.

THOMAS, District Judge. The complainant seeks to restrain the infringement by the defendant of letters patent No. 286,360, of October 9, 1883, for improvements in folding paper boxes, granted to Arthur G. Wilson, and since 1891 owned by the complainant. The defense involves anticipation and noninfringement. The alleged infringement relates to claim 1, which is as follows:

"A box or lid of a box having turned-in portions provided with apertures or openings, and an end piece provided with a tongue or tongues folded over the upper edges of the turned-in portions, and down into the apertures or openings therein, substantially as and for the purposes set forth."



It is urged on behalf of the complainant that:

"The two longer sides of the box are maintained in rectangular position, relatively to the bottom, by having their inwardly turned projections, c, c, overlapped and grasped by an inwardly folded and downwardly held projection from the extension, d, of the bottom, D. This projection, hinging on its connecting creased line, constitutes a 'lever,' whose fulcrum is at the crease, while the extremity of its operative arm, the tongue, g, is 'loosely' held in the slit, m, of the loose inturned projection, c."

This description of the function performed by the end piece folded over the upper edges, with its tongues passed into the apertures or openings, is correct; that is, such end piece, with its tongues caught

into the apertures in the way suggested, closes and holds together the end of the box, and for the reason stated.

It is urged on behalf of the defendant that this function was anticipated by patent No. 239,413, issued to the same Wilson, by the Arthur patent, No. 190,603, by the King patent, No. 219,213, and by several other patents to which it is not necessary to call specific attention. It is considered that the defendant's claim cannot be sustained. The Arthur box is evidently held together by the interlocking side pieces, perhaps with some assistance from the end piece. It is apparent from the specification in this patent that Arthur had no conception whatever of the function that is performed by the end piece, which is folded over the upper edges of the turned-in portions in the patent in suit. Without the interlocking end pieces, the Arthur box would immediately fall apart, but it may be kept in position by such interlocking parts, even though the end piece be not folded over the turned-in portions, although it must be admitted that such end piece does tend to hold down, and thereby to keep the turned-in portions in an interlocked state. The first patent issued to Wilson relates to the end of an inner box, intended to be pushed into an exterior cover. The ends of the inner box are turned in, an end piece folds over such turned-in portions, and the tongue passes into a slit at the base of the inturned portion. This tongue, drawn into the slit, holds the ends together, but the end piece in no wise fastens into the turned-in portions, or either of them. Beyond the fact that the end piece is folded over the turned-in portions, it does not appear that there is an analogy between this box and the later invention of Wilson. In the King patent there is a more striking resemblance, but the function of the end piece is entirely different. While there are two turned-in portions, with a horizontal slit, and two tongues on the end piece, fitting into such slits, such end piece does not fold over the turned-in portions, and, descending, pass into the aperture, so as to make an inner connection; but the end piece simply closes against and passes into the exterior of such turned-in portions. The result is that the edges of the turned-in portions do not act as a fulcrum, nor does the end of the box fold over such fulcrum and fasten on the inside thereof so as to embody the principle of leverage which is suggested in complainant's patent. The capacity of counsel on either side has produced ingenious argument, in which details of similarity and dissimilarity are presented with great force, but there are palpable distinctions in function between the parts of the box in suit and of any of those antedating it. Such salient features have been mentioned.

The second and more difficult question is the defense of noninfringement. The complainant contends that:

"Both boxes are set up and locked into operative position by the use of the 'loose lever clutch principle.' The only difference discernible is that the defendant's tongues project horizontally, instead of vertically, as in the patent, and his slots have been necessarily correspondingly changed from horizontal to vertical."

This is true, and the single question is whether complainant's claim is sufficiently broad to cover a box, where the tongues of the

end piece do thus pass horizontally into the aperture in the turned-in portions. Attention is forcibly called to the language of claim 1:

"A box or lid of a box having turned-in portions provided with apertures or openings, and an end piece provided with a tongue or tongues folded over the upper edges of the turned-in portions, and down into the apertures or openings therein, substantially as and for the purposes set forth."

It is argued by the complainant that the participle "folded" relates back to the substantive "tongue or tongues," and that the word "folded" should be understood as preceding the word "down," so as to read "folded down into the aperture." It is considered that such parsing of the phrase is not correct, but, rather, that the participle "folded" relates to the word "piece," and that the reading should be as follows:

"And an end piece, provided with a tongue or tongues, is folded over the upper edges of the turned-in portions, and is folded down into the apertures or openings."

The tongue or tongues, as distinguished from the end piece, are not folded over the upper edges, but the end piece, with its accompanying tongue or tongues, is folded over the upper edges, and is folded down so that some part thereof, to wit, the tongue or tongues, pass into the apertures or openings. The end piece consists not only of the part that folds over the turned-in sides, but of the tongue or tongues connected therewith; and as this end piece, with its tongue or tongues, is folded over the upper edges of the sides turned in, it passes down, and its appropriate parts (that is, its tongue or tongues) pass into the aperture. This is a very palpable reading of the claim and of the intention of the inventor, and under such interpretation the claim is not broadened beyond its proper merit. The specification states:

"I merely insert or pass the tongue or tuck, e, down into the V-shaped notches or cut-outs, c', c', of the turned-in end portions, c, c, as clearly shown at Figs. 2 and 3. * * * By reason of the V-shaped cuts or notches, two points or lips, c^2 are formed on each part, c, and the folded over and down tongue, e, passes in front of the upper set of lips, and in rear of the lower set or series, thus positively checking any tendency of the parts to spring open."

This form of aperture is not a necessary part of the patent, for the specification states:

"Instead of V-shaped notches, notches or cut-aways of other form may be used in conjunction with a tongue to hold the parts together, as described, without departing from the spirit of my invention; and, in lieu of notches or cut-outs, slits or incisions, m, m, or any other aperture or opening, may be made in the portions, c, c, and tongues, g, g, be passed through such slits, and the parts be thus held together, as seen in Figs. 4 and 5."

This language, in connection with what is deemed the proper interpretation of claim 1, illustrates that it was the intention of the patentee to claim any form of aperture, with tongues suitably shaped to enter the same. The argument of the defendant has been carefully examined and considered, but the result is reached that defendant's boxes infringe the complainant's patent. A decree should be entered enjoining the defendant from infringing the complainant's patent. If more specific direction as to the terms of the decree be required, application can be made to the court respecting the same

BOSTON SAFE-DEPOSIT & TRUST CO. v. CITY OF RACINE et al.

(Circuit Court, E. D. Wisconsin. November 18, 1899.)

1. JURISDICTION OF FEDERAL COURT—PLEADING.
   The jurisdiction of a federal court must affirmatively appear from the allegations of the plaintiff's pleading.
2. SAME—DIVERSITY OF CITIZENSHIP—REAL INTEREST OF PARTIES.
   A bill by a mortgagee of a water company against the company and the city in which it was located, both defendants being corporations of the same state, alleged that the city had subjected the company to unjust and oppressive regulations and requirements, against which the company had at all times protested, and which had the effect of jeopardizing complainant's security; that the company had brought an action at law against the city to recover for water which it had been compelled to furnish, and for which the city refused to pay; and that the only remedy at law was by a multiplicity of actions by the company. It further alleged that the company had yielded to the unjust demands of the city to such an extent as to render its right to recover at law contestable, but alleged no act of hostility on the part of the company towards the complainant, or collusion between the defendants. The prayer was for an injunction against both defendants. *Held*, that the matter in dispute disclosed by the bill was one in which the interests of the complainant and the company were identical, and the court was without jurisdiction.

This was a suit in equity by the Boston Safe-Deposit & Trust Company against the city of Racine and the Racine Water Company. On final hearing.

Quarles, Spence & Quarles, for complainant.

Max W. Heck, John B. Simonds, and Winkler, Flanders, Smith, Bottum & Vilas, for defendant city of Racine.

Kearnery & Thompson, for defendant Racine Water Co.

SEAMAN, District Judge. This cause is brought on for final hearing with voluminous testimony and extended argument upon the merits; but a question of jurisdiction is presented in the closing argument on behalf of the defendant city of Racine which bars all further inquiry, if the proposition is well founded that the complainant and the defendant Racine Water Company must be aligned on the same side of "the real matter in dispute," as disclosed by their pleadings, attitude, and interests. Railroad Co. v. Ketchum, 101 U. S. 289, 298, 24 L. Ed. 347.

The complainant is a corporation of Massachusetts, and, as trustee for the bondholders, is the mortgagee of the franchises and property of the defendant Racine Water Company, a Wisconsin corporation, under two certain mortgages securing bonds for the aggregate amount of $500,000. The city of Racine and Racine Water Company are named defendants, and the bill alleges hostility on the part of the people and municipal authorities of the city against the water company, and unauthorized requirements and conduct, by which the water company is oppressed, and the security of the complainant is endangered; and further avers that extreme tests of the works are ordered at times and under conditions not authorized by the ordinance; that a system of automatic flushing of sewers by means of tanks was adopted by the city after the works were com-

pleted and accepted, and not within the provisions of the ordinance, whereby one-half of the entire supply of water is arbitrarily used and wasted, without compensation; that the water company has constantly protested against such use, but submitted to the exactions, and claimed liability for the water so used, and has brought suit at law thereupon, which is now pending; and that "the only remedy at law in the premises is a multiplicity of actions at law to be brought by the said water company for the excess of water so used." Other allegations of the bill relating to the conduct and purposes of the municipality, fears of attempts to procure forfeiture of the franchise for noncompliance with the exactions, and of possible submission by the water company to prevent such course, are cumulative, but not essential to the present inquiry, in the absence of an averment either of collusion by the water company or of conduct on its part in hostility to the rights of the complainant. The relief sought is an injunction against both defendants, but the bill distinctly alleges just action and conduct of the water company at all times, and there is no allegation of conduct on its part hostile to the mortgagee, unless it appears in the averment that the "water company has for so many years yielded to the unjust demands" of the city "to such extent as to make its right to recover at law against said defendant city contestable," and thus jeopardizes the interests of the bondholders, and that the city is defending the action at law brought by the company for the excessive use of water on that ground, which cannot be urged against the mortgagee.

The answer of the defendant water company substantially admits all the material allegations of the bill. The acts of the city and of the water company in reference to the matters in controversy are recited in different form, and with more detail, but without taking issue upon any fact which is material. As averred in the bill, the water company asserts that the excessive use of water by the city was without its consent and against its constant protest.

Upon this state of pleadings, and with the same attitude preserved throughout the testimony and hearing, I am constrained to the opinion that this court has no jurisdiction over the controversy. The Racine Water Company is a resident of Wisconsin, is an indispensable party to the action, and in no aspect of the dispute stands opposed to the complainant. Counsel for complainant concedes that jurisdiction cannot be maintained if the interests of the water company and of complainant are identical, but insists that "there must be no antagonism at any point," and that "the situation of the defendant must be such that it can, in the prosecution of the suit, go along with the complainant at every step." If the contention on the part of the city can be taken into consideration, namely, that the water company induced the adoption of the wasteful flushing system, and became bound for its continuance, and if it be assumed that such defense could not be asserted against the pre-existing rights of the complainant, although good against the water company, there is seeming force in this distinction. But I am satisfied that it is not applicable here, for the purpose of determining jurisdiction, even if the general rule is modified, as the complainant con-

tends. The jurisdiction of this court is strictly limited in reference to parties and causes, and cannot be exercised, unless the bill clearly and affirmatively establishes the grounds therefor within the acts of congress. The condition upon which jurisdiction depends must exist in fact, and must be so alleged in the bill, and not as a mere contingency which may arise; and there is no allegation of such fact in this bill, no allegation that the water company has consented to the acts of waste, or has so conducted itself as to become bound thereby. Without sufficient affirmative allegations to remove the presumption against jurisdiction, no authority can be given, by consent or otherwise, for its exercise. I am of opinion that the authorities cited on behalf of the defendant city are conclusive against entertaining this bill, and that it must be dismissed for want of jurisdiction. See Water Co. v. Babcock (C. C.) 76 Fed. 243, First Nat. Bank v. Radford Trust Co., 47 U. S. App. 692, 26 C. C. A. 1, 80 Fed. 569, and cases cited in each. It is so ordered, and without costs, each party bearing its own costs.

SOUTHERN RY. CO. v. CITY OF MEMPHIS et al.

(Circuit Court of Appeals, Sixth Circuit. November 13, 1899.)

No. 708.

EASEMENTS—TERMINATION—IMPOSSIBILITY OF USE FOR PURPOSE GRANTED.

An easement granted for a particular purpose ceases when its use for such purpose is or becomes impossible under the terms of the grant; as, where an easement to lay and maintain a railroad track in a street was granted by a city on condition that the cars should be moved thereon by animal power only, and, owing to the grade of the street, it was found that no practicable use of the track could be made by the use of animal power for the purpose intended, the easement is at an end, through the limitation of the grant itself, and the city may require the track to be removed.

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

The object of this bill is to enjoin the city of Memphis from removing a railroad track on Washington street, in said city, under a claim that same is an obstruction and nuisance, unlawfully maintained on a public street by the complainant. The track in question was laid down in said street in 1875 by the Memphis & Charleston Railroad Company, under whom, through purchase at a mortgage foreclosure sale, the appellant claims, and has been ever since maintained. The right to so occupy said street is claimed under an ordinance passed September 9, 1875, which, for certain valuable considerations therein named, granted to said Memphis & Charleston Railroad Company "the right and privilege to construct, maintain and operate, in the manner hereinafter provided, a single railroad track from their present depot grounds * * * through the city to the river." The principal condition touching "the manner" in which the privilege granted was to be used was in these words: "The cars of said company shall be drawn over the route by horse or other animal power at a rate of speed not greater than six miles per hour, except over that portion of the track lying west of Main street, which, at the option of the company, may be operated by locomotive steam engines." This controversy involves only that part of the street easement granted by this ordinance which lies on Washington, east of Main street; being that part of the route between the depot and the river on which the road was to be operated by animal power

only. This ordinance was granted upon several valuable considerations,—among them being that the railroad company would pave and keep paved Washington street, and would promote the construction of an elevator on the river front, and subscribe not less than $15,000 to the capital stock thereof. These provisions of the contract have been complied with, so far as they were conditions, and the track was at once constructed, and has been maintained, though possibly not in the precise state and condition required by the ordinance,—a question which we find no occasion to decide. September 6, 1894, the city council of Memphis passed a resolution reciting that this Washington street track was "a useless and unnecessary obstruction on that street," and making it the duty of the mayor to notify said company to remove same within 30 days. At the date of this resolution the Memphis & Charleston Railroad was being operated by Charles M. McGhee and Henry Fink, as receivers, appointed by the United States circuit court for the Western district of Tennessee, under a creditors' bill pending in that court, entitled, "Samuel Thomas v. Memphis & Charleston Railroad Company." The receivers aforesaid at once filed a petition in the cause of Thomas v. Memphis & Charleston Railroad Company, making the city of Memphis a party defendant thereto; setting up the contract under which said track had been laid down on Washington street, and that the city, through its police force, was about to remove its track from said street, in violation of the contract under which it had been placed there; and praying an injunction upon the ground of irreparable injury and an inadequate legal remedy. A restraining order was made. The city thereupon filed its answer, setting up the extinguishment or abandonment of the easement granted by the ordinance of 1875, as well as that same had been forfeited by failure to keep the street and track in such repair as required by the terms of the grant. Much evidence was taken, but the cause was not brought on for a hearing, either upon the motion for an interlocutory injunction or on the merits, until December 30, 1898. In the meantime the Farmers' Loan & Trust Company, as trustee, filed its bill in the same court for the foreclosure of a mortgage made by the said Memphis & Charleston Railroad Company, covering its entire railroad, and including said Washington street track and easement. McGhee and Fink were appointed receivers under this bill, also, but the causes were not consolidated with the bill of Samuel Thomas against the same corporation. In February, 1898, said Memphis & Charleston Railroad, including the track in question, was sold to satisfy said mortgage, and bought by the Southern Railway Company, the appellant here. The sale was confirmed, purchase money distributed, and an order made in both cases discharging the receivers, December 27, 1898. On December 30, 1898, the court dismissed the pending petition of the receivers against the city of Memphis, upon the ground that their relation to the property in question had ceased by reason of their discharge as receivers. An application by the purchaser of said railroad to be substituted as a party in the room and stead of the receivers, with leave to prosecute said suit, was denied. The decree dismissing said petition was without prejudice to the merits, or to the right of the Southern Railway Company, as purchaser of the property, to file an independent suit to protect its rights as such. Thereupon this bill was filed by the Southern Railway Company, and by stipulation the evidence taken under the petition of the receivers is taken as evidence in this cause. Upon a final hearing the circuit court denied an injunction and dismissed the bill.

Frank P. Poston and Josiah Patterson, for appellant.

John H. Watkins, for appellee.

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

LURTON, Circuit Judge (after stating the facts as above). The grant of the right here involved was "to construct, maintain and operate, in the manner hereinafter provided," a single-track railway from the then depot grounds of the Memphis & Charleston Railroad Company through the city to the river, by a specified route. The

principal provision in reference to the manner in which the privilege conferred should be used was that cars east of Main street should be drawn "by horse or other animal power." The reasons for this conditional easement are not vital to the validity of the prescribed mode of operation, but are found in the fact that Washington street, east of Main, was devoted to private residences, and any other mode of use was therefore objectionable, as greatly increasing the burden of the easement upon the street and abutting owners. After laying down the track, and otherwise complying with the conditions of the grant, the railroad company found that, owing to the grade of Washington street, the track thereon could not be operated with horse or other animal power, as required by the ordinance. When this was discovered the company applied for and obtained, by resolution of the city council passed January 7, 1876, the privilege of operating said track until July 1, 1881, by means of a dummy engine. Upon expiration of that license the company continued to use steam power by sufferance until January 2, 1890, when another agreement was entered into, whereby the city consented to the use of steam power until November 2, 1893; the railroad company agreeing that it would not "claim the right to use such steam power after that date, except in so far as it is expressly permitted by said original contract of September 9, 1875." After the expiration of the license thus extended, the company desisted from the use of steam power, and the track has not been since used for traffic purposes at all. To preserve as far as possible any right which the company might have to maintain and operate said track, the company, since November, 1893, has been in the habit of daily sending a hand car or railroad velocipede over the track, the motive power being man power. The superintendent, Mr. R. B. Pegram, very frankly testifies that the franchise, restricted to animal power, is valueless, and that the track is maintained solely with the hope that the city may at some time consent to the use of some other power. The facts make a case where an easement to maintain and operate a railroad on a public street has been granted subject to such conditions as to mode of operation as to render any lawful operation impossible. If, under such circumstances, the right to continue the maintenance of the track upon the street exists, it is a barren right to maintain an obstruction in the public street which is of no possible beneficial use to the grantee, and which is only maintained in the hope that the terms upon which the easement was originally granted may in some future time be so modified as to make its operation practicable. This franchise was granted in 1876. This bill was filed in 1898. For 22 years this franchise has never been available, and it is now admitted that it is unavailable in the terms granted. The use of the track by means of steam power is of no avail in preserving the franchise under the original contract, for that use was by special license, which has expired, and is therefore of no advantage whatever in avoiding the termination of the rights granted. The right to maintain a track upon Washington street is only accessory to the right of operating it, and, if the right to operate has ceased, the right to maintain the track is lost. That which is only accessory cannot subsist when the principal right is lost. Washb.

Easem. (4th Ed.) pp. 699–702; Jessup v. Loucks, 55 Pa. St. 350, 362; Manure Co. v. Donald, 4 Hurl. & N. 8; Day v. Walden, 46 Mich. 575, 10 N. W. 26; Hahn v. Lodge No. 47, 21 Or. 30–34, 27 Pac. 166; Jones v. Tapling, 11 C. B. (N. S.) 283; Mussey v. Proprietors, 41 Me. 34; Central Wharf & Wet-Dock Corp. v. Proprietors of India Wharf, 123 Mass. 567–570; Willard v. Calhoun, 70 Iowa, 650, 28 N. W. 22; Town of Freedom v. Norris, 128 Ind. 377, 27 N. E. 869.

This grant was by the public of an easement in a public street, to a quasi public corporation, and for public purposes. It was intended that the track should be operated as a public facility, and upon this ground only was it admissible at all. The fact that the track has not, in 22 years of experiment, been used in the only way admissible under the grant, and the conceded fact that it cannot be made available in the only way allowable, operate to terminate the easement. Without regard to any question of abandonment by nonuser, the impossibility of enjoying the easement granted operates to bring it to an end through the inherent limitation of the grant itself. It is like an easement granted for a particular purpose. If that purpose cease to exist, or its enjoyment become impossible, the grant is at an end. Thus, where there was a reservation of a right of way over flats appurtenant to uplands, for water craft, to and from a dock or wharf, the easement was held to be extinguished by the subsequent construction by the city of a public street between the plaintiff's upland and the dock, which made access to the dock and deep water impossible. Mussey v. Proprietors, 41 Me. 34. In Manure Co. v. Donald, 4 Hurl. & N. 8, an easement to take water for the use of a canal was held to cease when the canal was converted into a railroad. Pollock, C. B., in that case stated the principle thus:

"If an easement for a particular purpose is granted, when that purpose no longer exists there is an end of the easement."

In Central Wharf & Wet-Dock Corp. v. Proprietors of India Wharf, 123 Mass. 567–570, Gray, C. J., for the court, said:

"The only easement which the plaintiff acquired * * * was made to depend upon an open dock and common passageway for ships and other water-borne crafts. All the covenants, including those against erecting fixtures or buildings of any kind within the bounds of the dock, were incidental to the grant of this easement. The laying out of a street and filling up of the dock by the city under authority conferred by statute made the enjoyment of this easement impossible, and thereby extinguished it."

In Washb. Easem. (4th Ed.) p. 102, the principle is thus stated:

"But where a way, for instance, is created in favor of an estate for one purpose, or in reference to a particular use to be made of such estate, it ceases to be appurtenant, if the estate is essentially changed in its mode of occupation. Thus, where a way belonged to an open parcel of land for the use of it as an open parcel, and the owner of the same erected a cottage thereon, covering the entire space, it was held that by such change in the premises the right of way was extinguished."

The same author, at page 702, states the principle as defined by Toullier (3 Toullier, Droit Civil Français, 522), as follows:

"Servitudes cease when the subjects of them happen to be in that condition that they cannot be used. As, if the dominant and servient estates go to ruin, or they are submerged, or the house which owes the servitude and that

to which it is due are burned or demolished. It would be the same if the cause of the servitude should cease,—as, for example, if a spring where I have a right to draw water becomes dry, I should not only lose the right of drawing water; I should lose the right of passing over the neighboring tenement, because the right of passage was only accessory to the right of drawing water, and that which is accessory cannot subsist when the principal right is lost."

It matters little, in principle, whether the easement as originally granted was incapable of enjoyment for the purposes intended, or whether by change in conditions its exercise became impossible. The track, as a mere accessory to the principal right, is incapable of enjoyment, is an obstruction to the public street, and equity will not interfere to prevent its removal. The decree denying the injunction and dismissing the bill is accordingly affirmed.

FELTON v. HAMILTON COUNTY, TENN., et al.

(Circuit Court of Appeals, Sixth Circuit. November 13, 1899.)

No. 711.

1. TAXATION—POWER OF COUNTY COURTS IN TENNESSEE—SPECIAL TAXES.
   The power of county courts in Tennessee to levy taxes is derived solely from legislative enactments, and in case of special taxes must be clearly granted. Under the decisions of the state supreme court, any tax levied which is not authorized by some positive provision of law is ultra vires and void.
2. SAME—SPECIAL TAX FOR MAKING COUNTY EXHIBIT AT CENTENNIAL EXPOSITION.
   The Tennessee act of February 6, 1895, authorizing the county courts of the respective counties of the state to "make appropriations of money" to provide for an exhibit of their resources at the Tennessee Centennial Exposition, and to "prescribe ways and means, rules and regulations governing the expenditure of any money so appropriated," did not confer on such courts the power to levy a special tax to provide the money so appropriated.

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

In 1896, Tennessee celebrated the one hundredth anniversary of its admission as a state into the federal Union by an exposition given at Nashville under the auspices of a corporation created by the state for that purpose. The plan contemplated, in addition to the general exposition of the industries of the state, that the various counties should make such exhibits of their resources as they should see fit. To this end the legislature, by an act passed February 6, 1895, provided: "That the county courts of the respective counties of Tennessee are hereby authorized and empowered to make appropriations of money to provide for an exhibit of their resources at the Tennessee Exposition to be held at the city of Nashville, state of Tennessee, in the year 1896, and to prescribe ways and means, rules and regulations governing the expenditure of any money so appropriated." Hamilton county, one of the counties of the state, availed itself of this power, and made an appropriation for the purpose of defraying the cost of a county exhibit. To raise a fund to meet this appropriation, a special tax of 3 cents upon each $100 of taxables was assessed. This special tax was resisted by the appellant, who is receiver of the Cincinnati, New Orleans & Texas Pacific Railway Company, a railroad being operated under the orders and decrees of the circuit court. In consequence of the refusal of the said receiver to pay this special tax, the county trustee, as collector of taxes, filed a petition in the case in which appellant had been ap-

pointed, and asked for an order directing same to be paid. The receiver answered, and denied the power of the county court to assess any special tax for Centennial Exposition purposes. The circuit court held the tax valid, and directed its payment. From this decree the receiver has taken this appeal.

A. P. Haggard and H. A. Chambers, for appellant.

Before LURTON and DAY, Circuit Judges, and THOMPSON, District Judge.

LURTON, Circuit Judge, having made the foregoing statement of facts, delivered the opinion of the court.

In Tennessee the power of the county courts to levy taxes is derived solely from legislative enactments, and any tax levied which is not authorized by some positive provision of law is ultra vires and void. Article 2, § 29, Const. Tenn.; McLean v. Tennessee, 8 Heisk. 22, 268; Winston v. Railroad Co., 1 Baxt. 60; Nashville & C. & St. L. R. Co. v. Franklin Co., 5 Lea, 707. By general legislative provision the counties of the state have power to levy a tax for general county purposes, not exceeding the aggregate tax levied by the state. In addition, the county courts have, from time to time, been authorized to levy certain special taxes. But by the act of 1895 (chapter 4, § 2, Acts Ex. Sess. 1895) it was provided that the aggregate of all special taxes authorized by law should not exceed 30 cents on each $100. No power exists to levy a special tax unless clearly granted. Nashville & C. & St. L. R. Co. v. Franklin Co., cited above; Burnett v. Maloney, 97 Tenn. 704, 37 S. W. 689. No special act has been pointed out authorizing the levy of a special tax for Centennial purposes. The exhibition of the industries of the state and counties of the state was held to be a public purpose, and the act authorizing counties to make an appropriation for county exhibits was held to be constitutional, in Shelby Co. v. Tennessee Centennial Exposition Co., 96 Tenn. 658, 36 S. W. 694. But that act does not in terms, nor by necessary implication, confer power to levy a special tax. The authority is "to make appropriations of money" for the purpose of providing a county exhibit. To "appropriate" means to set apart; to assign to a particular use. The obvious meaning of the act is that county courts should have power, out of the fund arising from taxes assessed for general county purposes, to appropriate, set apart, or assign, for the purposes of a county exhibit, such sum of money as should be deemed prudent and necessary. It neither conferred power to increase the total tax which might be lawfully levied for general county purposes, nor to levy a special tax to meet such appropriation. The special tax for Centennial purposes, not being authorized by any provision of law, was void. The decree will be reversed, and the relief denied.

DUFFIELD et al. v. MICHAELS et al.

(Circuit Court, D. West Virginia. November 20, 1899.)

1. PRINCIPAL AND AGENT—RIGHT OF AGENT TO REPUDIATE AGENCY.
On the breach of a contract of agency by the principal, the agent is justified in abandoning the contract and repudiating the agency.

2. SAME—REFUSAL OF PRINCIPAL TO COMPLETE CONTRACT.
Complainants secured an oil and gas lease on a farm, made to one of their number as trustee, by which he bound himself to drill a well within two months. One of the parties interested negotiated with defendant for drilling the well, and, on his promise to secure a contract from the trustee such as defendant required, defendant moved his machinery and tools onto the leased property and commenced the well. The trustee, however, refused to make the required contract, and the lessor notified defendant that he had declared the lease forfeited. Thereupon defendant secured a new lease to himself, which he offered to turn over to complainants if they would secure payment for his work as he had originally required, which they refused to do. Defendant drilled the well nearly to completion, and again asked a settlement, which was refused. He subsequently completed the well on his own account, and, on its proving successful, complainants tendered defendant payment for his work, and claimed the well. *Held* that, having refused to obligate themselves, and compelled defendant to do the work at his own risk, they were not entitled to claim the benefit of the venture after its profitableness had been demonstrated, and that defendant was justified in repudiating any agency for complainants, if such agency existed.

3. OIL LEASE—FORFEITURE—WAIVER OF RIGHT.
An oil lease required the lessee to drill a well within 60 days, or, in default of its completion within that time, to pay to the lessor $10 for every month until its completion; each payment to keep the lease in force for 1 month only. *Held* that, on a failure to complete the well or to make the monthly payments required, the lessor had the right to declare the lease forfeited, and that such right was not waived by his acceptance of payment for the last preceding month, the rental for previous months being unpaid.

This was a suit in equity to cancel an oil and gas lease. On final hearing.

Aug. M. Campbell, Lee & Chapman, and B. M. Ambler, for complainants.

F. L. Blackmarr and John A. Howard, for defendants.

JACKSON, District Judge. This is a bill filed in equity to cancel a lease for oil and gas purposes executed by Lewis Virgin to A. Learn on the 16th day of March, 1898, as appears by a copy filed as an exhibit in this cause. It is alleged in the bill that Learn, the lessee, paid to Virgin, the lessor, the sum of $25, "which was to be in full of all rentals and bonuses on said lease for the time of two months mentioned in said lease,"—the time in which he was to drill a well, or thereafter pay the sum of $10 per month for further delay. The bill further alleges that on March 23, 1898, Learn, by a written assignment of that date, transferred and assigned said lease to C. C. Duffield, trustee for himself and W. H. Roessle and C. C. Duffield, and that the said trustee subsequently sold and assigned to S. S. Willock an undivided one-fourth, to James A. Elphentone an undivided one-eighth, to William Muehlbronner an undivided one-eighth, and to

F. F. Murray an undivided one-eighth interest in the said lease and leasehold. The bill further alleges that Duffield, as trustee for the plaintiffs, on or about June 1, 1898, entered into a written agreement with the defendant H. E. Morris for the drilling of a well upon said leasehold. The plaintiffs are unable to produce a copy of this contract, but aver that, by its terms and conditions, Morris was to furnish a temporary rig, machinery, drilling tools, cordage, and labor, and to drill said well down to and through the first Cow Run sand, and to furnish all the machinery and appliances necessary to clean out the well for one day after it was torpedoed, and upon the completion of said contract Duffield was to pay Morris 80 cents per foot for the number of feet necessary to drill the well through the first Cow Run sand; that, after the execution of the contract between Duffield and Morris, the latter assigned the said contract to Asa A. Michaels, under which assignment Michaels entered into possession of the leasehold estate, with the consent of the plaintiffs, and commenced to drill a well thereon for oil and gas under the terms and conditions of the lease from Virgin, and of the contract between himself and Morris; that the plaintiffs furnished the casing, which was placed in the well by Michaels, as required by the contract. It is further alleged in the bill that, after the well had been drilled to the depth of 280 feet, Michaels informed Duffield by telephone, at his office, in Pittsburg, that he (Michaels) had taken a lease of the farm, which covered the Virgin lease, but, if the plaintiffs would pay for the drilling of the well to the top of the sand, that he would turn the lease over to the plaintiffs. The plaintiffs declined to recognize Michaels' new lease, claiming that their lease was in full force and effect, and they notified him to complete the well according to the Morris contract, and upon doing so he would be paid the price agreed upon for drilling the well. After this notice, Michaels continued the drilling of the well until June 27, 1898, when he informed the plaintiff Duffield by wire, at Pittsburg, that the well was down to the top of the sand, and to come to St. Marys and have matters adjusted. On the morning of the 28th of June, Michaels informed Learn that the well had been drilled through the first Cow Run sand, and was dry and made no show of oil. Plaintiffs, desiring to ascertain the truth of Michaels' statement, informed him that they wished to measure the depth of the well, when he informed them that it would be impossible, as he had removed the rig and cable, but had left the casing in the well; stating at the time that the well was a complete failure for oil and gas purposes. The plaintiffs charge in their bill that when Michaels left the well he had not drilled through the first Cow Run sand, as he represented, and did not complete his contract in that respect before removing the rig and machinery from the said well, as required by the contract. They further charge that some time in August, 1898, without notice to the plaintiffs and without their knowledge, he again placed his rig and machinery and drilling tools at said well, and commenced to drill the well deeper, for oil and gas, and that a few days after he commenced drilling the second time the well commenced to produce oil at the rate of 200 barrels per day, and at the time of the filing of the bill was producing 100 barrels

per day. Plaintiffs further allege that after the second drilling took place, and it was discovered that the well was a valuable oil well, they requested Michaels to furnish them with a statement of the amount due him for the drilling of the well, in accordance with the Morris contract, which he declined to do, and then notified the plaintiffs that he and his associates were the owners of said well and leasehold, and refused the plaintiffs any participation therein, though they were ready and willing to pay the amount, and had tendered, as well as they could ascertain, the amount due him for drilling the well under the contract. Plaintiffs aver that Michaels knew that they were at all times ready to comply with the conditions of the Virgin lease, and that, after he had entered upon the leased premises for the purpose of drilling for the plaintiffs a well according to the requirements of the Virgin lease and in pursuance of his contract with Morris, he went to Virgin and made various statements, one of which was that he was afraid of having trouble with the plaintiffs in getting his pay for drilling the well, and then and there induced Virgin to make a second lease of his farm to him; stating to Virgin that, if the plaintiffs paid him for the drilling of the well, he would turn the lease over to them upon the completion of the well. Virgin at first declined to make the second lease, but Michaels threatened him, if he did not give him a lease of the farm, that he would remove his rig, machinery, and drilling tools from the lease, and abandon the well. Thereupon Virgin, being desirous and anxious to have the well drilled, on the 21st day of June, 1898, executed and delivered to Michaels a second lease of his farm, with the express understanding that he would save Virgin harmless from all damages by reason of the execution of the second lease, which lease was recorded in the clerk's office of the county court of Pleasants county, in the proper deed book, June 22, 1898. Plaintiffs allege that they have complied with all the terms and provisions of the Virgin lease, and that Michaels failed to comply with the terms and conditions of said lease as required by his contract with Morris, but stopped the drilling of the well at a point where he knew that oil would be reached, for the reason that he was satisfied that it would prove a valuable oil well, and with the fraudulent intent of acquiring the property himself. There are other provisions of the bill that the court deems it unnecessary at this time to allude to. In the bill there are six prayers, but the only one which it is necessary at this time to notice is the third prayer, which asks for a cancellation of the lease, Exhibit B, which is the lease to Michaels, aand that the same be declared null and void and of no effect. To this bill there are three separate answers of Lewis Virgin, Asa A. Michaels, and H. E. Morris; the joint answer of Plummer Boyd and Fleming Boyd, partners as Boyd Bros.; and the joint and several answers of William Ferrell and William Smith. The answers of the defendants deny all the allegations of the plaintiffs' bill; assert and insist that, by the terms of the lease executed by Virgin on the 16th of March to Learn, it was forfeited, and that Learn and those who claim under him did not have any right to the leased premises after the forfeiture was declared.

The first question that is presented for the consideration of the

court is whether or not R. E. Bills, who at one time had an interest in the lease, held that interest at the time of the institution of this suit. It is claimed by the defendants that he had such an interest, and, being a citizen of the same state as the defendants, he could not maintain this action, for the reason that there was not such diverse citizenship as gave this court jurisdiction. No plea in abatement has been filed, setting up this fact. It is a mere suggestion of the defense in their answers. But the evidence in the case shows that he transferred or assigned his interest in the lease about the 12th of June,—long prior to the filing of this bill, which was filed September 16, 1898; and, so far as the evidence discloses, he had no interest whatever in the lease at the time of the institution of this suit. For this reason this objection to the jurisdiction of the court must be overruled.

The next question to be considered by the court, and one that is vital, is the question whether the lease was forfeited or not on the 21st day of June, 1898. This question not only involves the consideration of the lease, but the examination of a large amount of conflicting testimony in reference to this matter. This lease was executed on the 16th day of March, 1898. The term was for two years. By the terms of the lease, it was to be "null and void, and not binding on either party," if a well was not completed within two months from its date, unless the lessee would pay monthly to the lessor $10 per month for each month's delay in completing the well. Each payment of $10 was to extend the time for the completion of the well for one month, and no longer. It is apparent from the terms of the lease that unless the lessee completed a well within two months, or, upon his failure to do so, paid "a monthly rental of ten dollars for each month's delay in completing said well," then the lease was null and void.

It is claimed by the defendants, first, that there was a failure to complete the well within the time specified by the terms of the lease. This lease was dated the 16th of March. The well was to be completed within two months. There is no pretense upon the part of the plaintiffs in this action that the well was completed within the time prescribed by the terms of the lease. If this was the only condition of the lease, a failure to comply with it would unquestionably forfeit the lease; but there is coupled with this condition a provision of the lease that, if the well was not completed within the time prescribed by its terms, then after that date it became the duty of the lessee to pay to the lessor $10 per month for each month's delay in completing said well, and each payment would extend the time one month longer. These are the plain, unquestioned conditions of the lease; and a failure to comply with any one of its provisions would operate as a forfeiture of the lease, and all the rights of the lessee under it would cease from the date of the forfeiture. This brings us to the consideration of the testimony, which is somewhat conflicting in the facts in regard to the payments of the monthly installments that were required to be paid by the terms of the lease. If the lessees failed to make these payments according to the terms and conditions of the lease, their failure to comply with the terms would necessarily

forfeit their rights under it, unless there was an expressed waiver of the same, or there were acts of the lessor equivalent to a waiver. To determine this question, it is necessary to briefly review the history of the facts in this case connected with the execution of the lease to Learn, as well as the lease to Michaels. As we have seen, the lease to Learn was executed on the 16th day of March, 1898. Some time in the early part of June, 1898, Learn and R. E. Bills, who was at that time an interested party with Learn, had a conversation with H. E. Morris in reference to taking a contract for the drilling of an oil well on the Virgin farm. Subsequently a contract was drawn in writing, but Morris did not execute it. The reason Morris assigned for not executing the contract was that he could not get the tools to drill with. He then referred Learn, Roessle, and others of the plaintiffs in this action, to Michaels. Morris showed Michaels the contract, and, after Michaels examined it, he declined to drill under it, for the reason that Michaels said he was not satisfied with the responsibility of the parties, nor would he do business with Duffield as trustee; that he wanted each party that had an interest in the well to sign the contract, and also wanted the money placed in some bank, so that when the well was finished and completed he could get his money. In this conversation between Roessle and Michaels, Roessle took the contract, and said he was going to Pittsburg in a few days, and would have "the contract fixed" as Michaels wanted it, and at the same time urging Michaels to put up the rig and place the machinery, and commence drilling the well; promising Michaels that he would see that the parties complied with his terms. Duffield, the trustee, who represented the plaintiffs in this action, was seen by Roessle or Learn, or both of them, in Pittsburg, who reported to Michaels that Duffield said that he had the money in bank, and for Michaels to go on and drill the well, and when the well was finished and completed he would pay him. Michaels said this was not satisfactory to him, and that he did not know anything about the responsibility of the parties, and he wanted the money deposited at one of the banks in St. Marys, when Roessle replied that, if he (Michaels) would go on with the work, "he would see that all should be made right and to his satisfaction." These various conversations took place along in the early part of June. Michaels then made arrangements to commence drilling the well, trusting that everything would be made satisfactory. He erected the derrick and placed the boiler and machinery upon the lease, when he notified Duffield, the trustee, that he wanted things straightened up, as he had insisted previously that the provision for the payment of the drilling of the well was unsatisfactory. It cannot be denied that the first information that Michaels had of the Virgin lease was given him by Morris; that he was fully apprised of its terms and conditions; that, when he entered upon it with a view of drilling the well, he did so at the instance of Roessle and Learn, who were acting for themselves and the other owners, and did not take possession of it in his own right, but under a conditional agreement with Roessle, though protesting time and again that he would not drill the well unless the money was put up and placed where he could get it when the well was finished and com-

pleted. Confiding and relying upon the promises of Roessle, as he asserts in his answer, the boiler was placed on the lease June 17th, and the tools were placed in the derrick on the 18th, and the hole started for the conductor, which was sunk about eight feet, when the well was shut down until June 20th. There is some confusion as to dates, but that is not material. Upon the 20th Michaels was informed that Virgin wanted to see him. He went to see Virgin, and was informed by him that the lease to Learn was forfeited, for the reason that the rentals had not been paid according to its terms, that there were two months' rent still due and unpaid, and that Virgin did not want him to drill a well under a forfeited lease and lose his money. The work of erecting the rig and placing the boiler and machinery upon the lease he did under the promise made him by Roessle; expecting, when he commenced to drill the well, that Roessle would see that a proper contract was executed, and that he would see that he (Michaels) was protected. It appears that Roessle did not go to Pittsburg, as he promised in the first instance, but got Bills to write some kind of an indorsement upon the contract, expecting that would be satisfactory to Michaels, but which Michaels refused to accept. Michaels was informed, however, that Duffield, the trustee, declined to do anything except to promise to pay the money when the work was completed. This last information was obtained about the time that he was informed by Virgin that the lease was forfeited. The day after he obtained such information from Virgin, at the instance of Virgin, and with a view of protecting himself, he took from Virgin, on the 21st day of June, a new lease, and paid $10 rental upon it. Immediately after having obtained the lease he went to St. Marys, and called up Duffield, at Pittsburg, over the telephone, and told him what had transpired between him and Virgin; that Virgin had forfeited the lease, and refused to let him drill under it; and that if Duffield would return him the $10 rental, and deposit the money for the drilling of the well, as Roessle agreed to, he would assign the lease obtained from Virgin, and go on and complete the work. This statement is uncontradicted, and seems to be in accordance with the facts and history of this case. When Michaels discovered it was the intention of Virgin to forfeit the lease, he had already been subjected to considerable expense and outlay in preparations for the drilling of the well. He had erected the rig, and put his boiler, machinery, and tools on the lease, and contracted for the fuel for firing the boiler. At this point Michaels felt that he had to determine upon some line of action to protect himself. He could get nothing satisfactory from Learn, Roessle, or Duffield.

It appears from the evidence that there was never any contract between Michaels and any of the plaintiffs in this action by which he contracted to drill the well. The only thing was what Roessle promised,—that, if he would go on, he would see that all was right. As he failed to make good his promise to Michaels, he (Michaels) evidently thought he was under no obligation to any of the plaintiffs in this action; that, in equity and good conscience, he had done all that could be required of him, or that he ought to be expected to do. He repudiated any contract or agreement between him and the

plaintiffs, other than the partial understanding with Roessle, which understanding Duffield refused to ratify. Consequently there existed no binding agreement between him and the plaintiffs. No money was ever paid to him for any portion of the work during the progress of the drilling of the well. This action by both parties would seem to end all relation between them and terminate the agency, if in fact any legal relation of that character ever existed. Not only had he repudiated the contract, and given the plaintiffs notice that he was not drilling under it, but after he had taken the lease on the 21st of June, 1898, and drilled on until he got to the sand, he informed the plaintiffs, at that time, that, if they would come on and settle up with him, he would make everything right with them. This they did not do. No steps were taken by the plaintiffs to comply with this request of Michaels. Failing to reach satisfactory arrangements with the plaintiffs, Michaels moved away his rig, engine, and machinery, and informed them that he was at the top of the sand, with but little indication of oil. They gave no instructions, and took no steps towards settling or adjusting his claim against them, although he told them two or three different times that he would transfer and assign the lease to them if they would reimburse him in any outlay he had been to in drilling the well. Some time in August, after this had transpired, Michaels again returned to the well, and drilled it in and got a good well, when, for the first time, the plaintiffs offered to measure the well and settle with him. When he had previously made an effort to have them straighten up matters with him, they declined; but, after the well had proven to be a good well, they wanted to settle with him, and wanted the well, also.

In the light of the facts and history of this case, it is apparent to my mind that, while Michaels went there under the promise of Roessle "to make all things right," still, after he had notified them repeatedly that he would not drill the well under the terms and provisions of the Morris contract, nor would he drill it except on the deposit of money in some bank where he could get it (neither of which terms they complied with), he would be justified in taking steps to protect himself, especially after having repudiated the existence of any contract between them, and having notified them that he would not drill the well any further, as they failed to take any steps to assert their rights or claim to the lease. Can it be said that, after the plaintiffs in this action had failed and avoided every effort upon the part of Michaels to bring them to terms, they should, under the circumstances of this case, be permitted to reap the benefit of the risk he took, and of his labor, which resulted in producing a fine oil well? I think not. It would seem that the delay upon their part had for its object and purpose to procure the drilling of the well, and, if it were a failure, to avoid the responsibility of paying for it, but, if it proved to be a success, then to claim it, without having expended a single penny in the outlay of the well. It seems to me, under the review of the facts of this case, and the course pursued by the plaintiffs in this action, that justice requires that the court should hold, even if the lease were not forfeited, that they were not entitled to have the benefit of the labor of Michaels, for the reason that they

failed to comply with the terms of Michaels, as they had, apparently, at least, if not altogether, abandoned their rights under the lease. Michaels had on more than one occasion offered to the plaintiffs in this action to turn over the lease that he had secured from Virgin, if they would only pay him what he had paid out for his work for drilling the well. If he was an agent of the parties, then this was an offer to return what he had received from them; but we must hold, under the circumstances of this case, that he did not occupy the relation of agent to the parties, and that he had repeatedly repudiated all their propositions to drill the well upon their terms, and thereby terminated the agency, if there was ever any such relation existing between them. I reach the conclusion that the agency was terminated before the forfeiture of the Learn lease, and before the actual drilling of the well commenced, which was not until after the execution of the lease by Virgin to Michaels; and I must further hold that the action of Learn, Roessle, and Duffield was a mere effort upon their part to secure the drilling of this well without becoming responsible to Michaels for the drilling, or, in other words, if the well was a failure, Michaels would have to pocket the loss, but, if it proved to be a success, then they would come forward and claim the well under the Virgin lease.

The supreme court of the United States, in Oil Co. v. Marbury, held, upon facts somewhat similar to these, that:

"The injustice, therefore, is obvious, of permitting one holding the right to assert an ownership in property to voluntarily await events, and then decide, when the danger, which is over, has been at the risk of another, to come in and share the profit." 91 U. S. 587–593.

Such would seem to have been the policy of the plaintiffs in this case.

It is a well-settled principle of law that an agent may withdraw from the service of his principal at his pleasure, though he might be liable in some instances to damages for the violation of a contract, if any existed. Bish. Cont. par. 1050. But in this case there was no contract between the plaintiffs and Michaels which bound Michaels and made him the agent of the plaintiffs, beyond the partial understanding between Roessle and Michaels. But it is an equally well settled principle of law that an agent "may, on account of the principal's wrongful conduct, be justified in abandoning his contract and repudiating the agency." Cody v. Raynaud, 1 Colo. 272; Bishop v. Ranney, 59 Vt. 316, 7 Atl. 820; 1 Am. & Eng. Enc. Law (2d Ed.) p. 1110; Newcomb v. Insurance Co. (C. C.) 51 Fed. 725.

I have, up to this time, discussed the merits of this controversy as presented by the evidence in the case; but it is claimed that the plaintiffs forfeited all their rights in the Virgin lease, for the reason that they failed to comply strictly with its terms. The evidence in this case satisfied me there never existed any contract between Michaels and the plaintiffs; that after he entered upon the lease he repudiated all relations existing between them, which ended the agency as claimed by the plaintiffs in this action; and, from all the facts and circumstances of the evidence in this case, I am of the opinion that Michaels was justified in the course that he pursued, the object and

purpose of which was to protect himself from damage and loss in drilling a well for irresponsible parties, and for this reason alone I am of the opinion that the plaintiffs cannot maintain this action.

The remaining question to be considered in this case by the court is whether or not the lease executed by Virgin to Learn on the 16th day of March, 1898, became forfeited by reason of the fact that Learn, or those claiming under him, failed to comply with its terms and provisions. The right of a lessor to declare a forfeiture for a breach of the conditions of a contract of this character is no longer an open question. This question is well settled by numerous adjudications in our state, Ohio, and Pennsylvania. Guffy v. Hukill, 34 W. Va. 49, 11 S. E. 754; Hukill v. Guffey, 37 W. Va. 425, 16 S. E. 544; Bettman v. Harness, 42 W. Va. 433, 26 S. E. 271. This court, in the case of Gas Co. v. Jennings (C. C.) 84 Fed. 839, was called upon to pass upon the question of forfeiture, and the ruling in that case sustains the doctrine I have announced in this case. By the terms of this contract the lessee was to pay to the lessor $25 in cash, and to drill a well to completion within 60 days from its date; and, upon a failure to complete the well within the time specified, he was to pay $10 monthly rental for each and every month until the well was completed. By the terms of the lease, if the well was not commenced within 30 days from its date, $10 extra was to be paid by the lessee to the lessor for the second month, ending the 16th day of May. From the 16th day of May to the 16th day of June there would be $10 due, and from the 16th day of June to the 16th day of July there would be $10 due, making in all $30 rental money. The evidence discloses that Virgin called upon Learn after the 30 days had expired, in April, and asked him to pay the $10 extra called for by the lease; and after repeated efforts he finally, in the early part of May, got $10, which was all of the rental money he ever received before the forfeiture. By the plain terms and provisions of the lease, he was entitled to the rent of $10 per month for each month's delay in completing a well. This provision of the lease was not complied with, and on the 21st day of June, 1898, Virgin declared a forfeiture of the lease to Learn for the reason that he had not proceeded to drill the well, as required by its terms, and no steps upon the part of the lessee or those claiming under him were taken to comply with the terms and provisions of the lease for the payment of rentals due. For this reason, as well as for a failure to comply with other provisions of the lease, Virgin declared a forfeiture. It is claimed, however, that he waived a forfeiture by accepting a check, because it is written upon the face of the check that it was for the rent for the month from June 16th to July 16th. If that was a waiver, it was only for the failure to pay promptly the money for that month's rent, and was not a waiver for the preceding rentals, due on May 16th and June 16th. If the check had been for the full amount of the rentals due, although given long subsequent to the time when the rentals fell due, and the lessor had accepted it, I should hold that that was a waiver of the forfeiture of the lease for failing to pay the rentals. But such is not the fact. There were but two rentals paid, and those payments did not operate to release the

lessee from a forfeiture of all the conditions of the lease that required him to pay the full monthly rentals.

For the reasons assigned, I am of the opinion that the bill should be dismissed; but, before dismissing it, a reference will be had to a commissioner, requiring the receiver to settle up his accounts, and directing him to turn the property over to the defendant Michaels and those claiming under him.

GADD v. EQUITABLE LIFE ASSUR. SOC.

(Circuit Court, S. D. New York. November 22, 1899.)

TONTINE LIFE INSURANCE POLICY — CONSTRUCTION — METHOD OF COMPUTING DIVIDENDS.

Where a life policy issued under a tontine savings fund plan provided that all surplus or profits derived from such policies of the same class as should not be in force at the date of the completion of the tontine dividend period should be apportioned equitably among those completing such period, and that the holder, provided the policy was then in force, might, at his election, withdraw in cash, in addition to its share of the accumulated reserve, the surplus "apportioned by the society" to such policy, the action of the society in making such apportionment cannot be reviewed by the courts, unless fraud or irregularity in its procedure is shown.

Arthur S. Luria and Ralph J. Moses, for plaintiff.
William B. Hornblower and Charles B. Alexander, for defendant.

WHEELER, District Judge. The policy in question was made subject to provisions as a part of the contract:

(1) That this policy is issued under the tontine savings fund plan, the particulars of which are as follows: (2) That the tontine dividend period for this policy shall be completed on the 15th day of May in the year eighteen hundred and ninety-nine. (4) That all surplus or profits derived from such policies on the tontine savings fund assurance plan as shall not be in force at the date of the completion of their respective tontine dividend periods shall be apportioned equitably among such policies as shall complete their tontine dividend periods. (5) That upon the completion of the tontine dividend period on May 15, 1899, provided this policy shall not have been terminated previously by lapse or death, the said George Gadd shall have the option either: First, to withdraw in cash this policy's entire share of the assets.—i. e. the accumulated reserve, which shall be seventeen hundred and eleven and $^{77}/_{100}$ dollars,—and, in addition thereto, the surplus apportioned by this society to this policy.

The complaint alleges that the defendant represented as an inducement to taking the policy that:

"Tontine savings fund policies are policies in which the excess of the premiums received over the claims by death and expenses remains with the society for ten or more years, to be accumulated for the sole benefit of the surviving members, among whom it is to be divided exclusively at the end of the stipulated time." "(15) That the total amount apportioned by the defendant to the plaintiff's policy is $1,711.77 for reserve and $847.08 as alleged portion of surplus, while the actual results shown by substitution of the actual experience of the company shows that, in addition to the reserve of $1,711.77, there had been actually earned by plaintiff's policy, as its portion of lapses, interest, etc., set forth in the preceding tabular statement, the further sum of $2,045.40 from these sources alone." "(18) That the defendant has violated

its contract with plaintiff, in that it has failed and refused to, equitably or otherwise, apportion to the tontine savings fund class all the profits accruing to said class, but has arbitrarily withheld over two-thirds of said profits, and apportioned the residue only in such manner that the plaintiff is deprived of the benefits of lapses occurring in the last year over an assumed rate of lapses which is less than the actual amount. (19) Plaintiff has demanded of the defendant that it comply with its contract to equitably apportion all the surplus, but the defendant, instead thereof, has only apportioned $847.08, while the true amount exceeds $2,045.40. (20) Plaintiff elects to withdraw his entire share of the assets of the defendant, and has so notified the defendant, but the defendant refuses to pay plaintiff any sum in excess of $2,558.85, while the sum actually due the plaintiff exceeds $3,757.17, to plaintiff's damage $5,000. Wherefore plaintiff demands judgment for the sum of five thousand ($5,000) dollars, with interest from May 25, 1899, together with the costs of this action."

Thus this action appears to be brought for the breach of an agreement that all the surplus derived from this class of policies should be apportioned equitably among this and other policies that had completed their tontine dividend periods, and that the plaintiff might withdraw, in addition to the accumulated reserve, the surplus apportioned by the defendant to this policy. The principal question is whether the plaintiff can in this action recover damages of the defendant for not including in the division all that may be shown to be such surplus. The ultimate agreement as to the amount he should have the right to withdraw, in addition to the accumulated reserve, was the surplus apportioned by the defendant to the policy. In Greef v. Assurance Soc., decided by the state court of appeals October 3d (N. Y.) 54 N. E. 712, the agreement there appears to have been that the policy, during its continuance, should be entitled to participate in the distribution of the surplus of this society by way of increase to the amount insured according to such principles and methods as might from time to time be adopted by the society for such distribution; and the complaint demurred to appears to have alleged that, according to the principles and methods adopted, there was a surplus applicable to the policy which would make the sum distributed to it $7,087.38 greater; but the demurrer was sustained. In Railroad Co. v. Nickals, 119 U. S. 296, 7 Sup. Ct. 209, 30 L. Ed. 363, there was to be a noncumulative dividend of 6 per cent. on preferred stock, in preference to any on common stock dependent on the profits of each particular year as declared by the board of directors, who declared in their report for one year "a net profit from the operations of the year of $1,790,620.71," but they declared no dividend on the preferred stock, and the preferred stockholders were held not entitled to share in these profits. The principles of those cases appear to cover this, and to show that the action of the body agreed upon in ascertaining the surplus cannot be reviewed in an action to recover the distributive share without showing fraud or irregularity in its procedure. While the complaint only alleges a refusal to pay any sum in excess of $2,558.85, as it sets up that the sum actually due exceeds $3,757.17, with an ad damnum of $5,000, the whole sum appears to be sued for, and a judgment for the defendant on this complaint might be a bar to the whole. In this view the demurrer must be overruled as to this undisputed amount, but it should be

without prejudice to a motion for leave to bring the money into court for the plaintiff, and have the demurrer sustained. Demurrer overruled as to undisputed sum of $2,558.85, without prejudice to motion for bringing that sum into court, and having demurrer sustained.

MILLER v. FIDELITY & CASUALTY CO.

(Circuit Court, S. D. New York. November 22, 1899.)

ACCIDENT INSURANCE—ACTION FOR DEATH OF INSURED—CONSTRUCTION OF POLICY.

Under a policy insuring the holder against "bodily injuries sustained through external, violent, and accidental means," but excepting "injuries, fatal or otherwise, resulting from poison or anything accidentally or otherwise taken, administered, absorbed, or inhaled, * * * or any disease or bodily infirmity," and providing for the payment to his legal representatives of the full amount of the policy in case of death resulting within 90 days from any of the injuries insured against, independently of all other causes, a complaint states a cause of action which alleges that the insured sustained bodily injuries by swallowing certain hard, pointed, and resistent substances of food, which accidentally, by reason of the weakened condition of his intestinal tissues, caused by an illness from which he had otherwise recovered, and which weakened condition was unknown to him, so perforated and wounded his intestinal canal as to cause his death within 90 days

This is an action at law on an accident insurance policy to recover for the death of the insured. On demurrer to complaint.

E. Spencer Miller, for plaintiff.

S. Sidney Carrere, for defendant.

WHEELER, District Judge. The policy in question runs that the defendant—

"Does hereby insure Hobart Miller, residing in Coeburn, county of Wise, and state of Virginia, by occupation lawyer, classified by the company as A special, for the term of 12 months," "in the amount of five thousand dollars, principal sum," "against bodily injuries sustained through external, violent, and accidental means, as follows: If death shall result within ninety days from such injuries, independently of all other causes, the company will pay the principal sum of this policy to the legal representatives of the assured." "This insurance does not cover disappearances; nor war risk; nor voluntary exposure to unnecessary danger; nor injuries, fatal or otherwise, resulting from poison or anything accidentally or otherwise taken, administered, absorbed, or inhaled, nor injuries fatal or otherwise received while or in consequence of having been under the influence of, or affected by, nor resulting directly or indirectly from, intoxicants, anæsthetics, narcotics, sunstroke, freezing, vertigo, sleepwalking, fits, hernia, or any disease or bodily infirmity."

The complaint alleges that the policy was in full force and effect on the 1st day of July, 1898, and:

"Fourth. That on the 1st day of July, 1898, at Coeburn, Wise county, Virginia, said Hobart Miller accidentally sustained bodily injuries by swallowing certain hard, pointed, and resistant substances of food, which substances accidentally, by reason of the force and manner with which they came in contact with the intestinal tissue of the said Hobart Miller, and accidentally, by reason of a weakened condition of the said tissue, caused by illness from which the said Hobart Miller otherwise had recovered, of which weakened

condition the said Hobart Miller had no knowledge, so perforated and wounded his intestinal canal as to cause his death at said Coeburn within ninety days after the receipt of the injuries aforesaid, to wit, on the 11th day of July, 1898."

The hard, pointed, and resistant substances of food appear from the allegations to have been external, violent, and accidental means, for they originated outside of the body, and were accidentally violent, although the accidental effect took place within. The insurance is not, by the first clause quoted, limited to an external effect, nor to one beginning at the surface. The accidental operation of external means may be wholly internal. These substances of food were neither administered, absorbed, nor inhaled, within the meaning of the second clause quoted; but injuries "from poison or anything accidentally or otherwise taken" are excluded. The food was eaten, and not taken, in the sense that it might be accidentally or otherwise injuriously done. It was merely placed where it accidentally caused the injury. A bomb taken into the hand of a person, and accidentally exploded there, causing fatal injuries, would not be said to be "taken" within the meaning of this clause; and still it would be taken into the place where it could cause the injury, as this food was. If an accident that persons of ordinary strength would withstand should kill a weak person, or a person of otherwise ordinary strength at a weak place, the accident, and not the weakness, would be said to have killed. Although the weakness should have been left by disease, the malady would not be said to have killed, but the accident would. This is what this allegation of the cause of death seems to amount to. The illness had gone, leaving only weakness at the place where the accident took effect. The question now is not whether the allegations can probably be proved, but whether, if proved as made, they will make out a case. It is now considered that they would. Demurrer overruled.

TEXAS & P. RY. CO. v. HUMBLE.

(Circuit Court of Appeals, Eighth Circuit. November 6, 1899.)

No. 1,223.

1. PARTIES—ACTION BY MARRIED WOMAN.
   A married woman suing in a federal court for a personal injury, in a state by whose laws she is permitted to maintain such action in her own name, cannot be compelled to join her husband as plaintiff.

2. CONTINUANCE—ABSENT WITNESS—AVOIDANCE BY ADMISSION.
   It is not error for a federal court in an action at law to deny a motion for continuance on account of the absence of a witness, where the adverse party admits, in accordance with a state statute, that the witness, if present, would testify as stated in the application.

3. REVIEW ON APPEAL—MATTERS OF DISCRETION.
   The action of a trial court in denying a motion for continuance cannot be reviewed on appeal or writ of error.

4. CARRIERS—INJURY TO PASSENGER AT STATION—ACTION.
   Where plaintiff was injured by reason of a defective chair in the waiting room of defendant's railroad station, and there was evidence tending to show that the chair had been defective for some time, and that defend-

ant's agent had been notified of the fact, the question of defendant's negligence in not repairing or removing it was one for the jury.

5. TORTS—LAWS GOVERNING RIGHT OF RECOVERY.
An action by a married woman for a personal injury, brought in the state where the injury occurred, is governed by the laws of such state as to the right of recovery and the damages recoverable, regardless of the place of plaintiff's domicile.

6. MARRIED WOMEN — DAMAGES FOR PERSONAL INJURY—LOSS OF EARNING CAPACITY.
Under the statutes of Arkansas, which provide that property acquired by a married woman by her trade, business, labor, or services carried on or performed on her sole or separate account shall remain her own, free from any claim of her husband, and which also authorize her to maintain an action in her own name for an injury to her person, a married woman, in an action for a personal injury, may recover damages for the impairment of her earning capacity due to the injury.

Sanborn, Circuit Judge, dissenting.

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

Emma Humble, the defendant in error, brought this action against the Texas & Pacific Railway Company, the plaintiff in error, to recover compensation for certain personal injuries which she sustained in the defendant's waiting room or station at Texarkana, Ark., on April 9, 1898, while she was waiting to become a passenger on one of the defendant's trains. She attempted to take a seat in said waiting room in one of the chairs that had been provided for the use of passengers, but, owing to a defect in the chair, the bottom gave way, causing her to fall through the chair, and to become wedged therein until she was extricated. As a result of the accident, the plaintiff sustained serious internal injuries, which, as she claimed, and as the evidence tended to show, had permanently impaired her health and strength, and lessened her capacity to labor, besides compelling her to wear a truss to counteract the effects of a rupture. A judgment was recovered by the plaintiff in the lower court, which has been brought before this court for review on a writ of error.

F. H. Prendergast (T. J. Freeman, on the brief), for plaintiff in error.

Oscar D. Scott (Paul Jones and S. S. Solinsky, on the brief), for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

THAYER, Circuit Judge, after stating the case as above, delivered the opinion of the court.

At the commencement of the trial in the lower court, the defendant company asked that court to require the plaintiff's husband to be made a party plaintiff, assigning as a reason for such motion that, if the plaintiff could recover for the injuries complained of, then her husband could also recover, and that it was desirable that he should be joined, to the end that all claims might be settled in one suit. The motion was denied, and an exception was saved. We perceive no merit whatever in this exception, as the suit was by the wife to recover for certain personal injuries which she had sustained, and as the laws of Arkansas, where the suit was brought, expressly provide (Sand. & H. Dig. Ark. § 5641) that a married woman "may maintain an action in her own name * * * for any injury to her person, character, or property." This statute is applicable to suits commenced in the federal courts as well as to suits brought in the courts of the state.

Association v. Smith, 1 U. S. App. 270, 275, 4 C. C. A. 8, 56 Fed. 141. Besides, as this action was originally instituted in a state court and was removed therefrom to the federal court at the instance of the defendant, it could not by such removal deprive the plaintiff of the right secured to her by local laws to prosecute the suit in her own name for her own benefit. Rev. St. U. S. § 721.

When the case was called for trial, the defendant company, in addition to the above motion, also applied for a continuance; but as the plaintiff's attorney took advantage of the provisions of the Arkansas statute (Sand. & H. Dig. Ark. § 5797), and admitted that the absent witness, if present, would testify to the facts stated in the defendant's application for a continuance, the motion was overruled. There was no error in such action. The trial court properly exercised its discretionary power. Besides, error cannot be assigned on appeal or writ of error on account of such discretionary action by the trial judge, as this court and other federal courts have repeatedly decided. Davis v. Patrick, 12 U. S. App. 629, 635, 6 C. C. A. 632, 57 Fed. 909; Manufacturing Co. v. Hess (C. C. A.) 98 Fed. 56.

Complaint is next made of the refusal of the trial court to give two instructions which were asked by the defendant. These instructions were as follows:

"(1) In this case the plaintiff cannot recover, because the evidence shows that the acts of some malicious boys, for whose acts defendant is not liable, caused the plaintiff to sit in a seat that had not been prepared for her, nor for other passengers, and thereby to receive the injuries she did."

"(5) If you believe the seat in question was out of order by reason of the perforated bottom being out or hanging down, and that its condition was apparent to any person about to sit down on it, and you further believe that some boys, not in the employ of defendant, and without defendant's knowledge or consent, went, a short time before the accident, and fixed the perforated bottom into the frame of the seat so that it would appear to be in good condition, and this was done for the purpose of deceiving persons and making them believe the seat was in good condition, and the plaintiff was deceived by its then appearance, and induced to sit in the seat by reason of being thus deceived, then the defendant would not be liable."

The first of these instructions was properly denied, because it assumed that an act committed by some mischievous boys was the proximate cause of the injury, without submitting that issue to the arbitrament of the jury. The only evidence contained in the record which tended to afford a basis for the foregoing instructions was the testimony of one witness to the effect that the chair in question had been out of repair for some time, and that certain small boys on some previous occasions had fixed the seat so as to make it appear all right, and then induced their unwary playmates to sit down in it and receive a fall. There was no evidence, so far as we are able to discover, which would have warranted the court in instructing the jury as a matter of law, as it was asked to do in the first of the above instructions, that the fall of which the plaintiff complained was induced by the malicious act of a stranger, rather than by the neglect of the defendant company. There was abundant evidence to the effect that the chair had been out of repair in the waiting room for a long time; that it was in such a condition as to prove a trap for the unwary; and that the station master had been notified of its condition, and had

taken no steps to remove it or to have it repaired. In view of this testimony, it is manifest that the first instruction should not have been given.

The other instruction was also erroneous, in that it assumed that there was some evidence before the jury tending to show that the bottom of the chair was out or hanging down, and that the defect therein was obvious to every one when the plaintiff attempted to sit down. We find no evidence to that effect, but, on the contrary, we do find testimony which tended to show that it appeared to be in a suitable condition at the time of the accident. Besides, the instruction utterly ignored an obligation which rested on the defendant company either to remove the chair from its waiting room or cause it to be repaired when it had notice of the defect therein and the tricks which boys were in the habit of playing on each other. It was the province of the jury to decide whether the defendant was not guilty of some negligence, directly contributing to the injury which the plaintiff sustained, in permitting the chair to remain for a long time in its waiting room with knowledge of its condition and the use that was being made of it by boys to deceive unsuspecting persons. In view of the testimony in the case and the form of the instruction, it was clearly erroneous and properly refused.

The next and most important question in the case is whether the trial court erred in instructing the jury that, if the finding was for the plaintiff, they might, in assessing the plaintiff's damages, "take into consideration her age and earning capacity before and after the injury was received, as shown by the proofs." This direction is said to have been wrong, because the plaintiff was thereby allowed to recover for a loss of her earning capacity, which was an injury, as it is claimed, on account of which the husband alone is entitled to demand compensation. It is further said that the husband was especially entitled to recover for the loss of the wife's earning capacity in the case at bar, because he had taken up his abode in the state of Louisiana shortly prior to the accident, under whose laws a claim for damages for an injury to the wife is community property, which must be sued for by the husband and the wife. The plaintiff in the case at bar, as the evidence shows, had resided in the state of Arkansas, where she was hurt, for more than 10 years prior to the injury, but she was on her way to Shreveport, La., to join her husband, when the injury was sustained. Now, assuming it to be true, although the fact was not pleaded, that the plaintiff's husband had taken up his abode in the state of Louisiana shortly before the accident, and that the laws of that state make the damages claimed community property, and entitle the husband to join in a suit for their recovery in that state, the inquiry arises whether by virtue of these facts the plaintiff's rights, when she sued in the state of Arkansas for an injury there sustained, differed in any respect from those of a married woman domiciled in that state. We think that this question should be answered in the negative. The laws of Louisiana cannot be allowed to have any extraterritorial effect in a case of this character. It was competent for the legislature of the state of

Arkansas to determine, as it has done, by whom a suit may be brought for personal injuries sustained by a married woman, and the legislative direction on that subject must be observed in all suits which are commenced in that state. It was equally competent for the legislature to enlarge the rights of married women so as to work a change in the kind and amount of damages recoverable by them on account of personal injuries sustained within the state; and such laws, when enacted, necessarily inured to the benefit of every married woman who subsequently sued in the courts of the state for personal injuries there sustained. It sometimes happens that the measure of damages for the same wrong is not the same in one jurisdiction as in another; but it has never been supposed that the courts of one state, when appealed to for relief by a nonresident, are bound to apply the rule for the admeasurement of damages which prevails in the nonresident's place of abode if it differs from their own. It is clear that the rule in vogue in another jurisdiction ought not to be applied when, as in the case at bar, the tort was committed, not in the foreign jurisdiction, but within the state whose courts are asked to afford redress for the alleged wrong. In short, the laws of a state, whether statutory or the result of judicial decision thereon, should have a uniform operation throughout the state, whether the protection thereof is sought by a citizen or a stranger; and this principle should be enforced especially in actions to obtain redress for an injury to the person, character, or reputation of the plaintiff committed within the state. The same damages should be awarded for the wrong, whether the action is by a citizen of the state or a nonresident, since, by appealing for relief in an action that is transitory and may be brought anywhere, the plaintiff necessarily elects to take that measure of relief which the chosen forum affords to its own citizens, and becomes subject alike to the advantages and disadvantages which ensue from his choice of a forum.

It results from what has been said that the substantial question in the case is whether, under the laws of Arkansas, a married woman, when suing for a personal injury there sustained, is entitled to recover as a part of her damages for a loss of earning capacity incident to the injury. The statutes of that state provide, as heretofore shown, that she may maintain a suit in her own name for an injury to her person, character, or property. They further provide, in substance (Sand. & H. Dig. Ark. §§ 4940, 4945), that both the personal and real property of the wife, acquired either before or after her marriage, shall be and remain her separate estate and property, and may be disposed of as if she were a feme sole. They also declare that property of all kinds which comes to a married woman by gift, bequest, or descent, and that which she acquires by her trade, business, labor, or services carried on or performed on her sole or separate account, and the rents, issues, and proceeds of all such property, shall remain her own, and may be used, invested, and disposed of by her as she deems best, free from the control of her husband and without liability for his debts. Herein is found a clear authority, by in-

ference, for a married woman to engage in trade or in any business which she may elect to pursue, the same as a feme sole, and to hold whatever property she may thus acquire as her own, free from the control or interference of her husband. The question does not appear to have been decided by the local courts whether, in view of the aforesaid statute, a married woman suing for a personal injury in the state of Arkansas may lay claim to compensation for a loss of earning capacity; but it seems to us to follow logically from the authority given to her to carry on any business as a feme sole, and to appropriate the proceeds of her labor, that a loss of earning capacity incident to a personal injury is a loss for which a married woman is entitled to demand reasonable compensation from the wrongdoer. As she is entitled to enjoy the fruits of her own labor without participation by the husband, a wrongful or negligent act which lessens her capacity to labor inflicts a loss on account of which she should be entitled to recover, as well as for the pain and suffering which was occasioned by the injury. The precise question here involved has recently undergone judicial consideration in the state of Massachusetts, whose laws concerning the rights of married women are substantially the same as in the state of Arkansas. Harmon v. Railroad Co., 165 Mass. 100, 104, 42 N. E. 505. It was there held, in substance, that the right conferred on married women by the statutes of that state to engage in trade and business on their own account, and to enjoy the fruits of their own labor, is inconsistent with the theory that a married woman's capacity to labor belongs exclusively to her husband, and, as a corollary from that proposition, it was decided that, in an action by a wife for personal injuries, the jury were entitled to consider to what extent, if any, the injury sustained had impaired her capacity to labor. The supreme court of Montana appears to have adopted a similar view in Hamilton v. Railway Co., 17 Mont. 334, 42 Pac. 860, and 43 Pac. 713. See, also, Jordan v. Railroad Co., 138 Mass. 425. Moreover, in the case at bar, there was evidence which showed that before the plaintiff was injured she had been engaged for several years in running a hotel and boarding house, which occupation was pursued as her sole and separate business. There was further testimony to the effect that she had discontinued the business aforesaid shortly prior to the accident, owing to a temporary illness, and had not been engaged in any business since then, owing to her enfeebled condition, which had incapacitated her from doing any work except such as could be done while she was sitting down. In view of what has been said, we are of opinion that no error was committed by the trial judge in permitting the jury to consider the plaintiff's earning capacity before and after the accident, for the purpose of arriving at a just assessment of the damages. She was entitled to some allowance on this account, if the proof showed that her capacity to labor had been impaired by the injuries which she had received, since it cannot be maintained, under such laws as prevail in the state of Arkansas, that a wife's capacity to labor is the exclusive property of her husband. It is certain

that no such doctrine ought to be tolerated in a case where it appears that previous to the injury the wife had carried on business in her own name and for her own benefit. Finding no error in the record, the judgment below is hereby affirmed.

SANBORN, Circuit Judge (dissenting). The question presented in this case has been the subject of much discussion and of conflicting decisions, but, under the statutes of Arkansas, the logical result seems to me to be that the husband may, and the wife cannot, recover for the loss of the wife's services, or for her diminished capacity to labor, which is the same thing. The husband is still the head of the family in Arkansas. He is liable for the support of the family, and lawfully entitled to services from his wife in that regard, and he necessarily loses through the impairment of her capacity to labor. The authorities cited in the majority opinion seem to rest on a supposed distinction between loss of service and diminution of the capacity to labor, and to hold that the husband may recover for the former and the wife for the latter (Hamilton v. Railway Co., 17 Mont. 334, 42 Pac. 860, and 43 Pac. 713; Harmon v. Railroad Co. [Mass.] 42 N. E. 505; Jordan v. Railroad Co., 138 Mass. 425), but there is and can be no practical distinction between them. The loss of service is the measure of the impairment of capacity and the proof of it, and to permit the husband to recover for the loss of service, and the wife for impairment of capacity to render it, is to allow two recoveries for the same damages. We have already held that, under the Arkansas statutes, the husband may recover for the destruction of the wife's capacity to labor and the loss of her service resulting therefrom. Railway Co. v. Henson, 7 C. C. A. 349, 58 Fed. 531, 533. To my mind, this was to hold that the wife could not recover for them, and I think that this is the true rule, and that it is in accord with the weight of authority. Railway Co. v. Stone (Kan. Sup.) 37 Pac. 1015; Blaechinska v. Howard Mission (N. Y.) 29 N. E. 755, 15 L. R. A. 215; Filer v. Railroad Co., 49 N. Y. 47; Tuttle v. Railroad Co., 42 Iowa, 518, 521. My conclusion is that her earning capacity was not a proper element of the damages of the married woman in this case, and that the judgment ought to be reversed for that reason.

COLORADO SPRINGS CO. v. AMERICAN PUB. CO.

(Circuit Court of Appeals, Eighth Circuit. October 30, 1899.)

No. 1,210.

1. CORPORATIONS—VALIDITY OF TERRITORIAL INCORPORATION ACT—STATUTE OF COLORADO.

   The amendment to the general incorporation act of the territory of Colorado adopted in 1870 (Sess. Laws 1870, p. 49), authorizing the organization of corporations "for the purpose of aiding, encouraging, and inducing immigration to this territory," and providing that such corporations should have power to purchase, hold, and sell lands, town lots, and other property, cannot be held invalid, as in excess of the powers conferred on

territories by congress, in view of Act June 10, 1872 (17 Stat. 390), in broad terms ratifying and confirming such territorial acts.

2. SAME—POWERS—VALIDITY OF CONTRACTS.
A corporation organized under such act, and authorized by its articles of incorporation to buy, hold, and sell lands, town lots, and mineral springs, to improve such property, build hotels and bath houses, and construct irrigation canals and ditches, had implied power to make contracts for printed matter or views of scenery calculated and intended to benefit the corporation by advertising the locality where its lands and springs are situated, and to induce immigration into the territory or state,—that being the principal purpose of the legislature in granting to corporations organized under the act such extensive powers; and it cannot repudiate contracts so made on the ground that for a number of years previously it had not exercised such power, so long as it retains and exercises the other powers conferred by its charter.

3. SAME.
A corporation making a contract which is within its charter powers for one purpose cannot avoid liability thereon on the ground that it was made for another and unauthorized purpose, unless it shows that the other party to the contract had knowledge of such fact.

4. SAME—APPARENT AUTHORITY OF OFFICER.
Where there was evidence that the person who was secretary and treasurer of a corporation, and one of its four directors, had been in charge of its office for a number of years, and had during such time transacted all its current business, making contracts and sales and leases of its lands, consulting the other directors only when he deemed it necessary, and being in fact the only person who represented the corporation in its dealings with third persons, such evidence justified the submission to the jury of the question whether he had been vested with such apparent authority that the corporation would be bound by a contract made by him in its behalf, and which was within its charter powers, although he did not possess such authority under the by-laws, or by virtue of his office.

5. SAME—NOTICE OF OFFICER'S WANT OF AUTHORITY.
A corporation in whose behalf a written contract has been executed by one of its officers, who had apparent, but not actual, authority to bind the corporation thereby, when sued on such contract, is entitled to show by parol that plaintiff's agent, who negotiated the contract, was notified by such officer that he had no authority to sign it in behalf of the company.

6. SAME—IMPLIED POWER.
To sustain an act done by a private corporation as a valid exercise of corporate power, it is only necessary, where the act is not challenged by the state, to show that the act in question was not prohibited by the company's charter, and that it had a natural and reasonable tendency to aid in the accomplishment of one or more of the objects for which the corporation was created.

7. SAME—STOCKHOLDERS—CONTRACT—RATIFICATION.
When, by statute, the power to transact the corporate business is vested in directors, stockholders can neither make nor ratify contracts for and in behalf of the corporation, unless such action is taken at a meeting where all of the stockholders are present or are represented.

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

This action is founded upon three contracts between the American Publishing Company, the defendant in error, hereafter termed the "Publishing Company," and the Colorado Springs Company, the plaintiff in error, hereafter termed the "Springs Company." In the lower court the position of the parties was reversed, the suit having been brought by the Publishing Company as plaintiff against the Springs Company as defendant to recover damages for an alleged failure of the Springs Company to keep and perform the aforesaid contracts. The first of these contracts was in the form of a proposal, dated June 27, 1889, whereby the Publishing Company offered to furnish 20,000 copies

of a bird's-eye view of the city of Pueblo, "embodying your real-estate interests and the north side real estate prominently" at 25 cents apiece. The proposal was addressed to "George H. Parsons, Esq., Sec'y and Treas. Col. Springs, Colorado," and at the foot thereof was indorsed as follows: "Approved. Geo. H. Parsons." The second contract was likewise in the form of a proposal, dated June 28, 1889, whereby the Publishing Company proposed to finish a sketch and lithograph of "Pike's Peak Panorama, embodying such changes as suggested on sketch submitted to you," and to furnish 50,000 copies of said view on chromo plate paper, executed in first-class style, after proofs were submitted, at 75 cents apiece. By this proposal the Publishing Company also offered to send reliable canvassers to canvass for the Springs Company for the sale of the panorama, for which a commission was to be paid canvassers of 25 per cent. on all wholesale editions and 50 per cent. on all retail sales which might be made by canvassers in Colorado Springs, Manitou, Colorado City, and Denver. This proposal was addressed to "Geo. H. Parsons, Esq., Sec'y, Colorado Springs Co., Colo.," and was indorsed at the foot thereof as follows: "Approved, Geo. H. Parsons, Sec'y." The third contract was a formal agreement, dated March 7, 1890, whereby the Publishing Company on its part agreed to publish a souvenir for the World's Fair to be held in America in 1892 or 1893, containing the view of Pike's Peak Panorama in reduced form, in the same style as the large panoramic view, and to furnish the Springs Company an edition of 50,000 copies of said souvenir at least six months before the World's Fair was held at the price of $3.75 per copy. The Publishing Company also agreed to furnish to the Springs Company a large amount of stationery, consisting of letter heads, letters, note heads, bills, business cards, and envelopes, having engraved thereon a vignette of the "Pike's Peak Panorama." The contract price of the souvenirs, one-third of which was to be paid when proofs were submitted, was $187,500, and the contract price for the stationery and vignette was $6,150. The third contract was signed by George H. Parsons individually, and in behalf of the Springs Company as follows: "Colorado Springs Company, by Geo. H. Parsons." The complaint which was filed by the Publishing Company alleged a breach of the three contracts by the Springs Company, and claimed damages on account thereof in the sum of $171,915. The three contracts mentioned above were declared upon in three different counts. The jury found in favor of the Publishing Company on each of said counts, but no damages were assessed for the alleged breach of the first and second agreements, which were executed, respectively, on June 27 and June 28, 1889. Damages were awarded by the jury for the breach of the third agreement, dated March 7, 1890, in the sum of $32,525, for which amount a judgment was subsequently entered in favor of the Publishing Company. To reverse such judgment the record has been removed to this court by a writ of error.

John M. Waldron and John S. Macbeth, for plaintiff in error.

H. H. Lee and Theodore Kronshage, Jr. (W. H. Bryant, on the brief), for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

THAYER, Circuit Judge, after stating the case as above, delivered the opinion of the court.

The first error assigned to which our attention is invited is the refusal of the trial court to give a peremptory instruction at the close of all the testimony, instructing the jury to return a verdict in favor of the Colorado Springs Company, which was the defendant below. It is argued at great length that this instruction should have been given—First, because the contracts sued upon were each and all beyond the corporate powers of the defendant company; and, second, if they were not in excess of its corporate powers, that the contracts were not executed in behalf of the defendant company by an officer or agent who was authorized to bind the company by

such agreements. These are the principal questions which the record presents for our consideration, and they will be first noticed.

The Colorado Springs Company was organized on June 26, 1871, under the laws of the then territory of Colorado. The general incorporation laws of the territory at that time provided (Rev. St. Colo. 1868, p. 117) that bodies corporate might be formed "for the purpose of carrying on any kind of manufacturing, mining, mechanical or chemical business, construct wagon roads, railroads, telegraph lines, dig ditches, build flumes, run tunnels, or carry on any branch of business designed to aid in the industrial or productive interests of the country"; and by an amendment to the general incorporation act, which was adopted in the year 1870 (Sess. Laws Colo. 1870, p. 49), it was provided, in substance, that, in addition to the companies which might be organized under existing laws, companies might also be formed "for the purpose of aiding, encouraging and inducing immigration to this territory," and that such companies, when organized according to the provisions of this act, "may purchase, acquire, hold, possess, sell, convey and dispose of lands, town lots and other property, whether real, personal or mixed." Under the warrant afforded by the general incorporation law of the territory as thus amended, the Colorado Springs Company, in its articles of association, declared that the objects for which the company was formed were "the purchase of lands and mineral springs in El Paso county and elsewhere in the said territory, and the establishment and building up of colonies, towns, and watering places in said county and elsewhere in said territory, and, in accomplishing these objects, to purchase, acquire, hold, possess, sell, convey, and dispose of lands, town lots, mineral springs, and other property; to prepare for sale and transport and sell the waters of said springs; and to erect hotels, baths, and make other improvements in connection therewith; and lease, sell, or otherwise dispose of the same; build ditches, wagon roads, and railroads, mills, and other manufacturing establishments, and work and operate or sell or lease the same; and especially to construct a dam and ditch for the purpose of conveying water to be used for manufacturing purposes and for irrigating the lands in and near the town of Colorado Springs, in said county of El Paso, which dam is to be built upon, and which ditch is to be taken out of Monument creek; * * * and generally to do all such things as are authorized by the acts aforesaid, which may tend to accomplish the said purpose." A doubt seems to have arisen prior to June 10, 1872, whether some of the then territories of the United States, including the territory of Colorado, which had passed laws authorizing the formation of corporations to engage in various kinds of business other than mining, manufacturing, and similar industrial pursuits, had not, by so doing, exceeded the authority conferred upon them by congress; whereupon, at the latter date, an act was passed (17 Stat. 390), which in broad terms ratified and confirmed all territorial laws theretofore enacted which authorized the formation of corporations for colonization purposes and the improvement of lands in connection therewith, or which authorized the formation of corporations for any rightful purpose con-

sistent with the constitution of the United States. It is apparent, therefore, that the general incorporation law of the territory of Colorado, as amended by the act of 1870, under which the Springs Company was organized, cannot be successfully challenged at this time on the ground that those acts were in excess of the power that had been conferred on the territorial government by the national legislature. A suggestion of that kind is made by counsel for the defendant company, but it is obvious, we think, that the suggestion is without merit.

Counsel for the defendant company also argues—and we are disposed to concede—that the legislature of the territory of Colorado did not intend that any one corporation which might be formed under the general incorporation law should engage in all of the various kinds of business enumerated in that act. Notwithstanding this concession, it is clear, however, that the territorial legislature did intend that corporations might be formed to encourage and induce immigration, and that in aid of that object corporations of that class should be vested with the power to acquire, hold, and dispose of lands, town lots, and other property, both real, personal, or mixed. Under the broad grant of authority conferred by the amendatory act of 1870, above cited, it is apparent, we think, that a corporation organized thereunder could lawfully open mineral springs on its lands, and take the necessary steps to found watering places thereon by advertising the medicinal virtues of the waters found in such springs, the healthfulness of the climate, and the grandeur of the surrounding scenery. Such a corporation could also acquire a body of land, and divide it into town lots, for the establishment of villages or cities, or sell the same in larger tracts for colonization or agricultural purposes. All of these powers, if exercised, would have a natural tendency to induce immigration to the territory, and increase its resources, which was the main object that the legislature appears to have had in view in conferring such extensive power to acquire and hold land. We perceive no reason, therefore, why a corporation which was organized, as the defendant company appears to have been, for the professed purpose of building up colonies, towns, and watering places in the territory of Colorado, and of acquiring land in aid of that object, should be restricted in the exercise of its powers, as its counsel seek to restrict it, to the exercise of the single power to purchase, sell, and lease lands situated within the county of El Paso. It is obvious, from an inspection of the defendant's articles of association, that the persons who organized the company intended that it should exercise other and more important functions, and of its right to exercise other powers besides the power to purchase and sell land in a single county we can entertain no doubt, in view of the liberal provisions of the act under which it was incorporated. The power which was conferred upon it by the general incorporation law to acquire, hold, and dispose of real estate and other property, was not given to it solely for its own profit, but to enable the corporation to aid in the development of the territory by promoting immigration. The service which the defendant company was expected to render to the public at large by encouraging immigration, and thereby increasing the wealth

and resources of the territory, was the main consideration for conferring upon it its extensive power to deal in real estate, and for that reason it ought not to be permitted to abandon the exercise of the former function, no matter what may have been its practice in recent years. It acquired a power which was practically unlimited to purchase and hold land at any place within the territory on the pretense that it would found colonies, build up towns and watering places,—or, in other words, that it would encourage persons to take up their abode in the territory; and it cannot be heard to say that it has lost that power because in recent years it has confined its operations to the sale and leasing of lots in a few cities and villages in El Paso county. The evidence contained in the record is not sufficient to satisfy us that the operations of the defendant company for many years past have not been different or more extensive, as it is claimed, than those of an ordinary private landowner; but, even if that fact was sufficiently shown, we should nevertheless be constrained to hold that its chief corporate function is the encouragement of immigration, and that it still possesses the charter power to induce people by any lawful means to become permanent or temporary residents of the state of Colorado, and particularly of those localities where most of its lands are situated, and where it has large financial interests.

It results from the foregoing considerations that the contracts in suit cannot be declared void on the ground that they are in excess of the corporate powers of the defendant company. The contracts in question, with the exception of the first (as to which there was no recovery), related to a panoramic view of Pike's Peak and its immediate vicinity, including therein the towns of Manitou, Colorado City, and Colorado Springs, in all of which the defendant appears to have had large interests. This panoramic view, on a reduced scale, was to be inserted in a pamphlet known as the "World's Fair Souvenir," which contained sketches of several other notable places in various parts of the country, and it was also to be engraved on a large amount of stationery, which the defendant had an undoubted right to purchase. It is obvious that the large panoramic view to which the second contract related and the World's Fair Souvenir were intended for very general circulation throughout the United States, especially during the season of the Columbian Exposition, and it was doubtless supposed that by reason of their extensive circulation during that year, and the notable character of the scenery which was represented, they would attract visitors to Pike's Peak and the watering places adjacent thereto, and prove to be an effective and valuable means of advertising the defendant's lands and increasing its patronage. By entering into the contracts, therefore, the defendant simply embarked in an advertising venture, which involved a large outlay, but it was doubtless supposed that it would be reimbursed in a great measure for its expenditures by the sale of the souvenirs and copies of the large panoramic view, which were to be executed in first-class style, and to possess considerable artistic merit. Moreover, the method of advertising which it saw fit to adopt to induce an influx of visitors and a probable increase of its patronage was not an unusual one

considering the fact that it was a large landowner, having extensive interests in the towns adjacent to Pike's Peak, and that one of its chief functions was the encouragement of immigration. We are of opinion, therefore, that the contracts in suit were within the implied powers of the defendant company. It was strictly a private business corporation, having no public duties to perform other than the encouragement of immigration. The question concerning its power to execute the contracts is not raised by the state, but by the corporation itself, to avoid a liability to another corporation with which it has contracted; and for these reasons a more liberal view may be taken of its implied powers than could otherwise be entertained. To sustain these contracts as a valid exercise of corporate power, it is only essential that it should appear that the acts undertaken by the defendant company were not expressly prohibited by any provision of its charter, and that they had a natural and reasonable tendency to aid in the accomplishment of the objects for which the corporation was created. Chicago, R. I. & P. Ry. Co. v. Union Pac. Ry. Co. (C. C.) 47 Fed. 15, 22; Omaha Bridge Cases, 10 U. S. App. 98, 51 Fed. 309, 2 C. C. A. 174; Tod v. Land Co. (C. C.) 57 Fed. 47, 53; Thomp. Corp. § 5641, and cases there cited; Cook, Stock, Stockh. & Corp. Law, § 681. That they did have such a tendency we can entertain no reasonable doubt on the state of facts disclosed by the present record.

Counsel for the defendant company furthermore contend that the contracts in suit were ultra vires, and for that reason unenforceable, provided they were entered into not as a means of advertising the defendant's business and encouraging immigration, but merely as a speculative enterprise for the purpose of earning a profit by the sale of the souvenirs and panoramic views for a sum in excess of the cost of their production and sale. We are willing to concede this proposition, with the qualification, however, that the defendant cannot avoid liability on this ground unless it is shown that the other contracting party, to wit, the American Publishing Company, was advised of the motive which actuated the defendant when the contracts were executed. Having the charter power to enter into the agreements for a certain purpose, it cannot now avoid liability to the other contracting party by asserting that it entered into the agreements for another and unauthorized purpose, unless it proves—and the burden is on it to prove—that the Publishing Company was made acquainted with the object for which the souvenirs and the views were purchased. The lower court was not asked by the defendant to submit this issue to the jury, and for that reason it is not entitled to complain on the present occasion because it was not submitted or because this issue of fact was ignored.

We pass, in the next place, to the consideration of the question whether there was any substantial evidence tending to show that George H. Parsons, by whom the contracts in suit were executed, possessed the requisite power to bind the corporation. If there was substantial testimony tending to sustain the affirmative of this issue, then, as a matter of course, the case was properly submitted to the jury. In the consideration of the latter question it may be conceded at the outset that Parsons did not possess the power in question under

any of the provisions of the by-laws of the defendant company, or by virtue of his office. Such power as he possessed to execute the contracts had been acquired, if at all, by the conduct of the corporation in holding him out to the public for many years as its general manager or agent, and in permitting him in this way to acquire an apparent authority which was calculated to deceive persons with whom it had business intercourse or dealings. The evidence that was adduced on this head, without going too much into detail, may be summarized as follows: For about 15 years before the contracts in question were signed Parsons had been a trusted officer of the defendant company, occupying the position of its secretary and treasurer. During most of that period he had transacted all of its current business, had charge of its office, and had his name prominently displayed on the letter heads and the bill heads of the company as its secretary and treasurer. The company had only four active directors, including Parsons, and two of these were frequently absent from Colorado Springs, where its chief office was located, for several weeks or months at a time. The fourth active director gave but little attention to the business of the corporation, intrusting it chiefly to Parsons. Meetings of the board of directors were held at long and irregular intervals, and on some occasions such meetings could not have been held, for want of a quorum, if a meeting had been desired, because some of the directors were abroad, and others absent from the state. Parsons repeatedly negotiated agreements for the sale and leasing of lands. He negotiated on one occasion a sale of an important right of way through the company's property, and on another occasion he modified, on his own responsibility, a contract for the sale of a considerable tract of suburban land that had been sold previously. He also borrowed money for the company on some occasions, and hypothecated some of its securities to secure its repayment. On some occasions he voted stock which the defendant owned in other corporations, and he always attended on behalf of the company to fixing the value of its property for the purpose of taxation. He ordered and paid for a few advertisements at different times, but none of them involved any considerable expenditure of the company's funds. He was practically the only officer with whom people came in contact when they had business with the company, and he had transacted its business so generally, and for so many years, that persons who had frequent dealings with the company had come to regard him as its general manager. The plaintiff company also offered testimony which tended to show that the negotiations concerning the contracts now in controversy were not conducted solely by Parsons, but that on one or two occasions when the subject was under discussion William A. Bell, the vice president of the company, and one of its active directors, was also present, and inspected the proofs of the proposed Pike's Peak Panorama when the same were submitted for approval, and suggested some changes therein, which were subsequently made. It was also proven that the three contracts in suit were copied into the record book of the defendant company shortly after they were executed, and that they had remained of record in the books of the company from that time forward until the present action

was instituted. The most important evidence, however, concerning the extent of Parsons' authority was that given by William J. Palmer, the president of the defendant company, on his cross-examination. As we read the examination of this witness, he conceded, in substance, that Parsons had transacted the great mass of the company's business for as much as eight or ten years without consulting any one unless he thought proper to do so; that he was not required to consult any one, or at least that he did not do so, unless he (Parsons) deemed the matter of sufficient importance to require some advice; that it was his province, or at least his custom, to determine that question for himself; and that he pursued this policy of making contracts in behalf of the company, without any restraint upon his actions except the fear that he might possibly lose his position if his conduct on any occasion proved to be unsatisfactory. As none of the agreements that were made by Parsons during the period in question appear to have been repudiated until the present controversy arose, it is by no means strange that the impression gradually gained ground in the locality where the company transacted its business that Parsons was its general agent, and that all contracts made by him which were within the scope of the company's charter powers would be recognized by it as obligatory. In view of the testimony to which we have adverted, we are of opinion that the trial court was fully justified in allowing the jury to determine whether the defendant company, by its course of dealing, had not armed its secretary and treasurer with a power to execute the contracts in suit which it could not deny, and that it would have erred if it had withdrawn that issue from the consideration of the jury. Counsel for the defendant company suggest that because Parsons had never before executed a contract like the contracts now in hand, or a contract of their importance and magnitude, therefore the testimony which was adduced was insufficient to support a finding that they were executed in pursuance of lawful authority or in pursuance of an apparent authority which the defendant was estopped from denying. We think, however, that it was not essential to the submission of the case to the jury that the plaintiff company should have shown that Parsons had theretofore executed contracts of a precisely similar nature involving an expenditure of the same amount of money, which the company had afterwards executed or approved. It was sufficient, in our judgment, that there was evidence which tended to show that the defendant had for a period of years left him at full liberty to make any contract within the purview of the corporate powers which he deemed expedient, without consulting the board of directors unless he elected to do so. If he was vested with an authority of that nature, it was fully adequate to sustain the contracts in controversy.

It is next assigned for error that the trial court wrongfully excluded certain testimony that had an important bearing on the question whether the contracts were executed in pursuance of an authority which the defendant was not entitled to dispute. We have been forced to conclude that this assignment is well founded. The defendant had in its employ from June 15, 1888, to November 20, 1895, a clerk by the name of Shoup, who was called as

a witness in its favor. He stated that he was present in the company's office when the last of the three contracts, being the one dated March 7, 1890, was executed. He was asked, in the course of his examination, to state all that occurred between Parsons and the agent of the American Publishing Company when that contract was negotiated and executed. The trial court refused to permit this question to be answered, whereupon the defendant's attorney offered to show by the witness that he heard the entire conversation between Parsons and the plaintiff's soliciting agent at the time the contract was entered into; that the conversation was to the effect that the contract was a personal matter between Parsons and the Publishing Company; that the name of the defendant company was not mentioned till the agreement was fully prepared by the plaintiff's agent, and ready for signatures; that Parsons objected to signing the defendant's name to the contract, assuring the agent that he had no authority to do so; that thereupon the plaintiff's agent stated, in substance, that he did not intend to make the defendant company a party to the agreement, but desired that Parsons should sign the agreement as an officer of the Colorado Springs Company, to show that he was a person of position and influence, and that on the strength of that assurance Parsons finally signed it in the form heretofore shown. At the time the trial took place Parsons was dead, but the plaintiff's agent, by whom the contract was negotiated, was living, and was a witness at the trial. Counsel for the plaintiff below make light of this offer of proof, and suggest that its admission would have violated the rule that oral testimony of what transpires when an agreement is signed cannot be permitted to vary its terms or legal effect. We are not able, however, to accept that suggestion as a sufficient reason for rejecting the proffered testimony. Parsons had no power, as we have before conceded, to sign the contracts in suit,—particularly the last contract,—either under the by-laws of the company or by virtue of his office. The company can only be held bound by his acts in signing the agreements on the ground that by a long course of dealing it had armed him with a power which it ought not to be permitted to dispute in a controversy with a third person, who dealt with him in good faith on the strength of his apparent power. One who deals with an agent who seems to have the requisite authority to bind his principal, but who is advised at the time, either by the agent himself or by any one else, that in point of fact he has no right to act in the matter in hand without consulting his principal, cannot invoke the doctrine of estoppel to sustain a contract with the agent which was made under such circumstances. When one who is dealing with an agent is advised by any responsible person having authority to interfere in the transaction that the agent's apparent power is not real, he is put on his guard, and acts thereafter at his peril, if he fails to consult the principal. The contracts in suit involved an expenditure of a large sum of money; and for the protection of his own principal, as well as for the protection of the defendant company, the plaintiff's agent should have heeded the statement of Parsons that he was exceeding his power by signing the agreement, if

such statement was in fact made. We are of opinion, therefore, that the evidence in question was material and important testimony, which the trial court should have admitted, leaving the jury to determine what weight they would attach to it. It may be that the admission of the proof would have changed the result of the trial.

As the case must be sent back for a new trial, it will be unnecessary to notice in detail all of the exceptions which were taken to the charge. In the main the objections that are made to the instructions seem to be that they dealt too largely in abstract propositions of law, which, although correct in themselves, were not adapted to the case, and for that reason had a tendency to mislead the jury. Some of the criticisms of the instructions on this ground may be justifiable, but we are not prepared to hold that they are of sufficient importance, in themselves, to warrant a reversal of the judgment. In one of the instructions, however, the trial court advised the jury, in substance, that a resolution which was passed at a stockholders' meeting held in June, 1891, and had been read in evidence, amounted to an express ratification of the contracts in suit if the stockholders present at that meeting had knowledge at the time of the existence of the contracts. This instruction is challenged on the ground that, as the power to make contracts was vested solely in the directors, and not in the stockholders, the latter had no power to ratify the contracts in suit, because they were without power to enter into the contracts originally. The statutes of the state of Colorado provide, in substance (Mills' Ann. St. §§ 481, 483), that the powers of a corporation shall be exercised by a board of directors or trustees of not less than three nor more than thirteen, who shall be elected annually by the stockholders, and who shall be empowered to elect one of their number president, and such subordinate officers as the company may by its by-laws designate. Where, by statute, the power to transact the corporate business is thus lodged in the directors, it seems to be well established that the stockholders cannot enter into contracts either individually or while acting together at stockholders' meetings, unless, indeed, all of the stockholders are in attendance at such meetings. Union Gold-Min. Co. v. Rocky Mountain Nat. Bank, 2 Colo. 565, 575; Gashwiler v. Willis, 33 Cal. 12, 20; Thomp. Corp. § 3975; Cook, Stock, Stockh. & Corp. Law, §§ 708, 709, and cases there cited. And where stockholders are denied the power to make contracts on the part of the corporation, either while acting singly or collectively at a stockholders' meeting, it follows that they have no power to ratify contracts that have been made by an agent of the corporation unless every stockholder is present or is represented when the ratification takes place. Mechem, Ag. § 111. For these reasons we are of opinion that the instruction above referred to, which gave to the resolution of a stockholders' meeting the effect of a ratification, was erroneous, inasmuch as it did not appear that at the meeting of the stockholders by which the resolution was adopted the entire stock of the company was then and there represented. This resolution, when it was offered and read in evidence, was not objected to on the ground that the stock-

holders were without power at a stockholders' meeting to ratify the contracts, but it was objected to solely on the ground that the stockholders were not at that time aware of the existence of the contracts. The admission of the resolution in evidence is not claimed to have been erroneous on any other ground except the one last mentioned, and, in any event, it was probably admissible in evidence as having some tendency to show that the stockholders had examined all of the proceedings of the board of trustees and of the officers of the company since their last meeting, which they professed to ratify, and in that way had become acquainted with the existence of the contracts in suit, which were incorporated in its records, and that they had no objection thereto. For the reasons heretofore indicated, the judgment below must be reversed, and the cause remanded for a new trial. It is so ordered.

STRAND v. GRIFFITH et al.

(Circuit Court of Appeals, Eighth Circuit. November 6, 1899.)

No. 1,238.

1. SALE—FALSE REPRESENTATIONS—STATEMENTS AS TO QUALITY AND VALUE.
   The rule that the value and quality of goods sold are matters of opinion, and that representations made by the seller relating thereto cannot be made the basis of an action for fraud, does not apply when such representations are as to matters of fact; as where old and shopworn goods were represented as new, and a false invoice was shown the purchaser, which was represented as truthfully showing the wholesale value of the goods in the market.
2. SAME — FRAUDULENT PRACTICES — INDUCING PURCHASE WITHOUT EXAMINATION.
   A seller who practices fraud and deceit to induce the purchaser to accept goods without examination, which he would otherwise have made, will not be heard to say, in defense to an action for fraudulent representations, that the plaintiff was cheated as the result of his own negligence and credulity, and is, therefore, without remedy.
3. SAME—ACTION FOR FRAUD—ESTOPPEL BY WRITTEN CONTRACT.
   A provision in a written contract, signed by the purchaser of a stock of goods, stating that he had fully examined the goods (which was untrue), and that he accepted the same, "waiving all claim for damaged goods, shortages and prices," etc., cannot avail the seller as an estoppel of the purchaser to claim damages for fraudulent representations made in the sale, where the contract itself was procured by fraud, and for the purpose of protecting the seller against such an action.

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

Henry J. Gjertsen, for plaintiff in error.
M. A. Spooner, for defendants in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

CALDWELL, Circuit Judge. Hans B. Strand, the plaintiff in error, brought this action against Joseph M. Griffith, Cyrus A. Campbell, and Edwin L. Buck, the defendants in error, to recover damages for alleged fraud and imposition practiced upon him in the sale, by

the defendants to him, of a stock of dry goods. The defendants demurred to the complaint upon "the ground that the same does not state facts sufficient to constitute a cause of action." The court sustained the demurrer, and rendered a final judgment for the defendants, and the plaintiff sued out this writ of error. The demurrer necessarily admits the truth of all the allegations of the complaint, which were well pleaded. It would serve no useful purpose to set out these allegations at length. They comprise 19 pages of the printed record, and are set out with technical accuracy and formality. It is sufficient to say that the complaint avers that prior to this transaction the plaintiff had been engaged in operating a sawmill, and had had no experience in the mercantile business, and knew very little about dry goods; that the defendants, knowing these facts, and that the plaintiff was contemplating the purchase of a stock of goods, entered into a conspiracy to defraud him by inducing him to purchase an old and comparatively worthless stock of goods at ten times their value, and that the conspiracy was carried out and consummated by a series of gross frauds, false representations, and fraudulent devices and practices, which are set out at length and with particularity, and show a succession of frauds and deceits of the grossest character. Among other things, it is averred that the defendants falsely represented the goods to be new and fresh, when in fact, as they well knew, they were old, shopworn, and moth-eaten, and but remnants of old stocks, which they had themselves gathered up for the very purpose of putting them off on the plaintiff as new goods, and at the price of new goods; and for the purpose of carrying out their fraudulent scheme, and preventing the plaintiff from detecting the fraud, they made out and presented to him a false and fraudulent invoice of the goods, and put a layer of new and fresh goods on the top of the boxes containing the old goods, and by various false pretexts, cunning devices, and artful deceptions, which are fully set out in the complaint, induced the plaintiff to believe their invoice was true, and that it was unnecessary for him to examine the goods in the boxes; that they were new, and all like the goods he saw on the top of the boxes, and worth $11,000 at wholesale prices, as shown by the invoice, when in truth and in fact they were old, moth-eaten, and shopworn goods, not worth one-tenth of that sum, as the defendants well knew. This is but a brief summary of some of the averments of the complainant. When a defendant chooses to attack such a complaint by a general demurrer, he not only admits the truth of the averments of the complaint, but every inference and deduction which a jury can fairly draw from the facts set out the court must draw in support of the complaint. It is not seriously contended that the representations made by the defendants to the plaintiff touching the value, quantity, and quality of the goods were not false and fraudulent. The defendants seek to avoid their effect on several grounds. Their first contention is that "value and quality are always matters of opinion," and that fraud cannot be predicated upon false representations as to value and quality. Conceding the soundness of this rule, it has no application to this case. In the case at bar the representations made to the plaintiff by the defendants related to matters of fact, and

were not mere puffs or expressions of opinion. They related to the condition of the goods, and their wholesale value, as shown by the invoice. Whether goods are old, shopworn, and moth-eaten are matters of fact; and when such goods are represented to a purchaser to be new goods, and of a given value at the wholesale price of such goods, as shown by an invoice of the same, such representations are not mere expressions of opinion as to the quality and value of the goods, but are the affirmations of fact; and, when false to the knowledge of the seller, and made with the intent to deceive and mislead the purchaser, who either has no opportunity to examine the goods for himself or is prevented from so doing by deceitful and fraudulent pretenses of the seller, he is guilty of an actionable fraud. Davis v. Jackson, 22 Ind. 233; Hanscom v. Drullard, 79 Cal. 237, 21 Pac. 736; Bradbury v. Haynes, 60 N. H. 124; Attwood v. Small, 6 Clark & F. 445. And the averments of the complaint give no room for the contention that the plaintiff had an opportunity to examine the goods for himself, and, not having done so, he cannot complain of the false and fraudulent representations of the defendants as to their character. It is an undoubted rule that one purchasing property must use his senses, and exercise ordinary diligence to ascertain its quality and character for himself, but, according to the averments of the complaint, the plaintiff was prevented from examining the goods by the deceitful practices and fraudulent representations of the defendants, made for that very purpose, and which accomplished their object. The defendants having by such means induced the plaintiff to forego an examination of the goods, they will not be heard to say, in effect, that the plaintiff ought to have known they were playing a confidence game upon him, and given no credit to their false representations and assurances. The law will not reward dishonesty and falsehood, and punish confidence and trustfulness, in any such way. The rule of caveat emptor is not founded on the highest standard of morals, but it is no longer a shield and protection to the deliberate frauds and cheats of sharpers. Where falsehood or deceit is practiced by the vendor for the purpose of throwing the purchaser off his guard, and inducing him to make the purchase without first making personal examination of the thing purchased, which, but for such fraudulent practices, he would have done, it does not lie in the mouth of the vendor to say that by giving credit to his false and fraudulent representations the purchaser must be held to have been cheated and defrauded as the result of his own negligence and credulity. There is no rule of law which requires men in their business transactions to act upon the presumption that all men are knaves and liars, and which declares them guilty of negligence, and refuses them redress, whenever they fail to act on that presumption. The fraudulent vendor cannot escape from liability by asking the law to applaud his fraud and condemn his victim for his credulity. "No rogue should enjoy his ill-gotten plunder for the simple reason that his victim is by chance a fool." Chamberlin v. Fuller, 59 Vt. 256, 9 Atl. 832. The supreme court of Minnesota, in the case of Maxfield v. Schwartz, 45 Minn. 150, 47 N. W. 448, 10 L. R. A. 606, says:

"If Berens & Nachtsheim were seeking to enforce the written contract, a plea of fraud, such as is here presented, would constitute a defense, even though the defendants may have been wanting in ordinary prudence in relying upon the representations of the other contracting party as to the tenor or contents of the writing. They might still rely upon the defense that this was not their contract. C. Aultman & Co. v. Olsen, 34 Minn. 450, 26 N. W. 451; Frohreich v. Gammon, 28 Minn. 476, 11 N. W. 88; Miller v. Sawbridge, 29 Minn. 442, 13 N. W. 671; Institution v. Burdick, 87 N. Y. 40; Linington v. Strong, 107 Ill. 295; Gardner v. Trenary, 65 Iowa, 646, 22 N. W. 912; Thoroughgood's Case, 2 Coke, 9; Stanley v. M'Gauran, 11 L. R. Ir. 314; Redgrave v. Hurd, 20 Ch. Div. 1, 13; Pol. Cont. 401 et seq., and cases cited; Bigelow, Frauds, 523–525. While in the ordinary business transactions of life men are expected to exercise reasonable prudence, and not to rely upon others, with whom they deal, to care for and protect their interests, this requirement is not to be carried so far that the law shall ignore or protect positive, intentional fraud successfully practiced upon the simple-minded or unwary. As between the original parties, one who has intentionally deceived the other to his prejudice is not to be heard to say, in defense of the charge of fraud, that the innocent party ought not to have trusted him."

The vendor cannot complain that the purchaser relied too implicitly on the truth of representations he himself made, knowing them to be false, but intending that they should be received and acted upon by the purchaser as true. In the case of Hale v. Philbrick, 42 Iowa, 81, the court says:

"We are not inclined to encourage falsehood and dishonesty by protecting one who is guilty of such fraud on the ground that his victim had faith in his word, and for that reason did not pursue inquiries that would have disclosed the falsehood."

And in Graham v. Thompson, 55 Ark. 299, 18 S. W. 58, the court says:

"The very representations relied upon may have caused the party to desist from inquiry, and neglect his means of information; and it does not rest with him who made them to say that their falsity might have been ascertained, and it was wrong to credit them. To this principle many authorities might be cited. Gammill v. Johnson, 47 Ark. 335, 1 S. W. 610; Bigelow, Estop. 627; Dodge v. Pope, 93 Ind. 480; David v. Park, 103 Mass. 501; Holland v. Anderson, 38 Mo. 55; Evans v. Forstall, 58 Miss. 30; Kiefer v. Rogers, 19 Minn. 32 (Gil. 14)."

In Warder v. Whitish, 77 Wis. 430, 46 N. W. 540, the court says:

"A person cannot procure a contract in his favor by fraud, and then bar a defense to a suit on it on the ground that had not the other party been so ignorant or negligent he could not have succeeded in deceiving him."

"As between the original parties," says the supreme court of Illinois in Linington v. Strong, 107 Ill. 302, "when it appears that one has been guilty of intentional and deliberate fraud, by which, to his knowledge, another has been misled and influenced in his action, he cannot escape the legal consequences of his fraudulent conduct by saying that the fraud might have been discovered had the party whom he deceived exercised ordinary care and diligence."

In Reynell v. Sprye, 1 De Gex, M. & G. 549, the court said:

"However negligent the party may have been to whom the incorrect statement has been made, yet that is a matter affording no ground of defense to the other. No man can complain that another has too implicitly relied on the truth of things he has himself stated."

Another contention of the defendants in error is that the terms of the written contract set out in the complaint estop the plaintiff from claiming that he had not examined the goods, and from setting

up any claim for damages. The complant avers the sole object on the part of the defendants in procuring the execution of this contract was to further their scheme to defraud him, and protect themselves from the consequences of their fraud. This contract declared that the "stock of goods, wares, and merchandise has this day been fully inspected by said party,"—meaning the plaintiff,—and it further declares that the party of the first part "does by these presents accept the same in the condition it now is, and at the prices set forth in said inventories, waiving all claim for damaged goods, shortages, and prices," etc. Accepting the averments of the complaint as true, the execution of this written paper, as well as the deed and chattel mortgage mentioned in the complaint, were links in a long chain of artful and cunning frauds. The written contract was gotten up, and the plaintiff's signature thereto procured, by false and fraudulent representations for the sole purpose of protecting the defendants from an action for damages for the fraud which they were conscious they were perpetrating upon the plaintiff. Upon the averments of the complaint, the means used and representations made to procure the execution of these papers were false and fraudulent, and these papers are only to be regarded as parts of an elaborate scheme to deceive and defraud the plaintiff. The written contract contains the unusual and suspicious declarations which we have quoted, and which would seem to have no other purpose than to back up a fraudulent transaction. The object of reducing contracts to writing is to prevent, not to promote or to protect, fraud. In the case of Hoffiin v. Moss, 32 U. S. App. 200, 14 C. C. A. 459, 67 Fed. 440, we had occasion to consider somewhat similar provisions in a contract, and we said:

"And the clause in a contract, 'that no representation, understanding, or agreement not in this contract shall bind either party, unless in writing, and signed by both parties, as this is the complete agreement of the parties hereto,' is of no avail to the plaintiff. This clause, to the extent that it is valid, expresses no more than the law would imply without it. False and fraudulent representations made by one party to a contract, by which the other party is induced to enter into the contract, render it voidable, at the election of the defrauded party; and a stipulation in such a contract to the effect that the false and fraudulent representations by which the one party induced the other to enter into it shall not affect its validity is itself of no validity. No one can be estopped by anything contained in an instrument, which instrument was itself obtained from him by fraud and deceit. The law will not give effect to a stipulation intended to grant immunity to iniquity and fraud. In the case of Bridger v. Goldsmith, 38 N. E. 458, the court of appeals of New York, discussing a somewhat similar provision in a contract, says: 'A mere device of the guilty party to a contract, intended to shield himself from the results of his own fraud practiced upon the other party, cannot well be elevated to the dignity and importance of an equitable estoppel. If the clause has any effect whatever, it must be as a promise or agreement on part of the plaintiff that, however grossly he may have been deceived and defrauded by the defendant, he would never allege it against the transaction, or complain of it, but would forever after hold his peace. It is difficult to conceive that such a clause could ever be suggested by a party to a contract, unless there was, in his own mind, at least, a lingering doubt as to the honesty and integrity of his conduct.' * * * Public policy and morality are both ignored if such an agreement can be given effect in a court of justice. The maxim that fraud vitiates every transaction would no longer be the rule, but the exception. It could be applied then only in such cases as the guilty party neglected to protect himself from his fraud by means of such a stipulation. Such a principle would, in a short time,

break down every barrier which the law has erected against fraudulent dealing.' See, to the same effect, Fashion Co. v. Skinner, 64 Hun, 293, 19 N. Y. Supp. 62."

Clearly, upon the averments of the complaint, this case should go to a jury upon the issues of fraud. The judgment of the circuit court is reversed, and the cause remanded, with instructions to overrule the demurrer, and permit the defendants to answer.

ST. LOUIS BREWING ASS'N v. HAYES et al.

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

No. 799.

1. PRINCIPAL AND SURETY—EFFECT OF FAILURE OF PRINCIPAL TO SIGN BOND.
Where the failure of a principal named in a bond to sign it in no way affects the rights or liability of the sureties, as where he is equally bound by the contract to secure the performance of which the bond is given, and under the laws of the state the rights of the sureties are the same in that case as though he had signed the bond, his omission to sign it does not relieve the sureties from liability thereon.

2. BONDS—PROOF OF DELIVERY.
The delivery of a bond need not be proved by direct evidence, but may be inferred from the acts of the parties.

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

George E. Mann, for plaintiff in error.

John Lovejoy, Alex Sampson, and M. L. Malevinski, for defendants in error.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

SHELBY, Circuit Judge. On the 18th of November, 1893, the St. Louis Brewing Association made a contract with George Hayes, making him its agent for the sale of beer. This contract was duly signed by both parties to it. The association agreed to furnish Hayes the beer at a price stated, and he was to be its only agent to sell beer in Galveston, Tex. He was to pay cash on receipt of bill of lading, and to return empty kegs and barrels. The association was to furnish him with horses, carts, and harness, free of charge, to perform the duties of the agency; the same to be returned to the association at the termination of the agency. The agreement required the agent "to give good and sufficient bond or security, in the amount of $2,500, signed by two responsible sureties." The required bond was given. In the body of the bond, it purports to be the obligation of "George Hayes, as principal, and the other subscribers hereto, Nicolaus Bohn, H. C. Kerst, and George Schwoebel, as sureties." The bond is signed at the foot by the three sureties named in it, but it was not signed by George Hayes. The bond bears date November 20, 1893,—two days after the date of the contract of agency, signed by George Hayes, under which the bond was given. The condition of the bond was, in brief, that Hayes should pay the association for the beer sold and delivered to him under the contract

from its date, "November 18, 1893, to November 18, 1894." The bond recited the fact that Hayes was appointed agent for the association, and that it was given as the security required by the agreement. Under the contract the association delivered beer to Hayes, who received and sold it. The value of the beer delivered was over $11,000, but payments were made by Hayes which reduced the debt to about $5,000. This suit was brought to recover this debt. The plaintiff, by its petition, sought judgment against Hayes for the amount remaining due on the account, and judgment against the defendants who are sureties on the bond for the amount of the bond, $2,500. On the first trial in the court below, verdict and judgment were had against Hayes for the amount due on the account; but, under the instructions of the court, the sureties were relieved of liability by reason of an alleged new contract between the association and Hayes. A writ of error was sued out to this court, where it was held that the transaction on which the case had been determined in favor of the sureties "did not operate wholly to release them from their obligation." The opinion of this court on this point appears in 17 C. C. A. 634, 71 Fed. 110. The case was reversed, and remanded for a new trial. On the second trial, verdict and judgment were had against Hayes for $5,167.46, with interest from January 1, 1895, and a verdict for the sureties on the bond (to quote the verdict), "releasing them from responsibility on the bond." Hayes is insolvent. The case is brought to this court by the association, seeking to make the sureties liable for $2,500 of the debt.

The main question in this case is whether the failure of Hayes to sign the bond made it invalid. The defendants the sureties alleged in their answer that the bond was "not the obligation of the defendants, in that it was not executed by the principal therein named. * * *" The evidence of these defendants tended to show that they signed as sureties with the understanding that Hayes was to sign the bond as principal. Their answer also averred that the bond was not to be delivered until it was so signed by Hayes, the principal named in it. At the request of the defendants, the court charged the jury:

"If you believe from the evidence in this case that the bond or written obligation sued on was never signed and delivered by the defendant George Hayes, or by any one for him, or with his knowledge and consent, to the St. Louis Brewing Association, the plaintiff in this suit, then your verdict should be for the defendants Nicolaus Bohn, H. C. Kerst, and George Schwoebel."

It was an undisputed fact in the case that George Hayes did not sign the bond. The bond itself was in evidence, signed only by the sureties. To instruct the jury to find for the sureties, unless Hayes signed the bond, was equivalent to peremptory instructions to discharge the sureties. It was, in effect, the announcement of the court, binding on the jury, that the bond was not a legal obligation of the sureties, even if formally delivered, because it had not been signed by George Hayes, the principal named in it. If the failure of Hayes to sign this bond made it invalid, this charge is correct; otherwise, it is erroneous. The reason underlying the

discharge of sureties from liability in cases like this is the increased liability of the surety caused by the failure of the principal to sign the obligation executed by the surety. It would be manifestly unjust to hold the surety bound, when the principal fails to sign the instrument, if by its terms it was to be signed by him, and his signing fixed a liability on him not otherwise placed on him by the transaction, for in such case his signature would lessen the liability of the surety. The same principle would govern where the signature of the principal would give the sureties some right or power tending to protect them which was not conferred on them otherwise by the transaction or by law. The surety on a bail bond would not be bound if it was not signed also by the principal named in it as an obligor, because the signing by the principal would confer an advantage on the surety. In such case the court asked:

"Suppose they [the sureties] wish to arrest the principal in some distant place or in some other state; what evidence would they carry with them that they were his bail? There is nothing to estop him from denying the fact, nor any proof that it was true." Bean v. Parker, 17 Mass. 591; 1 Brandt, Sur. (2d Ed.) § 157.

Do we find in the case at bar that the signature of the principal would have any effect on the rights or liability of the sureties? He had already signed the contract creating the agency. The bond was a part of that contract, given pursuant to its terms. The sureties could be held liable for no sum, unless the principal was also liable for the same sum under the contract. The signing of the bond by the principal would not change his liability in any way, nor vary the measure of evidence required to fix his liability. No breach of the bond could be shown without first proving a debt of the principal to the payee in the bond. This evidence was required, whether the principal signed the bond or not. In either case the surety could not be sued "unless his principal is joined with him, or unless a judgment has been previously rendered against the principal. * * *" Rev. St. Tex. art. 3818. In either case, if the surety paid the judgment against his principal, it is considered as assigned to the surety. Id. art. 3815. In Lindsay v. Price, 33 Tex. 280, an appeal bond is held valid against the sureties, although not signed by the appellant. The reason given is that all the obligations stipulated in the bond are incumbent on him independent of the bond. In San Roman v. Watson, 54 Tex. 254, the court reaffirmed the doctrine announced in Lindsay v. Price, supra, and cited, as sustaining the same view, Cooke v. Crawford, 1 Tex. 10; Shelton v. Wade, 4 Tex. 150; and McKellar v. Peck, 39 Tex. 381. Both the contract and the bond were executed in the state of Texas, and, it has been assumed in argument, are governed by the laws of that state. The Texas statutes cited, providing for a joint action against both principal and sureties, furnish the rule of practice for the United States courts. Sawin v. Kenny, 93 U. S. 289, 23 L. Ed. 926; Rev. St. U. S. § 914. In Williams v. Marshall, 42 Barb. 524, the sureties who were sued had entered into a contract with certain persons that if they would sell and deliver books to one William H. Hadley, "for which said books, * * * if said Hadley

should not pay within three months from the date of each invoice or delivery," they would pay. The bond, signed by the sureties, names "William H. Hadley as principal," and names the sureties, but it is signed only by the sureties. Hadley failed to pay for the books, and, suit being brought on the bond against his sureties, they made the defense that Hadley failed to sign the bond. The court said:

"It is objected that, because in the body of the instrument in question the name of the principal is inserted as one of the obligors, it ought to have been subscribed by him, in order to make it binding on the sureties. The omission of the principal to sign the instrument operates in no respect prejudicially to the latter. In the recital they declare that they contract as sureties, and that William H. Hadley is principal; so that, if he had signed it, his relation to them or to the vendor of the goods would be in no degree different from what it now is. In either case they would be only liable conditionally; that is, in case Hadley failed to pay for the goods to be sold or delivered to him by the plaintiffs. This being the case, there can be no valid reason why the instrument should be deemed void."

It is true that, when the failure of the principal to sign the instrument affects the surety injuriously, the cases usually, and we think correctly, hold that the surety is not bound; but when, as in this case, the failure of the principal to sign the instrument in no way affects the rights of the surety, the instrument is valid, and the surety is bound. 1 Brandt, Sur. (2d Ed.) §§ 151, 152, and cases there cited. The foregoing conclusion settles other contentions in this case. Hayes' signature not being essential to the validity of the bond, and, if added, in no way changing the liability or affecting the rights of the parties, all issues and evidence as to the understanding that he was to sign it become immaterial.

One of the defenses presented is a denial of the delivery of the bond. Delivery is, of course, essential to its validity. In order to bind a surety or guarantor, his contract must be delivered, and it takes effect from the time of its delivery. 1 Brandt, Sur. (2d Ed.) § 25. When there is conflicting evidence as to the delivery, it is a question for the jury. Formal delivery, however, need not be proved by direct evidence, but it may be inferred from the acts of the parties. 4 Am. & Eng. Enc. Law (2d Ed.) 622. The sureties themselves testify that they had knowledge of the fact that the obligee had possession of the bond, and that sales were being made on its security. From the existence of these facts, and their knowledge of them, it may be inferred that the bond was formally delivered; and, if the delivery on their part was coupled with any condition affecting the validity of the bond, it may be inferred by their silence and acquiescence that such condition had been waived. Wright v. Lang, 66 Ala. 396.

Other questions have been argued, but, as they may not arise on the next trial, it would perhaps serve no useful purpose to discuss them. The judgment is reversed, and the cause remanded for a new trial.

SANDERS v. THORNTON.

(Circuit Court of Appeals, Eighth Circuit. October 30, 1899.)

No. 1,240.

1. UNLAWFUL DETAINER—GROUNDS OF RECOVERY — DISQUALIFICATION OF DEFENDANT TO HOLD PROPERTY.
   The fact that a defendant in possession and claiming the equitable ownership of lands in the Indian Territory is a citizen of the United States, and not entitled to hold such lands, affords no ground for the recovery of their possession by one to whom the legal title was conveyed in trust for the defendant, the sovereign alone having the right to oust the defendant for the disqualification.
2. SAME—UNDER STATUTES OF INDIAN TERRITORY — NECESSARY RELATION OF PARTIES.
   Under the Arkansas statutes, in force in the Indian Territory, an action of unlawful detainer will not lie unless the relation of landlord and tenant exists between the parties.

In Error to the United States Court of Appeals in the Indian Territory.

James S. Davenport, Preston C. West, and William T. Hutchings, for plaintiff in error.

Dennis H. Wilson and John B. Turner, for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

CALDWELL, Circuit Judge. This was an action of unlawful detainer instituted by Daniel Sanders, the plaintiff in error, against W. R. Thornton, the defendant in error. The complaint alleges that the plaintiff is a citizen by adoption of the Cherokee Nation, and that defendant is a citizen of the United States; that the plaintiff is the owner of the lands in controversy, and that he leased them to the defendant for the term of six years, who took possession of them as his tenant, and, after the expiration of the term, and after notice in writing to surrender the premises, refused to do so, but unlawfully detains them. The defendant in his answer denies the execution of the lease, and denies that the relation of landlord and tenant ever existed between him and the plaintiff, and avers that the lands were bought by him of a Cherokee freedman who owned them, and that as he could not own them, not being a citizen of the nation at that time, it was agreed that the title should be taken in the plaintiff's name, who was to hold them as trustee for the defendant, plaintiff paying nothing, and the defendant paying the entire consideration therefor, and being the equitable owner of the lands and improvements thereon, and entitled to the possession of the same. There was a trial by a jury, and a verdict for the defendant. On appeal to the court of appeals in the Indian Territory, the judgment of the court below was affirmed, and thereupon the cause was removed to this court by a writ of error.

The first assignment of error is that the court erred in refusing to charge the jury, at the request of the plaintiff, that, if the defendant is a citizen of the United States, he had no right to purchase or hold

improvements on the public domain of the Cherokee Nation, and that plaintiff is entitled to a verdict. If the defendant was a citizen of the United States, and for that reason was not entitled to hold lands and improvements thereon in the Cherokee Nation, these facts alone would not entitle the plaintiff to recover, as the instruction asked broadly asserts. Several other things would have to occur to entitle the plaintiff to oust the defendant. These facts might entitle the sovereign to oust the defendant, but, if the defendant was not entitled to hold lands or improvements thereon in the Cherokee Nation, that is no concern of the plaintiff, and he cannot profit by it in this action. The sovereign alone, either the United States or the Cherokee Nation, has the right to oust him of his possession or occupancy on that ground. In the state of Colorado, the law prohibits foreign corporations from doing any business in the state without having a known place of business and an agent upon whom process may be served in the state. In Fritts v. Palmer, 132 U. S. 282, 10 Sup. Ct. 93, 33 L. Ed. 317, it was claimed that a conveyance of land to a foreign corporation, which had failed to comply with the provisions of the statute, passed no title whatever to it; but the court held that this question could not be raised collaterally by private persons, unless there be something in the statute expressly, or by necessary implication, authorizing them to do so, but that the sovereign only can object. To the same effect is Seymour v. Gold Mines, 153 U. S. 523, 14 Sup. Ct. 847, 38 L. Ed. 807. The same question is found arising in cases where national banks have taken mortgages on real estate to secure loans, although prohibited by act of congress from doing so, and it has invariably been held that, "where a corporation is incompetent by charter to take real estate, a conveyance to it is not void, but only voidable, and the sovereign alone can object." It is valid until assailed in a direct proceeding instituted for that purpose. Bank v. Matthews, 98 U. S. 621, 25 L. Ed. 188; Bank v. Whitney, 103 U. S. 99, 26 L. Ed. 443; Reynolds v. Bank, 112 U. S. 405, 5 Sup. Ct. 213, 28 L. Ed. 733.

The second and only remaining assignment of error is that the court erred in charging the jury that if the plaintiff held the title merely as trustee for the defendant, and the relation of landlord and tenant did not exist between them, the action of unlawful detainer would not lie. Under the Arkansas statutes in force in the Indian Territory, no action of unlawful detainer will lie unless the relation of landlord and tenant exists between the parties, as we have twice decided. McCauley v. Hazlewood, 19 U. S. App. 343, 8 C. C. A. 339, 59 Fed. 877; Hardy v. Ketchum, 32 U. S. App. 198, 14 C. C. A. 398, 67 Fed. 282.

The judgments of the United States court of appeals in the Indian Territory and the United States court for the Northern district of the Indian Territory are each affirmed.

LANTRY v. WALLACE.

(Circuit Court of Appeals, Eighth Circuit. October 30, 1899.)

No. 1,221.

1. NATIONAL BANKS—LIABILITY OF STOCKHOLDER TO ASSESSMENT ON INSOLVENCY—DEFENSES.
   The liability of a stockholder of a national bank to assessment on the bank's insolvency is one created by statute, for the sole benefit of creditors; and one who becomes and remains a stockholder for a considerable length of time while the bank is engaged in business, and until it is declared insolvent, cannot avoid such liability on the ground that this subscription was induced by fraud which would entitle him to a rescission as between himself and the corporation, unless it is affirmatively shown that there are no creditors who became such while he was a registered stockholder.

2. SAME.
   The fact that a national bank purchased shares of its own stock ultra vires does not render its subsequent sale of such stock to another unlawful, or the stock void in the hands of the purchaser; nor does it constitute any defense to an action by a receiver of the bank against such purchaser to recover an assessment made after the bank's insolvency.

3. SAME—ACTION TO RECOVER ASSESSMENT—COUNTERCLAIM.
   In an action by the receiver of a national bank against a stockholder to recover an assessment, the defendant cannot set up, by way of counterclaim, a claim for damages against the bank for fraudulent representations made to induce his purchase of the stock.

Sanborn, Circuit Judge, dissenting.

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

This suit was brought by Theoderic B. Wallace, as receiver of the Missouri National Bank of Kansas City, Mo., the defendant in error, against Charles J. Lantry, the plaintiff in error, to recover an assessment, in the sum of $20,000, which had been theretofore duly assessed by the comptroller of the currency against said Lantry as the owner of 200 shares of stock in the Missouri National Bank of Kansas City, Mo., which had previously become insolvent. The complaint was in the usual form, and alleged that said bank was duly incorporated under the act of congress of the United States relative to national banks; that it had become insolvent; that Theoderic B. Wallace was duly appointed receiver of said bank by the comptroller of the currency on December 3, 1896; that an assessment of $100 per share had been made by the comptroller of the currency on July 30, 1897; that the defendant Lantry was the owner of 200 shares of the stock of said bank; and that by virtue of the aforesaid assessment he was obligated to pay to the receiver the sum of $20,000, with interest at the rate of 6 per cent. per annum from August 30, 1897. The defendant below filed an answer containing two defenses, separately stated, and a counterclaim. In the first defense it was alleged, in substance, that the defendant on April 18, 1896, purchased 200 shares of stock in the aforesaid bank, and received a certificate therefor; that the stock so purchased was represented by D. V. Rieger, the president of the bank, to be the property of the bank at the time of the sale, which the bank had theretofore lawfully acquired; that he was induced to make the purchase by certain false and fraudulent representations which were made by said president and other officers of the bank concerning its financial condition, which false representations were set out at great length in the answer; that the stock was held by the defendant from the date of its purchase on April 18, 1896, until December 3, 1896, when a receiver of the bank was appointed on account of its insolvency; that after the appointment of a receiver that officer had exclusive control of all the books, papers, and assets of the bank, and repeatedly assured the defendant when he applied for information that the bank was solvent, and would pay all of its debts

and liabilities without recourse against the stockholders; that the defendant was lulled into security by such statements of the receiver, and by reason thereof did not gain access to the books and papers of the bank until on or about September 1, 1897, at which time he was given access to the books and records of the bank by direction of the comptroller of the currency; that thereafter he discovered the falsity of all of the statements and representations on the faith of which he had been induced originally to purchase the aforesaid stock, and that he thereupon, on or about October 27, 1897, called at the prior place of business of said bank, and there tendered to the receiver, who was in charge of said bank, the certificate for the 200 shares of stock which he had received, and demanded of said receiver that he should repay to him the sum of $20,000 which he had paid for said stock, or such proportionate part thereof as he would be entitled to receive as a creditor of the bank for that sum. For a second defense the defendant repeated all of the averments which were contained in his first plea, and in addition thereto he averred, in substance, that the president and cashier of the Missouri National Bank of Kansas City had acquired the stock which was eventually sold to him in the following manner, that is to say: That they had purchased the stock with the funds of the bank from other shareholders when the bank was insolvent, to prevent such other shareholders from throwing the stock on the market at ruinous prices, and thereby disclosing to the public the true condition of the bank; that the stock, when so purchased with the funds of the bank, had been transferred to clerks and other agents of the bank, to conceal the character of the purchase; that such pretended purchasers had then given notes to the bank representing the amount of money that had been expended by the bank to acquire the stock; that the persons who thus gave notes to the bank representing the money that it had so expended were totally insolvent, and never intended to pay their said notes; that all of these facts were concealed from the defendant until long after his purchase of the 200 shares of stock in question; and that the stock so as aforesaid sold to him was a part of certain stock, amounting at its par value to $80,000, which the bank had so unlawfully acquired, whereas at the date of his said purchase, and long afterwards, he believed it to be stock that the bank had lawfully acquired, and had a good right to sell. The counterclaim which the defendant interposed was in the nature of a cross action against the Missouri National Bank to recover the damages which the defendant had sustained by reason of the fraudulent representations that had been made by its officers to induce the sale of the aforesaid stock, and such damages were pleaded as an offset against the comptroller's assessment. These defenses were adjudged insufficient on demurrer (C. C.; 89 Fed. 11, 1023), whereupon a judgment by default was rendered against the defendant below in the sum of $21,550; he having declined to plead further. The writ of error which was sued out by the defendant below presents the question whether the demurrer to the answer was properly sustained.

C. N. Sterry (Eugene Hagan and I. E. Lambert, on the brief), for plaintiff in error.

William C. Cochran (J. McD. Trimble and W. H. Wallace, on the brief), for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

THAYER, Circuit Judge, after stating the case as above, delivered the opinion of the court.

While the defendant's answer is unusually lengthy, and contains many allegations showing that he was grossly deceived as to the financial condition of the Missouri National Bank by the false and deceitful statements of its officers when he was induced to become a purchaser of its stock, and that he was not guilty of negligence up to the time the bank failed, in failing to discover that he had been defrauded, yet, when the answer is carefully analyzed, it is manifest

that the defendant seeks to escape from the assessment on two principal grounds: First, on the ground that he has lawfully rescinded the contract by which he purchased the stock, and reinvested the bank with the title thereto; and, second, on the ground that he never became the owner of any stock in the bank, because the bank had wrongfully acquired it from other shareholders when it was in an insolvent condition.

It will be observed from the foregoing statement that the answer shows that the defendant became a registered shareholder of the insolvent bank on April 18, 1896, when it was a going concern, and that he remained such until it was placed in liquidation by the comptroller about eight months thereafter, to wit, on December 3, 1896. From the very nature of the business in which banks are engaged, it must be presumed that between the last-mentioned dates the Missouri National Bank incurred large obligations to depositors and to other creditors. Besides, the answer alleges, among other things, that one of the reasons which was assigned by the officers of the bank for soliciting the defendant to become a stockholder therein was that he was a man of large means, with an extensive acquaintance in Kansas, whose connection with the bank would attract to it a large amount of patronage from that state. It must be assumed, therefore, that there are many creditors of the insolvent bank, who are now represented by the receiver, who became such subsequent to April 18, 1896; and it is probably true that there are some persons who became creditors of the concern because of the defendant's connection therewith as a large stockholder. It is immaterial, however, to the present discussion, whether the answer does or does not show that certain persons became creditors of the bank after April 18, 1896, in reliance on the fact that the defendant had become one of its shareholders, since the creditors of a bankrupt company are entitled to nothing less than its whole outstanding capital stock as a fund for the payment of their claims, and because all persons are, in law, presumed to extend credit to corporations, and especially to national banks, whose shares are subject to a double assessment, in reliance upon the amount of their issued capital stock, although they do not know accurately by whom such stock is at the time held. Moreover, a creditor of a corporation, when he becomes such, is under no obligation to ascertain what representations, if any, may have been made to the stockholders of the company to induce them to become such. Pauly v. Trust Co., 165 U. S. 606, 611, 17 Sup. Ct. 465, 41 L. Ed. 844; Upton v. Englehart, 3 Dill. 496, 504, Fed. Cas. No. 16,800. These considerations lead to the conclusion that, within the rule which was enunciated by this court in two recent cases (Scott v. Latimer, 60 U. S. App. 720, 33 C. C. A. 1, 89 Fed. 843, and Bank v. Newbegin, 40 U. S. App. 1, 20 C. C. A. 339, 74 Fed. 135, 33 L. Ed. 727), the defendant's effort to rescind the purchase of the stock in question was wholly ineffectual, and cannot be permitted to release him from the assessment which was made by the comptroller of the currency, so far as the creditors of the insolvent bank are concerned. In the Latimer Case it was decided, in substance, that the receiver of

an insolvent bank, in suits of this character, is armed with all the rights of creditors, which are very different from those of the corporation itself; that the liability of the stockholders of national banks to an assessment, in case of corporate insolvency, is a liability created by statute for the sole benefit of creditors; that the liability does not grow out of any contract between the corporation and its shareholders; and that, in the very nature of things, it is a liability which cannot be released or discharged by any agreement between the corporation and its shareholders. It was also held in that case that even though a stockholder has been induced to become such through fraud which would render his purchase or subscription voidable as between himself and the corporation, or as between himself and the party from whom he acquired his stock, yet, if he has knowingly permitted himself to be registered upon the books of the corporation as a shareholder prior to its insolvency, and has remained such for any considerable length of time, and until insolvency supervened, he cannot then be permitted to rescind his purchase or subscription, so far as the corporate creditors are concerned. In the Newbegin Case this court recognized the right of the shareholder, who was then seeking a rescission of his subscription on the ground of fraud, to rescind, under the peculiar facts of that case, inasmuch as it appeared that all the creditors of the bank who were entitled to object to the rescission had been paid, or had waived their right to object to the rescission; but in that case it was distinctly held that the right to rescind a subscription for stock should be denied to a stockholder who is registered as such when insolvency happens, if he has been a stockholder for any considerable period, or if debts remain unpaid which have been contracted since his subscription or purchase was made. It results, therefore, from the previous decisions of this court to which we have referred, that the first defense which was pleaded by the defendant in his answer was without merit, and that the demurrer thereto was properly sustained.

In considering the second defense which was interposed by the defendant, it is important to bear in mind that the 200 shares of stock which he purchased from the bank was not void stock, but was stock which, according to the averments of the answer, had once been issued to other persons, and had been reacquired by the bank by purchasing it from such other persons to prevent them from throwing it on the market at ruinous prices. It is necessary to infer from the averments of the answer that this stock had once passed the scrutiny of the comptroller, and had been outstanding and had been held by other persons since the organization of the bank in the year 1891. The purchase of this stock by the bank, under the circumstances disclosed by the answer, was doubtless ultra vires, but the purchase in question did not render the stock void. In purchasing it the bank made an unlawful use of its funds, for which the officers concerned in the transaction could have been held responsible, as for any other unlawful act, if the corporation had sustained damage; but, in point of fact, by the sale of the stock to the defendant that portion of its capital which had been dissi-

pated by the purchase was restored by the resale, and no loss seems to have been incurred. We are at a loss to understand how this transaction on the part of the bank can operate to relieve the defendant from his liability as a stockholder in a suit brought by the receiver to recover a stock assessment which was levied solely for the benefit of corporate creditors. The sale of the stock to the defendant after the bank had purchased the same was not unlawful, since it operated to restore that part of the capital that had been retired, and to that extent repaired the wrong which might otherwise have been done to the bank's creditors. Bank v. Stewart, 107 U. S. 676, 678, 2 Sup. Ct. 778, 27 L. Ed. 592. In the case last cited it was also decided that if a national bank wrongfully acquires its own stock, as by making a loan thereon, no one but the government can be heard to complain after the contract has been fully executed; and in the case at bar the purchase of the stock was fully consummated, and was no longer executory, when the sale was made to the defendant. Inasmuch, then, as the stock was not void, and the sale of the same to the defendant was not prohibited by law, we are of opinion that the defendant has no greater right to shield himself from his statutory liability to creditors because of the wrongful conduct of the bank in purchasing the stock from other shareholders, than he has to shield himself from liability because his purchase of the stock was induced by the fraudulent representations of the bank's officers. The creditors of the bank, who must be presumed to have extended credit on the security afforded by the capital stock and the statutory liability incident thereto, cannot be deprived of such security, either by the fact that the defendant was fraudulently induced to become a shareholder, or by the further fact that the bank had wrongfully acquired the stock which it subsequently sold to him, when it appears that he knowingly became a registered shareholder, and remained such for eight months, and until insolvency supervened, and in the meantime enjoyed all the rights and privileges incident to that relation. The equity of the corporate creditors under such circumstances is superior to that of the stockholder, and the latter cannot obtain a rescission of the fraudulent contract for the sale of the stock which would operate to the prejudice of the bank's depositors and other creditors. The second defense pleaded in the answer was therefore untenable.

Concerning the counterclaim which was pleaded by the defendant, it is only necessary to observe that the same reasons which prevent the defendant from rescinding the contract for the purchase of the stock, and thereby depleting the statutory fund for the benefit of the creditors which was created by the comptroller's assessment, will likewise prevent him from offsetting against the assessment the damages incident to the fraud and deceit of the bank. That is a claim against the bank alone, growing out of the wrongful conduct of its officers, for which the corporate creditors are in no wise responsible; and, according to well-established rules, such a demand cannot be interposed as a counterclaim in a suit where the receiver sues merely as the representative of creditors, for the enforcement of a

stock liability which was created by the statute solely for their benefit, and cannot be enforced by the bank, under any circumstances, in a suit brought in its own name. In proceedings to liquidate the affairs of insolvent corporations, where stockholders are called upon to pay amounts that remain unpaid on the capital stock, it is invariably held that such stockholders will not be permitted to set off debts due to themselves from the corporation against stock assessments, and thereby secure an advantage or preference over other creditors. Sawyer v. Hoag, 17 Wall. 610, 21 L. Ed. 731; Handley v. Stutz, 139 U. S. 417, 11 Sup. Ct. 530, 35 L. Ed. 227; Scammon v. Kimball, 92 U. S. 362, 23 L. Ed. 483. It is obvious, therefore, that the counterclaim should be rejected, since the effort is to offset the bank's liability for an injury done to the defendant by the fraud and deceit of its officers against a demand which does not, and never did, exist in favor of the bank, but was created solely for the benefit of the bank's creditors. It is questionable, to say the least, whether a judgment recovered against the bank for the alleged fraud and deceit could be permitted to participate in the distribution of the fund created by the stock assessment until all contract obligations of the bank have been fully paid; but, be this as it may, we are satisfied that the cross demand in question cannot be entertained in the present action. It results from what has been said that the demurrer to the defendant's answer was properly sustained, and the judgment below is therefore affirmed.

SANBORN, Circuit Judge. I dissent from the conclusion reached and the views expressed in the foregoing opinion, for the reasons stated in my dissenting opinion in Scott v. Latimer, 89 Fed. 843, 857–862, 33 C. C. A. 1, 15–20, 60 U. S. App. 720, 743–751.

HILDRETH et al. v. GRANDIN et al.

(Circuit Court of Appeals, Eighth Circuit. November 6, 1899.)

No. 1,237.

APPEAL—RECORD—WHEN BILL OF EXCEPTIONS IS NECESSARY.

When a motion is presented to a trial court which raises issues of fact to be determined on evidence, the action of the court cannot be reviewed on a writ of error, unless a bill of exceptions embodying the motion and the proofs is duly settled, signed, and filed, so as to show to the appellate court, in an authentic manner, on what state of facts such action was predicated.

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

B. E. Ingwaldson, for plaintiffs in error.

John Carmody (C. E. Leslie, on the brief), for defendants in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

THAYER, Circuit Judge. The record in this case which we are called upon to review contains the following pleadings, orders, affidavits, and exhibits, in which the error complained of is supposed

to inhere: First. A complaint in an action of ejectment which appears to have been instituted by John L. Grandin and William J. Grandin against E. G. La Bar (all of whom are defendants in error) in the circuit court of the United States for the district of North Dakota. Second. An amended answer to said complaint which appears to have been filed in behalf of the defendant La Bar by his attorneys, S. B. Pinney, M. A. Hildreth, and B. E. Ingwaldson, who are the plaintiffs in error. Third. A reply which appears to have been filed in said cause on October 24, 1898, wherein it was alleged, in substance, that by a stipulation in writing made on October 7, 1898, the parties plaintiff and defendant to said cause had mutually agreed that said action should be settled and dismissed. Fourth. An order of court which appears to have been made in pursuance of said stipulation on October 24, 1898, directing that the action be dismissed, without costs. Fifth. A notice signed by S. B. Pinney, as attorney for the defendant, which was addressed to John L. Grandin and William J. Grandin and their attorneys, and to E. G. La Bar and Matilda La Bar, notifying them of a motion which was to be made in said cause on January 2, 1899, to vacate the aforesaid judgment, and to open up said cause, and to determine and adjudicate the rights of the defendants' attorneys therein. Sixth. An affidavit made by B. E. Ingwaldson, which appears to have been filed in support of the aforesaid motion, wherein it was charged, in substance, that on the 7th day of October, 1898, without the knowledge or consent of his attorneys, Edward G. La Bar, the defendant in said ejectment suit, had surreptitiously, and with intent to avoid the payment of the fees that were then due to his attorneys for services in said cause, collusively entered into a stipulation with the plaintiffs therein to dismiss said action. Attached to said affidavit, as an exhibit, was a copy of the stipulation between the parties to said ejectment suit, in pursuance of which the action had been dismissed, and a copy of a quitclaim deed that had been executed to carry said stipulation into effect. Seventh. Two affidavits made by J. L. Grandin and by C. E. Leslie, his attorney, wherein it was denied that the plaintiffs in said ejectment suit had entered into a collusive agreement with the defendant therein to settle said cause to avoid the payment of fees due to the defendant's attorneys, and wherein it was further stated, in substance, that the agreement for a settlement of the cause had been entered into by the plaintiffs in good faith for the purpose of adjusting their controversy with the defendant, and without notice of any indebtedness being due from the defendant to his attorneys on account of fees earned in the defense of said action. Eighth. An order which appears to have been entered by the circuit court of the United States for the district of North Dakota, wherein said ejectment suit was pending, denying the aforesaid application of the defendant's attorneys to vacate the aforesaid judgment, and to open up the cause for further proceedings. Ninth. An assignment of errors, wherein it is asserted that prejudicial error was committed by the lower court in refusing to vacate the aforesaid judgment that had been entered in the ejectment suit.

The foregoing is a statement in brief of all the proceedings which the record discloses. No exception appears to have been taken to the order of the lower court denying the motion to vacate the judgment when such order was entered. Moreover, and what is of more importance, no bill of exceptions was settled, signed, and filed for the purpose of making the motion to vacate the judgment, and the testimony offered in support thereof and in opposition thereto, a part of the record, as should have been done to obtain a review of the order denying the motion to vacate. This court has heretofore held, and such is the well-established rule, that, when a motion is presented to a trial court which presents issues of fact for determination by that court on evidence adduced by the respective parties, the action of the trial court cannot be reviewed on a writ of error, unless a proper bill of exceptions, embodying the motion and the proofs, is duly settled, signed, and filed, so as to show to this court, in an authentic form, on what state of facts the action of the trial court was predicated. Dietz v. Lymer, 19 U. S. App. 667, 10 C. C. A. 71, 61 Fed. 792; Manufacturing Co. v. Johnson, 60 U. S. App. 661, 32 C. C. A. 309, 89 Fed. 677, 679; Stewart v. Ranch Co., 128 U. S. 383, 9 Sup. Ct. 101, 32 L. Ed. 439; Evans v. Stettnisch, 149 U. S. 605, 607, 13 Sup. Ct. 931, and 37 L. Ed. 866; State v. Hemrick, 62 Iowa, 414, 17 N. W. 594. In the present case there was apparently an issue of fact as to whether the ejectment suit had been settled by collusion between the parties thereto for the purpose of depriving the defendant's attorneys of their lawful fees. There may have been an issue of fact as to whether the defendant La Bar owed his attorneys, who have sued out the present writ of error, any sum of money on account of fees; and there may have been other questions of fact which were tried and determined, and on the strength of which the objectionable order was entered. In the absence of a bill of exceptions showing in an authentic form what did occur, and making all of the proceedings and testimony in the lower court a part of the record, we do not know on what evidence the order was predicated. And as the presumption must be indulged, in the absence of an authentic showing to the contrary, that the action of the trial court was right, the order made by that court must be affirmed, and it is so ordered.

THE JOHN B. KETCHAM, 2d.

GLOBE IRON-WORKS CO. v. HURON TRANSP. CO.

(Circuit Court of Appeals, Sixth Circuit. November 13, 1899.)

No. 694.

1. MARITIME LIENS — OHIO STATUTE — OWNERSHIP OF VESSEL WHILE BEING BUILT.

A person contracting to have a vessel built to be paid for in installments at fixed times, both before and after its completion, does not become the owner of such vessel until it is completed and delivered to him by the builder, although by the contract he is to furnish machinery to be used therein; hence one who sells him such machinery, which is delivered to and

placed in the vessel by the builder while it is still in his hands, is not entitled to a lien on the vessel therefor, under the Ohio statute relating to liens on water craft (Rev. St. Ohio, § 5880), which gives a lien for debts contracted on account of a vessel by the "master, owner, steward, consignee or other agent." [1]

2. ADMIRALTY JURISDICTION—SHIPBUILDING CONTRACTS.

A contract for the building of a ship is not maritime, or within admiralty jurisdiction, and a lien given by a local statute for materials furnished in the building may be enforced in state courts.[2]

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

This is a suit by the Globe Iron-Works Company, a corporation of the state of Ohio, against the steamer John B. Ketcham, 2d, her engines, boats, tackle, apparel, and furniture, and against all persons lawfully intervening for their interest therein, for the purpose of enforcing a lien thereon for the price of a boiler and appliances furnished for the original construction of said steamer under a contract with Oscar P. Bills and Edward E. Koch, partners under the firm name of Bills & Koch. The suit was begun in the circuit court for the county of Wayne, state of Michigan, under chapter 285, How. Ann. St., entitled "Collection of Demands against Water Craft." A warrant was issued, and the vessel seized thereunder. At the same time a summons was issued and served on the master of the vessel. Afterwards a bond was filed by the Huron Transportation Company, pursuant to the statute, conditioned to pay any judgment obtained against it, and the vessel was released by the sheriff. The Huron Transportation Company thereupon filed a demurrer to the complaint, upon the ground that the suit was one upon a maritime contract, and denying the jurisdiction of the state court to entertain such a suit. The demurrer was overruled. From this ruling the Huron Transportation Company took an appeal to the supreme court of the state of Michigan, where the judgment was affirmed, the opinion being reported in 100 Mich. 583, 59 N. W. 247. The cause was remanded to the circuit court for further proceedings, when the Huron Transportation Company, after filing an answer in which it asserted exclusive ownership of the vessel, removed the suit to the United States circuit court for the Eastern district of Michigan upon the ground of diversity of citizenship; said transportation company being a corporation of the state of New York, and the complainant a corporation of the state of Ohio. By stipulation, a jury was waived and testimony heard by the court, which made special findings of fact and law, and rendered judgment against complainant. The facts found by the court, so far as deemed necessary to the decision of the case, are as follows:

(1) Bills & Koch, a co-partnership engaged in business at Toledo, Ohio, on the 10th day of December, 1891, entered into a written contract with the Craig Shipbuilding Company, for the construction of a steamer. Said agreement being as follows: "The party of the first part agrees to furnish all material, and construct and deliver in the water at the place where built, a steel barge, to rate A1 star, 190 feet keel, 40 feet beam, 12 feet hold in the shoalest place, material to be the same weight as in the propeller J. W. Moore; said boat to have a steel deck, and boiler house, with hoisting engine, which will be connected with windlass by messenger, so it (the windlass) can be worked by steam. This agreement includes anchor chains, sails, masts rigging, cabin outfit, which is to be plain. Party of the first part also agrees to take the engine and boiler from the steamer Germania, and erect it in the new boat, they to alter the old steam pipe to adapt it to the different relative positions of the boiler and engine in the new boat, but they are not to replace

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[1] For maritime liens created by state laws, see note to The Electron, 21 C. C A. 21.

[2] For jurisdiction in admiralty as to matters of contract, see note to The Richard Winslow, 18 C. C. A. 347, and, supplementary thereto, note to Board v. Howard, 27 C. C. A. 530.

anything on the boiler and engine except the piping or bolts and nuts, and lengthen the smokestack which may be destroyed in taking down and erecting in new boat. This boat to be commenced at once, and to be delivered about May 1st, 1892, barring fire, flood, strikes, railroad delays, or circumstances beyond their control. For and in consideration of the foregoing work, the parties of the second part agree to pay to the first party $60,000, as follows: $5,000, April 15th, 1892; $10,000, August 15th, 1892; $12,500, August 15th, 1893; $12,500, August 15th, 1894; $10,000, August 15th, 1895; and $10,000, October 15th, 1895. Time payment to draw interest at 7 per cent. per annum, and to be negotiable, notes secured by a mortgage on the boat, and policy of insurance to cover the amount of the notes." Bills & Koch made the payment of $5,000 due April 15, 1892, on the date due, but made no further money payment until September, 1892, when they paid the further sum of $3,333. February 15, 1892, this agreement was so modified as to allow Bills & Koch to procure and furnish in substitution another engine and boiler in place of those from the steamer Germania.

(2) Thereupon Bills & Koch contracted with the Globe Iron Works for the construction of a boiler and certain attachments, to be delivered to them f. o. b. cars at Cleveland, for the price of $3,772. The terms of payment were a four-months note, dated at delivery of boiler and attachments, to bear interest at 7 per cent.

(3) The Globe Iron Works were informed at the time this contract was made that said boiler and attachments "were designed and intended to be used in a steamboat then being built for Bills & Koch by the Craig Shipbuilding Company at Toledo."

(4) Shortly after the above contract, and before the delivery of the boiler as hereinafter stated, the Craig Shipbuilding Company "were informed of all the terms of said contract between the complainant and said Bills & Koch."

(5) At date of the contract between Bills & Koch and the complainant, "the hull of said vessel was yet upon the stocks upon the land, * * * partially constructed, but incomplete, and was not launched."

(6) By agreement, the Globe Company delivered the said boiler and attachments on board a steamer at Cleveland instead of upon railroad cars, and same was unloaded upon the docks of the Craig Company at Toledo, on May 15, 1892, and while the Ketcham was still upon the stocks. Shortly thereafter the vessel was launched, and the boiler and appliances placed therein by the Craig Company. Bills & Koch also furnished the engine and machinery used in the boat, same being of the value of about $5,000.

(7) The Ketcham was completed July 19, 1892, and was on that day enrolled in the name of the Craig Company as owner. About same time she was placed in possession of Bills & Koch, and was run by them on their own account upon the lakes, with the permission of the Craig Company, until about the close of navigation in 1892.

(8) July 21, 1892, Bills & Koch executed their negotiable note to the Globe Company for $3,936.33, same being dated July 21, 1892, and, by agreement with the Globe Company, made payable November 25, 1892. This note was the price of the boiler and appliances, with interest from May 15th, the day when the property was delivered. No part of this note has been paid.

(9) September 15, 1892, the Craig Company executed a bill of sale of the vessel to Bills & Koch, and on same day Bills & Koch executed a mortgage back to the Craig Company to secure a balance of about $45,000 due on construction contract. Both these instruments were dated back to July 20, 1892. Default was made in the conditions of the mortgage, and the Craig Company took possession of the vessel, and on January 25, 1893, the same was sold under the mortgage, and bid in by the Craig Company for the amount of the mortgage debt. Prior to said sale, and on December 31, 1892, and before the Craig Company took possession under the mortgage, it received notice of the claim of the Globe Company here asserted.

(10) The Craig Company sold said vessel, January 28, 1893, to one Henry Loud, taking a mortgage to secure entire purchase price, and on April 13, 1893, Loud sold her to the present owner, the Huron Transportation Company. Both Loud and the Huron Transportation Company received notice, December 31, 1892, of the claim of the Globe Company and of the lien asserted by it.

H. Hatch and Harvey D. Goulder, for plaintiff in error.
John C. Sharo and T. E. Tarsney, 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.

The appellant, who was the complainant below, asserts a lien upon the John B. Ketcham, 2d, upon the facts already stated, by virtue of section 5880 of the Revised Statutes of Ohio, which is as follows:

"Any steamboat or other water craft navigating the waters within or bordering upon this state, shall be liable, and such liability shall be a lien thereon, for all debts contracted on account thereof by the master, owner, steward, consignee or other agent, for materials, supplies or labor in the building, repairing, furnishing or equipping of the same, or for insurance or due for wharfage, and also for damages arising out of any contract for the transportation of goods or persons or for injuries done to persons or property by such craft, or for any damage or injury done by the captain, mate or other officer thereof, or by any person under the order or sanction of either of them, to any person who is a passenger or hand on such steamboat, or other water craft at the time of the inflicting of such damage or injury."

The right to enforce the lien thus acquired under the Ohio statutes in a Michigan court is claimed under chapter 285, How. Ann. St. Mich. One section (8278) of that chapter is in these words:

"In cases where, by the general maritime law or laws of any other of the United States, now or hereafter to be passed, liens similar to those provided for in this act shall have been created against water-craft, the same may be enforced under the proceedings established by this act in like manner as if they accrued in this state, and chattel mortgages upon such water-craft, or other interest therein held in such other states, under the laws thereof, may be enforced hereunder against surplus proceeds, in like manner as if held in this state under its laws."

That the lien secured by the Ohio statute is a lien similar to those provided for by chapter 285, How. Ann. St., and may therefore be enforced under the procedure established by that chapter, has been expressly decided. Globe Iron-Works Co. v. The John B. Ketcham, 2d, 100 Mich. 583, 59 N. W. 247.

The primary question is this: Did the Globe Iron-Works Company acquire a lien under the Ohio statute, above set out, for the price of the boiler and attachments sold to Bills & Koch, and used in the construction of the John B. Ketcham, 2d? The answer must depend upon the relation which the purchasers bore to that vessel while in process of construction. When the contract was made by Bills & Koch with the Globe Company, and when the boiler, etc., were unloaded on the dock of the Craig Shipbuilding Company, the vessel, for which the Globe Company knew they were intended and designed, was yet on the stocks. The statute gives the lien only in favor of "debts contracted on account" of the vessel, "by the master, owner, steward, consignee, or other agent." Confessedly, Bills & Koch were neither the "master," "steward," nor "consignee" of the vessel. The contention is that they were the "owners," and that for this reason the statutory lien attached, if, as was the case, the articles were designed and intended for this particular vessel.

The learned trial judge found, upon the law and facts, that Bills & Koch were not the owners when this machinery was bought or delivered, nor until long after the vessel was delivered to them by the contractors. The rightness of this conclusion depends mainly upon the construction of the contract under which the vessel was being built for Bills & Koch as ultimate owners. That contract has been set out in full. It provides for a complete vessel. The contractors agreed to furnish all materials (the engine, boilers, etc., excepted), and to complete the ship in every particular, and deliver same May 1, 1892, certain contingencies excepted. Bills & Koch were to furnish, as needed, the engines, boilers, and attachments, and to pay $60,000 in money. The payments were to be made as follows: $5,000, April 1, 1892; $10,000, August 15, 1892; $12,500, August 15, 1893; $12,500, August 15, 1894; and $10,000, October 15, 1895. The contract does not in terms provide that the general property shall pass to Bills & Koch before completion and delivery of the vessel, and if under it the incomplete vessel passed to them it must be because such an intention is to be implied from the fact that a particular vessel was to be built for them, for which they were to furnish the engine and boilers, and upon which they were to make a payment in advance of completion and delivery. The general rule is that where one contracts for the building or making of a chattel, not existing in specie at the time, no property vests in the purchaser during the progress of the work, nor until the thing is finished and delivered. Butterworth v. McKinly, 11 Humph. 206; Mucklow v. Mangles, 1 Taunt. 319; Wood v. Bell, 5 El. & Bl. 772. There are certain exceptions to this general rule, the most specific of which is known as the rule in Woods v. Russell, 5 Barn. & Ald. 942, as interpreted in the later case of Clarke v. Spence, 4 Adol. & E. 448.

In Woods v. Russell the shipbuilder had contracted with the defendant to build a ship for him and complete her in April, 1819. The defendant agreed to pay for her in four installments,—one when the keel was laid, the second at the light plank, and the third and fourth when the ship was launched. The ship was measured, with the builder's privity, while yet unfinished, in order that defendant might get her registered in his name, and the builder signed the certificate necessary for her registry, and the ship was registered in defendant's name on the 26th of June, and he paid the third installment. On the previous March the defendant appointed a master, who superintended her building, and who chartered her on June 16th for a voyage, with the shipbuilder's consent. June the 30th the builder committed an act of bankruptcy, and the assignees in bankruptcy brought an action of trover against the defendant, who had taken possession before completion, but after the act of bankruptcy. It was held, on these facts, that the general property in the ship had passed to the defendant from the time of registration in defendant's name with the builder's consent.

In Clarke v. Spence, cited above, the contest was between the assignees of a bankrupt shipbuilder named Brunton and the plaintiff. In February, 1832, Brunton had agreed to build a ship for a

specified price, according to certain specifications, and under the superintendence of an agent appointed by the plaintiff. One installment was to be paid when the ship was rammed, a second when timbered, a third when decked, a fourth when launched, and the residue in four and six months thereafter. After the vessel had been rammed and timbered, and two installments of the price paid, and a part of the third installment paid in advance, Brunton became a bankrupt, having received in all £1,002. 11s., and the frame of the vessel was then worth £1,601. 13s. 7d. The title was held to have passed to the plaintiff. The court held that certain passages in the opinion in Woods v. Russell were "founded on the notion that provision for the payment regulated by particular stages of the work is made in the contract with a view to give the purchaser the security of certain portions of the work for the money he is to pay, and is equivalent to an express provision that, on the payment of the first installment, the general property in so much of the vessel as is then constructed shall vest in the purchaser."

To bring a case within the exceptions to the general rule, it is necessary to show that the intention of the parties was that the general property should pass to the purchaser at some stage of the building. Thus, in Laidler v. Burlinson, 2 Mees. & W. 602, Lord Abinger said: "There is no occasion to qualify the doctrine laid down in Woods v. Russell or Clarke v. Spence. I consider the principle which those cases establish to be that a man may purchase a ship as it is in progress of building, and, by the terms employed there, the contract was of that character; a superintendent was employed, and money paid at particular stages." In Wood v. Bell, 5 El. & Bl. 772, Lord Campbell, C. J., after stating the general rule in respect to the sale of a chattel to be constructed, said: "But these general rules are both and equally founded on the presumed intention of the parties. If, in the first, there are attendant circumstances from which the intention may be inferred that the property shall pass in the incomplete and growing chattel as the manufacture of it proceeds, or even in ascertained materials from which it is to be carried to perfection, that intention will be effectuated; and equally, in the latter, if it appear that the parties intended to postpone the transfer of the property till the payment of the price or the performance of any other condition, such intention will be upheld in the courts of law." "This principle," he added, "we believe to be well settled;" and, referring to the cases of Woods v. Russell, Clarke v. Spence, Laidler v. Burlinson, and others, cited in argument, he remarked that "previous decisions, therefore, are mainly useful as serving to guide our judgment in estimating the weight of circumstances as evidence of intention"; and concluded by saying: "Still it must be remembered, after all, that what we have to determine is a question of fact, namely, what, upon a careful consideration of all the circumstances, we believe to have been the contract into which the parties have entered." The fact that the purchase price is to be paid in installments, having relationship to the progress of the work, has not been generally

accepted by American courts as conclusive evidence of an intent that the general property in the incomplete chattel should pass to the purchaser. Benj. Sales, § 398 et seq.; Clarkson v. Stevens, 106 U. S. 505–515, 1 Sup. Ct. 200, 27 L. Ed. 139; Andrews v. Durant, 11 N. Y. 35; Williams v. Jackman, 16 Gray, 514; Green v. Hall, 1 Houst. 506; West Jersey R. Co. v. Trenton Car Works Co., 32 N. J. Law, 517; Elliott v. Edwards, 35 N. J. Law, 265. Butterworth v. McKinly, 11 Humph. 206, has been cited as approving the arbitrary rule of intention supposed to be established by Woods v. Russell. An examination of the case will show that this is a misinterpretation of the effect of Judge Totten's opinion. Clarkson v. Stevens, cited above, involved a contract between the United States and a shipbuilder, where the builder was to furnish the materials and labor, and to receive a sum, payable in installments, as the work progressed. After a review of many of the English and American cases, Justice Matthews said:

"The courts of this country have not adopted any arbitrary rule of construction as controlling such agreements, but consider the question of intent open in every case, to be determined upon the terms of the contract and the circumstances attending the transaction. 1 Pars. Shipp. & Adm. 63. And such seems to us to be the true principle. Accordingly, we are of opinion that the fact that advances were made out of the purchase money, according to the contract, for the cost of the work as it progressed, and that the government was authorized to require the presence of an agent to join in certifying to the accounts, are not conclusive evidence of an intent that the property in the ship should vest in the United States prior to final delivery."

The contract under which the vessel in question was being constructed for Bills & Koch did not provide for payments of the purchase price as the work progressed, and did not provide for any superintendence by the purchaser during construction. But $5,000 of the price was to be paid in advance of completion and delivery, and that payment was without any regard to the proportion of the work then done. In the fact that the advance payment did not relate to the progress of the work on the vessel, the case is plainly taken out of the doctrine of Woods v. Russell and Clarke v. Spence, and is in accord with Williams v. Jackman, 16 Gray, 514–518. The fact that the engine and boilers were supplied by the purchaser, and worked into the steamer by the builder, does not alter the case. Whether we consider the furnishing of those articles as payment of part of the price of a completed steamer, or as the property of the buyer and put into the ship by the builder, the general property in the ship would remain in the builder, and the articles, if so attached as to become parts of the ship, would pass to the owner of the ship. The case in that respect is like that of the West Jersey R. Co. v. Trenton Car Works Co., 34 N. J. Law, 517, where the purchaser of certain cars furnished the plush which was worked into the seats of cars built for the buyer. This was held not to pass the title in the cars to the buyer. The view we have taken leads to the conclusion that Bills & Koch were not the owners of the vessel, either when the boiler and attachments were bought or when delivered in the shipyard of the Craig Shipbuilding Company, and could not, therefore, incumber the vessel with any lien,

under the Ohio statute. They bore no such relation to the ship or its builders as constituted them either the owners of the ship or the agents of the contracting builders.

The case of The Etna v. Treat, 15 Ohio, 585–589, is much in point, as it arose under the Ohio statute here involved. Trent contracted to build two canal boats for Standart, Griffiths & Co. for a specific price. Standart, Griffith & Co. were to furnish such materials out of their store as should be needed in course of construction, and pay $500 on delivery of the boats, and the balance as the boats earned the money. The hardware needed was furnished, and a small sum in money was paid when the boats were delivered. Without completing the payments for the boats, Standart, Griffith & Co. sold them for cash to a purchaser who had notice that they had not been paid for. Treat, the builder, sought to enforce a lien against the boats for the balance due him under the Ohio statute here involved. The court held that Treat continued to be the owner of the boats until he made delivery to Standart, Griffith & Co. Upon this subject the Ohio supreme court said:

"Treat had contracted to build her and deliver her at a particular time. Before the delivery she was, undoubtedly, his property. He was the owner and had the absolute control of her. He might have broken her up at any moment, and a sale and transfer by him to any stranger would have vested in that stranger a valid legal title. If transferred without notice of the contract between him and Standart, Griffith & Co., the purchasers would have had a perfect title to the boat,—one that nothing could have affected save the debts which Treat himself had contracted, as owner, for supplies, etc., furnished in building the Etna. For those debts the boat was liable, and a transfer by Treat to any person, or under any circumstances, without notice of those debts, or the assent expressly or tacitly given by them, would not have prevented Standart, Griffith & Co., or the hands that labored upon the boat in assisting to build her, from attaching and selling her, under the statute, to satisfy their claims. The object of the act was to provide a remedy for those who otherwise might be defrauded, hindered, or delayed in collecting their just claims, and to save them the inconvenience of seeking out the owners, and subjecting them to the payment of the debts contracted by their authority. Looking to this object and to the facts of the case, and all difficulty about the law or its application vanishes. Treat could not recover. His claim was not for a debt contracted for labor, supplies, or materials in the building of the boat. A debt cannot exist without a debtor and a creditor. It is something which grows out of a contract, and to every contract there must be two parties; the contractor, who is to be bound by it, and the contractee, to whom he is bound. Treat could not contract with himself to furnish himself materials for his own boat, any more than he could sue himself for breaking such a contract. Both ideas are absurd, one not more so than the other. His claim, then, is simply a claim for the price due upon the sale and delivery of the boat, and does not come within the letter or spirit of the statute."

The doctrine of this case was approved in Treat v. The Etna, 16 Ohio, 276, and Webster v. The Andes, 18 Ohio, 187. In the latter case the facts were that Lewis and Beardsley contracted for the construction of a brig of certain dimensions, for which they agreed to pay $24 per ton, custom-house measurement. The contract provided that Lewis and Beardsley might, as the work progressed, "pay in materials for building said vessel, or by paying for [sic] secure for same, at said Lewis and Beardsley's option, not exceeding an amount which shall be $2,000 less than the whole vessel

shall amount to; but may, if required by said Arnold, equal that amount; * * * the remaining $2,000 to be paid in six and fifteen months after delivery." It was further agreed "that said vessel, frame, and materials shall remain in the possession of said Lewis & Beardsley as fast as got out or put together, as a guaranty that the said vessel shall be built and finished as above," and that Arnold, the builder, should have a lien after completion and delivery to secure the aforesaid balance of $2,000. The suit was by a laborer who had been employed by a contractor under Arnold, the builder, to enforce a lien under the Ohio water craft lien law now here involved, against the vessel after it had been paid for and delivered to the purchasers, Lewis and Beardsley. The Ohio court held: First, that Lewis and Beardsley, by the building contract, in order to secure their advancements, had "stipulated for the ownership and possession of the vessel from the laying of the keel upwards"; that thereby Lewis and Beardsley had "brought themselves most clearly within the meaning of the statute, as the owners of the Andes, when the labor was performed by the plaintiff." Second, that the plaintiff was entitled to a lien under the statute, having performed work upon the vessel at the instance of those at the time in the rightful control thereof. In other words, the court found that under the building contract the purchasers contracted for the ownership and possession from the laying of the keel up, and that the builder was in control of the construction as the mere agent of the owner, and might therefore charge the vessel with a lien for work and labor done on the vessel. The conclusion was clearly right upon the facts, but the case has no bearing here, because Bills & Koch were not the owners, and were not in possession through the Craig Company or otherwise.

The defendant in error has insisted that the contract here involved is a maritime contract, of which the admiralty courts of the United States have exclusive jurisdiction. The contract between the appellant and Bills & Koch was for the construction of machinery for a vessel in course of construction, and before it was launched. Such a contract is a nonmaritime contract, and liens arising under state laws out of such contracts may be enforced in state courts. In The J. E. Rumbell, 148 U. S. 1–11, 13 Sup. Ct. 498, 37 L. Ed. 345, it is said:

"It is now settled that a contract for building a ship, being a contract made on land, and to be performed on land, is not a maritime contract, and that a lien to secure, given by local statute, is not a maritime lien, and cannot, therefore, be enforced in admiralty."

There is no error, and the judgment is affirmed.

MINNESOTA TRANSFER RY. CO. v. FIELD.

(Circuit Court of Appeals, Eighth Circuit. November 13, 1899.)

No. 1,204.

NEGLIGENCE—ACTION FOR PERSONAL INJURY—QUESTIONS FOR JURY.

Where defendant, a transfer railroad company, maintained stock yards, transfer tracks, and an office, to which shippers were obliged to go on their arrival with stock, and plaintiff, arriving with stock in the night, in attempting to find his way into the office, outside of which no light was kept, stepped through an open door of the building, and fell into a cellar, receiving injuries, the questions of defendant's negligence and plaintiff's contributory negligence were questions of fact for the jury.

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

The Minnesota Transfer Railway Company, plaintiff in error and defendant below, owns and operates a railway transfer yard and stock yard, consisting of many railroad tracks, stock yards, sheds, and various buildings, among which is a freight house and general office in the same building, with a platform extending along its side, from which it is entered. The yard office is across the tracks from the freight office. Jacob A. Field, the defendant in error and plaintiff below, was a stock raiser and shipper in North Dakota, and reached the defendant's yards with three cars of stock about 4 o'clock in the morning, December 11, 1896. His stock was billed to the defendant's yards to be fed, and the bill of lading had to be changed there. This made it necessary for him to visit both the general and the yard office. When he left the cars to go to the yard office, it was dark. He had never been at that office, and the directions he received led him to the building containing the freight and general offices. The platform of this building was not lighted. The large globe lamp which customarily lighted it, and which should have been burning on this occasion, was not lighted. He proceeded along this platform in front of this building, seeking for an entrance to the office. Through two windows he saw a dim light, which he supposed was in the yard office, and, going to a door "that was opened about a couple of feet," he stepped in, with a view of going to the lighted office, and was precipitated into a cellar, and received the injuries for which this action was brought. He recovered a judgment in the circuit court, and the defendant sued out this writ of error.

F. W. Root (W. H. Norris, on the brief), for plaintiff in error.

F. D. Larrabee, for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

CALDWELL, Circuit Judge, after stating the case as above, delivered the opinion of the court.

It has been well said that the science of jurisprudence is not advanced by the discussion of mere questions of fact. In this case there was no exception taken to the charge of the court, which was clear and fair. The only error assigned which we can notice is that the circuit court erred in not instructing the jury peremptorily to return a verdict for the defendant upon the ground that the evidence showed the defendant was not guilty of negligence, and that the plaintiff was. Stock trains were arriving at the defendant's yard at all hours of the day and night. The owners and others in charge of stock had occasion, as soon as the trains carrying their stock arrived at the defendant's yards, either in the day or night, to visit the yard and the general office on business con-

nected with their stock. That is what the plaintiff was attempting to do when he received his injury. Under such conditions, the jury found the defendant was guilty of negligence in not lighting its platform in front of its general office, and in leaving a door on this platform, which apparently led into the building, but which in fact led to a cellar, open and unlighted, and without a guard of any kind. And they further found that the plaintiff, who had no knowledge that this open door led into a cellar, but supposed it led into the building, was not guilty of contributory negligence in stepping into the open doorway, in the confidence that it led into, or would open the way to, the office he was seeking, and which he had a right to enter. It appeared in evidence that the door in question was of a different pattern from the other doors, and was smaller and had a different fastening; and the contention, in substance, is that the plaintiff should have in some way ascertained these differences, and that when he had discovered them he would have had his suspicions aroused that that was not the main or proper entrance to the building. The jury found that ordinary care and caution on the part of the plaintiff did not require him, before entering this door, to get a light and examine its construction, size, and fastenings, and compare them with the other doors in the building, or to make such an examination in the dark. Every question in the case was a question of fact for the jury. Questions of negligence are questions for the jury. The learned trial judge rightly refused to take the case from the jury or grant a new trial. It is unnecessary to cite authorities in so plain a case, but we refer to Low v. Railway Co., 72 Me. 313; Bronson v. Oakes, 22 C. C. A. 520, 76 Fed. 734. The judgment of the circuit court is affirmed.

WESTERN GAS CONST. CO. v. DANNER.

(Circuit Court of Appeals, Ninth Circuit. October 2, 1899.)

No. 515.

1. REVIEW ON APPEAL—DISCRETION OF TRIAL COURT—ORDER OF PROOF.
   The order in which proofs are introduced is not ordinarily subject to review on a writ of error, and in no case will an appellate court interfere with the discretion of the trial judge in that regard, unless it clearly appears that there has been an abuse of such discretion to the prejudice of the party.
2. EVIDENCE—ADMISSIBILITY OF DIAGRAMS.
   It is a common and proper practice in personal injury cases to receive models, maps, and diagrams to illustrate the testimony of witnesses by giving a representation of objects and places which cannot otherwise be conveniently shown or described to the jury, and it is no objection to the admission of a diagram for that purpose that its accuracy is controverted, such question being properly submitted to the jury.
3. PAYMENT—ISSUES AND PROOF—ACTION FOR TORT.
   In an action to recover damages for a personal injury alleged to have been caused by defendant's negligence, the plaintiff is not required to allege and prove that such damages have not been paid.
4. DAMAGES—PERSONAL INJURY—SUFFICIENCY OF EVIDENCE.
   In an action to recover damages for a personal injury, evidence of the charge made to plaintiff by a physician for treatment on account of such

injury may be submitted to the jury, although there is no proof that such charge was reasonable for the services required.

5. CONTRIBUTORY NEGLIGENCE—WHEN QUESTION FOR JURY.
Where the question of whether a person injured was warned of the impending danger in time to have escaped the injury is in dispute, and without such warning he had no reason to apprehend the danger, the question of his contributory negligence is one for the jury.

6. TRIAL—REFUSAL OF INSTRUCTIONS.
It is not error to refuse to charge the jury on a theory which finds no support in the evidence.

7. DAMAGES—PERSONAL INJURY—DISCRETION OF JURY.
In an action for a personal injury, which caused the plaintiff severe physical and mental suffering, and probably permanently affected his health and constitution, the question of damages is one to be left to the judgment of the jury; and, unless their verdict clearly indicates that they were influenced by passion or prejudice, it will not be disturbed.

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

J. P. Langhorne, for plaintiff in error.

Platt & Bayne and J. W. Goad, for defendant in error.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

HAWLEY, District Judge. This is an action to recover damages for injuries received by the defendant in error (hereinafter designated as "plaintiff") from the falling of a smokestack through the carelessness and negligence of the plaintiff in error (hereinafter designated as "defendant") in erecting the same. The defendant's answer denied the allegations of the complaint, and affirmatively alleged that the injuries which plaintiff received were occasioned by his contributory negligence, "by reason of his failure to exercise ordinary and reasonable care and prudence in regard to his personal safety." The plaintiff, at the time of the accident, was engaged as an employé of the Colusa Gas Company in building a brick wall about 20 feet distant from the smokestack in question. The jury found a verdict in his favor for the sum of $2,500. There are seven assignments of error, which will be noticed in the order of their presentation. Assignments 1 and 2 will be considered together.

1. It is claimed that the court erred in admitting in evidence two diagrams; one (b) showing the position of the smokestack, the position of the temporary guy ropes that were attached to it when it fell, and the position of the permanent guy ropes that were attached to it at the time the diagram was made. The other (c) represents the position of the plaintiff when he was struck by the falling stack, the position of the stack after its fall, and the building of which it was a part. These diagrams were made by one St. Maurice, a civil engineer, who testified that he was not present at the time the accident occurred, and did not know, of his own knowledge, how the guys of the smokestack were arranged at the time of the accident; that he had located the position of the guy ropes in part from the information he had received from other persons and in part from actual measurements. At this stage of the testimony the diagrams were offered in

evidence. The grounds of the objections were that the diagrams were mere hearsay; that they were not made by the draftsman from his own knowledge, and that they were not the best evidence; and that there was no evidence tending to show that the diagrams were correct. It may be admitted that it would have been the better practice not to have admitted the diagrams in evidence until some witness or witnesses had testified that they were correct; but the order in which testimony shall be introduced is largely within the discretion of the court, and, as such testimony was given afterwards on that point, the error, if any, existing at the time of their admission, was cured by the subsequent testimony of other witnesses. The order in which proofs are introduced cannot, ordinarily, be subject to review on writ of error, and in no case should an appellate court interfere with the discretion of the trial judge, unless it clearly appears that there has been an abuse of such discretion to the prejudice of the party. It does not so appear in this case. St. Maurice testified that the green lines on (b) purport to represent the guy lines of the smokestack at the time it fell, as stated to him; that he took it from actual survey; that the green line running in a northwesterly direction to a point called "walnut tree," the one running in a southwesterly direction to a point called "eucalyptus tree," and one running in a southeasterly direction to a point called "post in fence," are the guy lines; that he obtained the information as to the location of these lines from the workmen who claimed to be there when the accident happened, viz. Kuhn, Clement, and Goad; that the black line running almost due north from the smokestack to a point called "guy post" is one of the present guy lines holding the smokestack in position; so is the black line running in a southwesterly direction to a point called "guy post," and the black line running southeasterly to a point called "guy post"; that the positions of these lines were obtained by actual measurement and survey; that the point to the right of the smokestack at a spot called "gin pole" was located from information given by Kuhn; that the other lines on (b) are located from actual survey, and are as they now exist; that the diagram (c) represents the staging and correct position of Mr. Danner at the time he was building the west wall when the accident occurred; that this was located according to information given to him, principally by Mr. Danner. Kuhn testified that he assisted in erecting the smokestack and tying the guy lines; that he pointed out to St. Maurice, as near as he could, the spot on the ground where the gin pole was; that the guy line running north was tied to the third tree from the eastern end; that he pointed out to St. Maurice the tree which he identified as the one to which he tied the guy line; that to the west he tied the guy line to a eucalyptus tree; that he pointed out to Mr. St. Maurice the tree that the guy line was tied to; that the third guy was attached to a fence post in the eastern boundary fence; that he pointed it out to Mr. St. Maurice, and identified it from the marks of the old guy line. Clement testified that he fastened the guy lines, helped raise the gin pole, and guyed it, fastened the sling around the top of the gin pole, put the blocks on it ready for raising it, and helped raise the stack; that the guy line to the stack where it was first raised running to-

wards the north was tied to a walnut tree, and that he helped tie it; that he pointed out this tree to Mr. St. Maurice; that the marks of the wire were around the tree; that he helped to raise the stack the second time, and it was raised on the same spot where it first stood; that he helped tie the original guy to the eucalyptus tree on the west, and pointed it out to Mr. St. Maurice as the particular tree, and that he was positive in his identification. The testimony as to whether or not the diagrams were correct was, upon some points, conflicting. The objections to the admission of the diagrams were properly overruled on the ground that, as clearly shown by the record, they were not admitted as evidence of any substantive or independent fact, or upon the ground that they were correct, but were admitted simply for the purpose of being used in illustrating the testimony of the witnesses. Shook v. Pate, 50 Ala. 91. The court, at the time of overruling the objections, said:

"It is not admitted as a truthful map, but simply as an illustration of the testimony of the witness. Whether or not it is a truthful map is a matter of proof. With that explanation, your objections are overruled, and the map will be received in evidence; but, of course, not as an absolutely truthful representation of the ground."

The court, in its charge to the jury, said:

"I instruct you that the important matter here is not the number of guys so much as it is the manner in which they were placed. And there is this important question for you to determine in this case: The plaintiff has introduced a map here, certain green lines upon which are alleged to indicate the way in which those guys were temporarily placed. If the guys were placed as represented upon that map, it is evident to any eye, and is admitted by all parties, that they would not be a support to the smokestack. The defendant says that those guys were not so placed. That is one of the important questions for you to determine, as I have said,—whether those guys were placed as represented by the plaintiff, or whether they were placed differently."

Moreover, the material question of fact was whether the smokestack fell by reason of any negligence on the part of the defendant. The undisputed testimony shows that, if ordinary care had been exercised in erecting the smokestack, it could not have fallen without the guys breaking or the fastenings giving away. The guys did not break; the fastenings did not give way; there was no high wind, or any convulsion of nature, to cause it to fall, unless it was unskillfully, carelessly, or negligently erected; there was no dispute as to the direction in which the smokestack fell, or its position after it fell, or any controversy as to the position of plaintiff when it fell, or that in falling it struck the plaintiff.

In Le Beau v. Construction Co., 109 Mich. 302, 67 N. W. 339, the court said:

"A map was introduced in evidence, which plaintiff claims was not correct. There was proof, however, that it was approximately correct, and one witness testified it was accurate. Its admission was not error. Hoffman v. Harrington, 44 Mich. 184, 6 N. W. 225; Battishill v. Humphreys, 64 Mich. 494, 31 N. W. 894."

In Concentrating Co. v. Schmelling, 24 C. C. A. 564, 79 Fed. 263, 267, this court said:

"Another point made on behalf of the plaintiff in error is that the court, against the objection and exception of the plaintiff in error, admitted in evi-

dence a diagram of the stope where the accident occurred, made by one Easton upon the representations of the witness Powers and others as to its appearance after the accident. Powers testified that it was a fair representation of the workings in the stope immediately after the accident, and the court admitted it, in connection with his testimony, only as his version of the workings, which the jury might consider for what it was worth. In this we see no error."

In Clegg v. Railway Co. (Sup.) 37 N. Y. Supp. 130, the defendant objected to the admission of a diagram which plaintiff testified was a perfect diagram of the place where the accident occurred, except it was not drawn to a scale, on the ground that it showed something more than the geographical features of the place of the accident. The court said:

"No doubt it did, but it was, nevertheless, admissible, when considered in connection with the testimony of the plaintiff given at the time it was received by the court; for the fair purport of what he said in response to questions by counsel for the defendant at that time was that his own position and that of the car and the workmen were correctly indicated upon the map. The situation was thus no different from what it would have been if the witness had taken a diagram of the street and railroad track alone, and had marked thereon, in the presence of the court, the position of the car, the workmen, and himself just prior to the collision. This is often done upon a trial, and the propriety of allowing a witness thus to aid his oral evidence has, so far as I know, never been questioned."

It is always competent in a personal injury case to show the entire surroundings of the place where the accident occurred. This can be done with or without a diagram. It is, however, a common and proper practice in courts of justice to receive models, maps, and diagrams, or sketches, drawn on paper, or traced with chalk on a blackboard, for the purpose of giving a representation of objects and places which cannot otherwise be as conveniently shown or described by the witnesses to the jury. If the accuracy of the representation is controverted, it is always a question for the determination of the jury, like any other question of fact. Assignments of error 1 and 2 are not well taken.

2. At the close of the plaintiff's testimony the defendant moved the court to grant a nonsuit "on the ground that there was neither allegation in the complaint nor proof that the alleged damages had not been paid and satisfied." This assignment is devoid of merit. This is too clear for discussion. Counsel cites numerous cases where it is held, in actions for nonpayment of money, that the complaint must allege, and proofs show, that the debt sued for has not been paid; but such cases have no application to actions brought to recover damages for personal injury. No case has been cited, and we apprehend that none can be found, that nonpayment of damages must be alleged in actions of this character.

3. It is next claimed that the court erred in instructing the jury that there was proof tending to show that the plaintiff's physician would charge him $100 for his services while attending him for the injuries he received from the falling of the smokestack. The pleadings and evidence necessary to be considered upon the assignment of error are as follows: It is alleged in the complaint that plaintiff "has become liable for a physician's fees to the amount of three

hundred dollars, and for a druggist's bill to the amount of fifty dollars, for medical services and drugs furnished said plaintiff on account of the injury received by him from the falling of said smokestack; that by reason of the injury so received by said plaintiff by being struck by said smokestack as aforesaid, and his liability for said medical attendance and drug bill as aforesaid, plaintiff has been damaged in the full sum of $5,500." Dr. West, who attended him during his illness, testified that plaintiff was indebted to him for "medical attendance about $100 between August 7th and August 23d." There was no direct evidence as to whether this sum was reasonable or not. The reasonableness of the charge in such cases does not solely depend upon the testimony of experts, although such testimony is proper, and entitled to weight, and is usually given as an aid to the jury in determining the proper amount to be allowed; but the jury have the right, in this connection, to consider the character and extent of plaintiff's injury, and the extent and character of the medical services and treatment he received, and from all the evidence determine the amount that should be given. The court, in instructing the jury in regard to the manner of estimating damages, said:

"The next item is the amount that he has paid out, or is liable to pay out, for his medical attendance and treatment. He has not proven anything here as being the amount paid for drugs or medicines, and the only proof, to my recollection, in this respect, is that tending to show that the doctor will charge him one hundred dollars for his services up to the time this action was commenced, and that is as far as you can estimate it."

The court further charged the jury:

"That the amounts that you find from these several items of damage to which I have referred will not be reported separately by you, but they will be put in one sum, and inserted in your verdict, if you find in favor of the plaintiff."

Whether the amount of $100 for medical attendance was allowed by the jury is a matter of mere conjecture, but, conceding that it should be so considered, it is apparent from the facts contained in the record that no error occurred in allowing it.

In Colwell v. Railway Co., 57 Hun, 452, 455, 10 N. Y. Supp. 636, the plaintiff, in order to prove the pecuniary loss which she had incurred by reason of the injuries she received, testified that she employed a nurse, who remained with her for six weeks, to whom she paid $100. There was no other evidence introduced as to the value of the services of the nurse, and no evidence to the effect that such a charge was reasonable. The counsel for the defendant asked the court to instruct the jury that the plaintiff could not recover the amount paid to the nurse, because there was no proof as to what the services were reasonably worth. It was held upon appeal that the trial court did not err in refusing to give this instruction.

In Scullane v. Kellogg (Mass.) 48 N. E. 622, the court said:

"Although there was no distinct proof of the amount of the expenses of sickness or medical attendance, the jury might allow what, in their opinion, was a reasonable sum."

In Donnelly v. Hufschmidt, 79 Cal. 74, 21 Pac. 546, the court held that in an action for personal injuries occasioned by the negligence of the defendant the plaintiff is entitled to recover the amount incurred for nurse hire, medicines, and physicians' services, although the same have not been paid.

4. It is contended that plaintiff was guilty of contributory negligence, and that the court, for this reason, erred in refusing to instruct the jury to find a verdict in favor of the defendant. Some testimony was given on behalf of defendant to the effect that plaintiff was warned in time to get out of the way, and that he had ample time to do so, as the stack fell very slowly. The plaintiff, at the time of the accident, was engaged, as before stated, as an employé of the Colusa Gas Company, in building a brick wall about 20 feet distant from the smokestack. He had nothing to do with erecting the smokestack. He was at the place where it was his duty to be under his employment. He had the right to assume, there being no apparent danger, that the defendant, in its work, would exercise ordinary care. The erection of the smokestack in question was not shown to be extrahazardous. The testimony on behalf of plaintiff was to the effect that it would not have fallen if ordinary care had been used in properly placing the guys. The plaintiff testified that he saw the stack standing erect when it was put in place, and supposed everything was all right, and went right on with his work; that he heard no warning; that he heard no noise, and was busy at his work; that he did not know that the stack was falling until he was hit by it. The law is well settled "that it is not contributory negligence not to look out for danger when there is no reason to apprehend any." 1 Beach, Cont. Neg. § 38. In other words:

"If the injured person had no actual knowledge of the danger that threatened him, and if, in the exercise of ordinary care under the circumstances, he would not have apprehended such danger in time to avoid the consequences of the defendant's negligence, he cannot be charged with contributory negligence." 7 Am. & Eng. Enc. Law (2d Ed.) 391, and numerous authorities there cited.

In Fraler v. Water Co., 12 Cal. 555, 558, in illustrating this point, Baldwin, J., said:

"We apprehend, if a man carelessly fires a gun into the street, that it would scarcely be admissible for him, when sued for the injury done another by it, to say that by reasonable care the other might have gotten out of the way."

The court instructed the jury fully and clearly on every phase of the case discussed by counsel,—certainly as favorably to the defendant as the law would warrant. The court charged the jury that it was the duty of the plaintiff to exercise ordinary care to avoid the injury; that it was the duty of the jury to decide "whether the raising of that stack was such a dangerous piece of work that plaintiff should have taken notice of it, and should have avoided all risk by removing from it." Moreover, "if you find from the evidence that the stack fell slowly, that the plaintiff was warned that it was falling, and that he, by the exercise of ordinary and reasonable care, and regard for his personal safety, could have

gotten out of the way of the falling stack, then I instruct you that the plaintiff was guilty of such negligence as to prevent any recovery by him, and your verdict should be for defendant." What more could defendant ask? From all the testimony it was clearly a question of fact to be submitted to the jury whether plaintiff exercised ordinary care, or was guilty of any negligence which contributed to the injuries he received. The supreme court of the United States has repeatedly declared that questions of negligence and contributory negligence are, as a general rule, questions of fact to be passed upon by a jury, and that it is only in cases where the undisputed evidence is so clear and conclusive that the court would be compelled to set aside a verdict returned in opposition to it that it should withdraw the case from the consideration of the jury, and direct a verdict. Elliott v. Railway Co., 150 U. S. 245, 246, 14 Sup. Ct. 85, 37 L. Ed. 1068; Southern Pac. Co. v. Pool, 160 U. S. 438, 440, 16 Sup. Ct. 338, 40 L. Ed. 485; Warner v. Railroad Co., 168 U. S. 339, 348, 18 Sup. Ct. 68, 42 L. Ed. 491. It would have been gross error for the court, upon such facts as are shown in the record, to have instructed the jury to find a verdict for defendant.

5. The next assignment—that the court erred in refusing to instruct the jury as to defendant's liability if it should find that the stack fell by reason of some undisclosed defect in the appliances—is wholly untenable. There was no evidence tending to show that the accident occurred by reason of any undisclosed defect. The evidence does show that the wires did not break; that neither the trees nor post to which they were tied gave way. There is no claim that the stack broke, that the foundation sunk; and it would require a miscroscopic mind to discover from the record that there were any latent defects in the guys or smokestack. The same stack and the same guys have been in use ever since the accident, and no defect has been found in them. It is simply and solely a question whether defendant exercised due and ordinary care, and whether or not the injury occurred by reason of negligence on the part of the defendant.

6. This brings us to the last assignment of error. Was the verdict of $2,500 excessive? A bare and brief statement of the facts on behalf of plaintiff is sufficient to show that this question must be answered in the negative. Plaintiff was 61 years of age; a bricklayer and plasterer by trade. His average yearly earnings had been, for several years, from $1,200 to $1,500. By reason of the accident he was confined to his bed 4 weeks, and to his house 44 days. For several weeks he suffered intense pain. He had to lie upon his back. Could not raise his head, or turn over. The pain was continuous, night and day. Could not sleep, without taking opiates, for over two months. The pain in his neck and shoulder continued to and existed at the time when the case was tried. Dr. West testified that he had known the plaintiff, and been his family physician for 18 years; that immediately after the accident the plaintiff was suffering so that he could not bear to have his head moved; that he did not have the power to move his head, or neck, or shoulder, or arm on the left side; that there was a deep and

sharply-defined wound on the right side of his head, beginning near the back cross seam of the head; that this cut was deep enough to go down to the muscle covering the bone of the head; that there was another bruised wound on the left side of the head; that he is suffering from a loud roaring in his head; that he is still unable to move his head and neck, through the lack of power of the muscles in the left side of his neck; that since the accident he has complained of impairment of hearing and of memory; that there has been a steady let-down in his general vitality; that what the effect in the future of the congestion and contusion will be no man can tell. "From my knowledge of Mr. Danner, he is not physically capable of following his trade, as he was prior to the accident; and never will be. His disability may be complete after a while. There may be great mental impairment. * * * All these are in the range of possibilities, and whether they will be probabilities or certainties depend upon time. I think that he is now as well as he will ever be again. His ability to do work has been very much impaired. He cannot go up any high place without growing dizzy. He cannot work in the sun without becoming dizzy. His muscular ability has been exceedingly impaired in the lack of the ready use of the left arm." In the very nature of the case, there is no precise rule for estimating damages for bodily pain and suffering. The amount cannot be arrived at with any degree of mathematical certainty. As was said in The City of Panama, 101 U. S. 463, 464, 25 L. Ed. 1061:

"Damages in such a case must depend very much upon the facts and circumstances proved at the trial. When the suit is brought by the party for personal injuries, there cannot be any fixed measure of compensation for the pain and anguish of body and mind, nor for the permanent injury to health and constitution, but the result must be left to turn mainly upon the good sense and deliberate judgment of the tribunal assigned by law to ascertain what is a just compensation for the injuries inflicted."

It is sufficient to show to the jury the extent of the injury, and the amount of the verdict must be determined by the jury in the exercise of their sound and deliberate judgment; and it necessarily follows that, unless the amount of the verdict is such as to clearly indicate that it was given under passion or prejudice, it should be sustained. Engler v. Telegraph Co. (C. C.) 69 Fed. 185, 188, and numerous authorities there cited; Telegraph Co. v. Engler, 21 C. C. A. 246, 75 Fed. 102; Clare v. Light Co. (Cal.) 55 Pac. 326, and authorities there cited.

The judgment of the circuit court is affirmed, with costs.

TRUMBULL v. ERICKSON.

(Circuit Court of Appeals, Eighth Circuit. November 13, 1899.)

No. 1,160.

1. CARRIERS OF PASSENGERS — INJURY TO PASSENGER — CONTRIBUTORY NEGLIGENCE.
   It cannot be held, as a matter of law, that a passenger in a crowded railroad car, by surrendering his seat to one less able to stand than himself, is guilty of negligence which precludes his recovery for an injury received through the negligence of the carrier, although such injury would not have been received had he retained his seat.
2. SAME.
   A passenger in a crowded railroad car, where the seats and aisle are filled, is not guilty of negligence in standing with other passengers on the platform while the car is in motion.
3. SAME—NEGLIGENCE OF CARRIER—FAILURE TO PROVIDE SEATS FOR PASSENGERS.
   It is the duty of a railroad company, having notice of an unusual number of passengers, and which has been instrumental in inducing such extraordinary travel over its line, to provide reasonable seating accommodations for all passengers to whom it sells tickets; and it is liable for an injury to a passenger resulting from its failure to do so.
4. SAME—CONTRIBUTORY NEGLIGENCE OF PASSENGER—INTOXICATION.
   The mere fact that a passenger at the time he was injured was intoxicated is not in itself evidence of contributory negligence, but is a circumstance to be considered; and it is for the jury to determine whether it in fact contributed to his injury.
5. SAME—DEGREE OF CARE REQUIRED.
   A railroad company running trains for the carriage of passengers is bound to the exercise of the highest degree of care and skill to protect its passengers from injury.
6. SAME—ACTION FOR INJURY—INSTRUCTIONS.
   An instruction that, to preclude a recovery by a passenger for an injury, he must himself have "substantially or directly" contributed to the injury, is not erroneous, since it is only acts or omissions which substantially or directly contribute to an injury which constitute contributory negligence.
7. TRIAL—REFUSAL OF INSTRUCTION ASKED.
   It is not error to refuse instructions asked, which are based on particular facts or items of evidence, and by thus singling them out give them undue prominence, or which, in stating the evidence, give it a partisan coloring.
8. SAME.
   Where the charge given by the court in its own language fully and fairly presents to the jury for their determination all the material issues in the case, it may properly refuse to instruct further.

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

This writ of error was sued out to reverse a judgment recovered by John Erickson, the defendant in error, and plaintiff below, against Frank Trumbull, as receiver of the Union Pacific, Denver & Gulf Railway Company, the plaintiff in error, and defendant below. The plaintiff was a passenger on one of the defendant's trains from Denver to Ft. Collins. It was at the close of the "Festival of Mountain and Plain," and all outgoing trains were very much crowded. The defendant had full knowledge of the large number of passengers his trains would be required to carry, having himself advertised the carnival extensively, and, as an inducement to persons desiring to visit Denver on that occasion to take his road, assured them that ample accommodations would be provided for all passengers. The plaintiff obtained a seat in a coach, but

when the car became crowded, and the seats were all taken, he surrendered his seat to two old and infirm women. There being no other seat in that car, he stood in the aisle, which was crowded with passengers, who were alternately pushing forward and backward; and the plaintiff was pushed out on the platform, where numerous other passengers were also compelled to stand. While thus standing on the platform, the train, in making a curve, jolted all the passengers with more or less violence; and the plaintiff was thrown or fell off the car, and was seriously injured. The answer denied negligence, and alleged the plaintiff was guilty of contributory negligence. The jury found the issues in favor of the plaintiff.

Elmer E. Whitted, for plaintiff in error.

Henry J. O'Bryan (J. Grattan O'Bryan, on the brief), for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

CALDWELL, Circuit Judge, after stating the case as above, delivered the opinion of the court.

It is alleged that the court erred in refusing to give the jury this instruction:

"You are instructed that if you believe from the evidence that the plaintiff, on leaving Denver, had a seat in one of the coaches, but of his own accord gave it up to some one else, and went upon the platform of the car, either in search of another seat, or for the purpose of riding there, he cannot complain in this action that the defendant did not furnish seats for all of the passengers. The defendant, under these circumstances, must be held to have performed his whole duty to this plaintiff, and is not responsible for any injury which the plaintiff received by reason of having a seat, or by reason of his not having a seat; and you are instructed that the verdict must be for the defendant."

On that point the court, in its charge in chief, instructed the jury as follows:

"The court cannot say, as a matter of law, that a passenger surrendering his seat to one less able to stand than himself should be held guilty of contributory negligence upon that ground. The mere fact of surrendering his seat (as the testimony in this case, it seems to me, shows) to a couple of ladies who were old and infirm, would not, of itself, constitute negligence and relieve the defendant of liability. As I have explained, the burden of proof is upon the plaintiff to establish the defendant's negligence, and that his injuries resulted therefrom, by a fair preponderance of the evidence."

The charge the court gave meets our fullest approval. It properly left it to the jury to determine whether, under the peculiar circumstances of the case, it was an act of negligence on the part of the plaintiff to surrender his seat. The defendant, in effect, asked the court to declare, as a matter of law, that, when an able-bodied passenger in a crowded car surrenders his seat to an infirm old person, he is guilty of an act of negligence. It is a matter of everyday occurrence for passengers on crowded street cars to surrender their seats to women, and to men as well, who are old, crippled, and infirm; and this practice obtains under like circumstances on passenger cars on railroads, also. While the law does not make it obligatory upon a passenger to do this, the consensus of opinion in this country does; and one failing to extend this courtesy, under the circumstances that existed in this case, would justly subject himself to public scorn and censure. It is an act of courtesy which is practiced and approved by all men of ordinary social instincts, and

only a corporation, which is a creation of man, and therefore has neither soul nor conscience nor social instincts, nor any principles outside of its coffers, would seek to have such a polite and gracious act declared one of culpable negligence. "It cannot be held, as a matter of law, that a passenger surrendering his seat to one less able to stand than himself, contributes to an injury caused by the carrier's negligence, but which would not have been received had he remained in his seat." Lehr v. Railroad Co., 118 N. Y. 556, 23 N. E. 889.

Nor was the plaintiff guilty of contributory negligence in standing upon the platform, under the circumstances. The receiver had ample notice that there would be an extraordinary number of passengers on this occasion. He had invited them by alluring posters which assured them they would receive first-class accommodations, which, of course, included seats. All passengers who had tickets that entitled them to go by that train were entitled to seats. The plaintiff held such a ticket,—the return coupon of a round-trip ticket. Under these circumstances, it was negligence in the receiver not to furnish reasonable seating accommodations for his passengers; and the plaintiff was not guilty of contributory negligence by standing upon the platform, with others, when the seats and aisle were full. "The passenger is not guilty of contributory negligence by standing upon the platform while the car is in motion, if there be no vacant seat inside the car. Room inside the cars for the sufficient accommodation of the passengers means a seat for each passenger, not standing room in the passageway." Willis v. Railroad Co., 34 N. Y. 670–681.

There was conflicting evidence upon the question whether the plaintiff was intoxicated at the time, and upon that subject the court told the jury:

"If, from the evidence, you should find that the plaintiff was intoxicated at the time of the injury, this, of itself, does not constitute a defense to the plaintiff's right of recovery, unless you should further find that such intoxication was the proximate cause of the injury suffered by the plaintiff. If his intoxicated condition was the proximate cause of the injury, then he could not recover. The fact of plaintiff's intoxication, if you should find that he was intoxicated at the time of the injury, is, in itself, as a matter of law, not such negligence as would bar a recovery. The mere fact of intoxication will not establish want of ordinary care; nor is it, of itself, more conclusive evidence of his negligence, unless you further find that the intoxication of the plaintiff was the cause, and contributed to the injury. And if it was not the immediate cause, or did not contribute to the injury, it is of no importance; and you should disregard all such testimony, in case you should find that it did not contribute to, and was not the proximate or immediate cause of, the injury."

The charge correctly expressed the law on the subject. The authorities are uniform that the mere fact that a person, when injured, was intoxicated, is not, in itself, evidence of contributory negligence, but that it is a circumstance to be considered in determining whether his intoxication contributed to his injury; if it did, he cannot recover; if it did not, it will not excuse the defendant's negligence. Ward v. Railway Co., 85 Wis. 601, 55 N. W. 771; Keane v. Railroad Co., 61 Md. 154; Ditchett v. Railroad Co., 5 Hun, 165; Railway Co. v. Reason, 61 Tex. 613.

Serious exception is taken to the following paragraph of the charge of the court:

"As to the liability of the defendant, the rule of law is this: That a common carrier, a railroad (in this case, the receiver), is bound to exercise the highest degree of care and skill which a cautious or prudent man would exercise under the circumstances. If it fails to exercise (in this case, if the receiver fails to exercise) that degree of care and skill, and an injury results therefrom, without the party who is injured contributing materially or substantially thereto, then the defendant must respond in damages. It is, also, on the other hand, the duty of a passenger in a train to exercise that ordinary care and prudence which a prudent man would himself observe to save himself from injury. The degree of care on the part of the railroad company (in this case, the receiver) is the highest degree of care and skill. The degree of care on the part of a passenger is ordinary care and skill. Hence, in this case, it is your duty to look carefully at all of the facts and circumstances surrounding the case, to ascertain (1) whether the defendant was guilty of negligence; and (2) whether, if so, the passenger injured (the plaintiff here) did himself substantially or directly contribute thereto, because, if he did contribute thereto, the law does not divide between the respective parties the amount which has been caused,—the amount, I mean, in money or damages caused thereby. There is no rule by which such a division could be had. Therefore the law states distinctly that if a party has himself contributed substantially or directly to the injury, of which he complains, there can be no recovery on his part."

The contention is that this instruction fixed the standard of care, which a railway company is required to exercise in the transportation of passengers, too high. As far back as 1852 the supreme court of the United States, in Railroad Co. v. Derby, 14 How. 486, 14 L. Ed. 509, declared that:

"When carriers undertake to convey persons by the powerful and dangerous agency of steam, public policy and safety require that they be held to the greatest possible care and diligence."

This has ever since been recognized as the correct rule of law as to the degree of care and diligence a railroad company must exercise in the transportation of passengers. The rule is uniformly applied to passenger trains. Railroad Co. v. Lockwood, 17 Wall. 357, 21 L. Ed. 627; Railroad Co. v. Horst, 93 U. S. 291, 23 L. Ed. 898. There is nothing in this case that exempts the defendant from the operation of the rule. He had invited the crowd, had timely notice of its coming, had promised sufficient accommodations for all that came, and accepted all that applied for passage, as long as there was standing room inside the cars and on the platform.

This instruction is further objected to on the ground that it told the jury that if the plaintiff himself, substantially or directly, contributed to his injury, he could not recover. We think the learned counsel for the plaintiff in error has himself answered this contention, when he says in his brief:

" 'Contributory negligence' means any negligence on the part of the plaintiff which helped or tended to produce the injury. There is no such thing as negligence being contributory, unless it caused, or helped to cause, the accident. The very term itself implies and means that the negligence of the plaintiff and defendant are concurring forces, which, united, produce the injury complained of; that is to say, that there is an actual, effective, proximate connection between the negligence of the plaintiff and his own injury. In other words, where contributory negligence exists, the accident would not have happened but for the fault or omission of the plaintiff. Contributory negligence,

then, is always material and substantial. It is one of the causes producing the accident."

It is not, however, this language of the charge that is complained of, but the deductions which counsel draw from it. It is said:

"The court, in effect, told the jury that the conduct of Erickson might have been one of the causes producing the accident, that they might believe the injury would not have happened if he had been sober, yet they might, in their wisdom, still determine whether his conduct was such as substantially and materially contributed to his damage."

We are unable to find anywhere in the charge any language warranting the conclusion that the court told the jury, in effect, that the conduct of Erickson might have been one of the causes producing the accident, and that he might recover unless his conduct substantially or materially contributed to his injury. The language of the charge carefully excludes any such idea or deduction. The court told the jury over and over again that if "the plaintiff was negligent, and that negligence contributed to his injury," he could not recover, and that, if his intoxication was the proximate cause of his injury, he could not recover. Any negligence that contributed to his injury was substantial and material. It is impossible to conceive of any kind of negligence that would cause or contribute to an injury that would not be substantial and material.

The defendant preferred 19 requests for special instructions, all of which were properly refused. So far as they stated the law, they were covered by the clear and able charge in chief of the trial judge. Many of the special requests singled out particular items of the testimony, to the exclusion of other evidence in the case which the jury were bound to consider in forming their verdict. The practice of giving undue prominence to isolated facts of a case, by singling them out and making them the subject of special instructions, has been condemned. Smith v. Condry, 1 How. 28–36, 11 L. Ed. 35; Railway Co. v. Ives, 144 U. S. 408–433, 12 Sup. Ct. 679, 36 L. Ed. 485; Mining Co. v. Berberich, 36 C. C. A. 364, 94 Fed. 329. It gives undue prominence to the facts thus singled out, and tends to minimize and disparage other facts of equal or greater importance. They are the kind of instructions that may be multiplied indefinitely, though the party preferring a request for them is careful to limit his request to facts or items of testimony which he conceives make in his favor. A further vice of such instructions is that, drawn as they are from a partisan standpoint, they usually give a partisan coloring to the fact or testimony to which they relate. Such instructions are burdensome, confusing, and misleading to the jury, and ought never to be given where, as in this case, the charge in chief clearly and sharply points out the issues of fact in the case, and leaves the determination of those issues to the jury upon a consideration of all the evidence in the case. "It is the settled law in this court," says the supreme court, "that if the charge given by the court below covers the entire case, and submits it properly to the jury, such court may refuse to instruct further. It may use its own language, and present the case in its own way. If the results mentioned are reached, the mode and manner are immaterial.

The court then has done all that it is bound to do, and may thus leave the case to the consideration of the jury. Neither party has the right to ask anything more. Laber v. Cooper, 7 Wall. 565, 19 L. Ed. 151." Railroad Co. v. Horst, supra.

There are numerous other assignments of error, but such as do not fall within the reasoning of those we have decided are not of any general importance, and have no merit. They have all been carefully examined. The judgment of the circuit court is affirmed.

FIRST NAT. BANK OF BUTTE v. WEIDENBECK et al.

(Circuit Court of Appeals, Eighth Circuit. November 6, 1899.)

No. 1,205.

1. ALTERATION OF NOTE—MATERIALITY—ADDITION OF NAME OF GUARANTOR.
The placing by a third person of his name on a note as guarantor, by agreement with the payee, and without the privity of the maker, is not a material alteration, which affects the validity of the note as against the maker, nor is the erasure of such name by a subsequent agreement between the same parties.

2. STATUTES—REPEAL BY IMPLICATION—RE-ENACTMENT.
The provision of the statute of Montana making the trustees of a corporation jointly and severally liable for its debts, where the corporation failed to make the annual reports thereby required, was not repealed as to a right of action accrued thereunder by the Civil Code subsequently adopted, which re-enacts such provision without any change affecting such liability, and further provides (section 4653) that its provisions, "so far as they are substantially the same as existing statutes or common law, must be construed as continuations thereof, and not as new enactments," and also (section 4654) that no right accrued before its taking effect shall be affected by its provisions.

3. CORPORATIONS—STATE LAWS GOVERNING—VALIDITY.
A provision of a state constitution that no foreign corporation shall be allowed to exercise or enjoy within the state any greater rights or privileges than those possessed or enjoyed by corporations of a similar character created under the laws of the state is merely an inhibition against the grant of greater rights or privileges to foreign corporations, and does not affect the validity of laws governing domestic corporations, although they cannot be applied to foreign corporations.

4. SAME—SUIT TO ENFORCE STATUTORY LIABILITY OF OFFICERS—JURISDICTION.
An action against officers of a corporation to enforce a liability created by the statutes of the state of its domicile may be maintained in any court without the state which has jurisdiction of the subject-matter and the parties.

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

This is an action by the First National Bank of Butte, plaintiff in error, against Sigmund T. Weidenbeck and Gustave J. Heinrich, the defendants in error, to recover from them the sum of $4,000 on a note executed by the Twin City Butte Mining Company, a corporation existing under the laws of the state of Montana, of which the defendants were trustees. The complaint alleges that the mining company, which was a corporation organized and existing under the laws of the state of Montana, borrowed from the plaintiff in error the sum of $4,000, and executed therefor its note; that, after the execution and delivery of the note, the bank entered into an agreement with one George H. Tong, whereby Tong, for a valuable consideration, undertook and

promised to guaranty the payment of the note, and in pursuance of such agreement, and in evidence thereof, wrote his name upon the note, intending thereby to guaranty the payment of the indebtedness, and by inadvertence placed his name upon the face of the note; that at the time it was expressly understood and agreed between the bank and Tong that he did not sign the note as maker or surety, but only as guarantor; that this contract of guaranty was made solely between the bank and Tong, the mining company not being a party or privy thereto; that after maturity of the note the bank and Tong entered into an agreement whereby Tong was discharged from his contract of guaranty of the payment of the note, and thereupon his name on the face of the note was erased, and the note left in the same condition it was when delivered by the mining company to the bank; that the agreement of guaranty between the bank and Tong, as well as the discharge from the guaranty, were innocently made and done, and entirely independent of any contract of the bank and the mining company; that, with the exception of some small payments which were indorsed as credits on the note, it still remains unpaid, although frequent demand has been made upon the mining company for payment thereof; that the mining company is wholly insolvent, and has no property out of which the note could be paid; that by the provisions of the statutes of the state of Montana, under which the mining company was created, it is the duty of the officers of every corporation to make a report annually, within 20 days of the 1st of September, of its financial condition, which is to be published in some newspaper published in the city in which it is located, and filed in the office of the county clerk of the county where the business of the company is carried on; that this report is to be verified by the president or secretary of the company, and signed by the president and a majority of the trustees, and, upon failure of the company to comply with these requirements of the law, all the trustees of the company shall be jointly and severally, liable for all debts of the company then existing, and for all that shall be contracted before such report shall be made; that the defendants were at the time the debt was contracted, and ever since then, and are now, trustees of the mining company; that the business of the mining company is carried on in the county of Silver Bow, in the state of Montana, and has its principal office and place of business in the city of Butte, in that county and state; that the mining company failed and neglected to publish such report or file it in the office of the clerk of Silver Bow county, or any county of the state of Montana, within 20 days from the 1st of September, 1894, by reason whereof the defendants are liable, jointly and severally, for the indebtedness of the mining company; and it prays for judgment on the note. A demurrer to the complaint was sustained, and final judgment rendered for the defendants, whereupon the plaintiff sued out this writ of error. The opinion of the circuit court sustaining the demurrer is reported in (C. C.) 87 Fed. 271.

George B. Young, John A. Shelton (T. J. Walsh, on the brief), for plaintiff in error.

J. O. P. Wheelwright (Albert C. Cobb, on the brief), for defendants in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

CALDWELL, Circuit Judge (after stating the facts as above). Formerly it was held that any alteration of a contract, whether material or immaterial, by a party claiming under it, avoided the contract. But the modern doctrine is that an immaterial alteration of a contract by a party claiming under it does not avoid the contract. 2 Pars. Cont. 717–720; Rand. Com. Paper, § 1743; Daniels, Neg. Inst. 1398. The principal and most important question in this case is, did the addition of Tong's name to the note as guarantor, and its subsequent erasure therefrom, in the manner and under the circumstances stated in the complaint, constitute a material altera-

tion of the note which avoids it? The learned counsel for the plaintiff in error and the defendants in error, respectively, have furnished us with a full citation and exhaustive discussion of the authorities on both sides of this interesting subject. But, in view of the decision of the supreme court of the United States in the case of Mersman v. Werges, 112 U. S. 139, 5 Sup. Ct. 65, 28 L. Ed. 641, we do not feel called upon to indulge in any general discussion of the question. We think all that is there said by the court was fairly called for by the facts of that case, and that this court would not be justified in treating it as obiter dicta. Treating the opinion in that case as authoritative, as the courts and law writers who have had occasion to discuss this question have very generally done, we are constrained to hold that placing Tong's name on the note as a guarantor, and its subsequent erasure under the circumstances stated in the complaint, was not a material alteration of the note which avoided it. The court in that case said:

"The present case is not one of a change in the terms of the contract, as to amount or time of payment, but simply of the effect of adding another signature, without otherwise altering or defacing the note. An erasure of the name of one of several obligors is a material alteration of the contract of the others, because it increases the amount which each of them may be held to contribute. Martin v. Thomas, 24 How. 315, 16 L. Ed. 689; Smith v. U. S., 2 Wall. 219, 17 L. Ed. 788. And the addition of a new person as a principal maker of a promissory note, rendering all the promisors apparently jointly and equally liable, not only to the holder, but also as between themselves, and so far tending to lessen the ultimate liability of the original maker or makers, has been held in the courts of some of the states to be a material alteration. Shipp v. Suggett, 9 B. Mon. 5; Henry v. Coats, 17 Ind. 161; Wallace v. Jewell, 21 Ohio St. 163; Hamilton v. Hooper, 46 Iowa, 515. However that may be, yet where the signature added, although in form that of a joint promisor, is in fact that of a surety or guarantor only, the original maker is, as between himself and the surety, exclusively liable for the whole amount, and his ultimate liability to pay that amount is neither increased nor diminished; and, according to the general current of the American authorities, the addition of the name of a surety, whether before or after the first negotiation of the note, is not such an alteration as discharges the maker. Railroad Co. v. Hurst, 9 Ala. 513, 518; Stone v. White, 8 Gray, 589; McCaughey v. Smith, 27 N. Y. 39; Brownell v. Winnie, 29 N. Y. 400; Wallace v. Jewell, 21 Ohio St. 163, 172; Miller v. Finley, 26 Mich. 249. The English cases afford no sufficient ground for a different conclusion. In the latest decision at law, indeed, Lord Campbell and Justices Erle, Wightman, and Crompton held that the signing of a note by an additional surety, without the consent of the original makers, prevented the maintenance of an action on the note against them. Gardner v. Walsh, 5 El. & Bl. 83. But in an earlier decision, of perhaps equal weight, Lord Denman and Justices Littledale, Patteson, and Coleridge held that in such a case the addition did not avoid the note, or prevent the original surety, on paying the note, from recovering of the principal maker the amount paid. Catton v. Simpson, 8 Adol. & E. 136, 3 Nev. & P. 248. See, also, Gilb. Ev. 109. And in a later case in the court of chancery, upon an appeal in bankruptcy, Lords Justices Knight, Bruce, and Turner held that the addition of a surety was not a material alteration of the original contract. Ex parte Yates, 2 De Gex & J. 191, 27 Law J. Bankr. 9."

To the same effect are the following cases: Stone v. White, 8 Gray, 589; Miller v. Finley, 26 Mich. 249; Gano v. Heath, 36 Mich. 441; McCaughey v. Smith, 27 N. Y. 39; Barnes v. Van Keuren, 31 Neb. 165, 47 N. W. 848; Royse v. Bank, 50 Neb. 16, 69 N. W. 301; Ryan v. Bank, 148 Ill. 349, 35 N. E. 1120. These authorities support

the doctrine that the addition of the name of a guarantor to a note is not a material alteration, and does not release those primarily bound. It does not in any way change or affect their rights. It is an independent contract made with a third party, to which the consent of the obligors is unnecessary. Their liability is neither increased nor diminished by the addition of the name of the guarantor, and he has no right of contribution or exoneration. The rights of the obligors are no more affected by the guaranty placed on the note than they would be by a guaranty placed on a separate instrument.

It is claimed by the defendants in error that the statute creating the liability upon which the action is founded has been repealed, and that, though the plaintiff's right of action accrued before the repeal, he cannot recover in consequence. The statute has not been repealed, but only re-enacted in the new code of laws enacted by the legislature, with an added provision which in no way affects the plaintiff's cause of action. Fitzgerald v. Weidenbeck (C. C.) 76 Fed. 695. The new enactment is substantially the same as the old, and was obviously intended as a mere continuation of the old law, with the slight addition thereto which in no manner affects this case. Section 4653 of the Civil Code of Montana, which contains the new enactment, declares that "the provisions of this Code, so far as they are substantially the same as existing statutes or common law, must be construed as continuations thereof, and not as new enactments." The provisions of the Code on this subject being "substantially the same" as the former statute, it must, under this provision of the Code, be held to be a continuation thereof. Moreover, section 4654 of the Code provides that "no action or proceeding commenced before this Code takes effect, and no right accrued, is affected by its provisions." The right of action in this case accrued before the Code took effect, and is therefore not affected by its provisions. We do not consider whether it is a right of action for a penalty, and, if so, the nature or character of that penalty. It is enough to say that it was a right which accrued before the Code took effect, and is therefore saved by the section of the Code last quoted. Undoubtedly, if this action had been commenced before the Code took effect, it would have been saved by this section, and "an action commenced" and a "right accrued" are by the terms of the section put on the same footing,—both as saved. It is very clear that it was the manifest purpose of the provisions of the Code which we have quoted to preserve all rights, and to permit all actions to be maintained, that could have been maintained had not the Code been adopted. We agree with the learned counsel for the plaintiff in error that it is unreasonable to suppose that the legislature intended to take away the right from those creditors in whose favor it had already accrued, and give it to those who should occupy a similar position in the future.

Another contention of the defendants in error is that the statute on which the action is founded was annulled by the constitution of the state. Section 11 of article 15 of the constitution of Montana provides as follows: "And no company or corporation formed under

the laws of any other country, state or territory shall have, or be allowed to exercise or enjoy within this state any greater rights or privileges than those possessed or enjoyed by corporations of the same or similar character created under the laws of the state." The contention is that, under this provision of the constitution, a statute imposing any duty or obligation on a domestic corporation, which is not also imposed on foreign corporations doing business in the state, is unconstitutional. The position is untenable. One sufficient answer to it is that the liability in this case is imposed upon the officers of the corporation individually, and not upon the corporation. But, if a foreign corporation were given greater rights and privileges in the state than were enjoyed by domestic corporations, it is not perceived how that fact would annul all laws in the state applicable to domestic corporations. In the very nature of things, it is impossible to provide exactly the same system of laws for foreign as for domestic corporations. It is never done. The constitutional provision quoted contemplated no such thing. It is an inhibition against the grant of powers and privileges to foreign corporations that are not granted to, or cannot be enjoyed by, domestic corporations under like conditions. It does not nullify all laws for the government of domestic corporations when those laws are not or cannot be applied to foreign corporations. The case of Huntington v. Attrill, 146 U. S. 657, 13 Sup. Ct. 224, 36 L. Ed. 1123, answers the contention that the suit cannot be maintained outside the state of Montana.

The action is not barred. The filing of the original complaint arrested the running of the statute. The amended complaint counts on the same cause of action as was set up in the original complaint. But the case cited by counsel for the defendants in error in support of the contention that the action is one for a penalty, and is barred in three years, under the Minnesota statute of limitation (Merchants' Nat. Bank of Chicago v. Northwestern Manufacturing & Car Co., 48 Minn. 349, 51 N. W. 117), has been overruled (Flowers v. Bartlett, 66 Minn. 213, 68 N. W. 976). The judgment of the circuit court is reversed, and the cause is remanded, with instructions to overrule the demurrer to the complaint, and permit the defendants to answer.

CLARK et al. v. RUSSELL.

(Circuit Court of Appeals, Eighth Circuit. November 13, 1899.)

No. 1,200.

1. CARRIERS — LIABILITY FOR INJURY TO PASSENGERS — STATE STATUTE REGULATING.

The validity, under the constitution of Nebraska, of Comp. St. Neb. c. 72, § 3, providing that every railroad company "shall be liable for all damages inflicted upon the person of passengers while being transported over its road, except in cases where the injury done arises from the criminal negligence of the persons injured, or when the injury complained of shall be the violation of some express rule or regulation of said road ac-

tually brought to his or her notice," having been upheld by the supreme court of the state, such decisions are binding on the federal courts.[1]

2. SAME—ACTION TO ENFORCE STATUTORY LIABILITY—JURISDICTION.
Such statute is remedial, and not penal, in its nature, and gives a substantive right of action, which, when it has attached by reason of an injury received within the state, may be enforced in any court within or without the state having jurisdiction of the subject-matter and the parties, and in such action the statute furnishes the measure of the plaintiff's right, so far as its provisions extend.

3. SAME—CONSTITUTIONALITY OF STATUTE.
Such statute, although it makes a railroad company absolutely liable for an injury to a passenger who is without fault, irrespective of the company's negligence, is a valid exercise of legislative power, and not in violation of the constitution of the United States, as depriving the company of its property without due process of law, or denying to it the equal protection of the laws.

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

Emma Russell, the defendant in error and plaintiff below, was a passenger on a train on the Union Pacific Railroad, which at the time was operated by S. H. H. Clark, E. Ellery Anderson, Oliver W. Mink, John W. Doane, and Frederick R. Coudert, as receivers, the plaintiffs in error and defendants below. The car in which she was riding was derailed while the train was in the state of Nebraska, and she received the personal injuries for which she brought this action in a state court in Colorado, from whence it was removed by the defendants into the United States circuit court for that district. She recovered judgment in the circuit court, and the defendants sued out this writ of error.

Willard Teller (H. M. Orahood, on the brief), for plaintiffs in error.

E. F. Richardson (T. M. Patterson and H. M. Hawkins, on the brief), for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

CALDWELL, Circuit Judge, after stating the case as above, delivered the opinion of the court. The only error assigned which challenges our attention is that the circuit court erred in giving effect to a statute of Nebraska which reads as follows:

"Every railroad company, as aforesaid, shall be liable for all damages inflicted upon the person of passengers while being transported over its road, except in cases where the injury done arises from the criminal negligence of the persons injured, or when the injury complained of shall be the violation of some express rule or regulation of said road actually brought to his or her notice." Comp. St. Neb. c. 72, § 3.

This statute was enacted in 1867, and has been enforced, and its constitutionality upheld, from that time up to the present, by a long line of decisions of the supreme court of that state. Chollette v. Railroad Co., 26 Neb. 159, 41 N. W. 1106, 4 L. R. A. 135; Railroad Co. v. Chollette, 33 Neb. 143, 49 N. W. 1114; Railway Co. v. Baier, 37 Neb. 235, 55 N. W. 913; Railway Co. v. Porter, 38 Neb. 226, 56 N. W. 808; Railroad Co. v. Hague, 48 Neb. 97, 66 N. W. 1000; Railroad Co. v. Landauer, 39 Neb. 803, 58 N. W. 434; Railway Co. v. Chollette, 41 Neb. 578, 59 N. W. 921; Railroad Co. v. Hedge, 44 Neb.

[1] State laws as rules of decision, see notes to Griffin v. Wheel Co., 9 C. C. A. 548, Wilson v. Perrin, 11 C. C. A. 71, and Hill v. Hite, 29 C. C. A. 553.

448, 62 N. W. 887; Railroad Co. v. French, 48 Neb. 638, 67 N. W. 472. These cases dispose of the contention that the act is repugnant to the constitution of the state. That is a question of state law, upon which the decision of the supreme court of the state is binding on all other courts.

It is next claimed that the right of action which accrued to the plaintiff under this statute in Nebraska cannot be asserted in the courts of any other jurisdiction. The contention is not sound. This is not a penal, but a remedial, statute, and the plaintiff's action is not for the recovery of a penalty, but for the recovery of compensation for an injury for which the statute gives the right of action. It is not a statute establishing a rule of evidence, but a statute giving a substantive right of action. It extends the common-law liability of carriers of passengers by rail, and augments the right of action of the injured passenger, in the exact proportion that the common-law liability of a railroad company is enhanced. The statute makes the railroad company absolutely liable for an injury to a passenger, "except in cases where the injury done arises from a criminal negligence of the persons injured, or when the injury complained of shall be the violation of some express rule or regulation of said road actually brought to his or her notice." A passenger who sustains an injury on a railroad in Nebraska has an absolute right to recover for that injury, unless he comes within the exceptions of the statute. That right attaches at the moment of the injury, and adheres in it until satisfaction is made. The action is transitory, and may be asserted in any jurisdiction, and in whatever jurisdiction it is asserted the Nebraska statute furnishes the measure of the plaintiffs' right, so far as its provisions extend. In Dennick v. Railroad Co., 103 U. S. 11, 26 L. Ed. 439, the supreme court of the United States lays it down as a rule that "wherever, 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." Herrick v. Railway Co. (Minn.) 16 N. W. 413; Railroad Co. v. Richardson, 91 U. S. 454, 23 L. Ed. 356; Huntington v. Attrill, 146 U. S. 657, 13 Sup. Ct. 224, 36 L. Ed. 1123; First Nat. Bank v. Weidenbeck (decided at the present term) 97 Fed. 896; Railroad Co. v. Mase's Adm'x, 27 U. S. App. 238, 11 C. C. A. 63, and 63 Fed. 114.

A further contention of the plaintiffs in error is that the statute violates the fifth and fourteenth amendments of the constitution of the United States, in that it deprives the railroad company of its property "without due process of law," and denies to it the equal protection of the laws. The fifth amendment has no application to the states, and in no way affects their powers. In all jurisdictions inferior to the supreme court, we think it must be regarded as settled for the present that statutes imposing an additional, or even absolute, liability on railroads for injuries to passengers or property are not repugnant to the constitution of the United States. A statute of Missouri made every railroad company operating a railroad in that state absolutely responsible in damages for property injured

or destroyed by fire communicated by its locomotive engines, and declared a railroad company had an insurable interest in property along its route that authorized it to insure such property. The question whether this statute was repugnant to the constitution of the United States came before he supreme court in the case of Railway Co. v. Mathews, 165 U. S. 1, 17 Sup. Ct. 243, 41 L. Ed. 611. The contention of the railroad company in that case was exactly what the contention of the plaintiffs in error is in the case at bar. In the introduction to the opinion the court said:

"It has been strenuously argued, in behalf of the plaintiff in error, that this statute is an arbitrary, unreasonable, and unconstitutional exercise of legislative power, imposing an absolute and onerous liability for the consequences of doing a lawful act and of conducting a lawful business in a lawful and careful manner, and that the statute violates the constitution of the United States, by depriving the railroad company of its property without due process of law, by denying to it the equal protection of the laws."

After a learned and exhaustive review of all the cases, the court unanimously held the act constitutional, concluding their opinion with the declaration:

"The statute is not a penal one, imposing punishment for a violation of law, but it is purely remedial, making the party doing a lawful act for its own profit liable in damages to the innocent party injured thereby, and giving to that party the whole damages, measured by the injury suffered. Railroad Co. v. Richardson, 91 U. S. 454, 472, 23 L. Ed. 356; Huntington v. Attrill, 146 U. S. 657, 13 Sup. Ct. 224, 36 L. Ed. 1123. The statute is a constitutional and valid exercise of the legislative power of the state, and applies to all railroad corporations alike. Consequently it neither violates any contract between the state and the railroad company, nor deprives the company of its property without due process of law, nor yet denies to it the equal protection of the laws."

In their opinion, the court cite numerous statutes which impose liability on railroad companies wholly independent of negligence on their part, and show that the courts have uniformly maintained their validity. A statute in Massachusetts made the liability of a railroad company for the destruction of property by fire communicated from its locomotive engines absolute, and not dependent upon negligence on its part. The supreme judicial court of Massachusetts held this act valid upon grounds that have ever since been held to be sufficient to uphold such legislation. Chief Justice Shaw, delivering judgment, said:

"We consider this to be a statute purely remedial, and not penal. Railroad companies acquire large profits by their business. But their business is of such a nature as necessarily to expose the property of others to danger; and yet, on account of the great accommodation and advantage to the public, companies are authorized by law to maintain them, dangerous though they are, and so they cannot be regarded as a nuisance. The manifest intent and design of this statute, we think, and its legal effect, are, upon the considerations stated, to afford some indemnity against this risk to those who are exposed to it, and to throw the responsibility upon those who are thus authorized to use a somewhat dangerous apparatus, and who realize a profit from it." Hart v. Railroad Corp. (1847) 13 Metc. (Mass.) 99.

Similar statutes, imposing a liability upon the railroad company wholly independent of negligence on its part, exist in Vermont, Maine, New Hampshire, Connecticut, Iowa, Missouri, Colorado, South Carolina, and probably other states, and their constitutionality has

invariably been upheld. A Kansas statute made railroad companies doing business in that state liable for all damages done to an employé in consequence of the negligence of other employés. In Railway Co. v. Mackey, 127 U. S. 205, 8 Sup. Ct. 1161, 32 L. Ed. 107, the statute was assailed as unconstitutional, and the supreme court, in answer to that contention, said:

"The contention of the company, as we understand it, is that the law imposes upon railroad companies a liability not previously existing, in the enforcement of which their property may be taken, and thus authorizes, in such cases, the taking of property without due process of law, in violation of the fourteenth amendment. The plain answer to this contention is that the liability imposed by the law of 1874 arises only for injuries subsequently committed. It has no application to past injuries, and it cannot be successfully contended that the state may not prescribe the liabilities under which corporations created by its laws shall conduct their business in the future, where no limitation is placed upon its power in this respect by their charters. Legislation to this effect is found in the statute books of every state. The hardship or injustice of the law of Kansas of 1874, if there be any, must be relieved by legislative enactment. The only question for our examination, as the law of 1874 is presented to us in this case, is whether it is in conflict with clauses of the fourteenth amendment. The supposed hardship and injustice consist in imputing liability to the company where no personal wrong or negligence is chargeable to it or to its directors. But the same hardship and injustice, if there be any, exist when the company, without any wrong or negligence on its part, is charged for injuries to passengers. Whatever care and precaution may be taken in conducting its business or in selecting its servants, if injury happen to the passengers from the negligence or incompetency of the servants, responsibility therefor at once attaches to it. The utmost care on its part will not relieve it from liability, if the passenger injured be himself free from contributory negligence. The law of 1874 extends this doctrine, and fixes a like liability upon railroad companies, where injuries are subsequently suffered by employés, though it may be by the negligence or incompetency of a fellow servant in the same general employment, and acting under the same immediate direction. That its passage was within the competency of the legislature we have no doubt."

The latest expression of that court upon the general question under consideration is found in the case of Railroad Co. v. Matthews, 174 U. S. 96, 19 Sup. Ct. 609, 43 L. Ed. 909. In that case the court had under consideration a statute of Kansas relating to the liability of railroads for damages by fire, which provided that, in all actions commenced under the act, if the plaintiff recovered he should be allowed a reasonable attorney's fee, to become part of the judgment, and the court held the statute constitutional.

A railroad company owes a duty to its passengers to carry them safely. A passenger is powerless to protect himself from injury resulting from derailment or wreck of the car or from other causes. He is in the care and keeping of the railroad company, and has no knowledge of the roadbed, rails, cars, locomotive engines, or other appliances or fixtures, or of the management and conduct of the train, or of the fitness of its employés, and is frequently unable to locate the cause of the wreck, and convict the company of negligence, though the company may have been guilty of negligence. The company, in such cases, can easily produce evidence of due care which the passenger cannot be prepared to meet. It was considerations similar to these that led to the legislation making the railroad company absolutely liable for the damages resulting from fire escaping

from its locomotive engines. And we may add that they are quite as forcible as any that are given for the adoption of the rule that made a common carrier an insurer of the goods intrusted to him for carriage. It is settled by all the authorities that the carrier is an insurer of the passenger's baggage; and, where the rule has not been changed by statute, we have this anomalous condition, that, when a passenger and his baggage are injured in the same wreck, the railroad is liable for damages done to the baggage irrespective of its negligence, but is not liable to the injured passenger without proof of negligence. The Nebraska statute does away with this anomaly, and puts the passenger and his baggage on very much the same footing. And why not? There would seem to be more reason for protecting the passenger than his baggage. When a passenger, without any fault on his part, is injured, why should not the railroad company compensate him therefor? Grant that the company was innocent of any negligence or intention to injure him, the fact remains that it did injure him; and, where one of two innocent persons must suffer a loss, why should not the one who inflicted the injury be required to bear the burden? The learned counsel for the defendant in error contends—citing some cases to support the contention which we have not examined—that the Nebraska statute is simply a re-enactment of the early common law on the subject of the carrier's liability to the passenger, which, he maintains, was gradually changed by judicial decision, and he remarks that "it would, indeed, be singular if the courts, having legislated a new rule into the law on this subject, should deny to the real lawmakers the right to change the rule back to what it was in the beginning." We have not found it necessary to inquire into the soundness of the counsel's contention, and we express no opinion upon it; for without reference to the common law, ancient or modern, it is quite clear that a common carrier of passengers, who conducts its business by the powerful and dangerous agency of a railroad, the right to use which is derived from the legislature of the state, may be required by the state to compensate its passengers for injuries it inflicts upon them independent of any question of its own negligence. Such a statute cannot be distinguished in principle from those we have referred to imposing an absolute liability for the loss of property by fire, or from the common-law rule which imposes an absolute liability for loss of the passenger's baggage. Both upon principle and authority, the Nebraska statute is a valid enactment.

Exceptions were taken to some questions propounded to a witness. We think the question itself was proper, but, whether so or not, the witness did not answer it. There are no other exceptions having any merit or requiring special notice. The judgment of the circuit court is affirmed.

LAWRENCE v. GREENUP.

(Circuit Court of Appeals, Sixth Circuit. November 13, 1899.)

No. 701.

1. CORPORATIONS—TRUST-FUND DOCTRINE.
   Under the decisions of the courts of the United States, a solvent corporation does not hold its capital or property subject to any trust in favor of its creditors, although it is in process of liquidation.
2. NATIONAL BANKS—DISTRIBUTION OF CAPITAL DURING LIQUIDATION—ACTION TO RECOVER FROM STOCKHOLDER.
   The receiver of a national bank cannot recover from a stockholder, in an action at law, a sum received by him on a partial distribution of the capital of the bank, made and received in good faith during voluntary liquidation, when the bank was at the time solvent, and retained sufficient assets to pay all its liabilities, although it subsequently became insolvent.

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

This is an action at law by a receiver of the Big Rapids National Bank to recover a dividend paid by said bank, out of capital, to the defendant, John Greenup, who was a stockholder. Upon the conclusion of all the evidence, the court instructed the jury that there could be no recovery at law upon the facts proven; that the remedy of the receiver, if any he had, was by a bill in equity; and that a verdict should be returned in favor of Greenup. The receiver has sued out this writ of error. The facts, so far as material to the questions to be decided, are as follows:

(1) The Big Rapids National Bank went into voluntary liquidation in April, 1895. It was solvent at the time, and the object in liquidating was to consolidate with the Mecosta County Savings Bank, whose officers and stockholders were largely the same persons who were officers and stockholders of the national bank. There was an agreement that the savings bank should take the assets of the national bank, and pay its depositors and other debts; and it is stated in the bill of exceptions that the assets of the national bank were moved to the office of the savings bank, and that "a large amount of the assets of the national bank were so taken, and a large amount of the liabilities paid, and that the savings bank made advances in aid of its liquidation." This process of liquidation went on from about May 1, 1895, until December 31, 1896, when the comptroller, being of opinion that the bank was then insolvent, appointed the plaintiff in error receiver of said national bank, who at once took possession of the remaining assets. It is not shown why the agreement for a consolidation was not carried out, though it is inferable that it fell through in consequence of the subsequent failure of the savings bank, which occurred in October, 1896; the receivership being, as stated, "the outgrowth of the failure" of said savings bank. During this entire period of liquidation the affairs of both banks were under the control of C. W. Comstock, who was the cashier of the national bank, and "general manager of both banks." Claims, "proven to the satisfaction of the comptroller," aggregating $19,086.03, are shown to have been preferred against the national bank after the appointment of Lawrence receiver. The receiver is shown to have collected from assets $12,817.35. Of this sum, he has paid out as a dividend upon such claims $4,771.51. The remainder he has paid out for expenses of receivership, except $2,348.92 now on hand. Aside from claims against stockholders for return of dividends, the receiver has in his hands assets of the probable value of from seven to eight thousand dollars. These assets consist in bank furniture, and choses in action in process of collection. Of the claims stated to have been "proven to the satisfaction of the comptroller," $16,186.28 is due to the Mecosta County Savings Bank, the whole of which originated while the national bank was in process of liquidation, and consists in claims of depositors paid off by the savings bank in excess of assets received from the national bank, which claims were paid under the agreement mentioned above. The

statement of the bill of exceptions is that "the entire claims of the savings bank arose subsequent to the time when the national bank went into voluntary liquidation, and arose upon contract made after it went into liquidation." Upon this savings-bank claim for advances or loans made to the liquidating bank, the receiver has paid $4,046.57, leaving due a balance of $12,139.71. The claims against the national bank allowed by the receiver, other than this claim of this balance due to the savings bank, after deducting the dividend paid by the comptroller, aggregate only $2,185.50,—an amount less than the actual cash assets undistributed.

(2) In June, 1895, the directors of the liquidating bank passed a resolution to pay a dividend of 50 per cent. to the stockholders, and further dividends as fast as possible. Under this resolution the defendant in error, who held stock of the par value of $2,000, received a dividend of 50 per cent., or $1,000. All other stockholders were paid a like amount, and some were subsequently paid further dividends ranging from 10 to 37 per cent. At the time these dividends were paid, the directors and stockholders honestly believed the bank to be solvent, and that these distributions were authorized by the condition of the assets. Defendant in error received the dividend paid to him in November, 1895, and since then other dividends were paid out of remaining assets to other stockholders, but no additional dividend has been paid to him. The bill of exceptions states that it was admitted by counsel for the receiver that the defendant in error, Greenup, "received the dividend paid to him in good faith," "believing the bank was solvent," and that "no bad faith was alleged or claimed," and that counsel also admitted that all who had received dividends had not been sued, but only such, and in separate actions, whom the receiver believed to be solvent. The officers and directors of the savings bank were aware of the payment of these dividends, and many of them were themselves recipients of dividends upon their own stock in the national bank. Chester W. Comstock, who was the officer in charge of the liquidation, was also the general manager of the business of the savings bank.

N. A. Fletcher, for plaintiff in error.

Mark Norris, for defendant in error.

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

LURTON, Circuit Judge, after making the foregoing statement of facts, delivered the opinion of the court.

The claim of the receiver is based upon the theory that a dividend paid out of capital stock was wrongfully paid and received, and that the liability to repay such dividend constitutes an asset of the bank, which can be recovered in a suit at law. It is at the outset well enough to observe that this is not a suit to recover an unpaid stock subscription, as in Sanger v. Upton, 91 U. S. 56–62. In the case referred to there could be no question but that the remedy against the subscriber was at law, for the court observed that "the liability of the plaintiff in error, and the right and title of the company, were legal in their character"; "if the company had sued, it might have sued at law. The rights of the company passed to the assignee, and he also could enforce them by a legal remedy." Neither is the suit based upon the liability imposed by section 5151 of the Revised Statutes of the United States, imposing a liability upon a stockholder of a national bank, to the extent of the amount of his stock, for the debts, contracts, and engagements of such bank. The theory is, and must be, that payment of a dividend under the circumstances shown by the facts already stated did not pass the title, and that an action will lie as for money received to the use of the bank.

Neither can this suit be sustained as for a violation of section 5204, Id., which provides that:

"No association, or any member thereof, shall, during the time it shall continue its banking operations, withdraw or permit to be withdrawn, either in the forms of dividends or otherwise, any portion of its capital, * * * and no dividend shall ever be made by any association, while it continues its banking operations, to an amount greater than its net profits then on hand, deducting therefrom its losses and bad debts."

When the dividend complained of was declared and paid, the bank had ceased "its banking operations." It had gone into voluntary liquidation for the express purpose of returning its capital to its shareholders, after paying its debts. It was prohibited from engaging in banking operations after going into liquidation, and its officers and managers had no power or authority to bind its stockholders by any new operations or engagements whatever. Richmond v. Irons, 121 U. S. 27–60, 7 Sup. Ct. 788, et seq.

The suit can only be predicated upon the proposition that the capital of the bank was a trust fund for the payment of debts, and that any part of the trust fund so paid out in the way of dividends to the stockholders can be recovered back in an action at law of this kind, for the purpose of paying the debts of the bank. It is plain that, if this action will lie at all, it must lie for the recovery of the entire dividend received, regardless of whether the whole will be necessary to pay debts unpaid, and that like actions will lie against each stockholder who has received a dividend out of the capital stock.

The contention presented by the learned counsel for the receiver is that the capital stock of the bank constituted a trust fund set apart for the payment of its debts, and that no part of the capital of a corporation can be legally divided among the shareholders until all of the debts of the corporation have been paid, and that it is no justification, in law or equity, that the corporation was solvent when part of its capital was divided as a dividend, and that the dividend paid left the corporation still solvent. Upon these premises the deduction is drawn that the entire capital stock of a corporation must remain inviolate until every debt has been paid, and that every dividend paid out of capital, regardless of the solvency of the corporation, constitutes a debt due to the bank, in the same sense that a promissory note would, and that it becomes the duty of a receiver subsequently appointed to sue for and recover all capital so diverted, as plain common-law assets of the bank. Under the decisions of the courts of the United States, there is no solid foundation for the contention that the capital of a corporation which is solvent is a "trust fund" upon which there is any lien for the payment of corporate debts. The capital of a solvent corporation is as much the absolute property of the corporation as is the property of an individual. Neither a corporation nor an individual can so exercise the power of disposition over that which is possessed as to fraudulently defeat the just demands of creditors. But neither the individual nor the corporation can be said, in any accurate sense, to hold his or its property subject to any trust in favor of creditors. When,

however, the insolvency of a corporation is established, a condition arises which authorizes a court of equity, in view of the conditional liability of the assets to creditors and the equitable rights of stockholders, to treat the property as "in a condition of trust, first for the creditors, and then for the stockholders." Graham v. Railroad Co., 102 U. S. 148–161; Railway Co. v. Ham, 114 U. S. 587–594, 5 Sup. Ct. 1081; Hollins v. Iron Co., 150 U. S. 371–385, 14 Sup. Ct. 127; McDonald v. Williams, 174 U. S. 397–403, 19 Sup. Ct. 743, et seq. Thus, in Hollins v. Iron Co., supra, Justice Brewer, in discussing this theory of a "trust fund," said:

"In other words,—and that is the idea which underlies all these expressions in reference to 'trust' in connection with the property of a corporation,—the corporation is an entity, distinct from its stockholders as from its creditors. Solvent, it holds its property as any individual holds his,—free from the touch of a creditor who has acquired no lien; free, also, from the touch of a stockholder who, though equitably interested in, has no legal right to, the property. Becoming insolvent, the equitable interest of the stockholders in the property, together with their conditional liability to the creditors, places the property in a condition of trust, first for the creditors, and then for the stockholders. Whatever of trust there is arises from the peculiar and diverse equitable rights of the stockholders as against the corporation in its property, and their conditional liability to its creditors. It is rather a trust in the administration of the assets after possession by a court of equity, than a trust attaching to the property, as such, for the direct benefit of either creditor or stockholder. The officers of a corporation act in a fiduciary capacity in respect to its property in their hands, and may be called to an account for fraud, or, sometimes, even mere mismanagement in respect thereto; but, as between itself and its creditors, the corporation is simply a debtor, and does not hold its property in trust, or subject to a lien in their favor, in any other sense than does an individual debtor. That is certainly the general rule, and, if there be any exceptions thereto, they are not presented by any of the facts in this case. Neither the insolvency of the corporation, nor the execution of an illegal trust deed, nor the failure to collect in full all stock subscriptions, nor all together, gave to these simple-contract creditors any lien upon the property of the corporation, nor charged any direct trust thereon."

In McDonald v. Williams, heretofore cited, the suit was by a receiver of a national bank to recover a dividend paid to a stockholder wholly out of the capital of a going bank, though the stockholder believed it was paid out of profits; the bank being solvent at the time the dividend was declared and paid. The court unanimously held that a dividend paid under such circumstances could not be recovered, saying:

"The bank being solvent, although it paid its dividends out of capital, did not pay them out of a trust fund. Upon the subsequent insolvency of the bank and the appointment of a receiver, an action could not be brought by the latter to recover the dividends thus paid, on the theory that they were paid from a trust fund, and therefore were liable to be recovered back."

The question as to whether a recovery could have been had if the bank had been actually insolvent was reserved, the court saying:

"But we do not wish to be understood as deciding that the doctrine of a trust fund does in truth extend to a shareholder receiving a dividend, in good faith believing it is paid out of profits, even though the bank at the time of the payment be in fact insolvent. That question is not herein presented to us, and we express no opinion in regard to it. We only say that, if such a dividend be recoverable, it would be on the principle of a trust fund."

We express no opinion as to the effect of a fraudulent distribution of the assets of a corporation with the purpose of defeating its creditors; nor need we deal with the question of the legal right of the receiver to maintain this suit if the dividend had been paid or received in bad faith, or for a dividend paid and received in violation of section 5204, Rev. St., as in Finn v. Brown, 142 U. S. 56, 12 Sup. Ct. 136. The dividend sued for here was both paid and received in good faith; both the directors who declared it and the stockholder here sued believing that the bank was solvent, the assets being such as to justify this dividend. Neither is it shown that the payment of the 50 per cent. dividend was made when the bank was in fact insolvent, or that the payment reduced the bank to a condition of insolvency. Subsequently other dividends were paid, in which the defendant in error did not participate. From the showing of assets now on hand, and debts yet unpaid, it is indeed plain and obvious that the distribution made through the original 50 per cent. dividend of November, 1895, did not reduce the bank to its present probable condition of insolvency. The subsequent dividends are alone responsible for the present condition. The fact that this bank was in liquidation does not materially affect the situation. The corporation was still in absolute control of its assets, and its power of disposition was unaffected. Those in charge of the liquidation were charged with the duty of winding up the affairs of the bank, and applying the proceeds, first, to the payment of debts, and, second, to the distribution of the remainder among the shareholders. If the bank was not insolvent when this dividend was declared or paid, and the division of a portion of the assets did not reduce the bank to a condition of insolvency, on what theory can it be maintained that the bank, or a receiver subsequently appointed, could maintain an action at common law upon implied promises to return the dividend so paid and received? The distinction between this case and that of McDonald v. Williams, cited above, is that the dividend was confessedly paid out of capital, and received with knowledge of that fact. But in the case referred to the bank was a going concern, and prohibited by section 5204, Rev. St., from withdrawing any part of its capital for the purpose of paying dividends while it should "continue its banking operations." The directors who declared the dividend out of capital were said by the court to have rendered themselves liable under the statute, but the stockholder who received it was acquitted from liability to return same, though in fact paid out of capital, and though the bank subsequently became insolvent, because he did not receive it, knowing that it was paid in violation of the statute. Section 5204 has no application here, because this bank was not engaged in its ordinary banking operations, and was in voluntary liquidation. If this dividend was paid in good faith at a time when the assets were abundantly sufficient to justify such a return of capital without depriving existing creditors of a fund ample to pay their dividends, it is difficult, under the doctrine of the cases we have cited, to see any ground upon which the stockholder can be made to refund. But the equities are further complicated by the fact that this dividend, as well

as those subsequently made and paid, was paid with the knowledge and connivance of the Mecosta County Savings Bank. That bank now presents a claim for a debt created, pending liquidation, for alleged advances made in aid of liquidation. If the demand of this creditor be excluded, the undistributed assets are abundant to pay every claim which has been proven or preferred. These facts present both a question of equitable estoppel, and a question of the liability of a stockholder for an engagement entered into after going into liquidation. That a corporate creditor may by his acts estop himself from his right to attack a dividend cannot be denied. Cook, Corp. (4th Ed.) § 548; Brooks v. Brooks, 174 Pa. St. 519, 34 Atl. 205. So, where a creditor of a national bank received from the bank's president bills receivable, indorsed or guarantied by the bank, in settlement of his demand, it was held that a stockholder who had not consented to such guaranty could not be made liable in a proceeding against him under the double-liability provision of the national banking law, and that he was not precluded from going behind a judgment against the bank upon the indorsement. Richmond v. Irons, 121 U. S. 27, 7 Sup. Ct. 788. The ground of the decision was that the officers of a bank in liquidation had no authority to bind the bank by new contracts or engagements. But it is unnecessary to decide, and we do not decide, what would be the rights of either the savings bank or the receiver under a bill in equity against the stockholders who received the dividend paid in November, 1895. The considerations we have mentioned lead us to the conclusion that the plaintiff in error cannot, in an action at law, recover dividends paid by a liquidating bank which was solvent when the dividend was declared and paid, although paid wholly out of capital, if paid and received in the honest belief that the assets justified such payment. The case of McDonald v. Williams, and the cases preceding that, leave no room to doubt but that in the absence of fraud, or bad faith equivalent to fraud, the condition of trust necessary to give to a corporate creditor, or a receiver representing both the corporation and creditors, the right to follow and compel the return of the dividends paid out of capital, depends upon, and arises out of, an established insolvency. The right when insolvency is shown to have existed is an equitable right, and will not support a purely legal action. If we assume, therefore, that insolvency existed in fact when this dividend was paid, the remedy,—there being no fraud or bad faith,—where it is sought to compel the return of such dividend, is in equity, and not at law. There are few instances in which suits at law have been resorted to for the purpose of recovering dividends paid in derogation of the rights of creditors. But four cases have come under our observation, in all of which the action failed upon the ground that an action at law would not lie. Vose v. Grant, 15 Mass. 505–522; Spear v. Grant, 16 Mass. 9–15; McLean v. Eastman, 21 Hun, 312; Paschall v. Whitsett, 11 Ala. 472. In Vose v. Grant, the court, after a consideration of the difficulties in the way of a legal action by a creditor to reach dividends improperly paid out of capital stock, leaving nothing for payment of debts, said:

"This is one of the numerous cases, which are constantly occurring, which show the necessity of a court of chancery for the complete distribution of justice among the people."

In McLean v. Eastman, 21 Hun, 312–314, the action was by an assignee in bankruptcy of an insolvent banking corporation, and was brought for the purpose of recovering a dividend paid out of capital at a time when the bank was insolvent. This condition was unknown to the stockholders who received this dividend, supposing it to be paid out of profits. Neither were the officers of the bank aware of the insolvent condition, unless chargeable in law with such knowledge. Upon this state of facts the plaintiff was nonsuited in the court below. The supreme court affirmed the judgment, saying:

"The appellant contends that he has the right to reach the money in the hands of the defendants, as a part of the assets of the bank applicable to the payment of its debts, upon the principle that the assets of a corporation are a trust fund for the payment of its debts, and its creditors have a lien thereon, and the right to priority of payment over its stockholders. But the lien of creditors of an insolvent corporation upon its assets in the hands of others (independently of rights given by statute) is a purely equitable lien, and can only be enforced in an equitable proceeding. The cases of Bartlett v. Drew, 57 N. Y. 587, Osgood v. Laytin, *42 N. Y. 521, and Van Cott v. Van Brunt, 2 Abb. N. C. 283, cited by the appellant, were actions in equity. In the Case of Bartlett, the action was in the nature of a creditors' bill, brought by a single judgment creditor, after the return of an execution unsatisfied, to reach a sum received by a stockholder of a corporation on a division of its assets before all its debts were paid. The action could not have been maintained if there had been an adequate remedy at law. The present action is what would have been termed an 'action for money had and received,' under the system of pleading which was superseded by the Code of Procedure. The only relief sought is the recovery of the specific sum of money which was paid by the bank to the defendant's testator. The difficulty in the way of recovering it in a strictly legal action is that, as between the bank and the stockholder, the payment was made in good faith, according to the conceded facts, and the stockholder acquired a valid title to the money, as against the bank. A court of law cannot go beyond the parties to the transaction, and treat the payee as the recipient of moneys in trust for the benefit of the creditors of the bank. It is not alleged in the complaint, nor does the scope of the action permit an inquiry, as to whether the creditors represented by the assignee were creditors at the time of the transaction; and, if not, they have no interest in the money sought to be recovered. The inadequacy of a court of law to give relief in such a case was forcibly commented on in Vose v. Grant, 15 Mass. 505, and Spear v. Grant, 16 Mass. 9."

The case of Bartlett v. Drew, 57 N. Y. 587, has been cited and pressed upon us as an authority in point. But that was an equitable suit, and the jurisdiction maintained upon that ground, and the cases of Vose v. Grant, 15 Mass. 505, and Spear v. Grant, 16 Mass. 9, were commented on and distinguished; and in the case of McLean v. Eastman, cited above, the supreme court distinguished Bartlett v. Drew, upon the ground that the case was one of equitable cognizance. The ancient and well-established distinction between legal and equitable rights and remedies still exists in courts of the United States. There was no error in instructing the jury to find for the defendant in error, and the judgment is accordingly affirmed.

MONTGOMERY et al. v. ÆTNA LIFE INS. CO.

(Circuit Court of Appeals, Sixth Circuit. October 3, 1899.)

No. 639.

1. WITNESSES—LIMITS OF CROSS-EXAMINATION.
The right of cross-examination in courts of the United States is limited to facts and circumstances connected with the matter testified to upon the direct examination; the proper practice being, if it is desired to examine the witness as to other matters, for the party so desiring to call him as his own witness.

2. EVIDENCE—PAROL TESTIMONY TO VARY WRITTEN CONTRACT.
Where a written contract of employment as general agent for a life insurance company within a specified territory provided that the agent should receive as a part of his compensation a commission on the annual renewal premiums collected on existing policies within such territory, and the terms of the contract were full and unambiguous, parol evidence is not admissible to incorporate therein a collateral guaranty as to the amount of such renewal premiums.

3. CONTRACT OF EMPLOYMENT — CONSTRUCTION — PRACTICAL CONSTRUCTION BY PARTIES.
Defendant was employed as general agent of an insurance company within a certain territory, by a written contract, by which he agreed to devote his entire time to the service of the company, to conduct its business as directed, and was to receive as compensation stipulated commissions on the business done. For more than a year, and until his discharge, he rendered a monthly account as required, in which he credited himself with the commissions specified in the contract, and no more. *Held*, that the fact that he was directed by the company to designate himself on his stationery as "general manager," which he did, or that he performed some services as general manager different from those usually performed by a general agent, did not, under the circumstances and course of dealing, establish an implied promise on the part of the company to pay him for his services as general manager in addition to the commissions fixed by the contract.

4. SAME—ADVANCES MADE BY AGENT.
A contract of employment of a general agent for an insurance company obligated the agent to employ subagents in his territory, and provided that commissions allowed him on the business done should be in full compensation for his own services and those of his subagents. It also provided that the contract might be terminated at the option of either party, and that in case of its termination before five years the company should be under no obligation to pay the agent anything beyond the commissions earned up to the time of its termination. *Held* that, on the termination of the contract by the company within the five years, it could not be held liable to the agent for advances made by him to subagents, and which had never been charged by him to the company in his monthly reports.

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

This is an action in assumpsit upon a bond executed by William B. Montgomery, as principal, and M. V. and R. A. Montgomery, as his sureties, to the Ætna Life Insurance Company. March 16, 1896, W. B. Montgomery was appointed the general agent for the Ætna Life Insurance Company for the territory included in the lower peninsula of the state of Michigan. The terms of the agency were prescribed by a written contract, duly signed and delivered, as follows:

"This agreement, made in the city of Hartford, state of Connecticut, this 16th day of March, A. D. 1896, between the Ætna Life Insurance Company, of said Hartford, party of the first part, and W. B. Montgomery, of Detroit, state of Michigan, party of the second part, witnesseth: That, in consideration of agreements hereinafter made by the party of the second part, the

aforesaid Ætna Life Insurance Company hereby appoints and constitutes the party of the second part its general agent to procure applications for insurance for it in the counties in the state of Michigan lying south of Lake Michigan and Lake Huron, and to receive premiums upon all policies issued upon such applications, and to collect premiums upon renewals of the same, and also to collect renewal premiums on existing policies issued by said company in said territory. Said company is to allow and pay said party of the second part for his services, and the services of such agents as he may employ, commissions as follows: Seven per cent. of premiums paid and reported on single-payment policies. Forty-five per cent. of premiums paid and reported the first year on nonparticipating, renewable term policies, and upon other policies requiring less than twenty annual payments. Fifty per cent. of the premiums paid and reported the first year on other policies. Five per cent. of the premiums paid the second and subsequent years on all policies, including those existing in said territory and belonging to the Detroit agency. Said company also reserves the right to discontinue taking new insurance in the state of Michigan, should the legislation of said state, or the interpretation of existing laws respecting the business of insurance companies of other states, be deemed by said company prejudicial to its interests. Said company agrees to pay all physicians' fees, postage, exchange, and express charges on packages of agency supplies, also the taxes and license fees not higher than now required by state law; proper vouchers being given for all such expenses. Said company also agrees to furnish such stationery, blanks, and printed matter as it may consider necessary in the conduct of its business.

"This agreement further witnesseth that said party of the second part hereby accepts the agency of said company, and agrees to devote his entire time and energy to the business of said company, and to no other, and that he will not engage in or give any time to any other business whatever during the continuance of this agreement, and also employ a sufficient number of agents to canvass the territory named, and to see that the company is represented therein by efficient, active agents; that he will be responsible to said company for all premiums on policies and renewals sent him, or all papers and documents intrusted to him, and that he will account to said company on or before the tenth day of each month, or at any other time when required, for all premiums received by him or his agent, and remit the amount of same, less such charges as he is entitled to by this agreement; and that he will conduct the business in all respects in accordance with the instructions of the party of the first part. Said party of the second part further agrees to give a bond to said company for the sum of six thousand ($6,000) dollars, with good and satisfactory surety, and renew and increase the same as may be required. If the agreements herein made by the said party of the second part are not fully complied with, the agreement made by the party of the first part shall be wholly null and void. This agreement can be terminated by either party giving to the other not less than thirty days' notice. It is understood and agreed that, in consideration of the said party of the second part having received what is known by the company as a 'brokerage commission,' in case this agreement is terminated by either party hereto during the first five years from the date thereof the company shall be in no way obligated for the payment of any further consideration for the interest of said party of the second part in said business and agency. It is further understood and agreed that in case this contract is terminated by either party after five years from the date thereof, and none of the conditions thereof have been violated by the said party of the second part, the said company will pay to the said party of the second part an amount equal to five per cent. of the premiums becoming due the next year on all policies taken by said party of the second part and his agents after the date hereof, provided there is no agreement to pay or allow a renewal commission to any party on said business. In case there is an agreement to pay or allow to any party a renewal commission, there shall be deducted from the amount due said party of the second part, as herein provided, a pro rata sum on account of such agreement. The said company also agrees to add to the said five per cent. agreed upon to be paid in event of a termination of the agency after five years from date hereof, one per cent. for each full year the contract has been in force. That is to say, if the

agreement is terminated at the end of six years, six per cent.; seven years, seven per cent.; and so on up to ten years, after which there will be no increase; and the said party of the second part hereby agrees to accept the same as in full compensation for his then interest in the business and agency hereby conveyed. Said party of the second part further agrees that he will make no contract or contracts with subagents which cannot be terminated at any time at the pleasure of the company or by himself, and that he will not pay a renewal commission exceeding three per cent. to any subagent. It is understood and agreed that the agency books, records, and papers are the property of the company, and subject to its inspection and control at any and all times, and that the business and agency cannot be disposed of without the consent and approval of said party of the first part in writing. For two years from date hereof the said company will furnish said party of the second part with a suitable office for the proper conduct of the agency, of which it shall be the judge.

"This agreement is made in duplicate the day and date hereof.

"Ætna Life Insurance Company,
"By J. C. Webster, Vice President.
"William B. Montgomery.

"Witness:
"T. B. Merrill.
"T. B. Merrill."

In accordance with this contract of agency the bond in suit was executed, being as follows:

"Know all men by these presents, that we, William B. Montgomery, of Detroit, Wayne county, in the state of Michigan, as principal, and Martin V. Montgomery, of Lansing, Mich., Richard A. Montgomery, of Lansing, Mich., in the state of Michigan, as sureties, are holden and firmly bound to the Ætna Life Insurance Company of Hartford, in the state of Connecticut, its successors and assigns, in the penal sum of six thousand dollars ($6,000), for the payment of which sum we bind ourselves and each of us, our and each of our heirs, executors, and administrators, firmly by these presents. The condition of this obligation is such that whereas, the said Ætna Life Insurance Company had appointed the said William B. Montgomery its general agent for the following territory, viz. all that portion of the state of Michigan lying east of Lake Michigan and south of Lake Huron, which said territory may be enlarged or diminished from time to time, and the compensation for said agent's services changed, by agreement with him from time to time, neither affecting the obligation of this bond: Now, therefore, if he shall well and truly pay over to the said Ætna Life Insurance Company, or its order, all moneys which he shall receive for or belonging to it, reserving only such commissions and charges as he may be entitled to under and by virtue of the agreement existing, or which he may from time to time make with this company, and shall monthly, on or before the tenth day of the month, and at all other times when required by said company, render true and full accounts to said company of all dues, moneys, or property belonging to it in his hands or in the hands of his agents, or subject to his or his agents' control as long as he shall continue its general agent, and shall well and truly keep and perform all other acts and things by him to be kept and performed under and by virtue of the agreement now existing, or which he may from time to time make with said company, as aforesaid, then this obligation shall be void; otherwise, to remain in full force. And the sureties on this bond do hereby agree to waive notice of any fault the said principal may at any time make.

"Signed, sealed, and delivered this 21st day of March, A. D. 1896.

"William B. Montgomery. [L. S.]
"Martin V. Montgomery. [L. S.]
"Richard A. Montgomery. [L. S.]"

August 10, 1897, this agency was terminated by notice given by the insurance company July 10, 1897. On that day W. B. Montgomery rendered an account of his receipts since date of his last monthly report, showing, after deducting commissions and expenses expressly provided for by the contract, a balance due the company of $6,462.09. The suit is upon the bond, to re-

cover the balance so due the company. The defense was a set-off aggregating a sum larger than the balance due from Montgomery as agent. This set-off was composed of the following items:

Shortage on commissions on renewals	$ 490 00
Salary for services rendered in excess of the contract, at $150.00 per month	2,520 00
By clerk hire paid for seven months at $50 per month	350 00
For money advanced to subagents	3,166 90
	$6,526 90

Evidence offered in support of this defense was excluded upon objection by the defendant in error, and the jury instructed to return a verdict for the plaintiff in the sum of $6,000, being the full amount of the bond.

Fred A. Baker (Albert B. Hall, of counsel), for plaintiffs in error.
F. H. & G. L. Canfield, for defendant in error.

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

LURTON, Circuit Judge, after making the foregoing statement of facts, delivered the opinion of the court.

1. The first four assignments of error relate exclusively to the ruling of the court in respect to the limits of a cross-examination. A witness introduced and examined by the plaintiff to prove the mere formal parts of the plaintiff's case was cross-examined in respect to the subject-matter of the defendant's set-off, touching which he had not been examined in chief. Upon objection by the plaintiff, the court ruled that the cross-examination should be confined to matters covered by the examination in chief, and sustained an objection to a number of questions which related only to the subject-matter of the set-off. This was not error. The right of cross-examination in courts of the United States is limited to facts and circumstances connected with the matter testified to upon the original examination of the witness. If it is desired to examine the witness as to other matters, the proper practice is to call the witness as the witness of the party desiring to make such proof. Houghton v. Jones, 1 Wall. 702–706; Wills v. Russell, 100 U. S. 621–625.

2. The eighth, ninth, and fourteenth assignments of error relate to evidence offered to sustain the first item in the set-off, and may be considered together. That item, as stated in the amended detailed bill of particulars under the Michigan practice, was in these words:

"Under the contract under which William B. Montgomery entered the employ of the Ætna Life Insurance Company, said contract being dated March 16, 1896, he was to have 5 per cent. upon all annual premiums paid in on the second and subsequent years on all policies, 'including those existing in said territory belonging to the Detroit agency.' It was represented to said Montgomery at the time he entered into said contract that the renewals annually due on existing policies amounted to $54,000, but as a matter of fact they only amounted to $47,000, so that said Montgomery has not received, or lost, 5 per cent. on $7,000 from, to wit, March 16, 1896, to August 10, 1897, the sum of four hundred and ninety dollars ($490)."

To establish this item the plaintiff in error was asked as to what was said to him at Hartford, Conn., when this contract was signed by the vice president of the corporation in behalf of the corporation,

by either Mr. Webster, the vice president, or Mr. Merrill, the company's superintendent of agencies, in respect to the amount of business then standing upon the books of the Detroit agency, commonly called "renewals." He was also asked to state what was said to him at Detroit on either the 16th of March, 1886, when the contract was signed by the witness, or on the 17th of March, at Detroit, when the office and business of the agency was turned over to the witness by Merrill, the superintendent of agencies. The written agreement under which Montgomery became the general agent of the Ætna Life Insurance Company was full, clear, and specific, both as to his duties and powers, and as to how he was to be compensated for his services. By the specific terms of that agreement, the said company was "to allow and pay said party of the second part for his services, and the services of such agents as he may employ, commissions, as follows: Seven per cent. of premiums paid and reported on single-payment policies. Forty-five per cent. of premiums paid and reported the first year on nonparticipating, renewable term policies, and upon other policies requiring less than twenty annual payments. Fifty per cent. of the premiums paid and reported the first year on other policies. Five per cent. of the premiums paid the second and subsequent years on all policies, including those existing in said territory, and belonging to the Detroit agency." This covered the whole subject of compensation, and the aggregate of allowances constituted his entire compensation for his exclusive services to the company as its general agent. This agreement, though signed for the company at Hartford, where its general office was located, was not signed by or delivered to Montgomery until March 16, 1896, when the business was turned over to him at Detroit. It contains no representations or guaranty as to the amount of renewals payable at the Detroit agency. Whatever colloquies may have occurred between the parties prior to that time must be regarded as merged in the deliberate contract evidenced by the written engagement into which they have entered. The contract between the parties is particularly free from ambiguity in respect to any of its terms. The conclusive presumption is that the whole of the engagement, as the parties understood it, was reduced to writing, and that the absence of any provision in respect of the amount of renewals upon the books of the agency which Montgomery was about to take was in consequence of a determination that any statement occurring in the course of the negotiations in regard to such renewals should not amount to a guaranty or term or condition of the final engagement. Parol evidence was therefore not admissible to contradict, vary, or add to the terms of the written agreement, or to establish a collateral guaranty as to the amount of such renewals. Reid v. Glass Co., 54 U. S. App. 619, 29 C. C. A. 110, 85 Fed. 193; De Witt v. Berry, 134 U. S. 306, 10 Sup. Ct. 536; Seitz v. Machine Co., 141 U. S. 510, 12 Sup. Ct. 46; McAleer v. U. S., 150 U. S. 424, 14 Sup. Ct. 160. Montgomery did not sign this agreement for some days after it was signed for the company at Hartford. Every colloquium between Montgomery and the vice president, or Merrill, the superintendent of agencies, occurring either at Hartford or Detroit, prior to the time when the engagement went into

effect, is conclusively presumed to be merged in the written contract.

3. The next item in the set-off is for salary for services rendered in excess of the contract, at $150 per month, aggregating $2,520. The fifth, sixth, seventh, and eleventh assignments of error relate to evidence tending to establish this set-off, which was offered and excluded upon objection of plaintiff below. The evidence offered and excluded was intended to show that at the time the office and business of the agency was turned over to him at Detroit by Merrill, the superintendent of agencies, the latter instructed him to designate himself on all his stationery as "general manager," and that he had obeyed this direction. Montgomery also offered to prove that from that time he had not only discharged the duties of a general agent, but those of a general manager, and that the duties of a general manager include services which are not included within the duties of a general agent, and that he had performed the duties of such general manager, which were in excess of his duties under the written contract as general agent. There was no offer to prove any specific things done in consequence of this charge in the style of his office, but only an offer to prove that "the duties, among insurance men, of a manager of a state office," are different from those incident to the place of a "general agent." There was no offer to prove that any additional compensation was agreed to be paid, or that Montgomery ever at any time, until discharged from the services of the defendant in error, indicated any purpose to claim extra compensation for any possible extra services involved by this change in the designation and duties of his office. The right to recover for any extra service rendered by him must therefore depend wholly upon an implied contract to pay him, in addition to his compensation as general agent, the reasonable value of any additional services rendered by him as general manager. The excluded evidence, at most, only tended to establish that the designation of the position had been changed from that of "general agent" to that of "general manager," and that this change involved the rendition of certain services not incident to the place of a general agent. There was no offer to prove any agreement that Montgomery's compensation should be increased or in any way affected by the supposed imposition of duties not contemplated under the existing written contract. That contract obligated Montgomery "to devote his entire time and energy to the business of the company," and that he would not "engage in, nor give any time to, any other business whatever." The same contract required him to "conduct the business in all respects in accordance with the instructions" of the company. His compensation for this devotion of his "entire time and energy" to the business of the company was to consist in commissions upon premiums collected upon the business of the company within his territory. Under such circumstances, if the company should deem it advantageous that he should be designated as its "general manager" within the territory embraced within his general agency, would there arise by implication any contract to pay him additional compensation, even if this changed designation involved the rendition of services additional to those he was bound to render as its "general agent"? The general rule by which a promise

to pay for services is implied from the circumstances of the case does not assist the plaintiff in error; for an implied contract to pay for services rendered only arises when they are rendered "under circumstances authorizing an expectation of compensation therefor, or the inference that they would not otherwise have been rendered." McCarthy v. Mayor, etc., 96 N. Y. 1–8; Griffin v. Potter, 14 Wend. 209. Nothing is more evident than that Montgomery expected no extra compensation by reason of this change in the title of his position, even though it involved the rendition of some service which might not have devolved upon him otherwise. Month after month for a period of a year and a half he rendered his monthly account of premiums, and deducted therefrom the commissions allowed him according to the written contract, and made no claim for any other or additional compensation. The presentation of his claim only after he had been discharged is very cogent evidence that it was a mere afterthought. This rendition of monthly accounts, and deposit of the balance so shown due to the company, is in the nature of an account stated, which, though subject to impeachment for fraud or mistake, is prima facie evidence against the party rendering them of great weight. Oil Co. v. Van Etten, 107 U. S. 325, 1 Sup. Ct. 178; Wiggins v. Burkham, 10 Wall. 129; Pray v. U. S., 106 U. S. 594, 1 Sup. Ct. 483; McCarthy v. Mayor, etc., 96 N. Y. 1–8; Fertilizer Co. v. Hartog, 29 C. C. A. 56, 85 Fed. 150; Bartlett v. Railway Co., 82 Mich. 658, 46 N. W. 1034; Cicotte v. Wayne Co., 59 Mich. 509, 26 N. W. 686; Schurr v. Savigny, 85 Mich. 144, 48 N. W. 547; Sidway v. Commissioners, 120 Ill. 496, 11 N. E. 852. No evidence tending to rebut the implications arising from this course of dealing between the parties appears in the evidence received or that rejected. Without passing upon the question as to whether Merrill was authorized to make a new contract or vary that which had been made, or whether the evidence offered and rejected in respect to this item was technically admissible, we are of opinion that, if all the evidence excluded had been admitted, no case would have been made requiring the submission to a jury of the question as to whether there was an implied agreement to pay for the services which are the subject of the set-off now under consideration. The error in excluding the evidence, if error it was, was therefore harmless.

3. The next item in the set-off is for $3,166.90 advanced from time to time to agents. The detailed bill of particulars filed by the plaintiffs in error shows that these advances began in January, 1886, and were continued through each month until the termination of his contract. After proving that advances had been made to subagents, Montgomery was asked, as a witness, to state what his purpose was in making such advances. Objection was made to this evidence as incompetent. Thereupon there occurred the following colloquy between the court and counsel for plaintiffs in error:

"Mr. Baker: I want to prove the facts. I want to get the record in shape so that these legal questions can be considered together. And what I want to prove is that, in order to get efficient work from agents, it is necessary, advisable, and proper to make advances to them. Court: Is the right to employ them given by the contract? Mr. Baker: Yes, as we understand it. We desire to show under that contract that Mr. Montgomery employed a large num-

ber of subagents, and that he made advances to them in order to keep them at work, and that the time that they terminated this contract his advances amounted to $3,550. In addition to what the contract provided for, we will show that it is customary, in conducting the insurance business, for general state agents, like Mr. Montgomery, to make these advances; that it is usual in the business. We desire to show, in addition to that, the company, after the termination of the contract, got the benefit of that money, and realized on this very business that he started and built up for them, and insists upon having the earnings from it. And I desire to prove these advances were made with the knowledge of the company; that it is the usual course of business, and it is impossible for us to realize on them, and they are realizing on them. Court: I will have to exclude that. It is admitted, is it not, this account is substantially correct? Mr. Baker: They seek to recover upon his statements of the moneys he had received, and there is no doubt those accounts, as far as they go, are all right, but that is not all the case. There are these matters that arise because of the sudden and unexpected termination of the contract. Court: I am forced to take another view of that, I am sorry to say. I cannot interpret the contract as you do, and, if I understand your position correctly, that terminates your defense, under the rulings of the court? Mr. Baker: Of course, I offer to prove another item of clerk hire, which is covered by your honor's ruling in regard to the set-off. Court: Gentlemen of the jury, under the instruction of the court you will return a verdict in favor of the plaintiff for $6,000. Mr. Baker: I will note an exception to that instruction."

We cannot regard Mr. Baker's expression of a "wish to show" or "desire to prove" the matters stated by him as a proper mode of obtaining a ruling as to the competency or incompetency of the evidence he wished to make. Proper questions calculated to elicit the evidence desired should have been propounded, and, if objected to, a ruling thus obtained. This should have been followed with a distinct offer to prove specific facts, etc. This was not done. Waiving this, we are of opinion that there was no error in the ruling that under the contract such "advances" made by Montgomery to his agents were advances made at his own risk, and were wholly unauthorized by the contract. While the contract obligated Montgomery "to employ a sufficient number of agents to canvass the territory named, and to see that the company is represented therein by efficient, active agents," yet the same contract provided that the commissions allowed to Montgomery were "for his services and the services of such agents as he may employ." The moneys so advanced to these agents so employed by Montgomery were "advances"; that is, the sums so advanced were to be accounted for out of future commissions earned by them. It is too plain for discussion that the company was not responsible to Montgomery if he failed to recover such advances. The suggestion that the business thus built up would ultimately be beneficial to the company is of no force. The contract provides that, if the agency should terminate during the first five years, the company should be under no obligation to pay anything further to the agent than the commissions earned up to date of its termination. If it should continue longer than five years, the same agreement provides for certain payments to the agent upon its termination. The contract was terminated before five years, and, by the express terms of the contract, nothing was to be paid as a consequence of any interest in the business resulting from the labors or expenditures of the agent. But this item is subject to the same objections which applied

to the item for extra services; that is, the claim was never made until after the agent was discharged. The advances were made in small sums from month to month, and if they were made for the company, and out of its funds, and in expectation that credit would be given for them as legitimate expenses allowable under the contract, they should have been reported.

4. Section 7365, 3 How. Ann. St., provides as follows:

"If there be several defendants the demand set-off must be due to all of them, jointly, except where other provision is expressly made by law; provided, that in actions upon a note or other contract for the payment of money against several defendants, any one of whom is principal, and the others sureties therein, any claim upon contract in favor of the principal defendant, and against the plaintiff or any former holder of the note who transferred the same after due, or other contract, may be allowed as a set-off by the principal or any other defendant."

The court construed this statute as excluding the entire set-off of the defendants below, upon the ground that this was not an action "upon a note or other contract for the payment of money," but upon an indemnity bond, and that a set-off due to W. B. Montgomery, as the principal in the bond, was not a set-off due to all of the defendants, and therefore not a proper subject of set-off under the statutes of Michigan. We are not prepared to agree with the learned judge in this construction, though we find it unnecessary to decide the question. Irrespective of the ruling in this regard, the instruction to find for the plaintiff below was correct, for the reasons we have already stated. The error, if it be one, in also basing that instruction upon the inadmissibility of any set-off due to W. B. Montgomery, was harmless. The last item in the set-off account stands upon a somewhat different ground. That item is for $350, clerk hire paid by Montgomery "at the special request of the plaintiff," according to the amended bill of particulars. This bill of particulars shows that this sum was paid out in monthly installments of $50 each month for a period of seven months. At the conclusion of the colloquium between the court and Mr. Baker, counsel for defendants below, touching his offer to make certain proof in respect to the item for advances to agents, which has been set out above, Mr. Baker said, "Of course, I offer to prove another item of clerk hire, which is covered by your honor's ruling in respect to the set-off." To this the court seems to have made no direct reply. No other reference to this item of the set-off occurs in the bill of exceptions. The error assigned is the fifteenth, and is founded upon the general ruling that a set-off due to one of the defendants only was inadmissible. Treating this item as excluded wholly upon the ground that the set-off was due only to W. B. Montgomery, the ruling was harmless. The recovery was only for $6,000, the full amount of the bond. The balance due from W. B. Montgomery, if credited by this item of $350, was not less than $6,100. No harm, therefore, resulted; for the judgment was for no more than was recoverable, if this item had been allowed as a credit. The result, upon the whole case, is that no harmful error occurred in respect to any part of the defense, and the judgment is therefore affirmed.

In re McLAM.

(District Court, D. Vermont. December 1, 1899.)

No. 103.

1. BANKRUPTCY—ARBITRATION OF CONTROVERSIES—FINDING.
Under Bankr. Act 1898, § 26c, providing for arbitration of controversies arising in the settlement of bankrupts' estates, and declaring that the written finding of the arbitrators "may be filed in court and shall have like force and effect as the verdict of a jury," such finding, when so filed, is subject to be set aside or adjudged upon by the court in like manner as a verdict would be.

2. SAME—CHOICE OF ARBITRATORS.
Under the provision of the same section that "three arbitrators shall be chosen by mutual consent, or one by the trustee, one by the other party to the controversy, and the third by the two so chosen," it is an irregularity if one of the arbitrators is selected by the trustee, one by the other party, and the third agreed upon by the two contending parties.

3. SAME—FRAUDULENT CONVEYANCES—INTENT OF GRANTOR.
Where an insolvent debtor, a few days before filing his petition in bankruptcy, gave a mortgage to one of his creditors, which covered all of his property which then remained available for general creditors, and the trustee in bankruptcy and the mortgagee submitted the validity of the mortgage to arbitrators, who found that the bankrupt did not give the mortgage "with the intent and purpose on his part to hinder, delay, or defraud his creditors, or any of them." *held*, that the finding must be set aside; for the necessary effect of the mortgage was to prefer that creditor and to hinder and defraud the others, and it must be presumed that it was given with that intent and purpose.

In Bankruptcy.

Bates, May & Simonds, for mortgagee.

WHEELER, District Judge. The petition appears to have been sworn to March 24, 1899, and to have been filed March 27th, with schedules which show unsecured debts amounting to $7,227.68, secured debts amounting to $3,583.13, one of which, $225, was attempted to be secured by mortgage dated March 7, 1899, on a pair of horses, and another of $1,274 by mortgage dated March 16, 1899, on a stock of goods subject to prior mortgage; the value of the security being set down at $1,000. This last mortgage appears to have covered everything then available for general creditors. The mortgagee and trustee have submitted the validity of this mortgage to three arbitrators, one selected by the mortgagee, one by the trustee, and one agreed upon by both, who have found that, "in the execution and delivery of said mortgage, the said bankrupt did not do it with the intent and purpose on his part to hinder, delay, or defraud his creditors, or any of them"; and this finding is submitted to the court. Such finding, under section 26c of the bankrupt law, "shall have like force and effect as the verdict of a jury." Thus, it is subject to be set aside or adjudged upon by the court as a verdict would be. By that section the three arbitrators are to be mutually chosen, or one by one party, one by the other party, and the third by the two arbitrators so chosen, or, on their failure, by the court. Here neither course was followed. The three were not mutually chosen, nor was the third

chosen by the two or by the court; nor was this done "pursuant to the direction of the court," as that section also requires. And the trustee must have failed to submit the creditors' case, or the arbitrators must, apparently, have mistaken the law applicable. From the words of the finding, and the brief of counsel for the mortgagee, the latter seems most probable. The provisions of section 67 of this act are contrasted with those of the former act (Rev. St. § 5128), as more favorable in this respect. That act avoided a conveyance made within four months "with a view to give a preference" to a person "having reasonable cause to believe" the bankrupt to be insolvent, and that the conveyance was being made in fraud of the act. The latter act avoids such conveyances by the bankrupt "with the intent and purpose on his part to hinder, delay, or defraud his creditors, or any of them." A conveyance to one creditor of what would otherwise, under the provisions of the act, go to all, would hinder and defraud the others, and amounts to a preference, contrary to the purpose of the act, as much as if the word "preference" had been used in this act, as it was in the former. This provision of the latter act is more prohibitive than that of the former, for no reasonable cause of belief of insolvency and fraud on the act, by the person receiving the preference, is necessary to avoid it. The purpose and intent of the bankrupt only is looked at, and, if contrary to the act, is sufficient.

The question seems to have been considered as if it arose at common law, or under statutes of fraudulent conveyances, where securing any creditor is allowable, and not as arising under a bankrupt law, where any intended preference among creditors is forbidden and avoided. Such a mortgage of the last available property within eight days of filing a voluntary petition and schedules could have no other effect than to give a preference to that creditor over others existing, to many times the amount of the debt intended to be secured, and of the property to secure it. The intent in giving the mortgage is to be taken to have been that it should have its obvious effect. This could not be met by showing failure to sum up the effect in details. Such a finding should not be allowed to stand. The result heightens the irregularity. Finding set aside.

In re CONHAIM.

(District Court, D. Washington, N. D. November 28, 1899.)

1. BANKRUPTCY—PREFERENCES—PAYMENT OF MONEY.
   Payment of a debt in money is a transfer of property, within the purview of Bankr. Act, § 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.

2. SAME—PROOF BY PREFERRED CREDITOR—KNOWLEDGE OF CREDITOR.
   Under Bankr. Act 1898, § 57g, providing that "the claims of creditors who have received preferences shall not be allowed unless such creditors shall surrender their preferences," it is immaterial that the creditor did not know, or have cause to believe, that the debtor was insolvent or that he was receiving a preference, if such was actually the fact. This provision

is not limited or modified by the distinct provision of section 60b, that preferences shall be voidable by the trustee if the creditor "had reasonable cause to believe that it was intended to give a preference."

8. SAME—SURRENDER OF PREFERENCE.

Where a creditor, holding four promissory notes of his insolvent debtor, received several payments on account, all within four months before the debtor was adjudged bankrupt, and so applied the payments as to extinguish two of the notes, partly satisfy the third, and leave the fourth wholly unpaid, *held*, that he could not prove the fourth note in the character of an unpreferred creditor, but must surrender all the payments received, as a condition upon being allowed to prove any claim against the estate.

In Bankruptcy. On question certified by referee in bankruptcy.

Brady & Gay, for trustee in bankruptcy.

Piles, Donworth & Howe, for proving creditor.

HANFORD, District Judge. This is a case of voluntary bankruptcy, in which the referee has certified to the court for decision a question as to the right of the Washington National Bank to prove against the bankrupt estate, and have allowed, debts due to the bank upon two promissory notes, one of which has been partially paid. The trustee contends that the claim of the bank as to both of said promissory notes should be rejected, unless the bank will surrender the amounts of the several payments made by the bankrupt on account of his indebtedness to said bank. The facts of the case are as follows: On January 1, 1899, the bank held four promissory notes given by the bankrupt for loans made to him by the bank. Between January 1 and February 20, 1899, the bankrupt made several payments to the bank on account of his indebtedness on said notes, amounting in the aggregate to $3,150; the last payment being on the 14th day of February. The petition to be adjudged a bankrupt was filed in this court on the 20th day of February, 1899. The payments when made were not applied on all of the four promissory notes, but were so applied as to extinguish two of them, and the surplus was all applied on one of the notes now held by the bank, leaving a small balance unpaid; and the fourth note, amounting to $1,500, with accrued interest, remains wholly unpaid. At the time the payments were made the bankrupt was in fact insolvent, but there is no evidence tending to prove that the officers of the bank had any reason to suppose that he was in that condition, or that they were receiving a preference over other creditors.

Section 57g of the bankruptcy act provides that "the claims of creditors who have received preferences shall not be allowed, unless such creditors shall surrender their preferences." The attempt is made to avoid the objection to allowance of this claim by insisting that the bank has not received a preference, and in the argument there is an attempt to draw a distinction between preferences given and preferences received; that is to say, when an insolvent debtor disposes of his property so as to benefit one creditor, and knows that his other creditors must suffer a loss, the benefit so given is, as to the debtor, a preference, but, if the creditor who receives it does not happen to know that he is gaining an advantage over other creditors of the same debtor, then, as to him, there is no preference. This ap-

pears to me to be, in truth, a hairsplitting argument. It seems to me that, when a preference is given, there is necessarily a preference received. The word "preference," as used in the bankruptcy act, must be given its usual and ordinary definition; and it means exactly the same thing, whether connected with the word "given," or with the word "received." This section of the act was not intended to impose a penalty, but merely to give creditors who received preferences options to keep what they have received, and take no dividends from the estate, or to surrender their preferences, and share equally with other creditors in the general distribution. It is the benefit or advantage which one creditor obtains over others, and not the purpose or intent of the parties, which determines the effect. Section 60b provides that in cases of preferences received within four months before the filing of a petition, or after the filing, with reasonable cause to believe that it was intended thereby to give a preference, such payment or transfer of property shall be voidable by the trustee, and he may recover the property or its value. This is a distinct provision of the law, and, in my opinion, it does not control the interpretation of section 57g. The law which does govern is found in section 60a, which provides that a preference shall be deemed to have been given when an insolvent person shall have made a transfer of his property, and the effect of such transfer will be to enable any one of his creditors to obtain a greater percentage of his debts than any other of such creditors of the same class. Referring to the first section of the act, we find that a definition is given to the word "transfer," giving it a comprehensive meaning, including a payment. So it is made clear by the express terms of the statute that in making payments to the Washington National Bank after the petitioner had become insolvent, and leaving other creditors unpaid, the case was brought within the purview of section 57g; and the bank is therefore required to elect whether to account to the trustee for the $3,150 received in payment, and stand upon a plane of equality with other unsecured creditors, or to retain said amount in lieu of any dividends which it would otherwise be entitled to receive from the estate.

The argument that the bank may assume the position of an unpreferred creditor as to the $1,500 promissory note, and retain the payments which were applied on the other notes, is, in my opinion, contrary to the spirit and letter of the statute. The prohibition contained in section 57g is not limited by the terms of the section to the particular debt or chose in action on account of which a preference has been received, but it refers to creditors who have received preferences, and provides that the claim of such creditors shall not be allowed, unless they shall surrender the preferences received. In the very excellent treatise by Mr. Frank O. Loveland, the following commentary is made upon this section of the statute:

"The language of this provision is much broader than that contained in the former bankrupt acts. Under the act of 1867 such creditors were prohibited from proving only 'the debt or claim on account of which the preference' was made. Under that provision the court held that where a creditor had two disconnected debts, and had received a fraudulent preference as to one only, he might prove the other, and receive dividends upon it. It may be doubted,

however, under the present statute, if a creditor who has received a preference can prove any claim until he has surrendered his preference." Loveland, Bankr. p. 257.

Let an order be entered disallowing the entire claim of the Washington National Bank as to both of the promissory notes mentioned, unless said bank shall elect to surrender to the trustee the entire amount of payments which it has received, and present a new claim for the amount which the bankrupt owed on the 1st day of January, 1899.

In re BURRUS.

(District Court, W. D. Virginia. December 1, 1899.)

1. BANKRUPTCY—COSTS—FEE OF ATTORNEY OF VOLUNTARY BANKRUPT.
   Bankr. Act 1898, § 64b, cl. 3, giving priority of payment out of bankrupts' estates to "one reasonable attorney's fee to the bankrupt in voluntary cases, as the court may allow," vests solely in the sound discretion of the court the amount to be allowed in the circumstances of each case. There can be no fixed fee for all cases, but the character and condition of the estate, the orders necessary to be secured for its protection, and the corresponding amount of time and attention required of the attorney, are all matters to be considered by the court in determining what is a "reasonable" amount in the circumstances.

2. SAME.
   Where it appears that the attorney of a voluntary bankrupt, in addition to preparing the petition and schedules, was actively engaged for several days in three different cities in endeavoring to procure injunctions to restrain attaching creditors from selling property of the estate, and that, after the adjudication, he appeared four times before the referee and at creditors' meetings, and had entire charge of the bankrupt's interests, *held* that, in addition to his traveling expenses and actual disbursements, he should be allowed a fee of $200, to be paid out of the estate.

3. SAME—DISSOLUTION OF LIENS.
   Under Bankr. Act 1898, § 67c, cl. 1, providing for the dissolution of liens obtained in any suit or proceeding begun against a person within four months before the filing of a petition in bankruptcy by or against him, "if it appears that said lien was obtained and permitted while the defendant was insolvent, and that its existence and enforcement will work a preference," it is not necessary to the dissolution of an attachment levied within such time that the creditor should have known, or had reasonable cause to believe, that the debtor was insolvent, nor that the lien should have been sought and permitted in fraud of the act, nor that the debtor should have intended a preference.

4. SAME—"OBTAINING AND PERMITTING" LIEN.
   Under the above section the attaching creditor "obtains" his lien when proceedings instituted by him result in its attaching to an insolvent's estate in such a manner as to work a preference; and the debtor "permits" it when he allows a state of facts to exist rendering such lien possible, and cannot or does not in good faith resist it.

In Bankruptcy.

Geo. K. Anderson, for bankrupt.
Chas. S. Dice, for creditors.

JACKSON, District Judge. The certificates of evidence by the referee in this case present two points for review, to wit: First, the amount allowed as attorney's fee to George K. Anderson, attor-

ney for the voluntary bankrupt; and, second, whether certain attachment liens obtained upon the property of the bankrupt within four months prior to the filing of the petition are dissolved by the adjudication. It appears from the certificate of evidence before the referee that at the time of the filing of the petition several attachments had been sued out and levied by various creditors of the bankrupt upon certain of his personal property, consisting of a stock of goods, and that the same was about to be sold under said attachments; that the attorney for the bankrupt, George K. Anderson, in addition to preparing the petition and schedules herein, was actively engaged for several days at Lewisburg, Charleston, and Parkersburg, W. Va., in an endeavor to secure injunction and restraining orders against said several attaching creditors from the further proceedings and sale of the bankrupt's property under said attachments; that the bankrupt resided at Clifton Forge, Va., but carried on a mercantile business in Greenbrier county, W. Va.; that said Anderson, as attorney, has also appeared before the referee and at creditors' meetings in Lewisburg four times, and that he has had complete charge of the bankrupt's interest from the inception of the case. By an order of the referee, made on December 19, 1898, said Anderson was allowed the sum of $45.45 for traveling expenses, telegrams, clerk's charges, etc., actually incurred and paid by him in securing the restraining orders mentioned. This sum the trustee was directed by the referee to repay him out of the funds in his hands. For his services rendered and to be rendered the bankrupt in this proceeding he has asked to be allowed, and has duly proven before the referee, $250, to be allowed and paid him out of the estate in the hands of the trustee as a claim having priority under section 64b, cl. 3. The referee, by an order, allowed said attorney, in addition to the sum of $45.45 previously allowed and paid him for expenses incurred, the sum of $100, and rejected his claim in excess thereof.

The only provision of the bankruptcy act regulating the amount to be allowed and paid out of the estate as an attorney's fee in cases of voluntary bankruptcy is found in section 64b, which provides for one "reasonable fee," irrespective of the number of attorneys employed. This section evidently intended to and does vest solely in the sound discretion of the court the amount to be allowed under the circumstances of each case; and the character of the estate, its condition at the time of the adjudication, the injunctions or restraining orders necessary to be secured for its protection, and the corresponding amount of time and care required of the petitioner's attorney, are all matters to be considered by the court in arriving at the amount "reasonable" under the circumstances. Necessarily, therefore, there can be no fixed and determinate fee for all cases, nor will the amount allowed in this case establish a rule for subsequent cases in this court, but from a careful consideration of the evidence certified by the referee herein the court deems $200, in addition to the $45.45 already allowed and paid for expenses incurred, a reasonable fee, and the order of the referee will be modified accordingly.

The remaining point certified for the review by the court is whether certain attachment liens obtained upon the stock of goods of the bankrupt within four months of the filing of the petition herein by H. C. Bare and A. M. Buster are dissolved by the adjudication. Said attachments were sued out and levied upon the stock of goods on July 30, 1898, and the petition was filed September 23, 1898. It clearly appears from the evidence certified that at the time of the suing out of these attachments the bankrupt was insolvent, and it is conceded that their enforcement would work a preference. Upon this state of facts section 67c, cl. 1, is conclusive. It provides that all liens created by or obtained in or pursuant to any suit or proceeding, including an attachment which was begun against a person within four months of the filing of a petition in bankruptcy by or against him, shall be dissolved by the adjudication of such person to be a bankrupt, if "it appears that said lien was obtained and permitted while the defendant was insolvent, and that its existence and enforcement will work a preference." Knowledge of the insolvency, or reasonable cause for belief of the insolvency, is not necessary under this clause, as it is under section 67c, cl. 2, nor for such lien to have been sought and permitted in fraud of the bankruptcy act, as under clause 3. All that is required for such lien to be dissolved is that the suit or proceeding was begun within four months of the filing of the petition, and while the defendant was insolvent, and that its enforcement will work a preference. The intent on the part of the bankrupt to allow a preference to be obtained, or his collusion and participation to that end, is not, by clause 1, a requisite to the ipso facto dissolution of the lien. Unlike the bankruptcy act of 1867, the present act does not require intent to prefer as an element, even under clause 3 of section 3, defining the third act of bankruptcy to be "suffering or permitting, while insolvent, any creditor to obtain a preference," and not causing it to be vacated or discharged at least five days before a sale. Under section 67 the language is, "obtained and permitted," and the creditor "obtains" his lien when proceedings instituted by him result in its attaching to an insolvent's estate in such a manner as to work a preference, and the debtor "permits" it when he allows a state of facts to exist rendering such lien possible, and cannot or does not in good faith resist it. In re Arnold, 1 Nat. Bankr. N. 334, 94 Fed. 1001; In re Collins, 1 Nat. Bankr. N. 290. In the present case it is not necessary to consider section 67f, which seemingly renders all liens obtained within four months prior to the filing the petition null and void upon the adjudication without any of the provisos found in section 67b, further than to note that its apparent inconsistency with the preceding sections has been explained by the interpretation placed upon it by several of the district courts, viz. that it applied only to involuntary cases. It follows from the above that the ruling of the referee that the attachment liens of H. C. Bare and A. M Buster are dissolved by the adjudication herein is approved and confirmed.

In re EMSLIE et al.

(District Court, S. D. New York. December 2, 1899.)

BANKRUPTCY—DISSOLUTION OF LIENS—MECHANIC'S LIEN.

Where, under the laws of the state, a mechanic's lien attaches only from the date of filing in the office of the county clerk a notice claiming such lien, and not from the doing of the work itself, a lien so acquired will be dissolved by the adjudication of the insolvent debtor as a bankrupt within four months thereafter, under Bankr. Act 1898, § 67f, providing for the dissolution of liens "obtained through legal proceedings."

In Bankruptcy. On review of decision of referee in bankruptcy.

Ormsbee & Kehl, for lien creditor.

T. V. W. Anthony, for trustee in bankruptcy.

BROWN, District Judge. The question has been certified whether a mechanic's lien for labor and materials used in the construction of a house, is dissolved under section 67f by a petition filed within less than four months thereafter. The bankrupts had a general contract for the building of the house for the owner. Elliott made a subcontract with the original contractors to furnish certain material and labor, which were afterwards supplied pursuant to the original contract, amounting to $270. Emslie & Son afterwards failed and on April 29, 1899, made an assignment for the benefit of their creditors. On May 12th Elliott filed in the county clerk's office a claim of lien in conformity with the statutory requirements, and on May 29, 1899, a petition was filed by the creditors of Emslie & Son to have them adjudged bankrupt, and on August 15th they were so adjudged. Numerous other claims of lien it is said are in the same situation with that of Elliott, and if valid, they will absorb all of Emslie & Son's interest in their contract with the owner, and the moneys due thereon.

Under the present mechanic's lien law of this state (chapter 418, Laws 1897) no lien seems to exist for such contract work and materials, except from the time of filing a notice claiming such a lien. Upon this ground, the claim of lien was disallowed by the referee, inasmuch as it was acquired by the filing of the notice of claim in the county clerk's office in pursuance of the statute's provisions; and this was held to be a legal proceeding and therefore annulled under section 67f by a petition filed within four months thereafter.

The only case cited under the present act that bears upon the question, is In re Kerby-Denis Co. (D. C.) 94 Fed. 818, affirmed in 36 C. C. A. 677, 95 Fed. 116, in which a mechanic's lien under the statute of Michigan was held not to be made void under section 67f. These decisions, however, rested upon the express ground that the lien was not acquired by the filing of notice, but was created by the statute itself from the moment the work was done or materials furnished and existed independently of the notice; and that the requirement of filing the notice was merely a condition subsequent to prevent the lien from being lost. A decision essentially the same was made by Woodruff, J., in the case of In re Dey, 9 Blatchf. 285, Fed. Cas. No. 3,871, in reference to the statute of New Jersey, under

the bankruptcy act of 1867, reversing a decision below giving a different construction to the mechanic's lien law of that state.

The language of the present statute of New York seems to leave no doubt that the lien in this case does not arise upon doing the work or furnishing material, but only upon filing the notice of claim in conformity with the provisions of the statute, and it is only through this proceeding that the lien is created. It is the lodging of this claim under the statute that binds the property, just as the issuing of an execution to the sheriff under a judgment, binds the debtor's goods and chattels. I do not perceive any well-founded distinction in the nature of the acts creating such charges, and both I think are alike annulled under section 67f.

The liens allowed by the state statute on filing notice, are much more extensive than the preferences recognized by the bankrupt act (section 64b, cl. 4) in favor of workmen for their wages. The state statute embraces subcontractors, like this lienor, whose liens are often large, and much in excess of the $300 statutory limit; and these claims, if allowed, might exclude the very workmen favored by Bankr. Act, § 64b, cl. 4, by eating up all the assets.

The proceeding to foreclose the lien should, therefore, be stayed.

In re SCHLESINGER.

(District Court, S. D. New York. December 2, 1899.)

1. BANKRUPTCY—REQUIRING BANKRUPT TO PAY OVER MONEY.

A court of bankruptcy has authority to order the bankrupt to pay over to his trustee money in his hands which belongs to his estate in bankruptcy, when the bankrupt's present possession or control of the money, and his retention of it in fraud of his creditors, are proved beyond a reasonable doubt.

2. SAME—EVIDENCE.

Where it appeared that a bankrupt, within a period of seven or eight months before filing his petition, had received and deposited in bank sums of money amounting to over $12,000, all of which he drew out, the last check being drawn and the account balanced three days before the petition was filed; that he kept no books of account, and his check book was not produced; that all the checks returned to him by the bank (244 in number) were destroyed, although his attorney was then engaged in preparing his petition and schedules; that he testified that the money in question was all paid away, but professed ignorance or lack of recollection as to all particulars; that he admitted having received $2,000 for the sale of an equity in real estate, about a month before the bankruptcy, but gave no satisfactory explanation of his disposition of it; and that his testimony in several particulars was inconsistent and contradictory, and in some false,—*held*, that the evidence warranted an order requiring the bankrupt to pay over to his trustee the money in his hands belonging to his estate, which, making allowance for charges, losses, and expenses, would be fixed at $6,500.

In Bankruptcy.

Hillary C. Messimer, for trustee.
Black, Olcott, Gruber & Bonynge, for creditors.
Samuel Strasbourger, for bankrupt.

BROWN, District Judge. The trustee applies for an order directing the bankrupt to pay over the sum of $12,000 and upwards, which it is claimed is shown by the bankrupt's examination and other evidence, to be under his control. The referee denied the application, except as to the sum of $25.50 admitted in the schedules to be in the bankrupt's possession, on the ground that no specific sum beyond that was shown to remain in the bankrupt's control at the time his petition was filed.

In the summary of facts, the referee finds that upwards of $12,000, which has come into the possession of the bankrupt during the seven or eight months preceding the filing of the petition, was in no way satisfactorily accounted for. Debts for merchandise to the amount of nearly $18,000 during that period are unpaid; the stock was made up and sold, and the proceeds all collected, except the remaining stock and debts to the amount of about $3,200. During the same period the bankrupt deposited as shown by his bank pass book, $24,465.85, all of which was drawn out, the last on April 17th, three days before his petition was filed. The bankrupt kept no books of account. The check book was not produced, and all checks returned were destroyed. No account could be extracted from him as to what was done with these moneys, except that they were paid out. To all inquiries for particulars, his answer was, "I don't know," or "I don't remember." He was contemplating an application in bankruptcy for about a month prior to filing his petition. From the 17th of March to the 17th of April he deposited in his bank about $4,600. His book was balanced on the 17th of April, and according to the entry in the pass book, 244 vouchers were then returned to him, amounting to $13,300.16 from the previous December 30th. Though counsel had already been employed by him for the preparation of his petition in bankruptcy, all these 244 vouchers the bankrupt said were destroyed by him as soon as received, and nothing can be ascertained to whom or for what these payments were made.

The bankrupt further testifies that in March he received $2,000 for the conveyance of his equity in a house and lot, 34 E. Fourth street. The deed was dated March 23d and recorded April 20th, the same day his petition in bankruptcy was filed. The grantee being absent in Europe, he could not be examined. No account is given of what disposition was made of the $2,000 which it is said were received in bills, except that they were paid out, or deposited. There is no corresponding deposit in the bank book. In several details of his testimony the bankrupt's evidence was inconsistent and contradictory and was in some particulars proved to be false. The referee considered it incredible that the bankrupt was as ignorant of his business and his payments as he professed to be, and he did not consider him worthy of belief. No special losses, and no special causes of loss in business, were intimated by the bankrupt in his testimony.

It is seldom, I think, that so open a defiance of the requirements of the bankrupt law is met with. The examination of the bankrupt was begun on May 9th, while his business transactions were

yet recent. The ignorance he professed in regard to the disposition of his money, is altogether incredible. I cannot regard his testimony on this subject as other than a tissue of perjuries. The destruction of vouchers while his papers in bankruptcy were preparing, is not consistent with any other inference than the intent to conceal the facts and defraud his creditors. In re Salkey, Fed. Cas. No. 12,253. It is no doubt correct, as the referee observes, that no order for the payment of money "should be made unless the testimony in the case is such as to satisfy one beyond a reasonable doubt that the same is in fact in the possession or under the control of the bankrupt"; and great caution should no doubt be observed in applying this remedy. In re McCormick (D. C.; Nov. 17, 1899) 97 Fed. 566. A debtor, however, is not to go scot-free because the precise amount of his frauds and concealments is not ascertainable; nor should the bankrupt act be suffered to be paralyzed, as respects the interests of creditors, by such means. Upon the evidence I cannot conceive that a jury of merchants would for a moment hesitate in declaring that beyond all reasonable doubt the bankrupt has concealed a large amount of his property. Making every possible allowance for charges, minor losses, store and family expenses, a finding of upwards of $10,000 unaccounted for would be justified by the testimony. To be entirely within the limits of any possible doubt, I shall fix the amount required to be paid over by the bankrupt, at $6,500, an amount extending back but a few weeks prior to the time of filing his petition.

An order may be entered accordingly.

In re O'GARA.

(District Court, D. Oregon. November 20, 1899.)

No. 22.

BANKRUPTCY—GROUNDS FOR REFUSING DISCHARGE—CONCEALMENT OF ASSETS.

Where a merchant, finding himself insolvent, proceeded to hold out the money received from cash sales and from collections, until his business was closed by the levy of an attachment a few weeks later, and he was thereafter adjudged bankrupt, and it appeared that the money so accumulated by him amounted to a considerable sum, that it was not in his hands at the time of filing the petition in bankruptcy, that he gave no satisfactory account of it, and there was no evidence to show what had become of it, *held* to be sufficient ground for refusing to discharge him, especially with evidence of attempts to prefer certain creditors and to transfer his property to others.

In Bankruptcy. On bankrupt's application for discharge, and opposition thereto by creditors.

A. D. Stillman, for bankrupt.

J. N. Teal, for opposing creditors.

BELLINGER, District Judge. Upon this application reference was made to the referee in bankruptcy for Umatilla county, who finds and reports:

That the bankrupt commenced business by purchasing the stock of goods then contained in the White House grocery store, on Main street, in the city of Pendleton, about the 1st day of December, 1896, from his present wife, who was then Miss G. E. Stubenbordt, for the sum of $2,200 cash. That he has continuously conducted said business from that time up to the 28th day of November, 1898, when he was closed by attachment at the suit of Levy & Spiegel, creditors of said bankrupt. That, at the time of the levying of said attachment, the assets of said bankrupt consisted of the following items, viz.:

Stock of goods in store, about	$ 3,500 00
Fixtures	1,300 00
Book accounts, face value	5,234 00
Making a total of assets, nominal value	$10,034 00

That no deduction has been made for shortage or bad or uncollectible accounts. That at the time of said attachment the bankrupt's indebtedness amounted, in round numbers, to the sum of about $11,500. That the bankrupt conducted his business fairly and honestly, but in a very crude and unskillful manner, up to about the 1st day of October, 1898. That at no time was he able to ascertain from his books how his business stood, except by "estimating"; but such manner of bookkeeping was not indulged in with intention to defraud, but owing to lax business ideas of the bankrupt. That on or about the 1st day of November, 1898, the bankrupt found that he was unable to meet his obligations, and proceeded to hold out the money coming in from his cash sales, and most of the money coming in from his cash collections, and to pay back to all persons who had intrusted him money that they had deposited with him, and other small local cash claims against him, amounting, for the two months of October and November, to about $1,505; and the balance of the money taken by him during the month of November, less cash accounted for on his books, amounting, as near as can be ascertained, to the sum of $2,614.46, he has failed to satisfactorily account for. That said money was not in the hands of the bankrupt at the time of filing his petition in insolvency, and its present whereabouts the evidence does not disclose. That the bankrupt made false statement of accounts in this proceeding at the time of the filing of his petition, in not accounting for the money mentioned in last above finding, but not knowingly false, as he believed at that time that it would not be necessary for him to include said accounts, but what his true motive was the testimony does not disclose. That the bankrupt, while insolvent, transferred a portion of his property to Mrs. May O'Gara, G. Thurber, B. E. Kennedy, C. Downey, and money to others unknown, and book accounts to Allen & Lewis, which they refused to receive, with intent to prefer such creditors over his other creditors.

These findings of the referee are supported by the evidence. The testimony of the bankrupt and his wife is so vague and uncertain, and altogether unsatisfactory, that it necessarily gives rise to an unfavorable impression as to the good faith of the bankrupt in the conduct of his business between about the 1st day of September and the date of the attachment mentioned in the findings. On the first of these dates he had on hand, according to a statement made by him to his principal creditors, Allen & Lewis, merchandise amounting to $3,675. He has bought since that time merchandise of the value of $9,645. His liabilities on the 1st of September, according to his own showing made to his creditors as aforesaid, amounted to $4,493. On the date of the attachment, November 28th, this indebtedness had increased to $11,500. The statement of assets and liabilities on September 1st purported to be a complete statement, which he declared to be positively correct in every detail. When attached he had merchandise on hand to the amount of about $3,500, being not far from the amount on hand on September 1st. There is nothing to show

what the outstanding book accounts were on September 1st, but on April 25th they were of the face value, in round numbers, of $2,500. At the time of the attachment the book accounts were of the face value of $5,234. Assuming that the book accounts on September 1st were not more than what they were in April, these accounts had increased, in round numbers, $2,700; which helps to account for the difference between the indebtedness on September 1st and November 28th, the date of the attachment, during which time, as already stated, this indebtedness had increased, in round numbers, $7,000. But there still remains unaccounted for property and assets to a large amount. This discrepancy cannot be explained upon the theory of careless bookkeeping or other loose methods in the conduct of the business. The time is too short, and the amount that has disappeared too large, to admit of any other explanation than a purpose on the part of O'Gara to secrete or cover up a large amount of his assets. There is no escape from this conclusion. If the bankrupt could not show, he ought at least to have been able to explain, upon some reasonable hypothesis, what had become of all these assets. He should have offered some tenable theory, at least, to explain why, with a large purchase of goods, amounting to nearly $10,000, after he had made his statement to Allen & Lewis, there is practically nothing left with which to meet his largely-increased indebtedness. The amount of his collections and deposits, and the daily cash receipts, as nearly as may be ascertained, as testified to by himself and his clerk, are further confirmation of the unfavorable conclusions which these figures create. The findings of the referee are clearly within the facts as shown by the testimony. My own opinion is that the case is more unfavorable than the findings of the referee show it to be. In such a case there can be no discharge of the bankrupt from his liabilities, and such discharge will be denied.

UNITED STATES v. GABRIEL et al.

(Circuit Court, S. D. New York. October 14, 1899.)

CUSTOMS DUTIES—CLASSIFICATION—LITHOFONE.

Lithofone, which is a compound composed of 70 per cent. sulphate of barytes, and 30 per cent. sulphide of zinc, is dutiable, under paragraph 57 of the tariff act of 1897, as a "white paint or pigment containing zinc, but not containing lead, dry," and not as sulphide of zinc.

Appeal from Board of General Appraisers.

This was an appeal by the United States from a decision of the board of general appraisers fixing the classification for duty of certain merchandise imported by Gabriel and Schall.

D. Frank Lloyd, Asst. U. S. Atty.

W. Wickham Smith, for appellees.

LACOMBE, Circuit Judge. It seems unnecessary to add anything to the discussion of the case which will be found in the opinion of the board of general appraisers. The paragraph in the tariff act of 1897 reads as follows:

"57. Zinc, oxide of, and white paint or pigment containing zinc, but not containing lead, dry, one cent per pound; ground in oil, one and three-fourths cents per pound; sulphide of zinc white, or white sulphide of zinc, one and one-fourth cents per pound; chloride of zinc and sulphate of zinc, one cent per pound."

Certainly the article here imported (lithofone) is not chemically sulphide of zinc, since it is conceded to be a compound of 70 per cent. of sulphate of barytes, and only 30 per cent. of sulphide of zinc. The government undertook to convince the board that it was commercially known as "sulphide of zinc." The evidence presented to the board upon that point was conflicting, and the board found that it was "not so commercially known," and there is no further evidence on that question before this court. It is not disputed that it is a "white paint or pigment containing zinc, but not containing lead, dry," and is therefore dutiable at one cent per pound. The decision of the board is affirmed.

UNITED STATES v. INGHAM et al.

(District Court, E. D. Pennsylvania. November 18, 1899.)

1. CRIMINAL LAW — BRIBERY OF UNITED STATES OFFICIALS — CONSTRUCTION OF STATUTE.
   In Rev. St. § 5451, which makes it a criminal offense to bribe or attempt to bribe any officer of the United States, or "any person acting for or on behalf of the United States in an official function, under or by authority of a department or office of the government thereof," the latter clause must be construed as including persons not officers, and a secret-service operative employed by the secretary of the treasury to aid in the detection and suppression of frauds or crimes against the revenue laws, with which duty the secretary is charged, while in the performance of such service, is acting on behalf of the United States in an "official function" of the secretary, and his bribery or attempted bribery to collude in or allow a fraud on the United States is an offense within the terms of the statute.
2. SAME — TRIAL — COERCION OF VERDICT.
   The failure to discharge a jury on their announcing a disagreement does not constitute coercion by the court which vitiates a verdict afterwards returned, where it subsequently appeared that the disagreement was entirely because they did not clearly understand the charge of the court in certain particulars, and, when it was further explained, they soon reached an agreement.
3. SAME — INSTRUCTIONS ASKED.
   Where a point which the court is asked to charge by the defendant is stated in the charge of the court in substantially the same language, it is, in effect, affirmed, and error cannot be predicated on the fact that it was not read to the jury, and expressly affirmed.

On Motion in Arrest of Judgment and for a New Trial.

James M. Beck, U. S. Atty., and Francis F. Kane, Asst. U. S. Atty.
Albert S. L. Shields, for defendants.

McPHERSON, District Judge. I have considered with care the motions in arrest of judgment and for a new trial, but without being able to adopt the defendants' views upon either motion. It is unnecessary to elaborate the reasons that oppose these views, or to discuss the numerous cases that have been cited upon the one side and the

other in the learned and exhaustive briefs of counsel, but I may indicate briefly the grounds of the refusal.

1. I agree that McManus was not an "officer" of the United States, but I am satisfied that he was a "person acting for or on behalf of the United States in an official function, under or by authority of a department or office of the government thereof," and that he held a "place of trust or profit," within the meaning of section 5451 of the Revised Statutes.

The phrase "official function," taken in connection with the other language of the section, is, I think, of broader scope than the defendants' counsel is willing to admit. His position is that no one can exercise an official function unless he be an "officer" of the United States; and, if this argument is to prevail, the two provisions of the section are identical in meaning, although it is clear that congress supposed the words to be descriptive of two distinct classes of persons. This result is to be avoided if a fair and reasonable construction will lead to a different conclusion. In my opinion, such a construction is obvious, and relieves the case in hand from difficulty. The "official function" spoken of is not necessarily a function belonging to an office held by the person acting on behalf of the United States; it may also be a function belonging to an office held by his superior, which function has been committed to the subordinate (whether he be also an officer, or a mere employé) for the purpose of being executed. Thus—turning to the facts of the present case—it is an official function of the secretary of the treasury to detect and suppress certain crimes, and by his authority, lawfully exercised, the execution of this function has been (at least in part) intrusted to the secret-service operatives, who thereupon act on behalf of the United States as his subordinates or employés. The law lays the function upon him; but, as he cannot do the work alone, he is, of necessity, permitted to appoint others to share in the labor; and in this particular such appointees stand in his place. What the precise limits of an official "function" may be I do not attempt to lay down. At all events, the word embraces so important a duty as the detection and suppression of crime, although it might not, and, indeed, clearly does not, embrace every trivial labor to which a subordinate may be set.

If this construction is correct, those counts of the indictment that charge the defendants with bribing or attempting to bribe McManus, describing him as a person acting for or on behalf of the United States in an official function, are good; and these counts alone are sufficient to support the verdict.

2. The alleged insanity of a juror during the trial or the deliberations of the panel has not been proved. I think the fact may be that the nervous strain to which he was thus subjected may have helped materially to bring on the attack from which he is now suffering, but the attempt to prove that he was mentally unsound at any time during the 10 days in question was far from convincing.

3. That the jury were not coerced into agreement seems to me clear from one fact, if from no other. It appeared from their own statement on the last day of their deliberation that they were dis-

agreeing merely because they had not clearly understood the instructions of the court in certain particulars. I have seen this happen before, and it has rarely occurred that a disagreement, which a jury has declared repeatedly to be conscientious, and impossible to be overcome, has not been speedily harmonized, when the precise points of difference were distinctly stated, and presented to the court for further instruction. I supposed this to be the situation here, and the course of events made it clear that the supposition was correct. As soon as the jury's difficulties were made known, they were removed by a few words of explanation, and an agreement followed with little further delay. It seems to me that this consideration takes away all support from the averment that unlawful pressure by the court was the agency that brought about the verdict.

4. The other objections mainly concern alleged errors of law, and, if these are found to exist, they can be corrected on appeal. Of course, I should grant the proper relief myself by setting the verdict aside if I were convinced that I had harmed the defendants by an erroneous ruling; but a reconsideration of the points in which mistake is alleged does not shake my belief in the soundness of the views that I expressed at the trial.

5. With regard to my failure to answer the defendants' point concerning the weight to be given to evidence of good reputation, I may say that I probably did not read the point to the jury, because I had used almost the exact language in the charge. That this was regarded at the time as equivalent to affirmance is shown by the fact that no exception was taken to the failure to give the point a formal answer. An exception was merely taken to the refusal to affirm the points that were refused. This point was not refused; it was affirmed substantially, although not in so many words.

The motions in arrest of judgment and for a new trial are accordingly overruled. To this action of the court upon the motion in arrest of judgment an exception is sealed for the defendants.

YOUTSEY v. UNITED STATES.

(Circuit Court of Appeals, Sixth Circuit. November 13, 1899.)

No. 649.

1. CRIMINAL LAW—PRESENT INSANITY OF DEFENDANT—TIME AND MODE OF PRESENTING THE ISSUE.

   The question whether a defendant charged with a criminal offense is in a fit condition mentally to be placed on trial may be raised at any time, and in any appropriate manner; and the fact that the objection is taken in an application for continuance, which is also based on other grounds, does not relieve the court of the duty of giving the question of his mental soundness due consideration, and trying it in some appropriate form of proceeding.

2. SAME—PROCEDURE IN FEDERAL COURTS.

   The federal courts are governed by the practice at common law as to the method of trying an issue of the present insanity of a defendant, where the objection is urged in bar of his trial; and by such practice the defendant is not entitled to a jury as a matter of right, but the judge may, in his discretion, call a jury, or determine the issue himself, upon his own inspec-

tion of the defendant, and such testimony as he may choose to take, or he may direct the question to be tried by the jury with the plea of not guilty.

3. SAME—RIGHT OF DEFENDANT TO HAVE ISSUE TRIED.

An application for a continuance by counsel for a defendant stated that he was suffering from the effects of a recent attack of epilepsy, and that there was danger that the excitement of a trial at that time would bring on another attack. It further contained a showing, supported by affidavits of counsel and of reputable physicians, that defendant was a confirmed epileptic, and that recent attacks had so impaired his mind and memory that he was unable to recall the facts of the transactions involved in the charges against him, so as to assist his counsel in the preparation of his defense, or to testify as a witness, or even to remember events from day to day, and asked that an inquiry be instituted by the court to determine whether the defendant was in such condition mentally that he should be subjected to trial at that time. *Held* that, in addition to the mere question of continuance on account of defendant's physical condition, such application presented an issue as to his ability to make a rational defense, which went to the fundamental right of the court to try the main issue of not guilty, and should have been tried and determined by some appropriate proceeding.

4. SAME—REVIEW ON APPEAL—FACTS NOT SHOWN BY RECORD.

In such case an order merely denying the continuance, in the absence of anything else in the record relating to the subject, did not raise a presumption that such issue was considered or determined.

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

The plaintiff in error, Thomas B. Youtsey, cashier of the First National Bank of Newport, Ky., was indicted for violation of section 5209 of the Revised Statutes of the United States. The indictment embraced 27 counts. He was convicted upon the first 25 counts, and acquitted, by direction of the court, upon the twenty-sixth and twenty-seventh counts. Eighteen of the counts upon which he was convicted embraced but three distinct transactions, charged in different ways, and were for the embezzlement or willful abstraction or willful misapplication of assets of the bank, with intent to defraud or injure the bank. The remaining seven counts were for making, or causing to be made, false entries on the books of the bank, or in the reports to the comptroller, with intent to deceive the officials and directors of the bank, or any agent of the comptroller appointed to examine the affairs of said bank. Each of these seven counts included a distinct transaction. The indictment was returned into court September 20, 1897. On the same day the accused came into court, and entered into a recognizance to appear for trial November 22, 1897. On the latter date he came not, but made default, his counsel filing affidavits that his mental and physical condition was such that he was unable to appear. Upon the joint application of the government and the defendant, the cause was thereupon continued and set for hearing March 1, 1898. On the latter day he appeared, waived arraignment, and entered a plea of "Not guilty." Thereupon his counsel filed the following petition, in these words: "Now come counsel for defendant, and respectfully represent to the court that this cause should not be tried at this term of the court, but the same should be continued, for the reason that, in the judgment of counsel, the defendant is not in a condition, mentally or physically, to undergo the ordeal of a trial of this cause at this time. They further represent to the court that the defendant is a confirmed epileptic; that since November 22, 1897, at which time this cause was last set for trial, and at which time the cause was continued, the defendant then suffered from a severe attack of epilepsy. The defendant has had another severe attack of epilepsy, and counsel state, in consultation with said defendant, and in preparation for trial of this cause at this term, the impairment of the memory of the defendant has been so manifest to them, and his condition, mentally and physically, is such, as, in their judgment, to warrant this application to the court for a continuance of this cause. They submit with this application the affidavit of three physicians, each of whom is

personally acquainted with the defendant, and has prescribed for him for said epileptic attacks, and each of whom believes that the excitement resulting from the ordeal of this trial may possibly or probably result in another attack of epilepsy. Counsel for defendant desire to submit the mental and physical condition of this defendant to this court for such examination by competent physicians, and otherwise, as the court may deem best to make in order to determine whether the defendant should be subjected to a trial of this cause at this term. They further state that in the preparation of this cause for trial the impairment of the memory of the defendant has been such as to seriously interfere with its preparation; that he has been unable, by reason of said impairment of memory, to furnish counsel with any recollection of many of the vital transactions covered by said indictment, which ought to be personally within his knowledge; that this impairment of memory is such that in the opinion of counsel, from personal contact with him, and examination of the offenses charged in said indictment, he is unable to properly answer said charges, and that the impairment of said memory has been manifest from day to day, in the preparation of said cause for trial, in the failure of the defendant to remember transactions from day to day; and such impairment of memory and mental and physical condition warrant counsel, in their judgment, in making this application to the court for the continuance of the cause. Wherefore counsel pray, in view of the mental and physical condition of the defendant, as above stated, this cause be continued; and they further state that this application is not made for the purpose of delay, or to defeat the administration of justice, but solely on account of the mental and physical condition of the defendant as aforesaid, all of which is respectfully submitted." This was sworn to by one of the counsel. In support of this, the affidavits of three physicians were filed, the most important of which was that of C. Kearns, M. D., which was as follows: "Dr. Chas. Kearns, being duly sworn, says that he is a physician in active practice in the city of Covington, Kentucky; that he is acquainted with the disease of epilepsy, its symptoms and its results; that he has been called to attend, professionally, Thomas B. Youtsey, on several occasions within the last year; that he knows the said Thomas B. Youtsey to be a confirmed epileptic; that he has examined him, to wit, on the 26th day of February, 1898, and finds that, as a result of his numerous attacks of epilepsy, his memory and judgment have become permanently impaired, that his memory is not reliable as to ordinary occurrences of the past, and that, in the judgment of this affiant, he is not in a condition to testify in behalf of himself as to business and other transactions in which he has been engaged. Affiant further says that, in the present condition of said Thomas B. Youtsey, the excitement and strain of a trial may possibly bring on an attack of epilepsy." The only journal entry touching this matter is in these words: "This cause coming on to be heard, came the defendant (R. W. Nelson, of counsel), and filed a motion for the continuance of this cause; said motion being supported by the affidavits of Dr. Chas. Kearns, Dr. F. A. Davis, and Dr. E. M. Keeney. Argument was heard upon said motion, and the court, being now advised, overruled same, to which ruling of the court, defendant by counsel, comes and excepts." The trial was then proceeded with, but was interrupted for several days by reason of an epileptic attack suffered by the prisoner pending the trial, which necessitated an adjournment. The defendant did not testify in his own behalf. The trial resulted in a verdict of guilty upon the first 25 counts, upon which the court pronounced a judgment. For charge to jury see 91 Fed. 864.

A. C. Cassatt and Thomas McDougall, for plaintiff in error.

Wm. M. Smith, for the United States.

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

LURTON, Circuit Judge, after making the foregoing statement of facts, delivered the opinion of the court.

The primal question which confronts the court arises upon the objection interposed by counsel for the plaintiff in error to a trial of the

accused on account of his then nonsane mind and memory. The application was nominally for continuance, and the record entry simply shows that a continuance was refused. "The action of a trial court upon an application for a continuance is purely a matter of discretion, and not subject to review by this court unless it be clearly shown that such discretion has been abused." Isaacs v. U. S., 159 U. S. 487, 16 Sup. Ct. 51. So far as this application and motion for a continuance were based upon the fact that the prisoner was a confirmed epileptic, and that his counsel and medical advisers apprehended that the excitement and strain of a prolonged trial might induce another epileptic attack, it was addressed to the enlightened humanity and sound discretion of the lower court. The application, in that aspect, did not show any present inability to attend the trial, and promised no hope that any future trial would be attended by any less risk to the health or life of the accused. Under such circumstances, it was no abuse of discretion to proceed with the trial. But the petition of the counsel involved much more than a mere continuance on account of the physical condition of the defendant. In substance and legal effect, it also presented an issue of present insanity as a bar to any trial while that condition continued, and prayed a continuance for that reason, also. The blending of such an issue in bar of a trial with an application for a continuance upon that and another ground should not prejudice the right of the accused to have that issue considered and disposed of in some form of trial known to the law. The statutes of the United States present no mode for the presentation and trial of an issue of present insanity, when presented in bar of an arraignment, trial, judgment, or execution, and we must look to the common law for guidance in practice. It is fundamental that an insane person can neither plead to an arraignment, be subjected to a trial, or, after trial, receive judgment, or, after judgment, undergo punishment. In 1 Hale, P. C. 34, 35, it is said:

"If a man in his sound memory commits a capital offense, and before his arraignment he becomes absolutely mad, he ought not by law to be arraigned during such frenzy, but be remitted to prison until that incapacity be removed. The reason is, because he cannot advisedly plead to the indictment. * * * And if such person of nonsane memory after his plea, and before his trial, become of nonsane memory, he shall not be tried; or, if, after his trial, he becomes of nonsane memory, he shall not receive judgment, or, if after judgment he becomes of nonsane memory, his execution shall be spared; for were he of sound memory, he might allege somewhat in stay of judgment or execution."

To the same effect are all the common-law authorities. 4 Bl. Comm. 24, 25; 2 Bish. Cr. Proc. § 666; Frith's Case, 22 How. St. Tr. 307; Rex v. Pritchard, 7 Car. & P. 303; Bonds v. State, Mart. & Y. 143; Crocker v. State, 60 Wis. 556, 19 N. W. 435; Taffe v. State, 23 Ark. 34; Freeman v. People, 4 Denio, 9; Underwood v. People, 32 Mich. 1; Nobles v. Georgia, 168 U. S. 398, 18 Sup. Ct. 87; Guagando v. State, 41 Tex. 626; State v. Reed, 41 La. Ann. 581, 7 South. 132.

While an insane man cannot even plead to an indictment, and counsel, having reason to suppose their client too insane to stand a trial, should interpose and make such objection before arraignment, yet it is not technically waived by failure to object before arraign-

ment, and the defense may be interposed after arraignment in bar of a trial. In 1 Hale, P. C. 35, it is said:

"In case a man in a frenzy happens by some oversight or by the means of the gaoler to plead to his indictment, and is put on his trial, and it appear that he is mad, the judge, in his discretion, may discharge the jury of him, and remit him to gaol, to be tried after the recovery of his understanding."

In re Kinlock, 18 How. St. Tr. 411; Green v. State, 88 Tenn. 634, 14 S. W. 489; Reg. v. Berry, 1 Q. B. Div. 447.

In the case last cited, a deaf mute was put on his trial. The trial court put two questions to the jury: First, whether they found the prisoner guilty on the indictment; secondly, whether, in their opinion, the prisoner was capable of understanding, and had understood, the nature of the proceedings. The verdict was, "Guilty," but that the defendant was not capable of understanding, "and, as a fact, has not understood, the nature of the proceedings." Judgment was reserved until a case could be submitted to the queen's bench division. There the conviction was quashed. Kelly, C. B., after referring to Rex v. Pritchard, 7 Car. & P. 305, said:

"Further, I believe it to have been the law from the earliest times that if it be found, at the trial of a prisoner, that he cannot understand the proceedings, the judge ought to discharge the jury and put an end to the trial, or order a verdict of not guilty. The jury here have found the prisoner incapable of understanding, and it needs no argument to show that under such circumstances he ought not to be convicted."

Lush, J., said:

"I am of the same opinion. If it appear at any time during the trial that the prisoner is of nonsane mind, the proper course is to stop the trial, and direct him to be detained during the queen's pleasure."

For even stronger reasons, if it appear after arraignment, and before trial, that the prisoner is probably not capable of making a rational defense, the proceedings should stop until the sanity of the prisoner is determined or restored. 2 Bish. Cr. Proc. § 666. Such an issue, when presented, goes to the fundamental right of the court to try the main issue, "Not guilty." If present insanity does not appear until the trial has begun, the court may submit the objection to the jury along with the principal issue, requiring a special verdict as to the competency of the defendant to understand the proceeding and intelligently defend himself. But, if the jury find insanity to exist, a verdict upon the issue of not guilty should be quashed. Reg. v. Berry, 1 Q. B. Div. 447; 2 Bish. Cr. Proc. § 666. It is not "due process of law" to subject an insane person to trial upon an indictment involving liberty or life. If the time when such an issue is presented be not vital, for a still stronger reason the mode in which the objection is urged is still less of the substance of the matter. In 1 Hawk. P. C. p. 3, in the notes, it is said:

"Every person of the age of discretion is presumed of sane memory, until the contrary appears, which may be, either by the inspection of the court, by evidence given to the jury who are charged to try the indictment, or, being a collateral issue, the fact may be pleaded and replied to ore tenus, and a venire awarded, returnable instanter, in the nature of an inquest of office. And this method, in cases of importance, doubt, or difficulty, the court will, in prudence and discretion, adopt."

In 2 Bish. Cr. Proc. § 666, it is stated that:

"An insane man cannot even plead to an indictment. Therefore, if, at the arraignment, counsel have reason to suppose their client too insane to take his trial, they should then make the objection, which, it is believed, can be adequately done orally to the court. Or the objection may proceed from a third person on affidavit, or the court may take it on its own observations."

Here the matter was purely collateral, and the objection might well be taken in the form of a sworn application and motion for a continuance upon that ground. This sworn petition of counsel stated, among other things, that the accused was a "confirmed epileptic," and that he had suffered a severe attack of epilepsy since the last continuance. As to the effect of this disease, it was stated:

"That in the preparation of this cause for trial the impairment of the memory of the defendant has been such as to seriously interfere with its preparation; that he has been unable, by reason of said impairment of memory, to furnish counsel with any recollection of many of the vital transactions covered by said indictment which ought to be personally within his knowledge; that this impairment of memory is such that, in the opinion of counsel, from personal contact with him, and examination of the offenses charged in said indictment, he is unable to properly answer said charges; and that the impairment of said memory has been manifest from day to day in the preparation of said cause for trial, in the failure of the defendant to remember transactions from day to day, and such impairment of memory and mental and physical condition warrant counsel, in their judgment, in making this application to the court for the continuance of the cause."

To add to the prima facie case, the affidavits of three physicians were presented, all of whom state that the plaintiff in error is a confirmed epileptic, and that the effect of the disease is to weaken the mind and memory. Dr. Charles Kearns averred that:

"As a result of his numerous attacks of epilepsy, his memory and judgment have become permanently impaired; that his memory is not reliable as to ordinary occurrences of the past; and that, in the judgment of this affiant, he is not in a condition to testify in behalf of himself as to business and other transactions in which he has been engaged."

In further support of the application for a continuance, the petition invoked an investigation, and expressed the desire of counsel—

"To submit the mental and physical condition of the defendant to this court for such examination by competent physicians and otherwise as the court may deem best to make, in order to determine whether the defendant should be subjected to a trial of this cause at this term."

The prima facie showing made by the affidavit of counsel and physicians was that the defendant's mind and memory, as a consequence of epileptic attacks, had become so impaired as that he was unable to advise his counsel as to his defense, or recall transactions which ought to have been within his knowledge, and could not "remember transactions from day to day," and that he was unable, in consequence of his impaired mind and memory, to testify for himself. This prima facie showing was made by persons of weight and respectability, and upon that showing the court was asked to make such examination and inquiry as would further tend to throw light upon the question of the fitness of the defendant to be put on his trial at that term of the court.

The bill of exceptions fails to show that any trial by jury was demanded. As before observed, there is no congressional legislation, such as exists in many, if not all, of the states, regulating the mode of trial of such an issue when presented either as a bar to arraignment, trial, judgment, or execution. The disposition of an accused person found to be insane by the court in which he is indicted is provided for by section 4851, Rev. St., which is as follows:

"If any person, charged with a crime, be found in any court, before which he is charged, to be an insane person, such court shall certify the same to the secretary of the interior, who may order such person to be confined in the hospital for the insane."

And section 4855 provides for the return of one who has been insane, when recovered, for trial.

In 1 Hale, P. C. 35, it is said, touching the manner of proceeding when present insanity is objected:

"But because there may be great fraud in this matter, yet, if the crime be notorious, as treason or murder, the judge, before such respite of trial or judgment, may do well to impanel a jury to inquire ex officio touching such insanity, and whether it be real or counterfeit."

In Frith's Case, 22 How. St. Tr. 307, the court, upon the objection being urged when Frith was about to be arraigned, directed a special jury to be impaneled to try the question of the fitness of the accused to be tried. The same practice was followed in Rex v. Pritchard and Rex v. Dyson, 7 Car. & P. 303–305. But the defendant had no absolute right to a trial by jury of such a preliminary question. The most that can be inferred from the common-law authorities is that the judge may, if he have doubts, call to his assistance the aid of a jury, and submit the matter to them, and that this has been the usual practice. The mode of trial is one which addresses itself to the sound discretion of the court when the objection is made after verdict and sentence. Bonds v. State, Mart. & Y. 143; Nobles v. Georgia, 168 U. S. 398–409, 18 Sup. Ct. 87. We see no reason or authority for a different rule when the objection is made in bar of a trial. In 2 Bish. Cr. Proc. § 666, it is said:

"This question of present insanity is properly, and in practice is generally, submitted to a jury, which may be one of the regular juries attending on the court, or one specially impaneled for the purpose. But this course is not imperative. The court has the discretion, on its own inspection of the prisoner's mental condition, and without the aid of a jury's finding, to decline the trial on the main issue, or direct the question to be tried with the plea of not guilty."

The American authorities support this view. Webber v. Com., 119 Pa. St. 223, 13 Atl. 427; Crocker v. State, 60 Wis. 553, 19 N. W. 435; Freeman v. People, 4 Denio, 9; Jones v. State, 13 Ala. 153; People v. McElvaine, 125 N. Y. 596, 26 N. E. 929; State v. Arnold, 12 Iowa, 479–483; State v. Reed, 41 La. Ann. 581, 7 South. 132. The issue to be tried, when the objection is urged as a bar to a trial, is whether the accused can make a rational defense. 2 Bish. Cr. Proc. § 666; Guagando v. State, 41 Tex. 627; Rex v. Frith, 22 How. St. Tr. 307; Reg. v. Berry, 1 Q. B. Div. 447–450; Rex v. Pritchard, 7 Car. & P. 303.

Having the right to exercise its discretion as to the mode in which

the court should investigate the mental capacity of the accused to understand the proceedings against him, and rationally advise with his counsel as to his defense, we are confronted with the question as to whether the court in any way investigated and decided the issue thus tendered by the counsel for the accused. Undoubtedly the court was bound to entertain the objection and dispose of it in some way. State v. Reed, 41 La. Ann. 581, 7 South. 132. It is suggested that the court did so by personal inspection, and in that way satisfied itself of the competency of the accused to rationally conduct his defense. Unless a basis for the confinement of the accused under section 4851, Rev. St., is sought, it may be conceded that it was competent, where the objection is urged only in bar of a present trial, for the court to determine such an objection by inspection and other private investigation, as we are asked to here infer was had. Such a practice finds some sanction under statutes which make it the duty of the court to submit the issue of present insanity to a jury or to a commission when a defendant under indictment "appears to be, at any time before or after conviction, insane," etc., as is provided by section 658, Code Cr. Proc. N. Y., or under the Iowa statute prescribing trial by jury of such an issue "when a reasonable doubt arises," etc. In People v. McElvaine, 125 N. Y. 596, 26 N. E. 929, counsel for McElvaine, after pleading "Not guilty," tendered an oral plea to the effect that the prisoner was insane, and not a fit subject for trial, and requested the court to appoint a commission under the statute to examine and report on the issue. This was denied by the court upon the ground that there was nothing in the case "from which it appeared that the defendant was then insane." McElvaine was put on his trial and convicted. One of the defenses was insanity at the time of the commission of the offense. The New York court of appeals held there was no error in denying the appointment of a statutory commission, as the statute vested in the judge "a discretion to appoint a commission, or not, as in the exercise of his judgment he may deem it proper or necessary to do so." "It is," said the court, "only when the necessity is sufficiently made to appear to the court in which the indictment is pending, that it is bound to order an examination; but it would be the plain duty of a court, when the subject is brought to its attention by responsible parties, to itself make a sufficient inspection and examination to determine whether the application is made in good faith and upon plausible grounds, and the apparent facts thus discovered are made the condition of the right of the court to institute a statutory inquisition. Such an examination, we infer, the court made in this case." The grounds upon which this inference was drawn were found, not only in the terms of the order denying the application, but upon certain other indubitable evidence appearing on the record. Thus the court proceeds:

"It had previously tried the defendant for the same crime, and had heard the evidence adduced by the defendant to support the plea of insanity. It was familiar with the appearance and conduct of the prisoner during the period of that trial, and had sufficient grounds before it to judge as to the probability of his present sanity. It thus had the prisoner before it, and witnessed his actions and manner, and had access to the information acquired by the officers of the court through their daily contact and communication with the defend-

ant during the time of the imprisonment; and it is hardly possible that the defendant could have manifested symptoms of his insanity which would not have been discovered by, or be communicated, to the court. *There was no pretense that there had been any change* in his mental condition since the previous trial, *and no proof of any insanity whatever was given to support the demand for an inquisition.*" (The Italics are ours.)

To the same effect is the case of State v. Arnold, 12 Iowa, 479.

The case of Webber v. Com., 119 Pa. St. 223, 13 Atl. 427, has been much relied upon by counsel for the government as sustaining their contention that this court should infer, on this record, that the trial court disposed of the issue of present insanity by inspection and on information derived from other sources satisfactory to itself. In Webber's Case, his counsel filed what the report describes as "a formal suggestion" of the present insanity of the defendant, and asked that a jury be impaneled to try whether such fact be true or not, so that the court might take action under a statute of the state providing for the confinement of insane persons under indictment. This suggestion was objected to by the counsel for the state, and defendant offered to support same by affidavits and witnesses. The court declined to hear the evidence, denied the motion, and put the prisoner on his trial; one of his defenses being insanity at the time of the commission of the offense. But here the analogy between that cause and the one before us ends. It appeared on the record that the trial judge did hear, consider, and determine the issue, though he declined to hear the evidence offered in support thereof, and denied a special jury to hear the question. The trial judge inserted in the record his reasons for his action; saying, among other things, that:

"Nearly two hours was consumed in the argument and consideration of the motion, during which time I had the opportunity of observing the appearance and conduct of the prisoner, and the attention he gave to the proceedings. I had also the benefit of the information of the physician of the prison and others to assist me in coming to that sound judgment which it was my duty to exercise. Giving the matter the due consideration to which it was entitled, I came to the conclusion that the prisoner knew where he was, what he was here for, and what was being done."

In addition to this trial by inspection and otherwise, the judge added that:

"In order to protect the prisoner from any evil consequences in case my judgment should turn out to be erroneous, I told the jury, with emphasis, that, if they thought the prisoner is a lunatic at this time, they should add that finding to their verdict, in case they should convict him; and I went further in favor of the prisoner, and told the jury that they might give him the benefit of any doubt on that subject, although the strict rule of law is otherwise."

The supreme court of Pennsylvania, upon a consideration of the whole facts and law, held that the right of the accused to a preliminary trial by jury of the question of present insanity, in bar of a trial upon the merits of an indictment, was not an absolute one. As to the practice, the court said:

"The question principally discussed in this case is a novel one. It does not appear to have ever been determined or even presented to this court before. Briefly stated, it is this: Whether a defendant in a criminal case, who alleges his insanity at the time of arraignment, is entitled, as a matter of legal right, to have a separate, independent, and preliminary trial of that question by a

jury specially impaneled for the purpose. It is certainly the fact that the sixty-sixth and sixty-seventh sections of our Criminal Code of 1860 are substantially—almost literally—taken from the English statute of 39 & 40 Geo. III. c. 94, and that under that statute the English criminal courts do, not infrequently, award preliminary issues to determine the sanity of prisoners by the verdict of a jury. The same is true of the practice in several of our sister states. We have examined with much care the various authorities cited in the very able and exhaustive argument of the learned counsel for the plaintiff in error, and we find that in all of them the inquest was directed generally by the court of its own motion, sometimes at the instance of the attorney general, but always in cases where the appearance and the actions or the prisoner were such as to manifestly indicate a condition of insanity, either real or simulated. In point of fact, the purpose of the inquiry was to inform the conscience of the court as to the prisoner's real condition at the time of the trial, but before the trial proceeded. There was an obvious propriety in directing an inquiry by the verdict of a jury in all such cases, because the fact itself required determination before any further proceedings were had, if there was probable ground for belief that a condition of insanity existed. If, upon an examination of the prisoner, there was no apparent reason to suppose him insane, but, on the contrary, he seemed quite capable of pleading to the indictment, there was no necessity for a preliminary trial, because every right to set up insanity, either when the offense is committed, or at the time of the trial, still remained, and could be thoroughly tried by the jury who were to try the indictment. The existence of the doubt as to the prisoner's present insanity is a matter which, by the very necessity of the case, could only be determined by the court itself. Up to the time of pleading, there is no other tribunal which has the prisoner in charge, and there is no other which can say whether there is a doubt upon that subject. It is one of the functions which must be intrusted to the court, and it is not to be presumed that it will in any case be abused. If it should be, there is still the remedy available in all cases where abuse of discretion has taken place."

Having had the question tried and considered by the trial judge in the manner stated, and then by the jury along with the principal issue, the supreme court held that there had been no abuse of the discretion of the court in refusing a preliminary inquiry, and that there was no reason for reversing the cause for such a preliminary trial. The contrast between the proceedings in that case and those in the court below is quite striking. The fact that the trial court gave consideration to the issue of present insanity, and determined it by personal inspection, aided by the counsel, opinion, and advice of the jail physician "and others," and that it also submitted to the jury the question of the present sanity of the accused, appeared affirmatively upon the record in the Webber appeal. The record before us is silent as to how the court satisfied itself of the sanity of the accused, in the face of the showing made by the petition and accompanying affidavits, or whether the objection was entertained and decided in any way. The issue presented by the petition and motion thereon for a continuance involved the substantial rights of the accused. If the petition truthfully described the then condition of the mind and memory of the plaintiff in error, grave doubt must arise as to whether he was a fit subject for trial.

Assuming, as we shall, that no duty rested upon the court to impanel a jury to inquire whether the accused was in truth incapable of understanding the proceedings, and intelligently advising with his counsel as to his defense, and that it was optional with the court to call a jury, or to resort to any other special mode of aiding his

judgment, it was nevertheless his duty to consider and determine the matter judicially; and the record should show affirmatively that upon this issue there has been the exercise of judicial judgment and discretion. Whatever the court's judicial discretion as to the mode of hearing and deciding, we entertain no doubt but that it was error to refuse altogether to entertain the objection; and this, we think, is the only justifiable inference which can legitimately be drawn from the order denying a continuance, the record being otherwise silent as to the disposition of this question. When a matter rests in the absolute discretion of the court, as the granting or refusing of a new trial, and the court excludes, improperly, evidence admissible upon the question, as in Mattox v. U. S., 146 U. S. 140, 13 Sup. Ct. 50, or refuses to exercise its discretion, upon the erroneous opinion that it has no power to grant a new trial, as in Felton v. Spiro, 47 U. S. App. 402–411, 24 C. C. A. 321, 78 Fed. 576, the action is reviewable. This principle is applicable here. However wide the discretion of a trial court in respect to the mode of disposing of such an issue as that now involved, if the court has refused altogether to consider, hear, and determine in any way an issue of present insanity, when properly presented as a bar to a trial, there has been no exercise of discretion, and the action of the court is subject to review.

We are the more content to regard the action of the court erroneous, for the reason that upon the issue of not guilty much evidence was heard as to the mental state of the plaintiff in error at the time of the commission of the offense charged in the indictment. The dates of such offenses were between the latter part of 1894 and latter part of 1895. The trial occurred in March, 1898. As throwing light upon his condition at those dates, evidence was received as to his condition down to time of trial, but the jury were instructed that the material fact was his mental state at the dates of the offenses, and that evidence as to his mind and memory after those dates was important only as throwing a backward light upon his condition when he committed the offenses charged. Epilepsy is a progressive disease, and its effect upon the mind and memory is progressive. There was evidence strongly tending to show that the memory and mind of accused shortly before and during the trial were impaired, and rendering it doubtful whether the accused was capable of appreciating his situation, and of intelligently advising his counsel as to his defense, if any he had. This evidence indicated that the disease had progressed, and with it the impairment of mind and memory. We think the learned trial judge should have adopted some method of satisfying himself that the accused was able to rationally defend himself, before putting him on trial under the plea of not guilty. For this error we are constrained to reverse the case, with directions that a new trial be awarded, and that before such trial some mode, in the discretion of the court, be adopted for a thorough investigation of the sanity of the accused.

Inasmuch as we must logically regard the trial upon the merits as unauthorized, we refrain from passing upon any of the errors assigned which relate to the trial. If the accused was insane, he

should not be prejudiced by any rulings upon questions arising upon such a trial, by either the action of the trial court, or of this as a court of review. Reverse and remand for further proceedings.

BAKER v. SANDERS.

(Circuit Court, E. D. Pennsylvania. November 16, 1899.)

No. 16.

TRADE-NAMES—SUIT FOR INFRINGEMENT—PRELIMINARY INJUNCTION.

Where a decree has been entered by a circuit court in one circuit enjoining unfair competition by the use of labels similar to complainant's, a preliminary injunction to the same effect will be granted by a circuit court of another circuit in a suit by the same complainant against a different defendant, who is handling the same goods, but the nature of whose relations to the defendant in the former suit do not sufficiently appear to show whether he is bound by the decree therein.

This is a suit in equity to enjoin unfair competition in trade. On motion for preliminary injunction.

O. P. Bright and Walton Pennewill, for complainant.
J. G. Johnson, for respondent.

McPHERSON, District Judge. If the defendant is merely the agent of William H. Baker, of Syracuse, N. Y., the complainant's rights could be fully protected by asking Judge Coxe of the circuit court of the United States for the Northern district of New York to enforce the decree entered on October 10th, but, as the true character of the relation between William H. Baker and the defendant may admit of doubt, since the defendant may be a partner, and not merely the agent, of Baker, and therefore may not be embraced within the terms of the decree, I think a similar order should be made in the case now before the court. It is therefore ordered, adjudged, and decreed that the defendant, James Elwood Sanders, his servants, agents, employés, and clerks, be restrained from using the words "W. H. Baker" or "Wm. H. Baker is distinct from the old Chocolate Manufactory of Walter Baker & Company" in the business of making and selling chocolate and cocoa preparations, on labels, wrappers, boxes, cans, cakes, molds, signs, letter and bill heads, advertisements, or in any other manner whatsoever; and be further restrained and enjoined from using the name of "W. H. Baker" or "Wm. H. Baker" in connection with said business, on labels, wrappers, boxes, cans, cakes, molds, signs, letter and bill heads, advertisements, or in any other manner whatsoever.

But this injunction shall not operate to restrain and enjoin the defendant, his servants, agents, employés, and clerks, from using the name of "William H. Baker" in connection with said business on labels, etc., when the name is printed or written with the Christian name in full, and with the initials "W. H. B." in larger type than the other letters, thus, "William H. Baker," and in connection with the name "Syracuse," which shall be printed or written in each instance substantially the same as the name "William H.

Baker," with the letters of the entire name "Syracuse" as large as the said initials, or with the S as large as the initials of the name, and the balance of the letters in the word "Syracuse" in the same size as the smaller letters in the name "William H. Baker."

RAHTJEN'S AMERICAN COMPOSITION CO. v. HOLZAPFEL'S COMPOSITIONS CO.

(Circuit Court, S. D. New York. November 22, 1899.)

1. DEPOSITION—WAIVER OF OBJECTION.
   A deposition will not be suppressed for refusal of the witness to answer cross interrogatories, where no objection was made until too late to have the fault corrected.
2. TRADE-NAMES—UNFAIR COMPETITION.
   "Rahtjen's Composition" having become a well-known article of commerce by that name through the expired English patent and the operations thereunder, so that the name has become descriptive of the article, rather than indicative of its origin, it is not actionable for another manufacturer to make a bid under specifications calling for the article by that name.

This was a suit in equity for unfair competition in trade. On final hearing.

Thomas B. Kerr and Timothy D. Merwin, for plaintiff.
William McAdoo, P. F. B. Sands, and R. B. McMaster, for defendant.

WHEELER, District Judge. A motion to suppress a deposition for refusal of the witness to answer certain cross interrogatories has been brought into the hearing. The refusal might have been corrected if the proceeding against it had been brought on while an opportunity to correct it could be afforded. Not having been so treated, the refusal would seem to be waived. The motion is therefore denied.

"Rahtjen's Composition" appears to have become a valuable article of commerce, well known by that name throughout the maritime world, through Rahtjen's expired English patent and his operations under it, so that his name, in connection with trade in that product, is descriptive of it, and not an indication of its origin as from him or under his right. The article advertised for by the government, in calling for the bids, which are claimed to be an infringement or unfair in competition, was this product, however produced, and not the product produced by or under him. To bid for furnishing such a well-known article, by whatever name known, that would describe it, would not seem to be actionable, according to any established principles of law. Let a decree be entered dismissing the bill.

WELSBACH LIGHT CO. v. DAYLIGHT INCANDESCENT GAS-LAMP CO. et al.

(Circuit Court, S. D. New York. November 21, 1899.)

PATENTS—SUIT FOR INFRINGEMENT—VIOLATION OF INJUNCTION.

A corporation defendant, which, after the issuance of a restraining order in a suit for infringement, indirectly caused others to manufacture the infringing articles, and stamp them with its trade-mark, which were delivered to it, and which it sold, although it gave no formal orders therefor, is guilty of contempt.

On Motion to Punish for Contempt for Violation of Restraining Order.

John R. Bennett, for the motion.

Eugene Cohen and Julius Levy, opposed.

LACOMBE, Circuit Judge. A careful perusal and analysis of the defendant's affidavits, taken in connection with the undisputed evidence presented by complainant, has entirely satisfied me that defendant has caused infringing mantles to be manufactured since the issuing and since the modification of the restraining order. It may be that no formal written or oral order was given, but its continued dealing in mantles stamped with its trade-mark—a dealing which its officers evidently took occasion to make known in the proper quarters—seems to have induced other parties, who otherwise would not have done so, to stamp mantles with the name "Daylight," coat them in infringement of the patent, and turn them over to defendant, which apparently sold them to every chance bidder. There has been a shifty effort at evasion of the court's order; but as the officers of the company acted, as they say, under advice of counsel, they will not be punished by personal imprisonment. The defendant corporation is fined $500,—one-half to the complainant, one-half to the United States. The careful re-examination of the whole subject necessary for the decision of this motion has satisfied the court that the complainant is entitled to a broader injunction than that already issued. It may therefore move in the several suits in which injunctions have already been issued, upon four days' notice, for a modification of each injunction so as to prohibit the sale of any mantles coated in infringement of the patent, except such as shall be shown to have been coated, and infringement thus committed, prior to the date of service of the order enjoining such sale.

STREATOR CATHEDRAL GLASS CO. et al. v. WIRE-GLASS CO. et al.

(Circuit Court of Appeals, Seventh Circuit. November 8, 1899.)

1. PATENTS—ANTICIPATION—WIRE-GLASS.

The Shuman patents, No. 423,021, for a process for making wire-glass, or glass plates having embedded therein wire or wire-gauze, and No. 473,020, for a machine for carrying out such process, while not for pioneer inventions, the idea of making wire-glass having been known in the prior art, and notably disclosed in the English patent to Armstrong, were not anticipated by such patent, as the process of manufacture by the machine

therein described was not only different, but the machine was not successful in operation, and such glass was not known commercially until made by the Shuman process and machine. Such patents also *held* infringed by machines made in accordance with the Ryon patent, No. 521,570.

2. SAME—GROUNDS FOR SUSTAINING—SUCCESS OF THING PATENTED.

When the question of invention is doubtful, the presumption of validity arising from the granting of a patent, as well as the practical success of the thing patented, should be given due weight and consideration.

Woods, Circuit Judge, dissenting.

Appeal from the Circuit Court of the United States for the Northern District of Illinois.

This was a bill in equity instituted by the Wire-Glass Company, and the American Glass-Manufacturing Company, as assignee and licensee, respectively, of two patents granted to one Frank Shuman in 1892,—one for a process of making wire-glass, and the other for a machine for embedding wire-netting in glass,—against the Streator Cathedral Glass Company and others, for the infringement of these patents. Both patents were granted September 20, 1892.

In his mechanical patent, No. 483,020, the patentee describes the object of his invention as being "to construct a machine for rolling what I term 'wire-glass'; that is, sheet glass having embedded in it wire or wire-gauze."

In his specification he says: "My invention is especially useful in making glass for skylights of buildings such as railroad depots, conservatories, etc., or it may be used (the wire being preferably thicker) for vault lights, pavements, floors, etc., the thickness of glass depending upon the use to which it is put."

His machine consists of a long table mounted on a furnace, and heated thereby, upon which the molten glass is rolled. The molten glass is poured upon this table, and is then pressed to the requisite thickness by a carriage having three rollers, the front one of which smooths out the molten glass after it is poured out upon the table, and prepares it for the reception of the wire-gauze, which is introduced immediately behind the front roller, and is pressed into the molten glass by the second roller. This is corrugated so as to press the wire-gauze into the molten glass at uneven depths, after which the third roller passes over the glass and covers up the openings made by the rib roller and wire, thus completing the rolling of the glass. The finished glass is then removed, with its plate, and placed in an annealing furnace.

The first two claims—the only ones alleged to be infringed—are as follows:

"(1) The combination, in a machine for manufacturing wire-glass, of the table upon which the molten glass is poured, a roller for smoothing out said molten glass, a carrier for the wire or wire-gauze, situated back of the smoothing roller, and a finishing roller for closing up openings in the glass made by the wire or wire-gauze, substantially as described.

"(2) The combination of the bed for the glass, the carriage, the first smoothing roller, a ribbed roller, and a finishing roller for smoothing the glass after the ribbed roller has passed over it, with a chute or guide for the wire, situated between the first roller and the ribbed roller, substantially as specified."

In his process patent, No. 423,021, he repeats substantially his method of introducing the wire into the molten glass, and claims as his invention:

"(1) The process herein described of making wire-glass, said process consisting in—First, preparing a sheet of molten glass; second, mounting thereon wire or wire-gauze; third, pressing said wire or wire-gauze into the glass; and, finally, closing the openings made by the wire, substantially as described.

"(2) The process herein described of making wire-glass, said process consisting in—First, rolling the glass into a sheet; second, placing upon the glass the wire or wire-gauze, impressing portions of the wire-gauze deeply into the glass, thus corrugating the same; and, finally, rolling the glass and embedding the wire therein, substantially as described."

The defense was: First, that his process was not patentable; and, second, that it was practically described before by Armstrong, an English inventor, in his specification of a patent for a machine for making wire glass, which was filed in the United States patent office in 1887, and that it had also been

substantially anticipated by several others. The defendants also insisted that their machine was not an infringement of the Shuman patent, in that, while they used rollers for smoothing out the glass, and smoothing it again after the introduction of the wire-gauze, they employed the common and ordinary devices long and well known by plate-glass makers; and, while they admit their use of a device for embedding the wire after it has been smoothed by a roller, this device, though serving the same purpose as the corrugated roller in the Shuman machine, not only does this work more effectively, but operates according to a different principle. This device is an axle of independently revolving disks separated by washers, not only obviating the difficulty of pushing the glass ahead and thinning the layer on which the wire has been fed, but actually inserting the wire in the glass.

The circuit court entered a decree in favor of the plaintiffs upon both patents, with the usual injunction, whereupon defendants appealed to this court.

S. P. McConnell and H. N. Ryon, for appellants.

Charles Howson and Lysander Hill, for appellee.

Before BROWN, Circuit Justice, and WOODS and JENKINS, Circuit Judges.

BROWN, Circuit Justice (after stating the facts as above). 1. The object of this invention, as outlined in the specification, was to provide a practical method of introducing wire-netting into glass used for translucent roofing, such as skylights, court yards, conservatories, etc., as well as for vaults, pavements, and floor lights, or any similar places where strength is required, or where the sash is in such position that, if the glass should break, it would be liable to injure persons beneath it. "For instance," as stated in the specification, "if the glass is used in skylights in railway depots or train sheds, the wire embedded in the glass would prevent particles of glass from falling if it should crack, and at the same time the glass protects the wire netting from the action of gases, which corrode the wire."

Defendants attack the novelty of this invention, and introduce in support of their defense several patents, none of which require special mention except the English patent of April 19, 1887, to John Armstrong. The apparatus described by Armstrong consists of a long table, such as is commonly used for rolling glass, with a large roller, B, and a small roller, in front of which the wire-gauze is delivered from a spindle standing above the rollers. One end of the wire-gauze is rigidly attached to one end of the table, and as the carriage travels along the table the gauze is delivered in front of the small roller, which travels along the table, and presses the wire-work against the incandescent glass, and partly enters it, the hot glass coming through the meshes to the upper side. The glass with the wire partly inserted is thus drawn under the large roller by the motion of the carriage along the table, thereby pressing the glass out to its requisite thickness.

The testimony upon the subject of this patent is somewhat unsatisfactory. Though Shuman went to Europe in 1894, and visited the large plate-glass factories in England, Belgium, France, and Germany for the purpose of obtaining all the information he could regarding the state of the art of making wire-glass, he found none for sale anywhere, although every one of the glass works men-

tioned by him had made experiments towards making wire-glass for some years back. They were entirely unsuccessful in a commercial sense, however, and "I had no difficulty in disposing of my European wire-glass patents there." He does not appear, however, to have made inquiries for Armstrong, the patentee, though his address is given upon the face of his patent in a well-known street in London. Such expert testimony as there is upon the subject indicates that the Armstrong invention is not a practical one, and the fact that no wire-glass made by this machine was found upon the market, and that the patent was allowed by the patentee to expire in 1891 (when only four years old), through nonpayment of a renewal fee, required by British law, are cogent evidence that the patent was found to be inoperative or valueless.

Beyond this, there is a manifest difference in the mechanism of the two devices. In the Armstrong patent, one end of the sheet of wire-netting is fastened to the end of the table, the other end being wound around a spool suspended perpendicularly above the table. The progress of the roller from one end of the table to the other unwinds the spool, and delivers the netting in front of a smaller and secondary roller, against which the molten glass is banked up, without any effort to smooth the glass before the wire is delivered. It can scarcely be a matter of surprise that the wire-netting so delivered becomes so hot that it is unable to withstand the tension. Shuman, who experimented with it, states in this connection that he failed to produce a merchantable wire-glass of any kind with this machine. In operating the machine in the manner described in the specification:

"We found that the wire was made very hot by its contact with the molten glass, and could not stand the pull of the machine. It distorted, drew out into a thread, and in most cases broke. In the few cases where the wire was embedded in the glass it would be either on one side of the sheet or the other, and from the fact of being pulled in its white hot and weak condition the major portion of the sheet of the glass rolled had no wire in it at all. We rolled about thirty sheets, but failed to produce wire-glass."

Another witness—an expert—testifies to practically the same effect, and gave it as his opinion that the machine was utterly impracticable. There was no testimony to contradict this.

In the Shuman device a roller is employed to smooth the molten glass before it receives the wire, which is delivered from a chute immediately behind the first roller. The machine thus contains three rollers, the office of the first being to lay the glass of an even thickness; that of the second, which is preferably corrugated, to press the wire beneath the surface of the glass at greater or less depths according to the corrugations; and that of the third to close up the openings made by the ribbed roller and wire, and to leave the glass with a smooth upper surface. As the wire is dropped by the chute it is subject to no tension, and may be heated to a high temperature before delivery without the danger of the breaking or twisting encountered in the practical operation of the Armstrong patent.

In a copy of the Armstrong patent, certified by the commissioner of patents March 24, 1897, and introduced by the defendants, there

is a memorandum upon the drawings to the effect that the roller may have ribs to cut the glass through, or the table may be ribbed; but in a corrected copy, introduced by plaintiffs, and certified by the commissioner of patents January 17, 1898, and also by the English comptroller general of patents, no such memorandum appears. But, even if it did, it must be taken in connection with the specification, which states that "the large roller may be ribbed with large divisions to cut the glass nearly through if found necessary to make the sheets of smaller size by its action against the table; or the table may have ribs instead, for the same purpose." This was obviously something entirely different from the corrugations upon Shuman's second roller, which were designed not to cut the glass into divisions, but to press the wire-gauze to a greater or less depth beneath the surface.

While the Shuman patent may be an infringement upon that of Armstrong, we think the introduction of the third roller for the purpose of smoothing the glass to a uniform thickness before the wire is delivered, and the improvement in embedding the wire-netting in the molten glass by a corrugated roller, are such an advance upon the Armstrong device as to entitle Shuman to his patent. We acquiesce the more readily in this conclusion from the fact that his device met with an immediate success, and appears to have supplanted entirely the previously known methods of manufacturing wire-glass. This fact, though by no means decisive of novelty, may properly be considered. The Shuman patent was evidently the first practicable method of making wire-glass, and appears to have attracted a good deal of attention in this and other countries, and various medals were awarded to the inventor. Indeed, Ryon himself, the patentee of defendants' machine, visited complainants' manufactory in the spring of 1894, and endeavored to secure the right to use the Shuman machine.

Patent No. 521,570, granted December 25, 1894, to Francis M. Ryon, under which defendants are manufacturing, exhibits the same features of a roller for smoothing the glass, a corrugated roller for the introduction of the wire-netting into the molten glass, and a similar and almost identical method of unwinding the netting from a spool, and allowing it to fall immediately in front of the corrugated roller. The guiding and feeding device for delivering the wire is practically the same. The structural difference on which appellants appear to lay most stress is that between the ribbed roll of complainants' patent and what appellants call the "axle of disks" of their machine. The differences are, in brief, that defendants' axle of disks is not a solid ribbed roll, in which the ribs are integral with the roll, but consists of rotating disks strung on a stationary axle; and, second, that these disks are thinner than the ribs shown in complainants' drawings, and the spaces between said disks are wider than the spaces between the ribs as shown by complainants' drawings. But in point of fact both devices act with a rolling pressure upon the glass, and the wire-netting to be embedded therein, with the result of embedding the netting, and in doing so of forming longitudinal ribs and furrows in the glass.

While this patent, too, is probably an infringement upon Armstrong's, it manifestly contains the improvements which Shuman adopted for the more perfect working out of the Armstrong idea, and, we think, must be held an infringement. It is manifest on the face of the patent that the specification was prepared by one perfectly familiar with the Shuman invention, and that there is a studied effort throughout the patent to differentiate the alleged invention thereof from his.

2. But little need be said regarding the process patent, the claims of which are, as stated above, for a process consisting—First, of rolling the glass into a sheet; second, mounting thereon the wire or wire-gauze by means of the corrugated roller; and, finally, rolling the glass, and thus closing the openings made by the wire. Plaintiffs' experts describe the process as consisting essentially in preparing a smooth, homogeneous plate of glass upon a suitable hard and level surface. Upon this sheet of glass, while still in a hot and plastic condition, is placed wire gauze or netting, or simply wire. This wire or wire-netting is then pressed down into the glass, while it is still hot and plastic, by some suitable means. Finally, the openings left by the wire as it goes down into the glass are closed up, and their sides are welded together, and the surface of the plate is smoothed over by some means adapted to the purpose. This process may obviously be carried out by the mechanism described in the first patent, but other machines may be devised for the same purpose.

As it involves not merely the function of a mechanical device, but certain elemental action, we think it the proper subject of a process patent. It is, in fact, a series of acts performed with molten glass and wire-gauze, by which they are transformed into a separate manufacture, within the definition of a process patent in Cochrane v. Deener, 94 U. S. 780, 24 L. Ed. 514.

Prior to the Armstrong patent, the only method practiced for manufacturing wire-glass is disclosed in certain English patents, notably that granted to Lake in 1886, by which a layer of molten glass of half the thickness which the finished plate is to have is spread upon a table. Upon this layer is placed a network of iron wires, or the like, previously polished, the thickness of which wires varies according to circumstances. This network is then covered with a fresh layer of glass, over which the roller is passed. The finished product is thus formed of two distinct layers of molten glass with a network of wire between them. The difficulty seems to be that these two layers may weld or they may not, and in either case the glass which covers the wire-gauze on one side is not of the same original or continuous mass which covers it on the other. Other English patents to Newton, 1855, to Hyatt, 1871, and to Sievert, 1891, disclose certain modifications of this process; but all contain the underlying feature of two layers of molten glass with a sheet of wire-gauze sandwiched between them. They obviously differ from the process described by Shuman, and do not seem to have been put in practice, or to have met with success.

The Armstrong patent is the only one seriously insisted upon as

an anticipation of the Shuman process. If this be an anticipation, it is sufficient to defeat the Shuman patent. If not an anticipation, the others are not. It differs from the Shuman patent, as does the mechanical patent, chiefly in the fact of the omission of the first element of the two claims of the Shuman patent, namely, the preliminary preparation of the sheet of molten glass by the introduction of the third roller. In the Armstrong patent a mass of molten glass is dumped in a heap in front of the small roller, and, as the main roller is advanced, the small roller, having a mass of molten glass in front of it and beneath the taut wire-cloth, forces upward a bank of the glass against the wire-cloth and bulges the glass through the meshes of the cloth. All that the Armstrong patent says of the action of this small roller is that it presses the wire-work against the incandescent glass, and partly enters it, the hot glass coming through the meshes to the upper side. As this small roller does not form a sheet of glass, it cannot, even if corrugated, determine the depth to which the wire-net will be embedded in the plate. It cannot force the wire-cloth to a definite depth measured from the table, because as it advances it is gradually lowered, and its own distance from the table is constantly varying. In fact, it lacks the essential feature of the Shuman patent, of a preliminary roller smoothing out the molten glass so as to form a plate of uniform thickness in which the wire-netting is firmly embedded by the corrugated roller. It is difficult to see how, under the Armstrong process, the wire-netting can be thoroughly embedded in the molten glass to a depth beyond its own thickness. Certainly not to the extent to which it is forced in by the corrugated roller of the Shuman patent.

That this patent is infringed by the defendants is not seriously questioned. Indeed, the description in the Ryon patent is a practical description of the Shuman process:

"As the sheet is formed and passes under the first roller, the sheet of wire-netting which is attached to the spool, and which has previously been drawn to the table surface, is allowed to unwind from the spool, and, as the sheet of glass passes under the axle of disks, the disks force the wire-netting down into the soft glass about half way the thickness of the sheet. As the sheet passes under these disks, there are small creases and ridges on its surface, and it now passes under the second roller, B^1, which smooths it, and presses out all of the ridges caused by the action of the disks in the glass."

Upon the whole we are of opinion that both of these patents should be sustained, and the decree of the court below is therefore affirmed.

JENKINS, Circuit Judge (concurring). I agree to the affirmance of this decree. I have doubted whether that which Shuman accomplished was not the result merely of mechanical skill. The line of demarkation between invention and mechanical skill is not well defined, and is often, especially in this age of improvement, difficult to follow. In case of doubt the law has wisely required the consideration of certain facts outside the question of invention or mechanical skill to resolve the doubt. The patent itself is, in a restricted sense, prima facie evidence of novelty and invention. J.

J. Warren Co. v. Rosenblatt, 53 U. S. App. 234, 25 C. C. A. 625, and 80 Fed. 540; and, when the question of invention is doubtful, the presumption of validity should have due consideration. In such case, also, the success which has attended the patented thing ought not to be overlooked, and should be given due weight. It is true that the success may have resulted in large measure from the exercise of business energy and of liberal advertisement, but no enduring success could be attained unless the thing patented had merit. In the case in hand, Shuman cannot be regarded as a pioneer. Others, and notably Armstrong, had conceived the thought of wire-glass, and provided certain means for the manufacture; but they never achieved success, or pointed out any practical means for its accomplishment. There was no wire-glass in use or upon the market, either in Europe or in this country, when Shuman obtained his patent. Charging him, as we must, with knowledge of the prior art, he was not the first to conceive the idea of wire-glass, but was the first to make it possible. It is easy after the event to see how simple an act turned failure into success; but prior to the time of Shuman no mechanical skill had solved the problem, and, if we may credit the testimony of this record, those engaged in the art were diligently at work to accomplish that which only Shuman effected. He has given to the world a new, useful, and valuable product. He succeeded where all others failed. In such case, I think, the principle asserted by the supreme court in The Barbed-Wire Patent, 143 U. S. 275, 12 Sup. Ct. 443, 450, 36 L. Ed. 154, and similar cases should be applied:

"Under such circumstances courts have not been reluctant to sustain a patent to the man who has taken the final step which has turned a failure into a success. In the law of patents it is the last step that wins."

WOODS, Circuit Judge (dissenting). The patents in suit were applied for on July 6, 1892, and issued on the 20th of September ensuing. An application was made at the same time for a patent on the wire-glass which the machine and process were designed to produce, but presumably was denied, since there is no evidence that it was granted, and the expert whose testimony is chiefly relied upon to support the patents granted concedes that the product, wire-glass, was not then new. The fact of that application having been made is important here as evidence that Shuman was either entirely ignorant of the prior art, and supposed himself to be the inventor of wired-glass of the kind in question, or was willing to seek a patent to which he knew himself not entitled. "During December, 1891, and January and February and also March and April, 1892," he testified, "after conceiving the idea of making wire-glass, we inquired among the glass dealers of Philadelphia and New York, and at two large glass works in Pittsburg, and found no wire-glass on the market in this country." It may or may not be fair to infer from this use of the plural that he had assistance in working out the conceptions for which he sought patents, but it is noteworthy that in his applications for patents no reference was made to the prior art, and his testimony contains nothing concerning his knowl-

edge thereof, or concerning the circumstances or the manner of the making of his supposed discoveries. A statement of the circumstances, and especially of his knowledge of the prior art, it is evident, might throw much light upon the questions whether his conceptions were original, and were of an inventive character, or were the result only of mechanical skill applied to the improvement of prior processes and devices. The earlier patents on mechanism or processes for making wire-glass were foreign,—mainly English,—and it is fair to assume that, if he did not know of them sooner, they were brought to his knowledge by the report of the Franklin Institute of November 1, 1893, on which he was awarded "the John Scott legacy premium and medal, for his machine and process for producing wire-glass," as set forth in his letters patent. That report contained summary statements and explanations of the British patents to Newton, Hyatt, Lake, Armstrong, and Sievert, and also of certain French, German, and United States patents; of which those issued in this country manifestly have little relevancy to the art of making plate-glass. Of the Armstrong patent it was said:

"The patent of Armstrong * * * appears to come nearer to the practical solution of the problem than any which preceded those of Shuman. In Armstrong's case a clever attempt is made to realize practically the plan of pressing a wire-netting, by means of a heavy roller, into the body of a sheet of glass, and then covering the wire up in the glass by a pressure of the second roller following up the first one. The mechanism by which it is attempted to carry out this idea, though embodying the elements of a useful invention, was seriously defective, and the inventor does not appear to have made any effort to improve it."

Whether Armstrong made any effort to improve his invention is a question concerning which there is no evidence in the record, and probably nothing was known to the committee of the institute, but their report is important, because it affords an explanation, not otherwise furnished, of the experiments which, six months later, Shuman made for the purpose of testing the Armstrong machine. His testimony is that during May and June, 1894, he supervised the construction of a machine according to the specification of the Armstrong patent, and attempted therewith to manufacture wire-glass "according to the description of the specification, but failed to produce a merchantable wire-glass of any kind with said machine. In operating the machine in the manner described in the specification, we found that the wire was made very hot by its contact with the molten glass, and could not stand the pull of the machine. It distorted, drew out into a thread, and in most cases broke. In the few places where the wire was embedded in the glass it would be either on one side of the sheet or the other, and from the fact of being pulled in its white hot and weak condition the major portion of the sheet of glass rolled had no wire in it at all. We rolled about thirty sheets, but failed to produce wire-glass." This testimony is corroborated only by the superintendent of the glass works, who assisted in making the experiments. Shuman evidently believed or feared that the validity of his own patents depended upon showing that Armstrong's was a failure. His wish, if not his purpose, was to demonstrate a failure. Complete corrobo-

ration of his testimony, if true, could have been preserved and produced. Disinterested and skilled witnesses should have been called to observe the experiments, and competent mechanics to make them. The machine should have been preserved, and photographs and other indubitable evidence adduced that it was properly constructed and skillfully and honestly operated. Specimens of the product also should have been preserved, and produced in evidence. But none of these things are shown to have been done, and no excuse or explanation of the failure has been offered. Not even the names have been given of the mechanics who constructed and operated the machine, or of any witness, except the superintendent, who saw it operated, or examined the product. The only defect found in the operation of the machine was "that the wire was made very hot by its contact with the molten glass," and that may have resulted from the overheating of the glass, or from needless slowness of operation; but, in any event, the trouble was manifestly avoidable by causing the wire-netting to pass down immediately in front of the rear roller, or by leveling the molten mass in front of the small roller by means of a bar or other instrument properly adjusted for the purpose. The expert, Dayton, speaking with reference to Shuman's testimony on the subject, said: "The result there stated accords with the judgment which I had previously formed as to the practical inoperativeness of the Armstrong machine;" and while he added that he did not see how the machine could be changed to give any other than an unsuccessful result "so long as the scheme, plan, theory, and principle of the machine shall be preserved," it is evident that a mechanic of even ordinary skill, not compelled to concern himself about the exact "scheme, plan, theory, and principle of the machine," could easily have made the alteration necessary to prevent the overheating of the wire by its contact with the molten glass, and the consequent distortion and breaking of the wire. It could have been done without alteration of the machine; only a change in the method of use by passing the wire-netting in front of the second, instead of the first, roller was needed; and if a skillful mechanic could not have perceived at once the possibility of obviating, in either of the modes suggested, the obstacles to the successful operation of the device, then mechanical skill is only a name for stupid incompetence and inefficiency. And if the fastening of the wire to the end of the table tended to enhance the tearing and distortion described, it certainly required no invention to omit the fastening, which, it is to be observed, is no part of the Armstrong machine. It is only a suggestion in the specification touching the process or manner of using the machine. Another expert, after explaining that the lateral position of very hot wire will vary irregularly, concluded, with seeming emphasis: "And this irregularity appears to be utterly uncontrollable in the apparatus as shown." That an effect will remain unless the cause be removed hardly needed to have been said. It was more important that the witness should have expressed his opinion whether the apparatus might readily be changed so as to correct the irregularity.

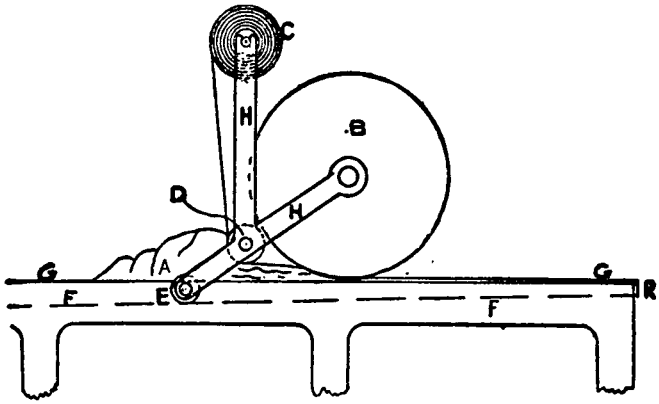
Recalled in rebuttal, Shuman testified:

"In 1894 I was sent to Europe for the purpose of disposing of my European patents to some of the glass makers over there. In the course of my travels I visited most of the large glass works in England, Belgium, France, and Germany,—among others, the works of Pilkington Bros., at St. Helens, England; the St. Gobain Works at Paris, France; and the works of the Societe Anonyme des Glaces at Charleroi, in Belgium; and others, the names of which I cannot at present recall. * * * I made special efforts during my travels to find out all about the state of the art in making wire-glass, and whether any was on the market. I found no wire-glass for sale anywhere, although every one of the glass works mentioned had made experiments towards making wire-glass for some years back. They were entirely unsuccessful in a commercial sense, and I had no difficulty in disposing of my European wire-glass patents there."

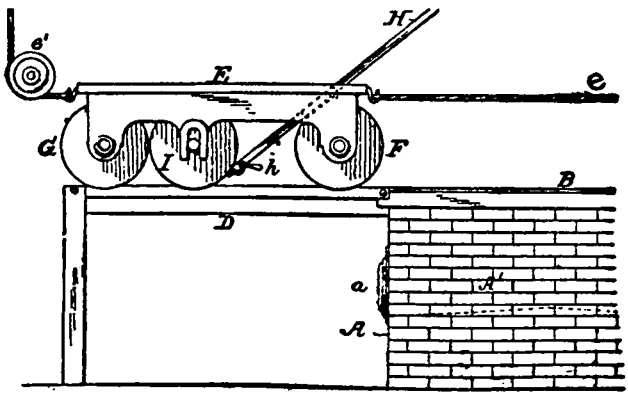
This, so far as material, is hearsay, and not competent evidence. Was that journey abroad before or after the construction and experimental use of the Armstrong machine? It is not shown. What were the experiments that had been made, and what were the causes of failure? Were the experiments original and independent, or were they made in the direction of the patents to Newton, Hyatt, Lake, and Sievert, and especially were they made with a knowledge and according to the specification of the Armstrong patent? These questions unanswered, there can be, in my opinion, no justification for finding in the fact that the Armstrong patent expired in 1891 through nonpayment of the renewal fee, or in any circumstance mentioned, "cogent evidence that the patent was found to be valueless and inoperative." Excepting the experiments made under Shuman's supervision, no test of the value or operativeness of that machine seems to have been made, and there is no evidence that experiments "towards making wire-glass" were attempted by competent men, possessed of an adequate knowledge of the prior art. Armstrong's patent was in force for four years. It was confessedly a clever attempt,—the first attempt in a direction which Shuman followed,—and, as the experts of the Franklin Institute were able to see without the aid of experiments, came "nearer to the practical solution of the problem than any which preceded." Why did not Armstrong keep his patent alive, and demonstrate its value? In the absence of evidence on the point, a number of inferences are possible, and quite as justifiable as that stated. He may have died, have been in ill health, or unable to pay the renewal fee; or, good as his conception was, he may have been absorbed in other things, and may not have suspected the possibilities of his invention. He was in advance of the market, and doubtless the publication of his patent tended to create for wire-glass the strenuous demand which, within a year after its lapse, gave assured success to the efforts of Shuman. That success, attributable primarily to the merits of wire-glass, and not to the means or manner of producing it, is amply accounted for by extensive advertising, by the sudden demand, for which there was no other supply, and by other causes, and therefore affords no ground for a more ready conclusion that the Shuman patents, which confessedly infringe the patent of Armstrong, contain patentable improvements because of the introduction of the third

roller for smoothing the glass to a uniform thickness before the wire is delivered and the corrugated roller for embedding the wire-netting in the molten mass.

Extrinsic and unessential considerations aside, what is the case on its merits? The art of making plate-glass was already well known, and the object which Armstrong proposed to accomplish was simply an addition to that art, stated in the specification of his patent to be "to insert wire-work into the interior of sheets of glass while being rolled," and this he proposed to do by adding to the rolling table and the single roller already in use for rolling plate glass another small roller, with an apparatus for carrying it and a bundle of wire wound upon another roller, supported above, from which it should be delivered beneath the rollers below as they should pass over the molten metal on the table. The device is illustrated by the following cut:



The following cut presents a corresponding view of the Shuman device:



The Walsh patent, No. 346,695, issued in 1886, and the Gray patent, No. 510,378, issued in 1893, disregarding special improvements therein claimed, afford good illustrations, according to the testimony of the expert Dayton, of the ordinary apparatus and method employed for many years in making what is known as "rough" or "ribbed" plate-glass; the "rough" being plain glass, without polish, as it comes from the machine, and the "ribbed" being the plate as it comes from a machine provided with a ribbed surface or surfaces, either of table or roller. The roller rests upon metal strips called "strangs," which, lying on the table, determine the thickness of the plate, the width being determined by the "gun," which is a detachable device, composed of parallel plates connected to each other by crossbars, which hold them a suitable distance apart to receive one or more ladlefuls of molten glass between them. The gun slides along in front of the roller as the latter is turned by the operators by hand through the medium of the pilot wheels, and simultaneously is made to advance by means of the cogwheels and racks. In the use of the machine thus described the roller is brought into position at one end of the table, the gun is placed in front of it, and the mass of molten glass is dumped upon the table within the gun and in front of the roller. The mass retains measurably the form of the ladle, but settles or flattens slowly. The roller is at once advanced against this mass of glass, and over such portion of it as the roller will accommodate beneath it. As the roller advances, the plate is formed; first with a narrow rounded end, until the glass has spread out to the width of the gun.

It is obvious, as suggested by Dayton, that no gun can be employed with Armstrong's apparatus, if arranged and operated in precise conformity with the specification of the patent, because the roller, D, continually changes its distance from the table, and because that roller stands in the way of a gun in front of the rear roller; but the inclined tracks, F, which cause the continual change in the distance of the roller, D, from the table are adjustable, and, without change in the construction of the device, may be made horizontal, causing a horizontal movement of the roller, D, and so admitting of the use, if found desirable, of a gun in front of it. Another roller or bar might be adjusted in front of D, and the gun introduced in front of that. The gun being already a well-known adjunct of such devices, there could be no invention in introducing it into the Armstrong machine. The old machines were readily adjustable for the making of plates of different thicknesses, and it therefore seems entirely probable that they might have been employed for the production of wire-glass by first rolling a sheet of one-half the thickness desired, placing thereon the wire-netting, and then rolling thereon another sheet in time to fuse with the first. That would have been according to the "sandwich process," so called, of the patents of Newton, Hyatt, and others; but only for its bearing upon the devices of Armstrong and Shuman need the old art of making ordinary plate-glass be considered here. In that art the roller, both smooth and ribbed, was familiar, and mani-

festly it could not have been invention to employ a second or third roller, one to follow another, whether moved separately or so framed together as to be controlled by a single force. It could not, therefore, have been a feature of novelty and invention to introduce a second or third roller into the old machine for the purpose of adapting it to the introduction of wire-netting into the product; or, if that was invention, Armstrong is entitled to the credit of introducing the second roller, and it was certainly not a patentable novelty thereafter, on the part of Shuman, to introduce a third roller for the same or like purpose. Indeed, there is in evidence a specimen of wire-glass, designated "Dayton's Specimen A," which was made on the Shuman machine by taking the plate "from behind the corrugated roller, and after the impression [embedding] of the wire-netting, but before being flattened and welded by the rearmost roller of that apparatus, the machine having been stopped before completing the sheet to afford this sample." That sample bears some analogy to the design shown in the patent of Sievert. It is a plate of embossed glass, evidently merchantable, in which the embedded wire seems to be well covered, even at the places of deepest impression. It is an article which, though it did not pass under the third roller, is certainly within the process of the patent. It needed no invention to produce it without using the third roller, and, by the same reasoning, no change in the Armstrong device being necessary for the purpose, it could have involved no invention to pass the wire-netting under the second, or large, roller thereof only, which, as already explained, would have obviated the contact of the wire with a molten mass of metal in front, and, the large roller of that device having but two, or at most a small number, of ribs, the product would be less embossed, and, to that extent, better, than the specimen in evidence. Dayton, if present at the experiments with the Armstrong machine, could not have failed to perceive, and, presumably, would have verified, this possibility. And when, in the Armstrong machine, the plate had been passed under the large roller with its two or three ribs, it would not have been outside of the known art or of ordinary skill to close up the openings made by the ribs by means of another roller following the first. But it is said, or implied, that Armstrong's ribbed roller does not anticipate the ribbed roller of Shuman, because of the statement in Armstrong's specification that "the large roller may be ribbed with large divisions to cut the glass nearly through, if found necessary, to make the sheets of smaller size," etc. This ignores the doctrine of double use. It is clear beyond question that a sheet of taut wire laid upon a sheet or layer of molten metal, and passed therewith under a roller ribbed at each end, would thereby be embedded in the metal as it passed between the ribs, and, if a third rib, or more, between the others, were added, the embedding would be correspondingly more nearly uniform and complete. The ribs on the Armstrong roller and upon that of Shuman necessarily were effective to embed the wire in the passing sheet of metal, and it is not material that Armstrong did not mention that obvious

result. The ribbed roller or table was already familiar in the plate-glass art, and in itself an impossible feature of novelty in the modifications made of the old mechanism for the purpose of introducing wire into the product. Whether the memoranda upon the drawings of the Armstrong patent were put there at one time or another is manifestly an immaterial question. The body of the specification contains enough on the subject, if anything at all was necessary when ribbed rollers were well known.

The experts against him are agreed in condemning Armstrong because he "sought to take a quick cut to the end by passing the wire into the unformed glass, and then rolling it into a sheet"; while they point out that the process of Shuman consists in four steps: "First, preparing a sheet of molten glass, which is rolled to a definite predetermined width and thickness; second, mounting or placing thereon wire-gauze, smoothly, evenly, and in a definite position; third, pressing the said wire-gauze or wire into the glass definitely into a predetermined depth; and, finally, closing over the glass and smoothing and finishing the plate to a definite predetermined thickness." This is an attempt to give importance to distinctions which at most are improvements merely of form, and have no bearing upon the question of invention. When the "quick cut to the end" has been devised, it is not invention to construct a longer way out of the old materials, and over familiar ground. Especial stress, however, is laid upon the first step of Shuman,—the preparing of a sheet of molten metal on which to place the wire-gauze; but that is just what was done in the old art of making plate-glass. The first roller of Armstrong prepares such a sheet, and when it was found necessary to prevent the contact of the gauze with the piled-up metal in front of that roller it needed no new conception or extraordinary intelligence to place another roller, or bar, in position to smooth down the mass in front of the first roller. In the Shuman device and process, as I see them, there is nothing which is not embodied and clearly revealed in the patent to Armstrong, when intelligently considered in the light of the prior art, and I cannot agree that either of the patents in suit is valid. "In the law of patents it is the last step that wins," if it be an act of invention, but certainly not if it be an obvious correction of the defects of a known mechanism.

IRWIN v. HASSELMAN et al.

(Circuit Court of Appeals, Seventh Circuit. November 3, 1899.)

No. 519.

1. PATENTS—PATENTABLE INVENTION.

There may be invention in applying a device which is either old or simple in a new way so as to accomplish a new result, and in cases of that class doubt on the question of patentability may be resolved in favor of the patent on proof of utility and popular acceptance.

2. SAME—CONSTRUCTION OF CLAIMS — ESTOPPEL BY PROCEEDINGS IN PATENT OFFICE.

Where an applicant acquiesces in the rejection by the patent office on the ground of anticipation of a claim covering one feature of his invention, and files a substituted claim, on which a patent is granted, he is thereby estopped from claiming as covered by such patent the particular feature rejected, although he did not change his specification which shows such feature, and it is included as one of the elements of the substituted claim.

3. SAME—INFRINGEMENT—IMPROVEMENT IN BOOKBINDING.

Claim 1 of the Ryan patent, No. 379,334, for improvements in bookbinding, construed, and *held* not infringed.

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

This appeal is a decree of dismissal entered on final hearing of a bill in equity for alleged infringement of letters patent No. 379,334, for "improvements in bookbinding," issued to Michael Ryan, March 13, 1888, and assigned to the appellant. 86 Fed. 642.

The drawings, specifications, and claims are set forth in the patent as follows:

Fig. 1.

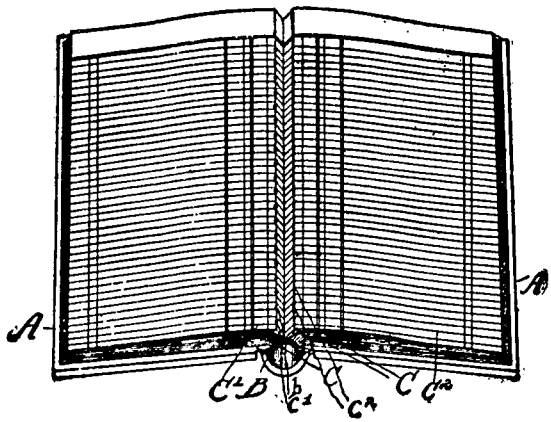


Fig. 2.

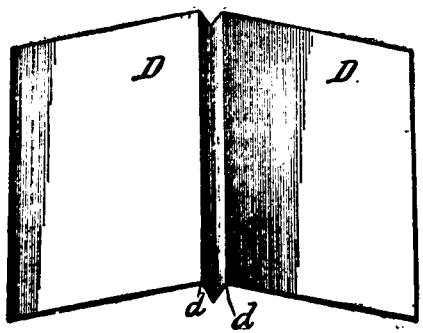
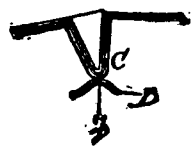


Fig. 3.



"Fig. 1 is a perspective view of an open book in which my device is used. Fig. 2 is a perspective view of a sheet forming two leaves, showing a modification of same. Fig. 3 is a sectional view showing the bunch, C, attached to the flexible back, B, and a leaf of one-half the bunch turned over upon the other half. A, A, are the covers, B the flexible back, C a section or bunch of sheets bound to the back at b. C′ and C^2 are the two leaves formed by the middle sheet of the section. c′ are perforations in the leaf C′. c^2 is the line of stitching by which the leaf C^2 is united to the remainder of that half of the bunch, C, lying beneath it. D, Fig. 2 is a sheet forming two leaves which have been folded to form the creases, d, d. The object of my invention is to provide a method of binding books, particularly blank books and books of record and reference, in such a manner that when a book shall be opened at any point the leaves may fall and lie substantially flat, and the pages thus exposed present, as nearly as possible, a level surface for convenience in writing and ruling thereon. This object I accomplish by forming a hinge-joint in the leaf at a line parallel to and a short distance from the binding (which distance would vary according to the size of the book and weight of the paper), either by a crease made by folding, as shown in Fig. 2, by perforations a short distance apart along the line, as shown in the leaf C′, in Fig. 1, which will render the leaf flexible at that point, or by fastening several leaves together at such line by stitching, as shown in the leaf C^2, Fig. 1, or otherwise. In the latter case I prefer to fasten together the leaves of each half of each bunch or section before binding, leaving the bunch open at its fold, so that it can be stitched to the back in the ordinary manner of binding. The whole number of leaves in the bunch may be thus stitched together, and the bunch bound into the back by gluing, or some such method; but I prefer the method explained above. This device would commonly be used in a book having a flexible back as shown in the drawings, but its use would not be limited to such a binding. I am aware that this object has been sought to be accomplished by attaching the leaves—commonly by stitching—to stubs, which are then bound to the back, a hinge-joint being formed at the line of such jointure. Such a method, however, greatly increases the labor and cost of binding, and there is also great danger in such a book that the leaves, being stitched along the line of their fold, will be cut by the thread, and so easily tear away from the stubs. In my device the folding, perforating, or stitching is rapidly done, there being nothing to handle except the one leaf or bunch of leaves, whereas in the method referred to there are both the leaves and stubs to handle and adjust to each other; also the leaves themselves are bound directly to the back, where they may be secured as strongly as necessary. I claim: (1) A book composed of sections or bunches of a small number of leaves, in which each section is secured to the back separately, and thereby flexibly thereon, independently of the others, and in which the leaves are rendered flexible at a line parallel to and at a sufficient distance from the back to allow each to lie flat upon the others when open, substantially as set forth. (2) A book composed of sections or bunches of a small number of leaves, in which the leaves comprising each half of each section are united by a row of short stitches, and thereby perforated and rendered flexible at a line parallel to and a sufficient distance from the back to allow each to lie flat upon the others when open, substantially as set forth. (3) A book composed of sections or bunches of leaves, in which each section is secured to the back separately, and thereby flexibly thereon, independently of the others, and in which the leaves comprising each half of each section are united by a row of short stitches, and thereby rendered flexible at a line parallel to and a sufficient distance from the back to allow each to lie flat upon the others when open, substantially as set forth."

The charge of infringement is founded alone upon the first claim of the patent, and the construction of the appellees' device in question, as shown by the testimony, is thus described in their answer to the bill: "A folded sheet of paper is taken and again folded parallel and near to the original fold thereof, at a point a short distance therefrom, backward and forward, thus breaking the fibre of the paper, and thereby rendering each sheet flexible at a point parallel to, and a short distance from the original fold. A series of such sheets are then placed together, one inside of the other, thereby forming a section. A series of these sections are then placed together, so as to form a book, and

the said sections are sewed continuously together upon a series of tapes or strips of parchment, which extend transversely across the back of the series of sections, thus forming the book of leaves, which book is afterwards bound into the covers in the usual manner."

The file wrapper and contents in the matter of this patent, produced from the patent office, show the following proceedings: In the application, as originally presented, the claims read: "(1) A book having leaves rendered flexible at a line parallel to and a short distance from the back, substantially as and for the purpose set forth. (2) A book having leaves perforated at a line parallel to and a short distance from the back, substantially as and for the purpose set forth. (3) A book whose sections or bunches are composed of a small number of leaves fastened together at a line parallel to and a short distance from the back, substantially as and for the purpose set forth. (4) A book in which the leaves composing each half of each section or bunch are stitched together along a line parallel to and a short distance back, whereby they are both perforated and fastened to facilitate folding, substantially as set forth."

The patent office ruled against all such claims as follows:

"Claims 1 and 2 are anticipated by the patents of Hopkins, 228,637, June 8, 1880; also by Edwards, 182,650, Sept. 26, 1876. Claim 3 is met by the Edwards patent cited; likewise by Beck, 185,066, Dec. 5, 1876. Claim 4 by Beck cited, & by Burwell, 285,794, Oct. 2, 1883. All references in 'Book & Covers.' As the matter stands, a patent must be refused.

"Wm. Burke, Ex. E. R. Williams, 2nd Ass't."

Thereupon the applicant submitted an amendment, striking out the four claims which were rejected, and substituting the three claims as they now appear, thus procuring allowance of his application in such form and issue of the patent.

Paul Bakewell, for appellant.

Before JENKINS and GROSSCUP, Circuit Judges, and SEAMAN, District Judge.

SEAMAN, District Judge, after the foregoing statement, delivered the opinion of the court.

An inspection of the several forms of record books which appear as exhibits in this case demonstrates the utility of that feature of the patent device by which "the leaves of the book are creased and rendered flexible at a line parallel to and a short distance from the back." It produces a book whereof, in the language of the specifications, the leaves, when open, will "fall and lie substantially flat, and the pages thus exposed present, as nearly as possible, a level surface for convenience in writing and ruling thereon." By this improvement the well-recognized defect of bulging leaves in the common form of large blank books, affecting both convenient use and durability, is obviated, and its value is manifest in such books required for records, accounts, and like uses. As the specifications further state, this object is accomplished "by forming a hinge-joint in the leaf at a line parallel to and a short distance from the binding," and three several methods of producing such joint in the leaf are there described, corresponding to the different forms stated as one element, respectively, in the claims allowed, one being "by a crease made by folding as shown in Fig. 2," which enters into the first claim of the patent. The appellant produced two record books as exhibits, of which he testifies that one is constructed in accordance with claim 1 of the patent, and the other "an ordinary record book, showing the old method of binding," and "that the only difference in the construction of the two books is in

the creased leaves of the Ryan patent." And the testimony is clear and uncontroverted that the books made by the appellee of which infringement is alleged are in every particular constructed in old and well-known methods, except that the leaves are creased as described in the first claim of this patent. This feature of the so-called "hinge-joint" in the leaf, which appears in each of the several forms specified in the patent, constituted the sole element of each of the claims presented in the original application; and the first claim there made unmistakably states as a single element this form of a fold or crease in the leaf on which the alleged infringement by the appellees must rest. That claim reads: "(1) A book having leaves rendered flexible at a line parallel to and a short distance from the back, substantially as and for the purposes set forth." Had the patent been allowed on such claim, infringement would stand confessed by the answer, and the question of patentable novelty upon the showing of the prior art would alone remain for consideration; and on that inquiry the test of invention would not be of simplicity alone in the device, nor in the fact that like means may appear as an element in prior devices where the use is not analogous. There may be invention in applying a device which is either simple or old where it is used in a new way, and accomplishes a new result; and the rule is well settled in cases of that class that doubt on the question of patentable novelty may be resolved in favor of the patent on such proof of utility and popular acceptance as shown in this record. Loom Co. v. Higgins, 105 U. S. 580, 591; Topliff v. Topliff, 145 U. S. 156, 163, 12 Sup. Ct. 825; Krementz v. S. Cottle Co., 148 U. S., 556, 560, 13 Sup. Ct. 719. The patent office, however, ruled upon the original application that each claim presented was anticipated by prior patents named, and that "claims 1 and 2 are anticipated by the patents of Hopkins, 228,637, June 8, 1880; also by Edwards, 182,650, Sept. 26, 1876"; and a patent was refused. As the applicant thereupon submitted his amended claims without change in the specifications, and accepted the patent on the substituted claims, his acquiescence in the ruling forecloses any claim of invention in the rejected feature, through the well-established doctrine of estoppel which then applies. Morgan Envelope Co. v. Albany Perforated Wrapping Paper Co., 152 U. S. 425, 429, 14 Sup. Ct. 627, and cases cited; Richards v. Elevator Co., 159 U. S. 477, 486, 16 Sup. Ct. 53. The ruling so made is not now open to question by the patentee, or by the appellant claiming under him, and there can be no inquiry here whether this rejected claim was in fact anticipated by the prior patents referred to, or whether, aside from the ruling, invention would appear in the device. The device of creased leaves appears as one of the elements in the substituted first claim on which the patent was granted; but, considered alone, it is, nevertheless, subject to the conclusive presumption thus created of want of novelty, and is open to the public for use with old methods of binding, or in any association not pre-empted by valid patent. According to the undisputed testimony, this single element was used by the appellee in books which were in all other respects of old and well-known construction, and it is therefore unnecessary to determine what effect must be given to the additional element inserted in the claim, namely, "a book composed

of sections or bunches of a small number of leaves in which each section is secured to the back separately, and thereby flexibly thereon, independently of the others." If the element thus inserted describes a new method of binding, it is clear that the book made by the appellee in the old method is no infringement. If the description is substantially identical with the pre-existing method, no force is imparted to the claim by this amendment. In either view the suit was properly dismissed for want of equity, and the decree accordingly is affirmed.

GROSSCUP, Circuit Judge, sat at the hearing, but, by reason of illness, took no part in the decision of the appeal.

PELZER v. MEYBERG et al.

(Circuit Court, S. D. California. October 30, 1899.)

No. 865.

PATENTS—REISSUE—LACHES.

While a higher degree of diligence is perhaps required in applying for a reissue where it broadens the claims of the original patent than in cases where it narrows, or simply makes more specific or certain, such claims, yet diligence must be exercised in all reissues; and, when the original patent is absolutely inoperative or invalid for any reason, an unexcused delay of 12 years in applying for a reissue constitutes such laches as will invalidate the reissued patent.

This is a suit in equity by William Pelzer against Max Meyberg and others for infringement of a patent. On demurrer to bill.

Graves, O'Melveny & Shankland, for plaintiff.
C. C. Wright, for defendants.

WELLBORN, District Judge. Complainant seeks to enjoin infringements of reissued patent No. 11,478, covering an improvement in electrical fixtures, invented by Luther Stieringer, assigned afterwards to George Maitland, and finally to complainant, and to obtain an accounting for profits derived by defendants from sales of the infringing devices. The date of said patent is March 12, 1895, while that of the original patent is June 6, 1882, nearly 13 years intervening between the issues of the two patents. The bill makes no excuse whatever for the delay in the issue of the new patent, but simply alleges:

"That the said letters patent were inoperative or invalid by reason of a defective or insufficient specification, or by reason of the said Luther Stieringer claiming as his own invention or discovery more than he had a right to claim as new; and that the error arose from inadvertence, accident, or mistake, and without any fraudulent or deceptive intention; and that the said George Maitland, therefore, duly surrendered said letters patent, and paid the duty required by law; whereupon the commissioner of patents, on the 12th day of March, 1895, caused new letters patent, for the same invention and in accordance with the corrected specification, to be issued to the said George Maitland, bearing date on the last-named day, and numbered 11,478, for the unexpired part of the term of said original letters patent; and your orator makes proffert of said reissued letters patent."

Does said delay invalidate the reissued patent? This question was decided negatively by the circuit court of appeals for the Second circuit, March 2, 1898, in Maitland v. Manufacturing Co., 29 C. C. A. 607, 86 Fed. 124, and affirmatively by the circuit court of appeals for the Third circuit, December 21, 1898, in Manufacturing Co. v. Pelzer, 34 C. C. A. 45, 91 Fed. 665. The latter case, I think, finds support in Miller v. Brass Co., 104 U. S. 350; Wollensak v. Reiher, 115 U. S. 96, 5 Sup. Ct. 1137; and Ives v. Sargent, 119 U. S. 652, 7 Sup. Ct. 436. It is true that, in each of the three cases last mentioned, the claims of the reissued patent were broader than those of the original patent, and the language of the court was confined to that state of facts; but there is no intimation that a reissue, which simply corrects a defective specification, without broadening the claims of the original patent, or which narrows said claims, may not be invalidated by protracted laches; and it seems to me that, when the original patent is absolutely inoperative or invalid for any cause, and the inventor or owner, without excuse, delays for 12 years his application for a reissue, he is chargeable with such laches as will invalidate the reissued patent.

Whether or not an unexcused delay of nine years will invalidate a reissue was one of the questions suggested, but not decided, in Machine Co. v. Searle, 8 C. C. A. 476, 60 Fed. 85, where the court says:

"We are not prepared to admit that, assuming that a new claim simply diminished the breadth of the original claim, the state of facts which has been described would justify limitation in a reissue, after the patent had been in existence and under repeated examination for nine years, and after individuals and the public had acquired adverse equities, which would be destroyed by a reconstruction of a void claim. This case does not call for a decision of that naked question."

See, also, in this connection, Hubel v. Dick (C. C.) 28 Fed. 132, and Peoria Target Co. v. Cleveland Target Co., 7 C. C. A. 197, 58 Fed. 227.

That diligence must be exercised in all reissues, although, where the reissue broadens the claim of the original patent, a higher degree of diligence is, perhaps, required, than in cases where the reissues narrow, or simply make more specific or certain, the claims of the original patents, is declared in one of the authorities quoted from by complainant in his brief filed in Pelzer v. Z. L. Parmelee & Co. (C. C. No. 866) 97 Fed. 992 (Topliff v. Topliff, 145 U. S. 156, 12 Sup. Ct. 825). There the court says:

"From this summary of the authorities it may be regarded as the settled rule of this court that the power to reissue may be exercised when the patent is inoperative by reason of the fact that the specification, as originally drawn, was defective or insufficient, or the claims were narrower than the actual invention of the patentee, provided the error has arisen from inadvertence or mistake, and the patentee is guilty of no fraud or deception; but that such reissues are subject to the following qualifications: * * * Second. That due diligence must be exercised in discovering the mistake in the original patent, and that, if it be sought for the purpose of enlarging the claim, the lapse of two years will ordinarily, though not always, be treated as evidence of an abandonment of the new matter to the public, to the same extent that a failure by the inventor to apply for a patent within two years from the public

use or sale of his invention is regarded by the statute as conclusive evidence of an abandonment of the patent to the public."

This last paragraph declares, in effect, that due diligence must be exercised in all cases, and that, if the purpose of the reissue be the enlargement of the claim, due diligence requires the application for such reissue to be made within two years.

Complainant in the same brief also quotes from Mahn v. Harwood, 112 U. S. 354–369, 5 Sup. Ct. 178, and 6 Sup. Ct. 451, as follows: "Lapse of time may be of small consequence in an application for the reissue of a patent on account of a defective specification or description, or where the original claim is too broad;" and, relying upon that, and kindred expressions in other cases, says:

"The sum of defendant's argument, then, is this: that 13 years have elapsed between the issuance of the original and reissued patents, and therefore the latter is void. But we have shown the court that the lapse of such a length of time does not necessarily have such an effect. It results only where there is a substantial variance between the two patents, so that the claims of the latter are broader than the former; but, where the new claims are more narrow or more specific, lapse of time is entirely immaterial; for the creation of intervening rights, in such a case, is wholly impossible."

Complainant's main premise, as expressed in the last line quoted, and on which he largely relies for his conclusion, is not true of all the cases to which he asserts its applicability. Where the defects of an original patent, whose claims are broader than the invention, do not render it void, but simply, for lack of distinctness or perspicuity, leave the patentee's rights obscure, and, on that account, difficult of enforcement, said premise, "the creation of intervening rights in such a case is wholly impossible," applies, and complainant's conclusion, that "lapse of time is entirely immaterial," follows; but, where the defects of such an original patent are so radical as to render it utterly void, intervening rights do accrue in behalf of the public, and may accrue in behalf of individuals, as fully as where the original patent is narrower than the reissue, and in such a case complainant's conclusion, "lapse of time is entirely immaterial," cannot be logically deduced. The ruling above made renders it unnecessary for me to notice the other questions raised by the demurrer.

The demurrer will be sustained, and the complainant allowed 30 days to amend, if he shall be so advised.

THE LYDIA M. DEERING.[1]

(District Court, E. D. Pennsylvania. November 18, 1899.)

NEGLIGENCE—DEFECTIVE APPLIANCES—PROXIMATE CAUSE—BURDEN OF PROOF.

Where a seaman alleges that an injury has been caused by a defective appliance, the burden of proof is upon him to satisfy the court that such defect was the proximate cause of his injury; the respondent's theory of the accident being equally or more probable from the testimony, the libel will be dismissed.

In Admiralty.

This was a libel for an injury to the libelant, an able seaman, caused by a blow from a rope to which power was being applied

[1] Reported by Arthur G. Dickson, Esq., of the Philadelphia bar.

by the vessel's donkey engine in "breasting her," or bringing the vessel further into a wharf. The facts sufficiently appear in the opinion of the court. Libel dismissed, but without costs.

Jos. Hill Brinton, for libelant.
Jos. T. Bunting, for respondent.

McPHERSON, District Judge. In October, 1897, the libelant was a seaman in the service of the schooner Lydia M. Deering, then at the wharf of the Knickerbocker Ice Company, in Philadelphia. She was lying head in, her starboard side towards the wharf. It became desirable to move the vessel nearer to the shore; and, in order to carry out this purpose, a five-inch hawser was fastened to a spile on the wharf, carried through the port chocks in the stern of the ship, and passed through and around the port quarter bitts. A rope, called a "messenger line," was then fastened to the hawser, and was laid along the deck of the vessel towards the bow, until it reached a snatch block fastened in the deck of the vessel, not far from the head of the steam winch. The line was to be wound around the winch, and tightened by the application of power from a donkey engine, thus tightening the hawser also, and drawing the schooner towards the wharf. In carrying out this purpose, the messenger line was passed through the snatch block by the second mate, but the libelant avers that the block lacked a safety appliance intended to prevent the rope from slipping out; and that when the power was applied, and the line and hawser were both tightened, the rope escaped from the block by the surging of the line, and the libelant, who was standing a little aft of the bitts, was struck by the hawser (or perhaps by the messenger), and suffered a fracture of the left leg. Upon this theory of the accident, the order of events is important, and there is a good deal of conflicting testimony upon the subject; the result being to leave me in serious doubt whether the injury was directly caused by the escape of the messenger from the block, or whether the hawser did not first slip over the bitts, and thus cause the escape from the block. On the whole, I incline to the conclusion that the slipping of the hawser was first in time, and therefore that the injury was not caused by the defective block; but, without being positive concerning this fact, I put the decision on the ground that the burden is upon the libelant to prove his averment,—namely, that the defect in the block was the cause of his injury,—and that he has failed to satisfy the court that this averment is true. It is neither alleged nor proved that the bitts were defective, or that the injury was caused by any other negligence than the failure of the ship to furnish a suitable block. The injury seems to have been an accident, so far as can now be seen. The libelant's own negligence may perhaps have contributed. No sufficient reason appears to justify his standing so close to the rope while the power was being applied. If he had stepped back two feet further, he would have been in a place of safety.

The libel must be dismissed, but without costs.

THE STAGHOUND AND THE GAMECOCK (SCHEUFFLER, Intervener).

(District Court, D. Oregon. November 1, 1899.)

1. SEAMEN—WAGES.
   Rev. St. § 4527, providing that any seaman who has signed an agreement, and is afterwards discharged before commencement of the voyage, or before a month's wages are earned, without fault on his part, is entitled to a month's wages in addition to wages earned, applies where the vessel was known to the owner to be wholly unfit for the voyage, and in a smooth sea, in pleasant weather, proved so unseaworthy that it could not proceed, and was compelled to return in a state of wreck.
2. SAME—ADVANCE NOTES.
   The owners of a fund derived from sale of a vessel cannot urge, as against the assignee of an advance note to seaman for a month's wages, the wages having thereafter been earned, and not paid, the rule, made for benefit of seamen, that the assignee of such a note cannot recover thereon.

Chester V. Dolph, for petitioner.
J. C. Flanders, for defendant.

BELLINGER, District Judge. Scheuffler, as the assignee of Wall, Willey, and McDonald, intervenes by petition to be paid, out of the funds derived from the sale of the steamers Staghound and Gamecock, certain claims arising out of the following facts: On the 9th of June, 1898, Wall, Willey, and McDonald shipped on board the Staghound, for service on board said steamer, for a trip to Alaska. It was admitted upon the argument that these persons regularly signed the shipping agreement, and received what are denominated "advance notes" for one month's pay, which notes have been assigned to Henry Scheuffler, who presents this petition. It is not so stated in the petition, but it was admitted upon the argument, that the parties so shipping actually went upon the steamer, which sailed from the port of Astoria, and was compelled to put back, after having gone to sea, in a wrecked condition. It is claimed in behalf of the representatives of the transportation company that this case is within the doctrine of the case of Grossett v. Townsend, 30 C. C. A. 457, 86 Fed. 908, decided by the circuit court of appeals for this circuit, where it is held, in effect, that an advance of wages, represented by an advance note, is invalid, and money paid under it cannot be deducted from a seaman's wages. In other words, the rule adopted by the circuit court of appeals in construing the statutes of the United States relating to the subject, made in the interest of the seaman, in order to protect him from his improvidence and from imposition, is to be turned against him so as to defeat his right of recovery, or the right of recovery by his assignee, where services have actually been performed and the wages earned, for, in my opinion, this is precisely what has occurred in this case. I shall consider the case upon the admitted facts, as well those stated in the petition as those outside of it. When these seamen rendered themselves aboard of the steamers, and went to sea, they entered on the performance of their contract of shipment. The subsequent loss of the steamers, under the circumstances in this case, will not suffice to relieve the owners from responsibility to the extent of their interest in the fund derived from

the sale of the wrecked boats. It was a matter of common knowledge before these boats sailed that they were wholly unfit for the voyage upon which they were about to go, and representations were made to the collector of customs of this port to prevent their clearance; and it turned out that in a smooth sea, in pleasant weather, the two boats were so unseaworthy that they were unable to proceed, and were compelled to return to Astoria in a state of wreck, and after great risk to those employed on board of them.

Section 4527 of the Revised Statutes provides that:

"Any seaman who has signed an agreement and is afterwards discharged before the commencement of the voyage or before one month's wages are earned, without fault on his part justifying such discharge, and without his consent, shall be entitled to receive from the master or owner, in addition to any wages he may have earned, a sum equal in amount to one month's wages as compensation."

It is admitted that the amount claimed in this case as to each of these persons is the amount of one month's wages due under the contract of shipment, and under the circumstances of the case I am of the opinion that the parties so shipping are entitled to receive wages precisely as though they had been discharged before the wages were earned, since the failure of the voyage was due to no fault of theirs, but wholly to the fault and carelessness of the owners in undertaking the voyage under the circumstances. In any event, it is equitable that these wages should be paid out of the proceeds in the registry of the court, and it is inequitable that the owners of this fund should be allowed to urge against such recovery a rule that an assignee or holder of an advance note cannot recover thereon, made for the protection of the seamen themselves. The case is considered and decided upon the assumption that these wages have been earned under the law as quoted, and that the present petitioner is the assignee of the claims for value. Exceptions to petition are overruled.

SMITH et al. v. CITY OF SHAKOPEE.[1]

(Circuit Court of Appeals, Eighth Circuit. October 30, 1899.)

No. 1,225.

JUDICIAL NOTICE—REGULATIONS OF LIGHTHOUSE BOARD.

Courts of admiralty will not take judicial notice of the regulations of the lighthouse board.

Appeal from the District Court of the United States for the District of Minnesota.

John E. Stryker, for appellants.

Charles G. Hinds (H. J. Peck, on the brief), for appellee.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

THAYER, Circuit Judge. This is an admiralty case which originated in the state of Minnesota, and grew out of injuries to the

[1] Motion for rehearing granted.

steamer Daisy that were occasioned by running into the draw of a bridge across the Minnesota river, which was constructed by the city of Shakopee, the respondent below and the appellee here. William C. Smith and Lora Smith, the libelants below and the appellants here, alleged in their libel, in substance, that they were the owners of the steamer Daisy, and that on June 15, 1896, at the hour of 2 o'clock a. m., as the said steamer was proceeding down the Minnesota river with an excursion party from St. Paul, which had been spending the day at Chaska, she ran into the draw of the aforesaid bridge, and carried away her smokestack and injured her pilot house and some of her upper works. It was alleged that the collision in question, and the consequent injuries to the steamer, were occasioned because the lights on said bridge were at the time insufficient to disclose the position of the draw, and because the draw was carelessly and negligently opened by the bridge tender, who was in the employ of the city of Shakopee, and because the lights on the draw were so negligently displayed as to deceive the pilot and master as to the position of the draw. The trial court found to the contrary of these allegations, and dismissed the libel.

One of the contentions on the part of the appellants is that on the occasion of the collision the city of Shakopee was negligent in not placing on the bridge such lights as it was required to place thereon by the regulations that had been prescribed by the lighthouse board. The alleged rules and regulations of said board were not offered in evidence, however, and they are not contained in the record, for which reasons they cannot be noticed or regarded as prescribing a standard of duty for the defendant city different in degree from its common-law duty. The courts will not take judicial notice of the regulations of the lighthouse board, or other similar boards, when they are not offered in evidence, as was held substantially in The E. A. Packer, 140 U. S. 360, 367, 11 Sup. Ct. 794, 35 L. Ed. 453, also in The Clara, 14 U. S. App. 346, 5 C. C. A. 390, 55 Fed. 1021. The case in hand must be considered, therefore, without reference to the alleged fault of the city in failing to comply with directions which may have been given by the lighthouse board relative to the lighting of bridges across navigable streams.

As the case is one, then, which involves an application of ordinary rules of law, and turns principally upon conclusions of fact to be drawn from the testimony, it will suffice to state the conclusions that have been reached by the court after an attentive reading of the testimony. There were enough lights on the bridge to indicate where the draw was located, and to advise the pilot how the steamer should approach to pass through the draw safely. The pilot approached the bridge at the proper place to enter the draw. He was not deceived as to its location, and would have passed through in safety but for the fact that the draw was not fully swung, so as to afford an unobstructed passage, when the attempt was made. The proximate cause of the collision seems to have been that the pilot attempted to make the passage before he was assured that the draw was fully opened. If there had been a dozen more lights on the bridge in addition to the four or five lights which appear to have been in place, it is not appar-

ent that they would have aided the pilot to see if the draw was fully swung, if he was not aware at the time, as others on board of the steamer appear to have been, that it was only partially open. Immediately before the accident occurred the steamer had landed at Shakopee, a short distance above the bridge, to discharge some passengers. While the steamer lay at that point is could be seen that the draw was not open, and that the bridge tender was making due preparations to open it. Passengers who were on board the steamer in a no more eligible position than the pilot or master saw that such was the condition of affairs when the steamer backed out into the stream after discharging the passengers for the purpose of running through the draw, and we have no doubt that the pilot and master could have seen that the draw was not then fully open if they had been duly observant. Now, it may be that, when the steamer backed out into the middle of the stream, it was somewhat difficult from that point to see the swinging span, by reason of a slight mist or haze which usually hangs over a river at night, and may have obstructed the view of the span to some extent. It is conceded, however, that from that point the piers and abutments on which the draw rested were clearly visible, and that no difficulty was experienced in fixing the exact location of the draw. The sole difficulty which the pilot seems to have experienced was in not being able to see clearly from his position in the middle of the stream whether the draw was fully swung or only partially swung, and we are not able to say that additional lights would have been of any service under the conditions which then prevailed.

Besides, the evidence does not satisfy us that there was unreasonable delay in opening the draw on the night of the accident. At that time and previously there was very little navigation on the Minnesota river. Steamers passed up and down the river only at rare intervals, and usually by daylight, whereas the steamer in question made the trip down the river at night and at an unusual hour. Under these circumstances, it would be unreasonable to require the defendant city to exercise the same degree of expedition in opening the draw which might be required if boats passed the bridge frequently and at all hours of the day and night. Neither are we able to find that the lights on the draw were improperly placed, since one light seems to have been on one end of the draw towards the steamer, and the others on either side of the passage. In view of these conclusions, the city does not seem to have been guilty of any fault which can be said to have rendered it legally responsible for the injuries occasioned by the collision. The master and the pilot, in their haste to pass through the draw, appear to have made the attempt before it was fully swung, without taking the trouble to ascertain, as they might have done, if the passage was clear, and by so doing the steamer came in contact, not with the piers or abutments, but with the draw itself while it was in motion. We are of opinion, therefore, that the decree dismissing the libel was right, and it is accordingly affirmed.

THE MARY B. BAIRD.

THE VAN NAME & KING.[1]

(District Court, E. D. Pennsylvania. November 24, 1899.)

TIME—PROCESS—CONSTRUCTION OF ADMIRALTY RULES—JURIDICAL DAYS.

The admiralty rules of a district court provided that, "where a number of days is limited by these rules, juridical days only shall be understood, and the computation shall be by including one and excluding one." *Held*, that the rules were not concerned with the juridical character of any other days than those that begin and end a period.

In Admiralty. These were motions by garnishees to quash writs of attachment on the ground that by the intervention of two Sundays between the issuance of the writ and the return day in the one case, and of one Sunday between the service of the writ and the return day in the other case, said process was invalidated. Motions dismissed, and the respondents given leave to answer.

Curtis Tilton, for libelants.

J. Warren Coulston and Alfred Driver, for respondents.

McPHERSON, District Judge. The ninth admiralty rule of this court provides as follows: "Process in rem shall, unless otherwise ordered, be made returnable at the first special session which shall not be less than fourteen days after its issue, and it shall be served at least ten days before the return day."

Rule 12 contains the following provision: "Process of foreign attachment against the goods," etc., "of a defendant, shall be made returnable and shall be served as prescribed by rule 9 in case of process in rem;" and rule 74 declares that, "where a number of days is limited by these rules, juridical days only shall be understood, and the computation shall be by including one and excluding one."

In one of the two cases of attachment now under consideration, the writ was issued on July 7th, and was made returnable on the 21st day of the same month; and, in the other case, the writ was served on July 24th, the return day being August 4th. The motions to quash are based on the facts that two Sundays intervened between July 7th and 21st, and one Sunday intervened between July 24th and August 4th,—the argument being that in the first case there are less than 14 juridical days between the issue of the writ and the return day, and in the second case that there are less than 10 juridical days between the return day and the day of service. I think the argument is based upon a misunderstanding of rule 74. It must be admitted that the rule might be expressed in clearer language, but I have little doubt about the meaning that it was intended to bear. It is not concerned with the juridical character of any other days than those that begin and end a period. This is shown by the concluding clause, which directs the computation to be made "by including one and excluding one"; there-

[1] Reported by Arthur G. Dickson, Esq., of the Philadelphia bar.

by clearly referring to the first and last days, and to no other. It is the method of computation with which the rule has specially to do, and this is provided for by dealing with the beginning and ending of the period. If, for example, the 14 days or the 10 days spoken of in rule 9 would end upon a Sunday or a legal holiday, the rule leaves that day out of account, and in either case extends the period until the following day. I see no good reason for the unusual construction that intermediate days are to be excluded merely because they may be nonjuridical.

The motion to quash is dismissed in each case, and the respondents have leave to answer within 15 days.

THE SYRACUSE.
THE GRACE DANFORTH.

(District Court, N. D. New York. November 20, 1899.)

COLLISION—COMPUTATION OF DAMAGES—INTEREST.

In determining the damages recoverable for a collision, where it appears that the amount expended by the libelant for repairs was extravagant, and the vessel was placed in better condition than before the collision, but under the settled rules there is no ground for disturbing the findings of the commissioner, the court will closely scrutinize the other items of damages claimed, and withhold any allowance for interest.

On motion to confirm report of the commissioner, appointed to assess the libelant's damages, and on exceptions to said report. For decision at final hearing, see (D. C.) 84 Fed. 1005.

George Clinton, for libelant.
William Burnet Wright, Jr., for the Grace Danforth.
Maurice C. Spratt, for the Syracuse.

COXE, District Judge. I have read with care the elaborate briefs submitted and the more important parts of the testimony returned. A reading of the entire record of over 600 pages seems unnecessary as much of it relates to unimportant details. I think I fully understand the matters in controversy and the proof bearing thereon.

It must be conceded that the repairs to the Elk were made, if not recklessly, certainly with no serious effort to economize. I am not prepared to say that they could have been made for the sums sworn to by the expert witnesses for the claimants, but I cannot avoid the impression that they might have been made for less than the amount paid. As to the principal claim allowed to O'Neil—$2,931.96—it is not easy to formulate any rule by which it can be consistently reduced. The tug was so badly injured that it is almost impossible to say at what point the old material could have been utilized and the use of new material, and the labor of putting it in, avoided. Besides, the learned commissioner had the benefit of seeing and hearing the witnesses which is a great advantage in a controversy like the present. There certainly is evidence to sustain his findings and under well-known rules the court would

not be justified in disturbing them. But the fact that the court is convinced that these elaborate and expensive repairs have added to the strength and efficiency of the Elk and have placed her in a somewhat better condition than she was prior to the collision, compels the closest scrutiny of the other items of damage. The following amounts should be deducted:

Demurrage	$300 00
Painting	17 50
Tools	69 21
Storage	10 00
Interest	780 00

The burden was upon the libelant to satisfy the court that the above items of damages were attributable to the collision and I am constrained to say that, in my judgment, it has failed to do so. The collision occurred almost at the end of the season of navigation, but 12 days remaining. The earnings of the Elk during that time were entirely problematical and depended upon the happening of a contingency which the evidence fails to prove. In such circumstances $60 is a fair allowance for demurrage. The painting of the Elk was an annual occurrence and would have taken place if no collision had occurred. There is nothing to show that the collision caused the loss of the tools. They were lost or stolen when the tug was in the possession of the libelant several days after the collision. The payment of storage charges was unnecessary. Interest should be withheld for the reason stated at the beginning of this memorandum. The amount thus disallowed aggregates $1,176.71, leaving the balance due the libelant $3,719.74. The amount found by the commissioner should be reduced as aforesaid and, as so modified, his report is confirmed.

MEMORANDUM DECISIONS.

AUTOMATIC TEL. EXCH. CO., Limited, v. STROWGER AUTOMATIC TEL. EXCH. (Circuit Court of Appeals, Seventh Circuit. June 13, 1899.) No. 601. Dismissed per stipulation of counsel.

BOARD OF COM'RS OF LAKE COUNTY, COLO., v. DUDLEY. (Circuit Court of Appeals, Eighth Circuit. May 1, 1899.) No. 1,186. In Error to the Circuit Court of the United States for the District of Colorado. George R. Elder, C. S. Thomas, W. H. Bryant, and H. H. Lee, for plaintiff in error. T. M. Patterson, E. F. Richardson, H. N. Hawkins, and H. B. Johnson, for defendant in error. No opinion. Reversed, with costs, on authority of decision of the supreme court in Board v. Dudley (No. 177, Oct. Term, 1898) 19 Sup. Ct. 398, and cause remanded to the circuit court for proceedings in accordance with the opinion of the supreme court. See 26 C. C. A. 82, 80 Fed. 672.

Ex parte BREESE.[1] (Circuit Court of Appeals, Fourth Circuit. November 10, 1899.) No. 343. Petition for mandamus to settle bills of exceptions. Charles A. Moore, for petitioner. Petition dismissed.

BUCKLEY v. CRANE. (Circuit Court of Appeals, Ninth Circuit. October 2, 1899.) No. 509. Appeal from the Circuit Court of the United States for the Southern District of California. Henry E. Highton, Theodore J. Roche, and Sullivan & Sullivan, for appellant. Sheldon Borden and Michael Mullany, for appellee. Before GILBERT, ROSS, and MORROW, Circuit Judges.

ROSS, Circuit Judge. This suit was commenced by the appellee, Henry A. Crane, against the appellant, C. F. Buckley, in the superior court of Tulare county, Cal., from which, on motion of the defendant, it was transferred to the court below. The suit was upon a contract for the sale and purchase of a certain tract of land situated in Tulare county. The complainant alleged a violation on the part of the vendee of the terms of the contract, and prayed a foreclosure of his rights and interests thereunder, and a recovery of the possession of the property from him. The defendant answered the bill of complaint, and also filed a cross bill, in which he alleged that the execution of the agreement of sale sued upon was induced on his part solely by false and fraudulent statements and misrepresentations, made to him by the complainant and one Thomas Hayes, regarding the character and value of the property in controversy, and in pursuance of a conspiracy between Crane and Hayes. The case was tried in the court below upon this issue of fraud, resulting in a judgment dismissing the cross bill, and awarding the complainant the relief prayed for. The present appeal is from that judgment. The record is a very voluminous one, and has received careful consideration. The court below was of the opinion that the evidence did not sustain the charges contained in the cross bill. We are of the same opinion. To review the evidence in detail, however, would serve no useful purpose; so nothing more need be said. The judgment is affirmed.

On Petition for Rehearing.

(October 19, 1899.)

PER CURIAM. In this case the appellant has filed a petition praying for a rehearing as to a part of the judgment given herein on the 2d day of October, 1899, or for such a modification thereof as will allow the appellant until the 1st day of November, 1899, within which to make the payments required by the decree from which the appeal was taken. This petition is based upon the fact that the appellant made large payments under the contract of sale, for the foreclosure of which the suit was brought, and upon the claim that the appeal was taken and prosecuted by him in good faith, and in the honest belief that his allegations of fraud in the making of the contract were well founded. The record does show that the appellant made large payments under the contract, and that he has made other large expenditures in the improvement of the property which was the subject of the contract. It is also true that the sums remaining due from the appellant under the contract were large. These payments the decree of the court below, which was entered on the 16th day of November, 1898, required to be made prior to January 1, 1899, in order that the rights and interests of the appellant in the property be saved, which were by the decree otherwise forever foreclosed and ended. Under the circumstances appearing in the record, this court is of the opinion that it is equitable and just to allow the appellant until the 1st day of November, 1899, within which to make the payments required by the decree from which the appeal is taken; and, accordingly, it is ordered that the judgment of this court, entered herein on the 2d day of October, 1899, be, and hereby is, so modified as to read: "Cause remanded to the court below, with directions to substitute for the 1st day of January, 1899, the 1st day of November, 1899, within which the payments therein provided for are permitted to be made, and, as so modified, the decree is affirmed." The petition for a rehearing of the cause is denied.

[1] Rehearing denied November 22, 1899.

In re CAMP et al. (Circuit Court of Appeals, Fifth Circuit. October 25, 1899.) No. 852. Appeal from the District Court of the United States for the Northern District of Georgia. H. A. Hall, for B. T. Camp. Alexander & Victor Smith, contra. Dismissed on stipulation of counsel, pursuant to the twentieth rule. See (D. C.) 91 Fed. 745.

In re CAMP et al. (Circuit Court of Appeals, Fifth Circuit. October 24, 1899.) No. 876. Appeal from the District Court of the United States for the Northern District of Georgia. Alex & Victor Smith, for Charles E. Caverly. H. A. Hall, contra. Dismissed on stipulation of counsel, pursuant to the twentieth rule. See (D. C.) 91 Fed. 745.

CHUNG KI FOON v. UNITED STATES. (Circuit Court of Appeals, Ninth Circuit. May 2, 1898.) No. 448. In Error to the District Court of the United States for the Northern District of California. Henry S. Foote, U. S. Atty. Dismissed, pursuant to the sixteenth rule. See (D. C.) 83 Fed. 143.

CLARK v. NATIONAL BANK OF COMMERCE OF KANSAS CITY, MO. (Circuit Court of Appeals, Second Circuit. October 18, 1898.) In Error to the Circuit Court of the United States for the Northern District of New York. Charles A. Williams, for plaintiff in error. Doolittle & Hazard, for defendant in error. Dismissed on consent, pursuant to the twentieth rule.

CLEMENT NAT. BANK v. HAYS et al. (Circuit Court of Appeals, Second Circuit. May 13, 1898.) Appeal from the Circuit Court of the United States for the District of Vermont. Charles A. Prouty, for appellant. Charles M. Wilds, for appellees. Dismissed on consent, pursuant to the twentieth rule.

COX v. STEWART et al. (Circuit Court of Appeals, Seventh Circuit. June 6, 1899.) No. 569. Dismissed per stipulation of counsel.

COX v. STEWART et al. (Circuit Court of Appeals, Seventh Circuit. June 6, 1899.) No. 570. Dismissed per stipulation of counsel.

CRUIKSHANK v. BIDWELL. (Circuit Court of Appeals, Second Circuit. May 20, 1898.) No. 121. Appeal from the Circuit Court of the United States for the Southern District of New York. Davenport & Bull, for appellant. Henry L. Burnett, U. S. Atty., for appellee. Dismissed. See (C. C.) 86 Fed. 7.

DEL-MONTE MINING & MILLING CO. v. LAST CHANCE MINING & MILLING CO. (Circuit Court of Appeals, Eighth Circuit. May 1, 1899.) No. 651. Appeal from the Circuit Court of the United States for the District of Colorado. Charles S. Thomas and H. H. Lee, for appellant. Joel F. Vaile and H. M. Teller, for appellee.

PER CURIAM. Affirmed, with costs. See 31 C. C. A. 592, 88 Fed. 986.

In re DENNING. (Circuit Court of Appeals, Seventh Circuit. October 3, 1899.) No. 636. Docketed and dismissed, pursuant to the sixteenth rule.

Ex parte DICKERSON.[1] (Circuit Court of Appeals, Fourth Circuit. November 10, 1899.) No. 342. Petition for mandamus to settle bills of exceptions. Charles A. Moore, for petitioner. Petition dismissed.

ELECTRIC CAR CO. OF AMERICA v. HARTFORD & W. H. R. CO. (Circuit Court of Appeals, Second Circuit. October 27, 1898.) No. 75. Appeal from the Circuit Court of the United States for the District of Connecticut. Frederick H. Betts, for appellant. Charles E. Mitchell, for appellee. Dismissed by consent, pursuant to the twentieth rule.

E. S. GREELY CO. et al. v. SANDS. (Circuit Court of Appeals, Second Circuit. April 18, 1898.) Appeal from the Circuit Court of the United States for the Southern District of New York. Eaton & Lewis, for appellants. Lockwood & Hill, for appellee. Dismissed on consent, pursuant to the twentieth rule. See 31 C. C. A. 424, 88 Fed. 130.

FAYERWEATHER v. RITCH et al. (Circuit Court of Appeals, Second Circuit. October 26, 1898.) Appeal from the Circuit Court of the United States for the Southern District of New York. Roger M. Sherman, for appellant. William B. Hornblower and Howard A. Taylor, for appellees. Dismissed on motion of appellee. See (C. C.) 94 Fed. 1021.

FENTON METALLIC MFG. CO. v. CHASE. (Circuit Court of Appeals, Second Circuit. November 21, 1898.) No. 65. Appeal from the Circuit Court of the United States for the Southern District of New York. Dickerson & Brown, for appellant. Kerr, Curtis & Page, for appellees. Dismissed on consent.

GOURD et al. v. UNITED STATES. (Circuit Court of Appeals, Second Circuit. October 27, 1898.) Appeal from the Circuit Court of the United States for the Southern District of New York. Hartley & Coleman, for appellants. Henry L. Burnett, U. S. Atty. Dismissed on consent.

HAWKINS v. STATE LOAN & TRUST CO. (Circuit Court of Appeals, Ninth Circuit. October 2, 1899.) No. 535. In Error to the Circuit Court of the United States for the Southern District of California. John W. Kern and Dillon & Dunning, for plaintiff in error. W. P. Gardiner and Willoughby Rodman, for defendant in error. Dismissed, at cost of plaintiff in error. See (C. C.) 79 Fed. 50.

HILE v. KANSAS & T. COAL CO. (Circuit Court of Appeals, Eighth Circuit. May 9, 1899.) No. 1,165. In Error to the Circuit Court of the United States for the Western District of Arkansas. T. P. Winchester, for plaintiff in error. Adiel Sherwood, for defendant in error. No opinion. Affirmed, with costs, on motion of the defendant in error.

[1] Rehearing denied November 18, 1899.

HOLDEN v. UTAH & M. MACHINERY CO. et al. (Circuit Court of Appeals, Eighth Circuit. May 9, 1899.) No. 1,167. In Error to the Circuit Court of the United States for the District of Utah. C. W. Bennett and Robert Harkness, for plaintiff in error. Charles E. Dey and John A. Street, for defendants in error. Dismissed per stipulation of parties, without costs. See (C. C.) 82 Fed. 209.

HOOD v. WALLACE. (Circuit Court of Appeals, Eighth Circuit. October 30, 1899.) No. 1,222. In Error to the Circuit Court of the United States for the District of Kansas. For opinion below, see 89 Fed. 11. C. N. Sterry (Eugene Hagan and I. E. Lambert, on the brief), for plaintiff in error. W. C. Cochran (J. McD. Trimble and W. H. Wallace, on the brief), for defendant in error. Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

THAYER, Circuit Judge. This case was submitted at the same time, by the same counsel, on the same argument, and involves the same questions, which have been considered and decided in the preceding case of Lantry v. Wallace (C. C. A.) 97 Fed. 865. For the reasons stated in the opinion in that case, the judgment in the case in hand is affirmed; Judge SANBORN dissenting.

HOOPER et al. v. TERRILL et al. (Circuit Court of Appeals, Fifth Circuit. November 8, 1899.) No. 881. Appeal from the Circuit Court of the United States for the Northern District of Georgia. W. H. Terrill, for appellees. Docketed and dismissed, pursuant to the sixteenth rule.

IOWA CENT. RY. CO. v. CHRISTIE. (Circuit Court of Appeals, Eighth Circuit. November 6, 1899.) No. 1,267. In Error to the Circuit Court of the United States for the Northern District of Iowa. George W. Seevers and F. F. Dawley, for plaintiff in error. Henry Rickel and E. H. Crocker, for defendant in error. Dismissed, with costs, per stipulation of the parties.

JONES v. VENABLE et al. (Circuit Court of Appeals, Fourth Circuit. November 14, 1899.) No. 345. Appeal from the Circuit Court of the United States for the Eastern District of Virginia. L. L. Lewis, for appellees. Docketed and dismissed, pursuant to the sixteenth rule.

THE J. P. DONALDSON. (Circuit Court of Appeals, Sixth Circuit. October 8, 1898.) No. 19. Appeal from the Circuit Court of the United States for the Eastern District of Michigan. Harvey D. Goulder, for appellant. F. H. Canfield, for appellee. No opinion. Reversed.

KINNEAR v. BAUSMAN. (Circuit Court of Appeals, Ninth Circuit. September 12, 1899.) No. 543. Appeal from the Circuit Court of the United States for the Northern Division of the District of Washington. John R. Kinnear, for appellant. F. Bausman in pro per. Dismissed per stipulation. See 24 C. C. A. 473, 79 Fed. 172.

In re KERBY-DENNIS CO. (Circuit Court of Appeals, Seventh Circuit. June 14, 1899.) No. 602. No opinion. Affirmed.

KOOKSEY v. UNITED STATES. (Circuit Court of Appeals, Eighth Circuit. May 2, 1899.) No. 1,265. In Error to the District Court of the United States for the Western District of Arkansas. James K. Barnes, for the United States. Docketed and dismissed, without costs to either party, pursuant to the sixteenth rule.

KUNSEMILLER v. UNITED STATES. (Circuit Court of Appeals, Eighth Circuit. May 2, 1899.) No. 1,080. In Error to the District Court of the United States for the District of Colorado. Charles Hartzell and George P. Steele, for plaintiff in error. Greeley W. Whitford, for the United States. Dismissed, without costs to either party, pursuant to the twenty-third rule, for failure to print the record.

LAWTON v. UNITED STATES. (Circuit Court of Appeals, Eighth Circuit. May 1, 1899.) No. 1,067. In Error to the District Court of the United States for the District of Minnesota. S. L. Pierce, for plaintiff in error. Robert G. Evans, for the United States. Dismissed, without costs to either party, on motion of defendant in error, pursuant to the twenty-third rule, for failure to print the record.

McCAFFERTY et al. v. CELLULOID CO. (Circuit Court of Appeals, Second Circuit. May 19, 1898.) Appeal from the Circuit Court of the United States for the Eastern District of New York. John R. Bennett, for appellants. Betts, Hyde & Betts, for appellee. Motion to dismiss denied.

MACKIE v. BRICKYARD GOLD-MIN. CO. et al. (Circuit Court of Appeals, Eighth Circuit. October 30, 1899.) No. 1,190. Appeal from the Circuit Court of the United States for the District of Utah. A. T. Schroeder, for appellant. Henry Rives and James M. Denny, for appellees. Dismissed per stipulation of the parties.

Ex parte MARTIN. (Circuit Court of Appeals, Eighth Circuit. May 24, 1899.) No. 1,211. Appeal from the United States Court of Appeals of the Indian Territory. Yancey Lewis, C. B. Stuart, W. T. Hutchings, J. H. Gordon, and P. C. West, for appellant. P. L. Soper, for appellee. Dismissed, with costs, for want of jurisdiction.

MICHAELIS et al. v. LARKIN et al. (Circuit Court of Appeals, Eighth Circuit. May 1, 1899.) No. 1,247. Appeal from the Circuit Court of the United States for the Eastern District of Missouri. O'Neill Ryan, for appellants. Dismissed, with costs. See (C. C.) 91 Fed. 778.

MICHIGAN SAVINGS & LOAN ASS'N v. LOEB et al. (Circuit Court of Appeals, Fifth Circuit. November 20, 1899.) No. 855. Appeal from the Circuit Court of the United States for the Northern District of Texas. Emmett Chambers and C. W. Starling, for appellant. D. A. Eldridge and S. W. Marshall for appellee. Dismissed on stipulation of counsel.

MINNEWAUKON BANK v. HANWAY. (Circuit Court of Appeals, Eighth Circuit. September 18, 1899.) No. 1,326. In Error to the Circuit Court of the United States for the District of North Dakota. John A. Watson, for defendant in error. Docketed and dismissed, with costs, pursuant to the sixteenth rule.

MONROE et al. v. NOBLE. (Circuit Court of Appeals, Eighth Circuit. May 2, 1899.) No. 1,228. In Error to the Circuit Court of the United States for the Western District of Arkansas. Joseph M. Hill and James Brizzolara, for plaintiffs in error. Ira D. Oglesby, for defendant in error. Dismissed, with costs, per stipulation of parties.

MORRIS v. CLARK et al. (Circuit Court of Appeals, Fifth Circuit. December 5, 1899.) No. 809. Appeal from the Circuit Court of the United States for the Northern District of Texas. Dismissed for want of prosecution.

MORTENSEN et al. v. BACON et al. (Circuit Court of Appeals, Eighth Circuit. September 11, 1899.) No. 1,319. Appeal from the Circuit Court of the United States for the District of Wyoming. Edward D. Upham, for appellees. Docketed and dismissed, with costs, pursuant to the sixteenth rule.

MOTT v. SABRE. (Circuit Court of Appeals, Second Circuit. October 25, 1898.) No. 90. In Error to the Circuit Court of the United States for the District of Vermont. Hiram M. Mott, for plaintiff in error. F. W. McGettrick, for defendant in error. Dismissed by consent, pursuant to the twentieth rule. See (C. C.) 88 Fed. 780.

MUTUAL LIFE INS. CO. OF NEW YORK v. ALLEN. (Circuit Court of Appeals, Ninth Circuit. October 2, 1899.) No. 519. In Error to the Circuit Court of the United States for the Northern Division of the District of Washington. Edward Lyman Short, John B. Allen, and R. C. Strudwick (Struve, Allen, Hughes & McMicken and Strudwick & Peters, of counsel), for plaintiff in error. Allen & Allen, for defendant in error. Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

HAWLEY, District Judge. This is an action brought upon two policies of insurance on the life of Samuel B. Stewart, each for the sum of $2,500. One premium was paid on each policy when delivered. No other premiums were ever paid. The pleadings in this case, as to forfeiture, are similar to the case of Insurance Co. v. Sears (C. C. A.) 97 Fed. 986. The court sustained a demurrer to the answer, and rendered judgment in favor of defendant in error for $5,091, with interest and costs. Upon the legal principles announced in Insurance Co. v. Hill, Id. 263, and authorities there cited, the judgment of the circuit court is affirmed, with costs.

MUTUAL LIFE INS. CO. OF NEW YORK v. COHEN. (Circuit Court of Appeals, Ninth Circuit. October 2, 1899.) No. 539. In Error to the Circuit Court of the United States for the Western Division of the District of Washington. Edward Lyman Short and John B. Allen (Struve, Allen, Hughes & McMicken, of counsel), for plaintiff in error. S. Warburton, for defendant in error. Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

HAWLEY, District Judge. This action is brought upon a policy of insurance issued to Alexander Cohen June 10, 1885, for $3,000, made payable, in case of his death, to his wife, Pine Cohen, the defendant in error herein. Indorsed and printed upon the notice of the application for the policy is the following notice to applicants and policy holders: "No policy holder must expect to be notified when his premium will be due. It is the practice of the company to send these notices as reminders, when the address is known; but no responsibility is assumed on the part of the company in consequence of their nonreception." All the premiums upon this policy were paid up to June 11, 1892, and one-half of the annual premium due for the year commencing on that day was paid. No other premiums were paid. Alexander Cohen died September 21, 1897. Judgment was rendered in favor of defendant in error for $2,671.41. The facts alleged in the pleadings, and the ruling of the court thereon, bring the case within the principles announced in Insurance Co. v. Hill (C. C. A.) 97 Fed. 263; and upon the authority of that case, and of the authorities cited therein, the judgment of the circuit court is affirmed, with costs.

MUTUAL LIFE INS. CO. OF NEW YORK v. SEARS. (Circuit Court of Appeals, Ninth Circuit. October 2, 1899.) No. 541. In Error to the Circuit Court of the United States for the Western Division of the District of Washington. Edward Lyman Short and John B. Allen (Struve, Allen, Hughes & McMicken, of counsel), for plaintiff in error. S. Warburton, for defendant in error. Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

HAWLEY, District Judge. The facts in this case, in so far as they bear upon the question of the policy of insurance herein sued upon, being a New York contract and governed by the laws of that state as to the forfeiture of the policy, are identical with the facts presented in Insurance Co. v. Hill (C. C. A.) 97 Fed. 263. The other facts presented by the pleadings are as follows: On May 18, 1891, the Mutual Life Insurance Company of New York issued a policy of insurance upon the life of Stephen P. Sears in the sum of $10,000, upon which an annual premium of $491 was to be paid for 10 years. Sears paid the first premium upon the delivery of the policy in 1891. He paid the second premium when due, May 18, 1892; and the policy by its terms then became an operative and binding contract between the parties. He never paid any other premium, or any part or portion thereof. Owing to his failure to pay any further premium, the insurance company declared the policy lapsed, forfeited, and void, and so entered it upon its books and records. After Sears failed to pay the annual premium due May 18, 1893, and after he was informed that said policy had been by the insurance company declared lapsed and void for nonpayment of the premium, an agent of the insurance company applied to him to make restoration of said policy, by making payment of said defaulted premium; but Sears refused to make such payment, and elected to have the policy terminated, and for this reason the insurance company never took any further steps in relation to the policy, by way of notice or otherwise, in order to effect the cancellation and termination thereof. On March 30, 1898, Sears died. Prior to his death he made his will, appointing his wife, Bessie F. Sears, executrix of his estate. This will was admitted to probate April 30, 1898, and the executrix appointed thereunder duly qualified and entered upon her duties. On June 14, 1898, the executrix notified the insurance company of Sears' death, inclosing due and sufficient proofs thereof. On June 23, 1898, she received a reply from the company, acknowledging receipt of the notice and proofs of death. On September 19, 1898, she commenced this action. Upon these facts, admitted by the pleadings, it is clear that the court did not err in sustaining the demurrer to the answer, and rendering judgment in favor of the executrix for $7,448.94, with interest and costs. There was no issue raised by the pleadings. The parties could not waive the provisions of the statute of New York, which expressed the conditions upon which the policy might be forfeited for nonpayment of premiums. The New York statute has been regarded as indicative of the legislative will and intent that life insurance companies

should be deprived of the power to declare policies forfeited for nonpayment of premiums, except in the mode prescribed by the statute. Upon the authority of Insurance Co. v. Hill, and of the authorities there cited, the judgment of the circuit court is affirmed, with costs.

NIVER v. ROCKWELL. (Circuit Court of Appeals, Fourth Circuit. November 15, 1899.) No. 323. In Error to the Circuit Court of the United States for the District of South Carolina. W. S. Monteith, for plaintiff in error. Abial Lathrop, U. S. Atty., and B. A. Hagood. Asst. U. S. Atty., for defendant in error. Dismissed on agreement of counsel.

NONEMANN v. UNITED STATES. (Circuit Court of Appeals, Ninth Circuit. November 7, 1898.) No. 489. Appeal from the District Court of the United States for the Northern District of California. Henry S. Foote, U. S. Atty. Dismissed, pursuant to the sixteenth rule.

NORTON et al. v. SANDS et al. (Circuit Court of Appeals, Eighth Circuit. May 4, 1899.) No. 1,155. Appeal from the Circuit Court of the United States for the District of Colorado. L. N. Cuthbert, for appellants. Westbrook S. Decker and S. D. Walling, for appellees. Dismissed for want of jurisdiction.

O'NEILL v. UNITED STATES. (Circuit Court of Appeals, Eighth Circuit. May 2, 1899.) No. 1,048. In Error to the District Court of the United States for the Eastern District of Missouri. Edward A. Rozier, for the United States. Dismissed, without cost to either party, on motion of defendant in error, pursuant to the twenty-third rule, for failure to print the record.

PHŒNIX INS. CO. OF NORTH DAKOTA v. HANWAY. (Circuit Court of Appeals, Eighth Circuit. September 18, 1899.) No. 1,325. In Error to the Circuit Court of the United States for the District of North Dakota. John A. Watson, for defendant in error. Docketed and dismissed, with costs, pursuant to the sixteenth rule.

ROUSELL v. UNITED STATES. (Circuit Court of Appeals, Eighth Circuit. May 2, 1899.) No. 1,264. In Error to the District Court of the United States for the District of Kansas. F. M. McHale and Oscar E. Learnard, for plaintiff in error. Motion of plaintiff in error for leave to file and docket record denied, and writ of error dismissed, without costs to either party.

SECURITY TRUST CO. v. DODD et al. (Circuit Court of Appeals, Eighth Circuit. May 19, 1899.) No. 916. In Error to the Circuit Court of the United States for the District of Minnesota. Edmund S. Durment, for plaintiff in error. James E. Markham, for defendants in error. No opinion. Affirmed, with costs. See 27 C. C. A. 685, 82 Fed. 1005.

SMITH v. MERIDEN BRITANNIA CO. (Circuit Court of Appeals, Second Circuit. November 18, 1899.) No. 50. Appeal from the Circuit Court of the United States for the District of Connecticut. J. E. Maynadier, for appellant.

John P. Bartlett and George A. Fay, for appellee. Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges. Affirmed on opinion of court below. (C. C.) 92 Fed. 1003.

SMITH v. TILLINGHAST. BLAIR v. SAME. (Circuit Court of Appeals, Ninth Circuit. September 12, 1899.) Nos. 511, 512. Appeals from the Circuit Court of the United States for the Western Division of the District of Washington. T. W. Hammond, for plaintiff. P. Tillinghast, in pro. per. Dismissed, with costs.

THE SOUTH PORTLAND. (Circuit Court of Appeals, Ninth Circuit.) No. 529. Appeal from the District Court of the United States for the Northern Division of the District of Washington. Metcalf & Jurey, for appellants. P. D. Hughes, for appellees. Dismissed, with costs and interest and 10 per cent. damages, pursuant to Rule 30, § 4, on amounts found due by decree of district court. See 95 Fed. 295.

STROWGER AUTOMATIC TEL. EXCH. v. AUTOMATIC TEL. EXCH. CO., Limited. (Circuit Court of Appeals, Seventh Circuit. June 13, 1899.) No. 583. Dismissed per stipulation of counsel.

THOMSON-HOUSTON ELECTRIC CO. v. UNION RY. CO. et al. (Circuit Court of Appeals, Second Circuit. October 29, 1898.) No. 76. Appeal from the Circuit Court of the United States for the Southern District of New York. Frederic H. Betts, for appellant. Charles E. Mitchell, for appellees. Dismissed on consent.

UNION PAC. RY. CO. et al. v. CHICAGO, B. & Q. R. CO. (Circuit Court of Appeals, Eighth Circuit. May 8, 1899.) No. 1,154. Appeal from the Circuit Court of the United States for the District of Nebraska. William R. Kelly, John N. Baldwin, and G. M. Lambertson, for appellants. Charles J. Greene and Ralph W. Breckenridge, for appellee. No opinion. Affirmed, with costs, by a divided court. See (C. C.) 74 Fed. 989.

UNITED STATES v. APGAR et al. (Circuit Court of Appeals, Second Circuit. November 9, 1898.) No. 2. Appeal from the Circuit Court of the United States for the Southern District of New York. Henry L. Burnett, U. S. Atty. Comstock & Brown, for appellees. No opinion. Affirmed.

UNITED STATES et al. v. ATASKA PACKERS' ASS'N et al. (Circuit Court of Appeals, Ninth Circuit.). No. 437. Appeal from the Circuit Court of the United States for the District of Washington. Wilson R. Gay, for the United States. C. W. Dorr, for appellees. Dismissed.

UNITED STATES v. BOKER et al. (Circuit Court of Appeals, Second Circuit. November 6, 1899.) No. 23. Appeal from the Circuit Court of the United States for the Southern District of New York. Henry C. Platt, for the

United States. Albert Comstock, for appellees. Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges. No opinion. Affirmed in open court. See (C. C.) 86 Fed. 119; (C. C.) 90 Fed. 804; (C. C. A.) 97 Fed. 205.

UNITED STATES v. DUNHAM et al. (Circuit Court of Appeals, Second Circuit. October 28, 1898.) No. 80. Appeal from the Circuit Court of the United States for the District of Connecticut. Charles W. Comstock, U. S. Atty. Comstock & Brown, for appellees. Dismissed, because appeal was not taken in time.

UNITED STATES v. LESSOR et al. (Circuit Court of Appeals, Second Circuit. May 25, 1898.) Appeal from the Circuit Court of the United States for the Southern District of New York. Henry L. Burnett, U. S. Atty. Hartley & Coleman, for appellee. Dismissed on consent, pursuant to the twentieth rule. See (C. C.) 89 Fed. 197.

UNITED STATES v. MERCK & CO. (Circuit Court of Appeals, Second Circuit. November 16, 1899.) No. 63. Appeal from the Circuit Court of the United States for the Southern District of New York. Henry C. Platt, for the United States. Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges. No opinion. Affirmed in open court. See (C. C.) 91 Fed. 639, 641.

UNITED STATES v. ROBBINS. (Circuit Court of Appeals, Second Circuit. November 6, 1899.) No. 21. Appeal from the Circuit Court of the United States for the Southern District of New York. Henry C. Platt, for the United States. Wm. Wickham Smith, for appellee. Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges. No opinion. Affirmed in open court. See (C. C.) 90 Fed. 805.

UNITED STATES v. WAGNER et al. (Circuit Court of Appeals, Second Circuit. April 19, 1898.) Appeal from the Circuit Court of the United States for the Southern District of New York. Henry L. Burnett, U. S. Atty. Hartley & Coleman, for appellees. Dismissed on consent, pursuant to the twentieth rule.

In re VIETOR et al. (Circuit Court of Appeals, Second Circuit. November 3, 1899.) No. 20. Appeal from the District Court of the United States for the Southern District of New York. James L. Bishop, for appellants. Alexander Blumensteil and Harry A. Avery, for appellees. Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges. No opinion. Affirmed in open court.

VILLAGE OF READS v. SAGE. (Circuit Court of Appeals, Eighth Circuit. May 10, 1899.) No. 1,181. In Error to the Circuit Court of the United States for the District of Minnesota. S. L. Campbell and C. L. Campbell, for plaintiff in error. Owen Morris and George H. Selover, for defendant in error. Dismissed, pursuant to the twenty-third rule, for failure to print the record.

WAGNER TYPEWRITER CO. v. WATKINS et al. (Circuit Court of Appeals, Second Circuit. February 24, 1898.) Appeal from the Circuit Court of the United States for the Southern District of New York. Arthur v. Briesen, for appellant. Carter, Hughes & Dwight, for appellees. Dismissed on consent, pursuant to the twentieth rule. See (C. C.) 84 Fed. 57.

WARNER v. PENOYER. (Circuit Court of Appeals, Second Circuit. January 18, 1898.) No. 82. Appeal from the Circuit Court of the United States for the Northern District of New York. Reynolds, Stanchfield & Collin, for appellant. Charles M. Woodward, for appellee. Dismissed as to the appellees, Nivison's executrices, by consent, pursuant to the twentieth rule. See (C. C.) 82 Fed. 181, 33 C. C. A. 222, 91 Fed. 587.

WINTHROP et al. v. STEWART et al. (Circuit Court of Appeals, Seventh Circuit. June 6, 1899.) No. 571. Dismissed per stipulation of counsel.

WOODWORTH v. NATIONAL BANK OF COMMERCE OF KANSAS CITY, MO. (Circuit Court of Appeals, Second Circuit. May 18, 1898.) In Error to the Circuit Court of the United States for the Northern District of New York. Cogswell & Cogswell, for plaintiff in error. Doolittle & Hazard, for defendant in error. Dismissed by consent, pursuant to the twentieth rule.

A. B. DICK CO. v. HAWTHORNE et al. (Circuit Court, S. D. New York. October 12, 1899.) Motion for Preliminary Injunction. Richard N. Dyer, for the motion. William A. Jones, Jr., opposed.

LACOMBE, Circuit Judge. The circumstance that complainants did not put their notice of restriction upon the outside of the packages sold in England materially weakens their position upon this application, because the affidavits presented by the defendants create a conflict of testimony, and this court does not, as a rule, grant a preliminary injunction where there is such conflict. Nevertheless, the court is strongly persuaded that, although the affidavit of the purchaser in England is a plausible one, it will turn out, when testimony is taken and the right of cross-examination exercised, that he had good reason to believe that the complainants uniformly restricted the use of their goods sold in England, so as to forbid their resale in the United States. The care with which this individual's affidavit is framed seems to indicate that cross-examination may be expected to elicit testimony favorable to the complainants. The application for preliminary injunction, therefore, will be denied, upon the condition that defendants file each month a sworn statement of the sale of any of the paper described in the moving affidavits, with names and addresses of purchasers, and prices paid.

HARTMAN et al. v. RHEINSTROM et al.

(Circuit Court, S. D. New York. November 6, 1899.)

EQUITY—TAKING TESTIMONY.

Max J. Kohler, for the motion.
Harrison, Seasongood & Edwards, opposed.

LACOMBE, Circuit Judge. Ever since Arnold v. Chesebrough (C. C.) 35 Fed. 16, it has been well-settled practice in this district to take testimony in

equity causes, either under the rules before an examiner, standing or special, or, where the special circumstances therein set forth exist, under section 863, Rev. St. U. S.; and that section is not restricted to causes at issue. Its phraseology is, "Any civil cause depending in a district or circuit court." Many of the objections interposed are premature. They relate, not to the issuing of the subpœna, but to questions which it is expected will be put to the witnesses when they appear. The other technical objections, save such as are withdrawn, seem to be without merit. The court is satisfied, however, that the defendants have acted in entire good faith, and with no intention to disobey the process of the court. The motion to punish for contempt is therefore denied. The witnesses, however, must attend within ten days, with the books called for, except the one which the government requires them to keep, and, upon being questioned, may interpose whatever objections they may be advised, which will then be passed upon by the court. It is not intended by this decision to intimate that the books and papers brought in obedience to the subpœna are to be open to inspection of defendants' counsel until such question is raised and passed upon by the court separately as to each.

HORWITZ et al. v. GROSS. (Circuit Court, E. D. Pennsylvania. December 7, 1899.) No. 45. In Equity. Motion to adjudge plea insufficient. Geo. T. Bispham and Gross Horwitz, for complainants. Richard C. Dale and Frank P. Prichard, for respondent.

McPHERSON, District Judge. I think this motion must prevail. Neither the interest of Mrs. Maria Horwitz, nor of her children, nor of Mrs. Osler,—whether such interest be vested or contingent,—will be affected by the decree that is now sought for, and I am unable, therefore, to regard them as necessary parties. It might, perhaps, be proper to join them all, or some of them, at least; but, as such joinder would deprive the court of jurisdiction, it should not be made. The complainants will be allowed to go on with the suit against the present defendant alone. If he should be removed from the trust that he now holds for the complainants, and if this court should undertake to appoint his successor, it may then be necessary to give notice to some, or all, of the parties having vested or contingent interests in remainder, in order that they may be heard concerning the appointment. But this is a separate matter, and need not now be considered. The plea is adjudged insufficient, and the defendant is directed to answer the bill within 20 days.

MARQUAND v. FEDERAL STEEL CO. (Circuit Court, S. D. New York. September 11, 1899.) Lamb & Voss (Joseph F. Daly, of counsel), for complainant. Stetson, Jennings & Russell (Charles MacVeagh, of counsel), for defendant.

THOMAS, District Judge. In the above action it has been determined that the statute requires that dividends must be paid during the month of January succeeding the end of the fiscal year, "unless some specific day or days for that purpose be fixed in its charter or by-laws, and, in that case, then on the days so fixed," etc. (C. C.) 95 Fed. 725. The charter provides that the dividend upon the common stock shall be declared "after the close of any fiscal year." This provision controls the power of the directors to amend the by-laws fixing specific days for the declaration of dividends in the common stock. But nothing stands in the way of the exercise of such power as regards the preferred stock. It appears that the by-laws of the Federal Steel Company have been amended, legally, so as to provide specific days for the declaration of dividends upon the preferred stock. This is a full compliance with the opinion of the court, and should result in a modification of the injunction, so as to permit the payment of dividends on the preferred stock.

PELZER v. Z. L. PARMELEE & CO. (Circuit Court, S. D. California. October 30, 1899.) This is a suit in equity by William Pelzer against Z. L. Parmelee & Co. for infringement of a patent. On demurrer to bill. Graves, O'Melveny & Shankland, for plaintiff. Mulford & Pollard, for defendant.

WELLBORN, District Judge. For reasons assigned in an opinion this day filed in Pelzer v. Meyberg (C. C.; No. 865) 97 Fed. 969, the demurrer in the suit first above mentioned is sustained, and the complainant allowed 30 days to amend, if it shall be so advised.

END OF CASES IN VOL. 97.

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ABATEMENT AND REVIVAL.

§ 1. Death of party and revival of action.

Under the statutes of Minnesota, which provide that a cause of action arising out of an injury to the person dies with the person, except as provided in Gen. St. 1894, § 5912, the personal representative of a person who died as the result of a personal injury cannot maintain an action for a breach of contract where the damages claimed as resulting from such breach are entirely those arising out of the injury, and the action is not brought under the provision of section 5913.—Webber v. St. Paul City Ry. Co. (C. C. A.) 140.

A cause of action for breach of contract, when the real ground for the recovery of damages is a personal injury, and the breach of the contract is merely an incident of the injury, dies with the person injured.—Webber v. St. Paul City Ry. Co. (C. C. A.) 140.

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§ 2. Costs.

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§ 1. Exclusion or expulsion.

A Chinese man, who owns an interest in a mercantile firm, but is not actually engaged in the conduct of its business, and who works as head cook in a restaurant, of which he is part proprietor, is a laborer, and not a merchant, within the terms of Act Nov. 3, 1893.—Mar Bing Guey v. United States (D. C.) 576.

A Chinese person, erroneously permitted to enter the United States for the first time without the certificate required by Act July 5, 1884, is unlawfully within the country, and may be arrested and deported, without regard to his occupation since his entry.—Mar Bing Guey v. United States (D. C.) 576.

The uncorroborated testimony of Chinese witnesses will not be accepted as sufficient to identify a Chinese person, claiming the right to enter the United States on the ground that he was

born in this country, where it is admitted that he left it when 3 years old, and has remained away for 16 years.—In re Louie You (D. C.) 580.

A certificate of residence, issued to a Chinese person under the provisions of 28 Stat. 7, is prima facie evidence of the right of the holder to remain in this country, of which right he can be deprived only upon clear proof of some act which would work its forfeiture.—Jew Sing v. United States (D. C.) 582.

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§ 2. Decisions reviewable.

A decree entered in accordance with the mandate of the appellate court, issued on appeal from a former decree, is not appealable.—Tyler Min. Co. v. Last Chance Min. Co. (C. C. A.) 394.

The fact that a judgment is merely against the plaintiff for costs in a blank amount will not deprive him of the right to prosecute error for its reversal, where it recites that it was entered on a verdict directed for defendant, and in legal effect determines the plaintiff's right of recovery.—Brown v. Parker (C. C. A.) 446.

The overruling of a motion for a new trial is not assignable as error under the practice established in the courts of the United States.—Frank Waterhouse v. Rock Island Alaska Min. Co. (C. C. A.) 466.

§ 3. Presentation and reservation in lower court of grounds of review.

Where a judgment rendered by a circuit judge, in an action at law tried without a jury, is taken to the circuit court of appeals by writ of error for review, a defense not presented to, nor ruled on by, the trial court cannot be considered.—Grattan Tp. v. Chilton (C. C. A.) 145.

In an action at law, the circuit court of appeals is a court for the correction of errors of the trial court exclusively, and questions which were not presented to or decided by that court are not open for review.—Board of Com'rs of Lake County v. Sutliff (C. C. A.) 270.

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§ 5. Record and proceedings not in record.

An exception to a peremptory instruction directing a verdict for plaintiff, and an assignment of error thereon, present no question for review, where the record does not contain all the evidence.—Board of Com'rs of Lake County v. Sutliff (C. C. A.) 270.

The correctness of the ruling of the trial court in refusing to direct a verdict, or of instructions given or refused, cannot be reviewed, where all the evidence contained in the record is given in narrative form, and the certificate thereto is limited to the statement that "the foregoing is substantially all the evidence."—Chicago G. W. Ry. Co. v. Price (C. C. A.) 423.

Exceptions to the charge of the court cannot be considered by the appellate court where only a portion of the charge is contained in the record.—Myers v. Sternheim (C. C. A.) 625.

The action of a trial court on a motion presenting questions of fact to be determined on evidence cannot be reviewed on a writ of error, without a proper bill of exceptions embodying the motion and the proofs.—Hildreth v. Grandin (C. C. A.) 870.

§ 6. Assignment of errors.

Rules 11 and 24 of the circuit court of appeals for the Eighth circuit (31 C. C. A. cxlvi., 90 Fed. cxlvi.; 31 C. C. A. clxiv., 90 Fed. clxiv.), requiring assignments and specifications of error to set out separately and particularly each error asserted and relied upon, will be enforced; and an assignment and specification of error in an equity case, which in effect only charge that the decree is erroneous in being for the wrong party, and suggest none of the questions argued in the brief, will be disregarded, and the appeal dismissed.—Sovereign Camp of the Woodmen of the World v. Jackson (C. C. A.) 382.

To entitle an appellant to an examination by the circuit court of appeals of any question, he must file assignments of error presenting such question before the appeal is taken, as required by the rules.—Savings & Loan Soc. v. Davidson (C. C. A.) 696.

§ 7. Review.
Where the evidence already before the jury upon an issue is conflicting, the admission in rebuttal of further testimony on the question, which would have been competent in chief, is largely discretionary with the court.—Chicago G. W. Ry. Co. v. Price (C. C. A.) 423.

What constituted the proximate cause of an injury in a particular case, within the accepted definition of such cause, is ordinarily a question for the jury; and, when they have determined it from evidence which is either conflicting or from which reasonable men might draw different conclusions, an appellate court cannot disturb their finding.—Chicago G. W. Ry. Co. v. Price (C. C. A.) 423.

The erroneous admission in evidence of an unstamped instrument is harmless, where it is set out in the complaint and no issue is made as to its terms.—Frank Waterhouse v. Rock Island Alaska Min. Co. (C. C. A.) 466.

On appeal to the circuit court of appeals, the findings and decree of a circuit court as to the facts are taken as presumptively correct; and, unless it clearly appears from the record that some mistake has been made in the consideration of the evidence, the decree should not be disturbed.—Savings & Loan Soc. v. Davidson (C. C. A.) 696.

The action of a trial court in denying a motion for continuance cannot be reviewed on appeal or writ of error.—Texas & P. Ry. Co. v. Humble (C. C. A.) 837.

The question of the amount of damages, in an action for a personal injury which resulted in severe pain and suffering, and probably permanently affected plaintiff's health and constitution, is one for the jury; and their verdict will not be disturbed, unless clearly the result of passion or prejudice.—Western Gas Const. Co. v. Danner (C. C. A.) 882.

The discretion of the trial court as to the order of proof will not be interfered with by an appellate court, unless it clearly appears that it was abused, to the prejudice of the party.—Western Gas Const. Co. v. Danner (C. C. A.) 882.

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Though court of appeals can grant injunction in aid of jurisdiction, it cannot, on appeal from order dissolving injunction restraining execution, modify the order so as to permit the sheriff to collect the money, and then restrain him from paying it over.—Leathe v. Thomas (C. C. A.) 136.

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In criminal prosecutions, see "Criminal Law," § 3.

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Under sixty-second article of war, and Rev. St. § 5488, where an officer of army has been convicted by a court-martial of misappropriating money furnished and intended for river and harbor improvements, court has power to impose penalty both by fine and imprisonment.—In re Carter (C. C.) 496.

Conduct constituting offense elsewhere provided for in articles of war may also warrant finding of guilty of unbecoming conduct, and dismissal from service, under sixty-first article.—In re Carter (C. C.) 496.

Under 100th article of war, where an officer has been convicted of fraud by court-martial, it must cause special publication of sentence to be made in newspapers.—In re Carter (C. C.) 496.

Under grant of jurisdiction conferred on a court-martial by sixtieth article of war, it has no power to punish an officer for misappropriating money appropriated by congress for improving rivers and harbors.—In re Carter (C. C.) 496.

Where an offense is specified in any of articles of war prior to sixty-second, the grant of jurisdiction to a court-martial to punish such offense is conferred by particular article which mentions it, and not by general language of article 62.—In re Carter (C. C.) 496.

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ASSIGNMENTS FOR BENEFIT OF CREDITORS.

§ 1. Requisites and validity.
The fact that a deed of general assignment was acknowledged before the attorney of the assignor does not render it invalid.—Brown v. Parker (C. C. A.) 446.

§ 2. Appointment, qualification, and tenure of assignee or trustee.
The right of an assignee, appointed by a court to succeed to the trust of the original assignee, to maintain an action as such, cannot be questioned, on the ground that he has removed from the state of his appointment, so long as his appointment remains unrevoked.—Brown v. Parker (C. C. A.) 446.

Under the Iowa Code, where an assignee, after accepting and recording the assignment, fails or refuses to qualify within the 20 days allowed, and another is appointed by the court to succeed to the trust, who qualifies, the assignment takes

effect from the date of its execution.—Brown v. Parker (C. C. A.) 446.

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Of risk by employé, see "Master and Servant," § 2.

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Effect of proceedings in bankruptcy, see "Bankruptcy," § 7.

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See "Assignments for Benefit of Creditors."

§ 1. Petition, adjudication, and warrant—Jurisdiction and course of procedure in general.

Bankr. Act 1898, § 23b, providing that suits by trustee shall only be brought in courts where bankrupt might have brought them, does not affect jurisdiction in bankruptcy conferred on the district courts by other clauses of the act; and the bankruptcy court has jurisdiction of a suit by a trustee to recover property conveyed in fraud of creditors, though the trustee, the bankrupt, and the defendant are all citizens of the same state.—In re Newberry (D. C.) 24.

In actions by trustees in bankruptcy to set aside fraudulent conveyance of bankrupt, the state courts and the district courts of the United States have concurrent jurisdiction, and the court first taking cognizance can dispose of the suit, to the exclusion of the other.—Robinson v. White (D. C.) 33.

Bankrupt Act 1898, § 11, providing for a stay of proceedings in certain cases where an action is pending against a person "at the time of the filing of a petition against him," applies, not only to involuntary cases, but also to voluntary bankrupts, since clause 1 of section 1 of the act declares that the phrase "a person against whom a petition has been filed" shall "include a person who has filed a voluntary petition."—In re Geister (D. C.) 322.

§ 2. —— Voluntary proceedings.

Where member of firm filing individual petition seeks to be discharged from firm debts, the petition must state the fact; and it must be so stated in notices for first meeting of creditors, in petition for discharge, and in notice thereof.—In re Russell (D. C.) 32.

Where a voluntary petition avers that petitioner and another are partners, and prays adjudication of the firm as bankrupt, and the other partner is not notified, an adjudication against petitioner as an individual is unauthorized.—In re Russell (D. C.) 32.

Where allegation of voluntary petition as to residence within the district is contested, and residence at a former period in another state is shown, the burden is on petitioner to prove his alleged change of residence.—In re Waxelbaum (D. C.) 562.

§ 3. —— Involuntary proceedings.

Under Bankr. Act 1898, § 3, cl. 3, where preference alleged was obtained by attachment of defendant's property and sale, the petition in involuntary bankruptcy is in time, if filed within four months after seizure and sale, though more than four months after attachment.—Parmenter Mfg. Co. v. Stoever (C. C. A.) 330.

Under Bankr. Act 1898, § 3b, providing that petition in involuntary bankruptcy may be filed within four months after commission of act of bankruptcy, the day on which the act of bankruptcy is committed is to be excluded, and that on which the petition is filed included.—In re Dupree (D. C.) 28.

Under Gen. Order No. 1 in bankruptcy (18 Sup. Ct. iv.), the clerk's docket should show that petition was filed in duplicate, as required by statute, if such is the fact.—In re Dupree (D. C.) 28.

The court acquires no jurisdiction in involuntary bankruptcy unless duplicate originals of petition are both filed within four months of the act of bankruptcy alleged.—In re Dupree (D. C.) 28.

Where petition in bankruptcy alleges a preferential payment and an act of bankruptcy, it may be amended by inserting allegations of other preferential payments before filing of petition.—In re Lange (D. C.) 197.

On trial of issue of solvency on involuntary petition, letter written by respondent, calling meeting of creditors to induce them to accept 30 per cent. of their claims, is prima facie proof of insolvency.—In re Lange (D. C.) 197.

Under Bankr. Act 1898, § 64b, subd. 3, providing for the allowance of a "reasonable attorney's fee for professional services actually rendered to the petitioning creditors in involuntary cases," where the adjudication is not contested, and the attorney's special duties to the petitioning creditors end with the first meeting of creditors, when a trustee is chosen, and there is no proof of special services by the attorney in the collection of assets, $75 will be allowed as a reasonable and proper fee.—In re Silverman (D. C.) 325.

Where, by law of state in which proceedings are had, wife cannot be witness for or against husband, she cannot be required, in proceedings in bankruptcy against him, to testify concerning money alleged to have been placed in her hands by him shortly before institution of proceedings, with view to their recovery by trustee.—In re Mayer (D. C.) 328.

Uncontested appointment of receiver in state court *held* not an act of bankruptcy, under Bankr. Act 1898, § 3a, cl. 3.—In re Baker-Ricketson Co. (D. C.) 489.

Authority given officer of corporation to make an admission of insolvency *held* to be an act of bankruptcy, under Bankr. Act 1898, § 3a, cl. 5. —In re Baker-Ricketson Co. (D. C.) 489.

Written admission of insolvency, executed after petition in involuntary bankruptcy, constitutes no ground for adjudication on the petition. —In re Baker-Ricketson Co. (D. C.) 489.

Uncontested appointment of receiver is not assignment for benefit of creditors, within the meaning of the bankruptcy law.—In re Baker-Ricketson Co. (D. C.) 489.

Where no actual partnership exists between two persons, one of whom carries on business on capital loaned by the other, a petition in bankruptcy on liabilities incurred in the business is properly brought against the ostensible owner thereof; and his trustee will be entitled to the stock in trade or the proceeds thereof.—In re Kenney (D. C.) 554.

§ 4. —— Warrant and custody of property.

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§ 5. Assignment, administration, and distribution of bankrupt's estate —Appointment, qualification, and tenure of trustee.

Where the creditors of a bankrupt are unable to elect a trustee, no sufficient majority agreeing upon any candidate, after two sessions held at the office of the referee for that purpose on successive days, and there appears to be immediate need of a trustee, it is within the authority of the referee to make the appointment; and an appointment so made will not be vacated by the judge, if the person chosen is competent, impartial, and otherwise suitable.—In re Kuffler (D. C.) 187.

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§ 6. —— Assignment, and title, rights, and remedies of trustee in general.

Bankruptcy court can order bankrupt to pay to trustee money in his hands belonging to his estate, and enforce his obedience by commitment for contempt.—In re McCormick (D. C.) 566.

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A court of bankruptcy can order the bankrupt to pay over to his trustee moneys belonging to his estate, when his possession of it is in fraud of creditors.—In re Schlesinger (D. C.) 930.

§ 7. —— Preferences and transfers by bankrupt, and attachments and other liens.

Where, at time of adjudication, property of bankrupt is in hands of receiver of a state court, the trustee, when appointed, should intervene to protect interest of general creditors; and, to entitle him to do this, bankruptcy court will restrain for reasonable time further prosecution of action in the state court.—In re Klein (D. C.) 31.

Mortgage made more than four months before filing petition in bankruptcy against mortgagee is not annulled by adjudication thereon, though not recorded until a month before the proceedings.—In re Adams (D. C.) 188.

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Payment of rent by insolvent debtor on leasehold interest in bakery, to continue the business with intent to defraud creditors, *held* a fraudulent preference under the bankrupt act.—In re Lange (D. C.) 197.

Organization of corporation by insolvent firm *held* a mere fiction, making its assets those of the bankrupt partners.—In re Horgan (D. C.) 319.

When adjudication is made on voluntary petition, personal property, which is then in possession of bankrupt, and which he lists in his schedule as assets, comes within jurisdiction and into custody of court of bankruptcy, although trustee has not yet been appointed; and it cannot rightfully be seized by officer acting under a writ of replevin from state court; and, if so taken, officer will be forbidden, by injunction, to sell or otherwise dispose of it under his writ, and ordered to restore it to custody of court of bankruptcy.—In re Schloerb (D. C.) 326.

Under Bankr. Act 1898, § 67f, where, within four months before petition against insolvent judgment debtor, execution had been levied on

his personal property, and sale made, proceeds in hands of sheriff at time of adjudication belongs to the estate of the bankrupt.—In re Kenney (D. C.) 554.

Where, on adjudication in bankruptcy, the sheriff held proceeds of sale on execution of bankrupt's property levied within four months before the filing of petition, and was ordered to pay the same over to the trustee, and the judgment creditor filed a bill to enjoin such payment, *held*, that such bill constituted no reason why the sheriff should not be required to obey the order of the bankruptcy court.—In re Kenney (D. C.) 554.

Bankr. Act 1898, § 67f, providing that liens obtained within four months before petition in bankruptcy shall be void, applies to voluntary, as well as involuntary, cases.—In re Vaughan (D. C.) 560.

Bankr. Act 1898, § 67c, providing that adjudication in bankruptcy shall dissolve liens against bankrupt, obtained within four months before filing petition, refers to the beginning of that part of the proceeding, the object of which is to secure a lien.—In re Higgins (D. C.) 775.

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Where insolvent, a few days before filing petition, gave mortgage to a creditor covering all his available property, and the validity of the mortgage was submitted to arbitrators, who found it was not given with intent to hinder or delay creditors, the finding will be set aside, as against the evidence.—In re McLam (D. C.) 922.

Where creditor, holding notes of insolvent debtor, received payments on account within four months before bankruptcy, and thereby extinguished two of them, and left one wholly unpaid, he could not prove the latter as an unpreferred creditor, but must surrender all payments as condition precedent.—In re Conhaim (D. C.) 923.

Under Bankr. Act 1898, § 57g, it is immaterial that a creditor, having received a preference, did not know that debtor was insolvent, or that he was receiving the preference, if such was the fact.—In re Conhaim (D. C.) 923.

Payment of debt in money is transfer of property, within Bankr. Act, § 60a, providing that a bankrupt shall be deemed to have given a preference if, being insolvent, he makes a transfer of property.—In re Conhaim (D. C.) 923.

Under Bankr. Act 1898, § 67c, cl. 1, it is not necessary, in order to dissolve an attachment levied within four months before filing petition in bankruptcy, that creditor should have known, or had cause to believe, that debtor was insolvent, nor that debtor should have intended a preference.—In re Burrus (D. C.) 926.

Where, under state law, a mechanic's lien attaches on filing notice in county clerk's office, a lien so acquired will be dissolved by an adjudication in bankruptcy within four months thereafter.—In re Emslie (D. C.) 929.

§ 8. —— Administration of estate.

Where court on petition in voluntary bankruptcy against absconding debtor has appointed receiver pending proceedings, it will not, before adjudication, authorize the receiver to sue in another state to obtain possession of bankrupt's property there, but creditors should proceed in courts of such other state, setting up pending proceedings, and asking protection of their rights in the debtor's property.—In re Schrom (D. C.) 759.

Bankruptcy court has jurisdiction to stay an action against bankrupt in a state court on a debt from which his discharge would be a release, pending determination of application for discharge.—In re Basch (D. C.) 761.

Under Bankr. Act 1898, § 26c, providing for arbitration of controversies concerning bankrupts' estates, it is an irregularity if one arbitrator is selected by the trustee, and one by the other party, and a third by the two contending parties.—In re McLam (D. C.) 922.

Under Bankr. Act 1898, § 26c, providing for arbitration of controversies as to bankrupts' estates, finding of the arbitrators, when duly filed, can be passed upon by the court as if a verdict.—In re McLam (D. C.) 922.

Evidence, on examination of bankrupt as to disposition of moneys which had come into his hands a few months prior to adjudication, *held* to warrant an order to pay over to his trustee the amount of $6,500, after allowance for necessary expenses and losses.—In re Schlesinger (D. C.) 930.

§ 9. —— Actions by or against trustee.

Provision of act, determining the forum in which suits by trustee against adverse claimant may be brought, do not limit right of trustee to examine a creditor, whose claims he disputes, as to the nature of the debt due him, whatever court had jurisdiction of suit against such creditor.—In re Cliffe (D. C.) 540.

Bankr. Act 1898, § 23b, applies only to suits on causes of action originally vested in the bankrupt, and not to suits on causes of action vesting originally in the trustee as such, of which the bankruptcy court has jurisdiction.—Murray v. Beal (D. C.) 567.

Demurrer to bill by trustee in bankruptcy, for failing to affirmatively show that the right of action was one vesting originally in the trustee, should be sustained with leave to amend.—Murray v. Beal (D. C.) 567.

§ 10. —— Claims against and distribution of estate.

A creditor of a bankrupt, who describes himself as a traveling salesman, and was employed by the bankrupt in that capacity at an annual salary of $5,000, is not a workman, nor a clerk or servant, of his employer, within the meaning of Bankr. Act 1898, § 64b, and entitled to priority of payment.—In re Scanlan (D. C.) 26.

Where vendor brings replevin in the state court claiming rescission because of fraudulent representations, and secures possession of part of the goods, and the vendee is adjudged bankrupt, and the vendor files proofs of debt for the dif-

ference between the price and the value of the goods recovered, *held*, that he cannot prove his claim without first surrendering to the trustee the goods recovered under the replevin writ.—In re Heinsfurter (D. C.) 198.

Under Bankr. Act 1898, § 63b, there can be no allowance of unliquidated claim against bankrupt until its amount has been made certain.—In re Heinsfurter (D. C.) 198.

Where judgment creditors caused executions to be levied on property of their debtor within two months before the filing of a petition in involuntary bankruptcy against him by other creditors, and, pending a contest over the adjudication in bankruptcy, it was agreed between the judgment creditors and the petitioning creditors that the sheriff should sell the property levied on, deduct the costs of sale from the proceeds, and hold the balance until further orders, and, after the adjudication, the sheriff paid such balance to the trustee in bankruptcy, and the judgment creditors, abandoning all claims to priority, proved their claims as unsecured, *held*, that the petitioning creditors would not be heard to insist that the costs of the executions should be refunded by the judgment creditors before they were entitled to participate in the fund, being bound by the agreement.—In re Moyer (D. C.) 324.

Under Bankr. Act 1898, § 21a, creditor of the bankrupt must answer questions as to his claim against the bankrupt, though they may furnish evidence to be used against him in a civil suit by the trustee.—In re Cliffe (D. C.) 540.

Where realty of bankrupt incumbered by mortgage is sold free of liens, that portion of the proceeds paid over by the trustee to each bondholder is a dividend, within the bankruptcy act, providing for compensation of referee by commissions on dividends.—In re Barber (D. C.) 547.

Where secured creditor collects his debt by sale of securities, the money realized, if it comes into bankruptcy proceedings, should not be regarded as a dividend, to be charged with commissions.—In re Barber (D. C.) 547.

A dividend is a parcel of the fund arising from the assets, allotted to a creditor, whether in the same proportion as other creditors or not.—In re Barber (D. C.) 547.

Landlord entitled to statutory lien *held* not required to establish lien in state court before ascertaining his rights in bankrupt's property in hands of trustee.—In re Byrne (D. C.) 762.

Where state laws give preference to wages of employés to the extent of $100, and the courts of the state hold that this preference outranks any lien, such claim will be entitled to priority, in preference to a landlord's statutory lien for rent.—In re Byrne (D. C.) 762.

Allowance of claim against estate, in favor of assignee who had acquired it after adjudication from bona fide holder, will not be set aside on allegation that assignee bought it to acquire a majority interest in the estate, with intent to hinder and defraud the other creditors, where such fraudulent purpose has not been carried out.—In re Headley (D. C.) 765.

Where bank buys judgment against a debtor for less than its face value, and causes execution to be levied under a secret agreement with the debtor, and, on petition in bankruptcy, proves its claim against his estate for the whole amount of the judgment, an allowance thereof should be set aside, and the claim postponed to those of other creditors.—In re Headley (D. C.) 765.

Where judgment is recovered against two defendants, and execution levied on property of the one, and the other is adjudged bankrupt, the creditor may prove his claim against the bankrupt as unsecured.—In re Headley (D. C.) 765.

Where tenant under lease with clause of forfeiture becomes bankrupt, and leasehold interest is sold by trustee in bankruptcy, landlord has no lien on the proceeds for rent overdue at time of bankruptcy.—In re Ruppel (D. C.) 778.

Where attorney for bankrupt, in addition to preparing petition and schedules, was actively engaged for several days in different cities procuring injunctions to restrain attaching creditors, and had entire charge of bankrupt's interest, in addition to expenses and disbursements he should be allowed $200.—In re Burrus (D. C.) 926.

Under Bankr. Act 1898, § 64b, cl. 3, the reasonable attorney's fee to be allowed after the bankruptcy is within the discretion of the court.—In re Burrus (D. C.) 926.

§ 11. —— Accounting and discharge of trustee.

Compensation of referee is fixed by statute, and will not be changed because some of the duties were assumed by the judge at request of parties.—In re Barber (D. C.) 547.

§ 12. Rights, remedies, and discharge of bankrupt.

A court of bankruptcy will not stay its decision upon bankrupt's application for discharge, to await result of pending action in state court wherein creditors seek to set aside transfer of property made before adjudication of bankruptcy, which they allege to have been fraudulent, same plaintiffs opposing bankrupt's discharge on ground of the alleged fraud; for issues are not identical, nor would decree of state court determine right of bankrupt to be discharged.—In re Cornell (D. C.) 29.

Specifications in opposition to a bankrupt's application for discharge, on the ground of his having concealed property from his trustee in bankruptcy, must be supported by evidence showing the existence of property in the bankrupt, or in trust for his use, at the time of filing the petition in bankruptcy.—In re Cornell (D. C.) 29.

Alimony, to be paid in weekly installments, overdue when husband files petition in voluntary bankruptcy, is not a debt which will be released by his discharge; and wife can, during bankruptcy, pursue appropriate remedies for its collection.—In re Shepard (D. C.) 187; In re Anderson (D. C.) 321.

Where debtor, within four months prior to filing petition, transfers property to his wife with intent to defraud, and states in his schedule that he has no property, he is not entitled to discharge.—In re Skinner (D. C.) 190.

Where bankrupt falsely states in schedule that he does not know where his books are, he is guilty of making a false oath, within Bankr. Act, § 29b, barring discharge.—In re Kamsler (D. C.) 194.

Bankrupt who, on examination, falsely accounts for fraudulent transfer of property to his wife as a repayment of a loan, is guilty of false oath, within the meaning of Bankr. Act, § 29b, and is not entitled to discharge.—In re Kamsler (D. C.) 194.

Where bankrupt is a married woman, and her husband conceals valuable property of her estate, her discharge may be conditioned on her using all reasonable means to discover such assets.—In re Hyman (D. C.) 195.

Where business of married woman is carried on by her husband, and he, without her knowledge, fails to keep books, and conceals property to deceive creditors, the wife, on her bankruptcy, is not deprived of her right to discharge by her husband's misconduct.—In re Hyman (D. C.) 195.

Bankrupt may be ordered before the referee for examination, whenever reasonably required by creditors, for the purpose of establishing their objections to his discharge; and the fact that he attended and was examined on the return of the order to show cause why his discharge should not be granted will not excuse him from undergoing a further examination, on the application of objecting creditors, if the referee shall deem it reasonable and necessary.—In re Mellen (D. C.) 326.

A partnership cannot be a head of a family, or a single person not the head of a family, within the meaning of Sess. Laws S. D. 1890, c. 86, relating to exemption.—In re Lentz (D. C.) 486.

A bankrupt partnership cannot claim any exemptions out of the partnership property, as an adjudication in bankruptcy dissolves the firm for every purpose.—In re Lentz (D. C.) 486.

In South Dakota, on the bankruptcy of a partnership, either member of the firm can claim any portion of the firm property, to be set apart to him as his individual exemption.—In re Lentz (D. C.) 486.

Under a state law exempting wearing apparel of the debtor and provisions for his family necessary for one year, a bankrupt cannot have set apart, as exempt, any portion of a stock of clothing and groceries owned and kept for sale by a mercantile firm of which he is a member.—In re Lentz (D. C.) 486.

Effect of discharge, if granted, on any particular claim, cannot be determined on petition for discharge.—In re Black (D. C.) 493.

It is no ground for refusing discharge that debt of creditor opposing it was created by fraud.—In re Black (D. C.) 493.

Where state statute exempts homestead, bankrupt having it set aside *held* not entitled to the crops growing thereon at time of filing his petition.—In re Hoag (D. C.) 543.

Where creditors who had filed specifications withdrew the same without notice to other creditors relying thereon, the discharge will be vacated and case reopened on motion of the latter.—In re Dietz (D. C.) 563.

Where creditor who has filed specifications in opposition to discharge withdraws the same because of part payment of his claim by a friend of the bankrupt, it is ground for vacating the discharge if the bankrupt consents to the arrangement.—In re Dietz (D. C.) 563.

Creditors opposing discharge on the ground that the bankrupt has concealed property must establish the fact by sufficient evidence.—In re Hirsch (D. C.) 571.

It is no ground for refusing a discharge that a bankrupt omitted to schedule a leasehold interest, where there is no evidence that the use of the property was worth more than the rent.—In re Hirsch (D. C.) 571.

Under Bankr. Act 1898, § 5a, an adjudication of a partnership may be made on voluntary petition of the partners, though there are no assets of the firm to be administered.—In re Hirsch (D. C.) 571.

Failure to include particular property in schedule of assets *held* no ground for refusing discharge, where the omission was the result of a mistake of law or of fact.—In re Morrow (D. C.) 574.

Requirements of application by one member of firm for discharge determined.—In re Meyers (D. C.) 757.

Where firm has been adjudged bankrupt on voluntary petition, either partner may present individual petition for separate discharge.—In re Meyers (D. C.) 757.

Where voluntary petition by partners prays that "they" may be adjudged bankrupt, instead of "the said firm," and the schedule shows all the debts to be firm debts, defect of form and adjudication *held* immaterial, on opposition to discharge.—In re Meyers (D. C.) 757.

Debt due by bankrupt, as commission merchant, on failure to account for value of goods consigned on commission on contract to return goods or proceeds, is not a debt created by fraud, misappropriation, or defalcation while acting in a fiduciary character, and is released by discharge.—In re Basch (D. C.) 761.

Under state statute exempting all wearing apparel of debtor, a bankrupt can claim as exempt a Masonic uniform.—In re Jones (D. C.) 773.

Where state statute exempts wearing apparel, a bankrupt owning a gold watch and chain which he habitually carries is entitled to have it set apart as exempt.—In re Jones (D. C.) 773.

Where money accumulated by bankrupt before filing petition amounted to considerable sum, and was not satisfactorily accounted for, it is sufficient ground for refusing discharge.—In re O'Gara (D. C.) 932.

§ 13. Costs and fees.

General Rule No. 10, relating to repayment of moneys advanced by the bankrupt, or any other person, for certain expenses, does not apply to the fee of $25 to be paid on the filing of a voluntary petition.—In re Matthews (D. C.) 772.

BANKS AND BANKING.

§ 1. Banking corporations and associations.

Evidence *held* to show transfer of stock, so as to relieve the former owner thereof from liability for an assessment, levied four years after, on insolvency of the bank.—Earle v. Coyle (C. C. A.) 410.

§ 2. Functions and dealings.

A bank is not guilty of negligence, or a violation of the usual rules and customs of banking, by crediting at once as cash to the account of a depositor the amount of a check indorsed and delivered for deposit by the authorized agent of the depositor; and permitting such amount to be subsequently drawn out by the agent prior to the collection of the check does not constitute an overdraft.—Warren-Scharf Asphalt Pav. Co. v. Commercial Nat. Bank (C. C. A.) 181.

A bank *held* entitled to recover from a depositor the amount of a check forged by an agent of such depositor, and indorsed and deposited by him under a power of attorney authorizing such indorsement and deposit, which check was credited to the depositor's account, and the amount drawn and embezzled by the agent.—Warren-Scharf Asphalt Pav. Co. v. Commercial Nat. Bank (C. C. A.) 181.

A plaintiff who delivered securities to a bank under an agreement that the bank should collect the same and reinvest the proceeds for her *held* not estopped by the subsequent acceptance of a receipt therefor, signed by the president individually, from showing as against the bank that she accepted such receipt in the belief that it was the receipt of the bank, and without reading it, and that in fact there was no change in the original agreement by which the bank, and not the president, was made her depositary and agent.—Emmerling v. First Nat. Bank (C. C. A.) 739.

§ 3. National banks.

The fact that a depositor in a national bank has given the bank an "overdraft note," which has not in fact been discounted, does not warrant the bank in reporting an overdraft by such depositor under the head of "loans and discounts."—Bacon v. United States (C. C. A.) 35.

Prior false reports *held* admissible on the question of intent, on the trial of the president of a national bank for making a false report.—Bacon v. United States (C. C. A.) 35.

Books of account of a national bank, in which the record of its daily business was kept, are admissible, without further proof, against an officer of the bank on trial for making false report of its condition.—Bacon v. United States (C. C. A.) 35.

Books of a national bank, obtained by the officers of the United States from the receivers of a state bank, which succeeded such national bank, are not inadmissible against an officer of such bank on trial for making false reports, on the ground that they were obtained in violation of the constitutional provision against unreasonable searches and seizures.—Bacon v. United States (C. C. A.) 35.

A letter taken by some person from a box marked as containing private papers of the president of a national bank, and given to officers of the United States, is not, by reason of the manner in which it was obtained, inadmissible in evidence on behalf of the government in a prosecution of the president for a violation of the national banking law.—Bacon v. United States (C. C. A.) 35.

To constitute the offense of making a false report of the condition of a national bank, within Rev. St. § 5209, it is not necessary that such report, when made by an officer of the bank to the comptroller, should have been made in response to a call or request of the comptroller.—Bacon v. United States (C. C. A.) 35.

The admission of expert testimony as to the meaning of certain entries in a report made by a national bank to the comptroller, against an officer of the bank on trial for making a false report of its condition, is not prejudicial error, where it appears that such entries were correctly interpreted.—Bacon v. United States (C. C. A.) 35.

Under an indictment based upon Rev. St. § 5209, charging an officer of a national bank with having made false entries in its books, with the intent to deceive the officers and directors of the bank and any agent appointed by the comptroller to examine the affairs of the bank, and to injure and defraud the association, it is sufficient to prove the wrongful intent in either particular charged.—McKnight v. United States (C. C. A.) 208.

An indictment of the president of a national bank for causing a false entry to be made in the books of the bank *held* sufficient, in the absence of an application for a bill of particulars, although it did not specify the manner in which the defendant "caused" the entry to be made.—McKnight v. United States (C. C. A.) 208.

An indictment for embezzlement by an officer of a national bank *held* sufficient.—McKnight v. United States (C. C. A.) 208.

The fact that a director of a national bank, whose presence was necessary to constitute a quorum at a meeting where, by the action of the directors, in which he participated, a contract by the bank to assume and pay the liabilities of another bank was ratified, was also a stockholder in such other bank, in the absence of any allegation of fraud in the transaction, is not sufficient to render the contract invalid.—Schofield v. State Nat. Bank (C. C. A.) 282.

A contract by a national bank to assume and pay the liabilities of another bank *held* not ultra vires, but within powers conferred by statute to conduct a general banking business.—Schofield v. State Nat. Bank (C. C. A.) 282.

The action of the comptroller in ordering an assessment against the stockholders of an insolvent national bank is conclusive on the stockholders of the necessity for such assessment which cannot be questioned by them, either at law or in equity.—Aldrich v. Campbell (C. C. A.) 663.

The comptroller has power to order successive assessments against the stockholders of an insol-

vent national bank, ratably on all, where the aggregate does not exceed the par value of the stock.—Aldrich v. Campbell (C. C. A.) 663.

The fact that a national bank purchased shares of its own stock ultra vires, and thereafter sold them to another, does not constitute any defense to an action by a receiver of the bank, after insolvency, against the purchaser, to recover an assessment.—Lantry v. Wallace (C. C. A.) 865.

In an action by the receiver of a national bank against a stockholder to recover an assessment, the defendant cannot set up, by way of counterclaim, a claim for damages against the bank for fraudulent representations made to induce his purchase of the stock.—Lantry v. Wallace (C. C. A.) 865.

A stockholder of a national bank cannot avoid liability for an assessment, after the bank's insolvency, on the ground that his subscription was induced by the fraud of the bank's officers, which would entitle him to a rescission as between himself and the corporation, unless it is affirmatively shown that there are no creditors who became such while he was a registered stockholder.—Lantry v. Wallace (C. C. A.) 865.

The receiver of a national bank cannot recover from a stockholder in an action at law a sum received by him on a partial distribution of the capital of the bank, made and received in good faith during voluntary liquidation, when the bank was at the time solvent, and retained sufficient assets to pay all its liabilities, although it subsequently became insolvent.—Lawrence v. Greenup (C. C. A.) 906.

The ordering of the making and enforcement of an assessment on the stockholders of an insolvent national bank by the comptroller is a quasi judicial act, which exhausts the power and jurisdiction conferred upon him by the statute, and he is without authority to make a second assessment.—De Weese v. Smith (C. C.) 309.

Limitation does not commence to run against an action to recover an assessment from stockholders of an insolvent national bank until such assessment has been ordered by the comptroller.—De Weese v. Smith (C. C.) 309.

A judgment at law against a stockholder of an insolvent national bank for an assessment made by the comptroller for an amount less than the par value of his stock is a bar to an action to enforce a second assessment.—De Weese v. Smith (C. C.) 309.

The action of the comptroller of the currency in ordering an assessment upon the stockholders of an insolvent national bank involves a determination of the necessity of such assessment, which is quasi judicial, and is conclusive on the stockholders.—De Weese v. Smith (C. C.) 309.

BAR.

Of action by former adjudication, see "Judgment," § 3.

BIAS.

Of witness, see "Witnesses," § 3.

BILL OF REVIEW.

See "Equity," § 5.

BILLS AND NOTES.

Alteration, see "Alteration of Instruments."

§ 1. Rights and liabilities on indorsement or transfer.

The liability of a payee who, by himself or an authorized agent, indorses and deposits in a bank for credit a forged check, is not the usual contingent liability of an indorser, but that of a warrantor of the genuineness of the paper, and is absolute, requiring neither demand nor notice.—Warren-Scharf Asphalt Pav. Co. v. Commercial Nat. Bank (C. C. A.) 181.

Bona fide transferee of accommodation paper *held* to hold the same free from set-off which would be good against his transferror and original payee, though he acquired note with notice of set-off.—Murphy v. Arkansas & L. Land & Improvement Co. (C. C.) 723.

BONA FIDE PURCHASERS.

Of bill of exchange or promissory note, see "Bills and Notes," § 1.
Settlers on and claimants of public lands, see "Public Lands," § 1.

BONDS.

County bonds, see "Counties," § 1.
Municipal bonds, see "Municipal Corporations," § 2.
Railroad bonds, see "Railroads," § 2.
School bonds, see "Schools and School Districts," § 1.
Sureties on bonds, see "Principal and Surety."

§ 1. Actions.

The delivery of a bond need not be proved by direct evidence, but may be inferred from the acts of the parties.—St. Louis Brewing Ass'n v. Hayes (C. C. A.) 859.

BRIBERY.

A secret-service operative, employed by the treasury department to assist in the detection and punishment of offenses against the revenue laws, while in the performance of such service, is "acting on behalf of the United States in an official function," and his bribery or attempted bribery in relation to such service is a crime, under Rev. St. § 5451.—United States v. Ingham (D. C.) 935.

BROKERS.

§ 1. Employment and authority.

A letter written by a principal to a broker, terminating his agency for the sale of property, *held* to have taken effect on its delivery at the office of the broker, although not received by him until subsequently.—Rees v. Pellow (C. C. A.) 167.

A modification of a contract between an owner of property and a broker, by which the owner was to receive a part of the broker's commission in consideration of his assistance in making the sale, does not render him the broker's agent in effecting a sale himself after the sale then contemplated had been abandoned and the contract between him and the broker terminated.—Rees v. Pellow (C. C. A.) 167.

A broker's agency for the sale of property, having no limit as to time, may be terminated at any time by the principal, subject to the ordinary requirements of good faith.—Rees v. Pellow (C. C. A.) 167.

§ 2. Compensation and lien.
A broker, having an option to purchase or sell for his principal property at a fixed price, *held* not entitled to commissions on such a sale made by the owner after terminating the contract.—Rees v. Pellow (C. C. A.) 167.

CANCELLATION OF INSTRUMENTS.

Rescission of contract, see "Contracts," § 3.

CARRIERS.

Carriage of goods by vessel, see "Shipping," § 4.

§ 1. Control and regulation of common carriers.
The North Carolina act of 1899, creating a state corporation commission, and giving it the right to regulate the rates of railroads, operates as an alteration, and a repeal pro tanto, of the charter of any railroad company of the state which vests such company with the exclusive right to fix its rates.—Matthews v. Board of Corporation Com'rs of North Carolina (C. C.) 400.

§ 2. Carriage of passengers.
In an action against a railroad company for a personal injury to a passenger in a waiting room at a station, the question of defendant's negligence *held* to be one for the jury.—Texas & P. Ry. Co. v. Humble (C. C. A.) 837.

It is the duty of a railroad company, having notice of an unusual number of passengers, and which has been instrumental in inducing such extraordinary travel over its line, to provide reasonable seating accommodations for all passengers to whom it sells tickets; and it is liable for an injury to a passenger resulting from its failure to do so.—Trumbull v. Erickson (C. C. A.) 891.

A passenger in a crowded railroad car, where the seats and aisles are filled, is not guilty of negligence in standing, with other passengers, on the platform, while the car is in motion.—Trumbull v. Erickson (C. C. A.) 891.

It cannot be held, as a matter of law, that a passenger in a crowded railroad car, by surrendering his seat to one less able to stand than himself, is guilty of negligence, which precludes his recovery for an injury received through the negligence of the carrier, although such injury would not have been received had he retained his seat.—Trumbull v. Erickson (C. C. A.) 891.

An instruction that, to preclude a recovery by a passenger for an injury, he must himself have "substantially or directly" contributed to the injury, is not erroneous, since it is only acts or omissions which substantially or directly contribute to an injury which constitute contributory negligence.—Trumbull v. Erickson (C. C. A.) 891.

The mere fact that a passenger, at the time he was injured, was intoxicated, is not, in itself, evidence of contributory negligence, but is a circumstance to be considered; and it is for the jury to determine whether it in fact contributed to his injury.—Trumbull v. Erickson (C. C. A.) 891.

A railroad company, running trains for the carriage of passengers, is bound to the exercise of the highest degree of care and skill to protect its passengers from injury.—Trumbull v. Erickson (C. C. A.) 891.

A right of action, which has attached, in favor of a passenger injured on a railroad, under a state statute regulating the liability of railroad companies in such cases, may be enforced in any court, within or without the state, having jurisdiction of the subject-matter and the parties.—Clark v. Russell (C. C. A.) 900.

A passenger steamship company is not liable for the loss of a passenger's baggage, where the loss is not occasioned by some particular breach of duty or negligence on the part of its servants, unless the baggage is delivered to and taken into the exclusive custody of its officers or servants:—The Humboldt (D. C.) 656.

CERTIFICATE.

Certified copies, see "Evidence," § 4.
Of record for purpose of review, see "Appeal and Error," § 5.

CHANCERY.

See "Equity."

CHARGE.

To jury, in criminal prosecutions, see "Criminal Law," § 3.

CHATTEL MORTGAGES.

§ 1. Requisites and validity.
The delivery by a chattel mortgagor, whose mortgage is unrecorded, to the mortgagee, of a written statement that possession of the property is delivered to the mortgagee, together with an order on a bailee for its delivery, does not constitute a delivery which will render the mortgage valid as a lien, under the laws of the Indian Territory, as against an attachment against the mortgagor, placed in the hands of the marshal before the mortgagee obtains actual possession, or presents the order to the bailee.—Strahorn-Hutton-Evans Commission Co. v. Quigg (C. C. A.) 735.

Possession of mortgagee to validate unrecorded mortgage must be actual, open, and public, so as to give notice to creditors of mortgagor.—Stra-

horn-Hutton-Evans Commission Co. v. Quigg (C. C. A.) 735.

CHINESE.

Exclusion or expulsion, see "Aliens," § 1.

CIRCUIT COURTS OF APPEALS.

See "Courts," § 5.

CITIES.

See "Municipal Corporations."

CITIZENS.

See "Aliens."
Citizenship ground of jurisdiction of United States courts, see "Courts," § 2.

CLAIMS.

Against estate of bankrupt, see "Bankruptcy," § 10.
Mining claims, see "Mines and Minerals," § 1.
Of patent, see "Patents," § 4.

COLLISION.

§ 1. Vessels in tow.
Evidence considered, and *held* to show both a steamship and a tug in fault for a collision between the steamer and the tow.—The James A. Lawrence and The Comanche (D. C.) 351; The Float No. 1, Id.

Evidence, in action for collision between ferryboat and tug with dumper lashed to it, *held* to show the tug in fault.—The Clinton (D. C.) 510; The Alfred W. Booth, Id.

§ 2. Suits for damages.
Where the amount found by the commissioner to have been expended by libelant for repair of a vessel injured by a collision appears to the court to have been extravagant, and the vessel was placed in better condition than before the collision, interest will not be allowed.—The Syracuse (D. C.) 978; The Grace Danforth, Id.

COMMERCE.

Carriage of goods and passengers, see "Shipping."

COMMISSIONERS.

Of broker, see "Brokers," § 2.

COMPENSATION.

Of agent, see "Principal and Agent," § 2.

CONSOLIDATION.

Of railroads, see "Railroads," § 1.

CONSTITUTIONAL LAW.

Provisions relating to juries, see "Jury," § 1.

§ 1. Personal, civil, and political rights.
The constitutional inhibition against unreasonable searches and seizures is a limitation upon the power of the state to make such searches and seizures for its own benefit, and has no reference to the unauthorized act of individuals.—Bacon v. United States (C. C. A.) 35.

§ 2. Obligation of contracts.
The Minnesota act of April 21, 1897, purporting to declare a forfeiture of lands previously granted to the Duluth & Iron Range Railroad Company, is invalid; the road having been fully completed, and the lands earned, prior to its passage.—State of Minnesota v. Duluth & I. R. R. Co. (C. C.) 353; Duluth & I. R. R. Co. v. State of Minnesota, Id.; Cobb v. Duluth & I. R. R. Co., Id.

Under Const. N. C. 1868, art. 8, § 1, the charter of a corporation, whether organized under a general law or by a special act, is subject to alteration or repeal by the legislature.—Matthews v. Board of Corporation Com'rs of North Carolina (C. C.) 400.

§ 3. Due process of law.
The statute of Nebraska, making railroad companies liable for injuries to passengers who are without fault, irrespective of the question of the negligence of the company, is a valid exercise of legislative power, and not in violation of the constitution of the United States.—Clark v. Russell (C. C. A.) 900.

CONTINUANCE.

In criminal prosecutions, see "Criminal Law," §§ 1, 2.

It is not error, in a federal court, in an action at law, to deny a motion for a continuance on account of the absence of a witness, where the adverse party admits, in accordance with the state statute, that the witness, if present, would testify as stated in the application.—Texas & P. Ry. Co. v. Humble (C. C. A.) 837.

CONTRACTS.

Alteration, see "Alteration of Instruments."
Damages for breach, see "Damages," § 2.
For compensation of attorney, see "Attorney and Client," § 1.
Impairing obligation, see "Constitutional Law," § 2.
Implied contracts, see "Money Paid."
Of particular classes of parties, see "Corporations," § 3.
Of separation, see "Husband and Wife," § 2.
Operation and effect of usury laws, see "Usury," § 1.
Parol or extrinsic evidence, see "Evidence," § 5.
Particular classes of express contracts, see "Bills and Notes"; "Bonds"; "Indemnity"; "Insurance"; "Principal and Agent"; "Sales."
—— charter parties, see "Shipping," § 1.
Subrogation to rights or remedies of creditors, see "Subrogation."

§ 1. Requisites and validity.
Contracts between parties in confidential relations, which do not themselves disclose any injustice or inequity, are presumed to be valid.—Daniels v. Benedict (C. C. A.) 367.

§ 2. Construction and operation.
A contract to lend money to a corporation, made with stockholders who furnished the consideration, is a contract with them individually, for the breach of which they are entitled to sue.—Kelly v. Fahrney (C. C. A.) 176.

An agreement by one bank to assume and pay the liabilities of another, in consideration of property and assets transferred, *held* not to imply an agreement on the part of the debtor bank to reimburse the other for any amount paid out in excess of the amount realized from such assets.—Schofield v. State Nat. Bank (C. C. A.) 282.

The consummation of a sale in accordance with the terms of a written contract therefor between the parties is a practical construction, which constitutes strong evidence that such contract embodied the true agreement.—Housekeeper Pub. Co. v. Swift (C. C. A.) 290.

A written contract, plain in its terms, cannot be changed by evidence of the preceding negotiations.—Housekeeper Pub. Co. v. Swift (C. C. A.) 290.

A contract for the building of vessels construed, and *held* to require the final payment therefor to be made at the place where the vessels were to be delivered.—Campbell v. Moran Bros. Co. (C. C. A.) 477.

§ 3. Rescission and abandonment.
The legal effect of a subsequent contract, completely covering the same subject-matter and made by the same parties as an earlier agreement, but containing terms inconsistent therewith, so that the two cannot stand together, is to rescind and supersede the earlier contract, and to constitute itself the only agreement of the parties on the subject.—Housekeeper Pub. Co. v. Swift (C. C. A.) 290.

A written contract of sale, executed by the delivery of the property and payment of the price, cannot be set aside. and a prior contract between the parties for the sale and purchase of the same property on different terms substituted, where neither fraud nor mistake is alleged.—Housekeeper Pub. Co. v. Swift (C. C. A.) 290.

§ 4. Actions for breach.
A party contracting for vessels to be delivered to him at a certain time and place, and paid for on delivery, cannot maintain an action against the other party for damages for failure to deliver at the time agreed upon, without alleging and proving that he was able and ready to perform by paying the price at the time and the place of delivery.—Campbell v. Moran Bros. Co. (C. C. A.) 477.

CONTRIBUTORY NEGLIGENCE.

See "Negligence," § 1.

CONVERSION.

Wrongful conversion of personal property, see "Trover and Conversion."

CONVEYANCES.

See "Assignments for Benefit of Creditors"; "Chattel Mortgages"; "Mortgages."
In fraud of creditors, see "Fraudulent Conveyances."

COPYRIGHTS.

§ 1. Infringement.
Showing for a preliminary injunction *held* sufficient in a suit for infringement of a copyrighted directory.—Trow Directory, Printing & Bookbinding Co. v. Boyd (C. C.) 586.

CORPORATIONS.

See "Municipal Corporations."
Banks, see "Banks and Banking," § 1.
Taxation of corporations and corporate property, see "Taxation," § 2.

§ 1. Incorporation and organization.
The amendment to the general incorporation act of Colorado (Sess. Laws 1870, p. 49), authorizing the organization of corporations to promote immigration into the territory, with power to acquire, hold, and sell lands and other property, was valid.—Colorado Springs Co. v. American Pub. Co. (C. C. A.) 843.

§ 2. Members and stockholders.
The appointment of a receiver for a Kansas corporation does not affect the right of a judgment creditor to bring an action against a stockholder to enforce his individual liability under the state statute.—Fidelity Insurance, Trust & Safe-Deposit Co. v. Mechanics' Sav. Bank (C. C. A.) 297.

Holding of the supreme court of Kansas that a stockholder may plead, in discharge of statutory liability, either in full or pro tanto, a bona fide indebtedness from the corporation, becomes a part of the statute law, and is available to the defendant in any other jurisdiction where suit may be brought.—Fidelity Insurance, Trust & Safe-Deposit Co. v. Mechanics' Sav. Bank (C. C. A.) 297.

A defense by a stockholder in a Kansas corporation, sued by a creditor to enforce his statutory liability, that the corporation was indebted to him in a sum exceeding the amount of his stock, is not an equitable one, in a technical sense, but goes directly to the question of his liability to another creditor, and is cognizable in a court of law.—Fidelity Insurance, Trust & Safe-Deposit Co. v. Mechanics' Sav. Bank (C. C. A.) 297.

A judgment creditor of a Kansas corporation, whose execution has been returned unsatisfied, and who is entitled, under Corpp. Laws Kan. 1879, c. 23, § 32, to bring an individual action to charge any stockholder with the amount of

his judgment, may maintain such action at law in any court of general jurisdiction where personal service may be made on the defendant.—Fidelity Insurance, Trust & Safe-Deposit Co. v. Mechanics' Sav. Bank (C. C. A.) 297.

§ 3. Corporate powers and liabilities.

A mode of service prescribed by state laws for obtaining jurisdiction over foreign corporations which is recognized as valid by the local courts will be given the same recognition by the federal courts, unless it violates fundamental rights of the defendant.—McCord Lumber Co. v. Doyle (C. C. A.) 22.

The fact that a contract, made by a national bank, to receive and collect securities, and reinvest the proceeds for the owner, contained provisions which were ultra vires, does not relieve the bank of the legal obligation to return the securities, or account to the owner for their value.—Emmerling v. First Nat. Bank (C. C. A.) 739.

A corporation is entitled to show by parol that the other party to a written contract, executed in its behalf by one of its officers, was notified of such officer's want of authority. — Colorado Springs Co. v. American Pub. Co. (C. C. A.) 843.

Evidence *held* sufficient to authorize the submission to the jury of the question whether an officer of a corporation had been vested with such apparent authority that the corporation was bound by a contract made by such officer in its behalf.—Colorado Springs Co. v. American Pub. Co. (C. C. A.) 843.

A corporation, making a contract which is within its charter powers for one purpose, cannot avoid liability thereon on the ground that it was made for another and unauthorized purpose, unless it shows that the other party to the contract had knowledge of such fact. — Colorado Springs Co. v. American Pub. Co. (C. C. A.) 843.

A corporation organized under Sess. Laws Colo. 1870, p. 49, authorizing the formation of corporations for the purpose of encouraging immigration, which is given power by its charter to deal in lands and other property, has implied power to contract for advertising matter which is calculated and intended to attract the attention of the public to the advantages of the state, and to induce immigration.—Colorado Springs Co. v. American Pub. Co. (C. C. A.) 843.

A claim for services rendered in behalf of bondholders of an insolvent corporation, on the foreclosure of a mortgage securing the bonds, cannot be allowed and paid from the proceeds of the mortgaged property, especially where there is no proof of a contract for such services with all the bondholders interested in the fund.—Trust & Deposit Co. of Onondaga v. Spartanburg Waterworks Co. (C. C.) 409.

Private corporation, by consent of stockholders and directors, may execute accommodation paper.—Murphy v. Arkansas & L. Land & Improvement Co. (C. C.) 723.

§ 4. Insolvency and receivers.

The fees of the counsel who file the bill under which the affairs of an insolvent corporation are wound up are allowable and payable from the proceeds of the property, the amount to be measured by the results.—Trust & Deposit Co. of Onondaga v. Spartanburg Waterworks Co. (C. C.) 409.

The president of an insolvent mortgagor corporation, who, in the discharge of his duty, cares for the property pending foreclosure, a receiver having been refused, is entitled to payment for the services rendered from its proceeds, when sold.—Trust & Deposit Co. of Onondaga v. Spartanburg Waterworks Co. (C. C.) 409.

Where the proceeds of the property of an insolvent corporation, sold in proceedings for winding up its affairs, are insufficient to pay creditors, fees of the attorneys representing the corporation cannot be allowed and paid therefrom.—Trust & Deposit Co. of Onondaga v. Spartanburg Waterworks Co. (C. C.) 409.

§ 5. Reincorporation and reorganization.

Bondholders, who have exchanged their bonds for those of a reorganized company, which by the reorganization agreement were to be made a first lien on the property, have the right to enforce such agreement, and to insist on the retention by the reorganization committee of all securities placed in its hands to secure the taking up of prior liens until their extinguishment is assured.—Peoria & E. Ry. Co. v. Coster (C. C.) 519.

§ 6. Dissolution and forfeiture of franchise.

Under the decisions of the courts of the United States, a solvent corporation does not hold its capital or property subject to any trust in favor of its creditors, although it is in process of liquidation.—Lawrence v. Greenup (C. C. A.) 906.

§ 7. Foreign corporations.

The fact that a foreign corporation, which had maintained an office in Minnesota and there contracted a liability, before suit brought in a court of the state to enforce such liability had withdrawn its local office, does not exempt it from being subjected to a personal judgment in such suit on service made on its president within the state, in the mode prescribed by Gen. St. Minn. 1894, § 5200.—McCord Lumber Co. v. Doyle (C. C. A.) 22.

An action, against officers of a corporation, to enforce a liability created by the statutes of the state of its domicile, may be maintained in any court without the state which has jurisdiction of the subject-matter and the parties.—First Nat. Bank v. Weidenbeck (C. C. A.) 896.

A provision of a state constitution, that no foreign corporation shall enjoy any greater rights or privileges within the state than domestic corporations, does not affect the validity of statutes governing domestic corporations, although they cannot be applied to foreign corporations.—First Nat. Bank v. Weidenbeck (C. C. A.) 896.

Court of equity has general power to appoint receiver for assets of foreign corporation within its jurisdiction.—Shinney v. North American Savings, Loan & Building Co. (C. C.) 9.

COSTS.

In admiralty, see "Admiralty," § 2.

§ 1. On appeal or error, and on new trial or motion therefor.

Though customary price for printing in district is 75 cents a page, $1 a page may be allowed as costs, where the page is larger than the customary page.—The Willowdene (D. C.) 509.

COUNTERFEITING.

Making a blank form of certificate of residence, such as, when filled, are issued by the United States to Chinese entitled to remain in the country, *held* not counterfeiting, within Rev. St. § 5418.—United States v. Ah Won (C. C.) 494.

COUNTIES.

See "Municipal Corporations."

§ 1. Fiscal management, public debt, and securities.

Where the constitution or act under which bonds are issued prescribes the public record which furnishes the test of compliance with the limitation on the amount of permissible indebtedness of the corporation, a purchaser is not bound to look beyond such record.—Board of Com'rs of Lake County v. Sutliff (C. C. A.) 270.

In an action on coupons from county bonds, the assessed valuation of the county *held* immaterial, in view of the prior evidence, and properly excluded.—Board of Com'rs of Lake County v. Sutliff (C. C. A.) 270.

A certificate or recital in negotiable municipal bonds, by officers authorized to determine the question and to make the recital, that a constitutional limitation has not been exceeded, or that a constitutional condition has been fulfilled, raises an estoppel, in favor of a bona fide purchaser, as conclusive as a recital or certificate of like effect relative to a statutory limitation or requirement.—Board of Com'rs of Lake County v. Sutliff (C. C. A.) 270.

Recitals in negotiable bonds that they are issued by authority of law are binding by way of estoppel on the corporation in favor of a bona fide purchaser, unless he is charged with notice to the contrary by the face of the bonds, or by some public record made by the statute a test of their validity.—Board of Com'rs of Lake County v. Sutliff (C. C. A.) 270.

Where a county in Colorado, issuing bonds under authority of Laws 1877, p. 218, fails to keep a book in which is recorded its indebtedness, as required by that act, a purchaser of such bonds is authorized to rely on the recitals therein that they are issued in conformity to the statute, as showing that they do not exceed the constitutional limit of indebtedness.—Board of Com'rs of Lake County v. Sutliff (C. C. A.) 270.

A transferee from a bona fide purchaser of negotiable municipal bonds takes all the rights of the transferror, and may invoke every presumption and estoppel from their recitals to sustain their validity that such transferror might, although he takes them as a gift or advancement, after maturity, and with notice of alleged defenses.—Board of Com'rs of Lake County v. Sutliff (C. C. A.) 270.

Act Colo. April 17, 1889, authorizing counties to refund their judgment and bonded indebtedness by the issue of bonds, is not in violation of the state constitution, either because it fails to require a vote of the electors, or as containing more than one subject, or because it refers to a prior statute by its title only as containing the provisions under which the taxes to meet the bonds issued thereunder shall be levied, or on the ground that it is a revenue act and originated in the senate.—Geer v. Board of Com'rs of Ouray County (C. C. A.) 435; Board of Com'rs of Ouray County v. Geer, Id.

As against a bona fide purchaser before maturity of bonds of a county containing recitals that they were issued, by virtue of a statute, in satisfaction of judgments which have been rendered against the county in courts of record, the county cannot deny the existence of such judgments.—Geer v. Board of Com'rs of Ouray County (C. C. A.) 435; Board of Com'rs of Ouray County v. Geer, Id.

COURTS.

Removal of action from state court to United States court, see "Removal of Causes."
Review of decisions, see "Appeal and Error."
Right to trial by jury, see "Jury," § 1.

§ 1. United States courts—Jurisdiction dependent on nature of subject-matter.

A federal court has jurisdiction of a suit brought under Rev. St. § 2326, to determine a contest between mining claims, where the alleged value of the property meets the statutory requirements.—McFadden v. Mountain View Min. & Mill. Co. (C. C. A.) 670.

A suit by a railroad company to restrain the enforcement of taxes on its property by state authorities, on the grounds that the assessment on which such taxes were levied is void, and also that it was intentionally discriminative against complainant's property, involves federal questions.—Southern Ry. Co. v. North Carolina Corp. Commission (C. C.) 513; Seaboard & R. R. Co. v. Same, Id.; Roanoke & T. R. R. Co. v. Same, Id.; Raleigh & G. R. Co. v. Same, Id.; Raleigh & A. Airline R. Co. v. Same, Id.; Carolina Cent. Ry. Co. v. Same, Id.; Atlantic Coast Line Ry. Co. v. Same, Id.; Wilmington & W. R. Co. v. Same, Id.; Norfolk & C. R. Co. v. Same, Id.

A trespass upon a mining claim does not raise a federal question, nor does a claim of right based upon a mere location of a mining claim, as against a patent regularly issued by the land department, under authority of law, for the land covered by such location.—Peabody Gold-Min. Co. v. Gold Hill Min. Co. (C. C.) 657.

Where the allegations of a bill show that the respective parties to the suit are making adverse claims to the same land, under the mineral land

laws of the United States, and that the determination of such conflicting claims necessarily requires the construction and application of those laws, a federal court has jurisdiction of the suit for that purpose, and to grant therein such incidental or provisional relief as may be necessary and equitable for the protection of the rights of a party.—Nevada Sierra Oil Co. v. Miller (C. C.) 681.

A bill asserting rights based on the location of a mining claim under the laws of the United States, which shows that the validity of such location depends on the question whether or not the locators discovered a mineral deposit within the limits of the claim prior to its location, within the meaning of such laws, and which sets out in full the facts relating to such alleged discovery, discloses a question arising under the laws of the United States which gives a federal court jurisdiction, where the requisite statutory amount is involved.—Nevada Sierra Oil Co. v. Miller (C. C.) 681.

§ 2. —— Jurisdiction dependent on citizenship, residence, or character of parties.

Evidence that the cause of action sued on was collusively transferred to plaintiff to give jurisdiction to a federal court *held* sufficient to warrant the dismissal of the suit.—Board of Com'rs of Lake County v. Schradsky (C. C. A.) 1.

The right of a purchaser of coupons, payable to bearer, taken from municipal bonds, to maintain an action thereon in a federal court, where he purchased such coupons after they were detached, is not affected by the fact that the bonds themselves are payable to persons who are citizens of the same state, and who could not sue thereon in such court.—Reynolds v. Lyon County, Iowa (C. C.) 155.

Municipal bonds payable to order, with the name of the payee left blank, are in effect instruments payable to bearer, and a transferee, who is a citizen of another state, may sue thereon in a federal court without regard to the citizenship of the original holder.—Reynolds v. Lyon County, Iowa (C. C.) 155.

The allegations of a bill by a mortgagee of a water company against the company and the city in which it was located *held* to show that the interests of the company were with complainant, and that a federal court was without jurisdiction for want of the requisite diversity of citizenship.—Boston Safe-Deposit & Trust Co. v. City of Racine (C. C.) 817.

§ 3. —— Jurisdiction dependent on amount or value in controversy.

A suit in equity in a circuit court of the United States to restrain the defendant, as receiver of an insolvent national bank, from prosecuting an action at law in the same court against the complainant, is ancillary to the action at law, and the court has jurisdiction without regard to the amount involved.—Aldrich v. Campbell (C. C. A.) 663.

§ 4. —— State laws as rules of decision.

The decisions of the supreme court of a state construing its revenue laws are binding on the federal courts in that state.—Rice v. Jerome (C. C. A.) 719.

The Nebraska statute, making railroad companies liable for all injuries to passengers, in the absence of negligence on their part, having been held valid, under the constitution of the state, by its supreme court, such decision is binding on the federal courts.—Clark v. Russell (C. C. A.) 960.

Upon questions of usury, the federal courts of equity are governed by the laws of the state applicable to the contract, as construed by the state courts.—Union Mortgage, Banking & Trust Co. v. Hagood (C. C.) 360; Hagood v. Union Mortgage, Banking & Trust Co., Id.; Corbin v. Same, Id.; Union Mortgage, Banking & Trust Co. v. Corbin, Id.

The United States court will not enforce statute of state court contravening distinction enforced in courts of United States between law and equity.—Adoue v. Strahan (C. C.) 691.

§ 5. —— Circuit courts of appeals.

A circuit court of appeals is without jurisdiction to entertain an appeal from an order denying a writ of habeas corpus, where the petition therefor is based on the alleged violation of the petitioner's rights under the constitution of the United States.—Davis v. Burke (C. C. A.) 501.

§ 6. Concurrent and conflicting jurisdiction and comity.

A United States court cannot, under Rev. St. § 720, enjoin a sheriff from collecting an execution out of the state court.—Leathe v. Thomas (C. C. A.) 136.

Comity prevents a federal court from enjoining execution from state court.—Leathe v. Thomas (C. C. A.) 136.

Neither the fact that a state appropriates money in aid of suits by its railroad commissioners, nor that a statute authorizes the imposition of fines, to be paid into the school fund in case a railroad company refuses to conform to a rate fixed by the commission, makes the state a party in interest to a suit to determine the validity of a rate so fixed.—Hickman v. Missouri, K. & T. Ry. Co. (C. C.) 113.

A suit brought by the railroad commissioners of Missouri, under the state statute against a railroad company to enforce obedience to rates fixed by the commission, is not one to which the state is, in effect, the party in interest, so as to prevent its removal from the state to a federal court, when the statutory grounds for removal exist.—Hickman v. Missouri, K. & T. Ry. Co. (C. C.) 113.

CREDITORS.

See "Assignments for Benefit of Creditors"; "Bankruptcy"; "Fraudulent Conveyances."

Subrogation to rights of creditor, see "Subrogation."

CREDITORS' SUIT.

Where a person is made a party to a creditors' bill who has no interest in and can derive

no benefit therefrom, he is entitled to his costs.—Malcomson v. Wappo Mills (C. C.) 225.

CRIMINAL LAW.

Particular offenses, see "Bribery"; "Counterfeiting."
—— offenses against customs laws, see "Customs Duties," § 2.

§§ 1, 2. Time of trial and continuance.
The failure of the record to show that an issue as to the present insanity of defendant, properly raised by an application for continuance and urged in bar of a trial at that time, was tried or determined by the court, *held* ground for the reversal of a judgment of conviction.—Youtsey v. United States (C. C. A.) 937.

An order merely denying a continuance does not raise a presumption that the question of the present insanity of defendant, also properly presented by the application for continuance, was considered and determined.—Youtsey v. United States (C. C. A.) 937.

§ 3. Trial.
It is prejudicial error for a court to permit counsel for the prosecution, over objection, to comment, in argument to the jury, upon the failure of the defendant to offer evidence of his previous good character.—McKnight v. United States (C. C. A.) 208.

Evidence of the good character of a defendant is to be considered by the jury in all cases, in connection with all the other evidence, in determining his guilt or innocence of the crime with which he is charged; and an instruction that such evidence can only be considered in case the other evidence leaves the question of guilt or innocence in doubt is erroneous.—Rowe v. United States (C. C. A.) 779.

The question of the mental fitness of a defendant to be subjected to trial may be raised at any time, and in any proper manner; and the fact that it is presented in a motion for continuance, also based on other grounds, does not relieve the court from the duty of considering and determining the issue thus presented.—Youtsey v. United States (C. C. A.) 937.

Where a point which the court is asked to charge by the defendant is stated in the charge of the court in substantially the same language, it is in effect affirmed, and error cannot be predicated on the fact that it was not read to the jury and expressly affirmed.—United States v. Ingham (D. C.) 935.

The failure to discharge a jury on their announcement of a disagreement does not constitute coercion, which renders a verdict subsequently returned invalid, where it appears that the disagreement was caused by the failure of the jury to clearly understand the charge of the court, and, on its being further explained, they soon reached an agreement.—United States v. Ingham (D. C.) 935.

CROSS-EXAMINATION.

See "Witnesses," § 2.

CUSTOMS DUTIES.

§ 1. Goods subject to duty, rate, and amount.
Nickel alloy in rods and sheets is dutiable, under paragraph 167½ of the tariff act of 1894, as an alloy in which nickel is the component material of chief value, and not under paragraph 177, covering generally manufactured articles not specifically provided for, composed wholly or in part of metal; but wire made from such alloy is dutiable under the latter paragraph.—Boker v. United States (C. C. A.) 205.

Lithofone is dutiable, under paragraph 57 of the tariff act of 1897, as a "white paint or pigment containing zinc, but not containing lead, dry," and not as "sulphide of zinc."—United States v. Gabriel (C. C.) 934.

§ 2. Violations of customs laws.
A proceeding under Rev. St. § 4377, for the forfeiture of a vessel and cargo, for violation of her license by carrying smuggled goods, is a civil suit, and the government is not required to prove the allegations of its libel beyond a reasonable doubt, but only by a preponderance of evidence.—The Good Templar (D. C.) 651.

DAMAGES.

For particular injuries, see "Collision," § 2.
In particular actions, see "Trover and Conversion," § 1.

§ 1. Grounds and subjects of compensatory damages.
A party who failed to comply with a contract made with stockholders, to lend money to a corporation, cannot be held liable in an action for the breach, for the value of stock owned by such stockholders individually, which they gave as a bonus to another person to procure the loan.—Kelly v. Fahrney (C. C. A.) 176.

§ 2. Measure of damages.
No substantial damages are recoverable for the breach of a contract to loan money, where no definite time for the continuance of the loan is agreed on.—Kelly v. Fahrney (C. C. A.) 176.

A state statute, fixing the measure of the damages recoverable for the wrongful conversion of personal property, is applicable to an action in a federal court for trespass upon a mining claim, where the only damage claimed or litigated is the value of the ore removed and converted by defendant.—Golden Reward Min. Co. v. Buxton Min. Co. (C. C. A.) 413.

§ 3. Pleading, evidence, and assessment.
In an action to recover damages for a personal injury, evidence of the charge made to plaintiff by a physician for treatment on account of such injury may be submitted to the jury, although there is no proof that such charge was reasonable for the services required.—Western Gas Const. Co. v. Danner (C. C. A.) 882.

DEATH.

Of party to action ground for abatement, see "Abatement and Revival," § 1.
Suspension of running of statute of limitation, see "Limitation of Actions," § 2.

DECEDENTS.

Testimony as to transactions with persons since deceased, see "Witnesses," § 1.

DECEIT.

See "Fraud."

DEDICATION.

§ 1. Operation and effect.

A nation, state, or municipality, which, as owner of land within a town site, dedicates the same to public use for the purposes of a park, is as conclusively estopped from revoking such dedication, or appropriating the land to other uses, after the town has been settled and the park improved with money derived from taxes paid by residents and taxpayers, as a private proprietor would be.—Davenport v. Buffington (C. C. A.) 234.

DEEDS.

By insane persons, see "Insane Persons," § 1.
Of trust, see "Assignments for Benefit of Creditors," § 1; "Mortgages."

DEPOSITIONS.

A deposition will not be suppressed, for refusal of the witness to answer cross-interrogatories, where no objection was made until too late to have the fault corrected.—Rahtjen's American Composition Co. v. Holzapfel's Compositions Co. (C. C.) 949.

DEPOSITS.

In bank, see "Banks and Banking," § 2.

DISCHARGE.

From indebtedness, see "Bankruptcy," § 12.
From liability as surety, see "Principal and Surety," § 1.

DISCRETION OF COURT.

Review in civil actions, see "Appeal and Error," § 7.

DISTRIBUTION.

Of estate of bankrupt, see "Bankruptcy," § 10.

DOCUMENTS.

As evidence in civil actions, see "Evidence," § 4.

DUTIES.

Customs duties, see "Customs Duties."
Excise duties, see "Internal Revenue."

EASEMENTS.

Grant of easement to street railroad, see "Street Railroads," § 1.

EJECTMENT.

§ 1. Right of action and defenses.

A deed purporting to have been executed by a common grantor prior to the one under which plaintiff deraigns title, but which was not so acknowledged as to entitle it to record, and under which it does not appear that the grantee was ever in possession or claimed title, is not admissible, to show an outstanding title in a stranger, to defeat plaintiff's recovery.—Plaster v. Rigney (C. C. A.) 12.

EMPLOYES.

See "Master and Servant."

EQUITY.

See "Creditors' Suit"; "Fraudulent Conveyances"; "Quieting Title"; "Receivers"; "Trusts."
Relief against judgment, see "Judgment," § 2.
Suits for infringement of patents, see "Patents," § 8.

§ 1. Pleading.

A complainant, by failing to set down a plea for argument, and by filing a general replication thereto, and going to hearing on the issue thus made, admits the legal sufficiency of the plea; and, if the facts pleaded are established on the hearing, the defendant is entitled to a dismissal of the bill.—Daniels v. Benedict (C. C. A.) 367.

§ 2. Evidence.

The rule that two witnesses, or one witness and corroborating circumstances, are required to overcome a sworn answer, does not apply where the reason upon which the rule is based fails.—Savings & Loan Soc. v. Davidson (C. C. A.) 696.

§ 3. Masters and commissioners, and proceedings before them.

The findings of a master on questions of fact will not be disturbed, unless it is manifest upon the evidence that they are wrong.—Kilgour v. National Bank (C. C.) 693.

§ 4. Decree, and enforcement thereof.

Where the facts alleged in a bill and shown by the proofs establish a trust which entitles complainant to the relief prayed for, he is not debarred from such relief solely because he failed to aver, as a legal conclusion, that the trust arose from such facts, but alleged an express trust.—Savings & Loan Soc. v. Davidson (C. C. A.) 696.

§ 5. Bill of review.

Where a party against whom a decree has been entered in a circuit court has no right of appeal to the supreme court, either because no question appealable to that court is in issue, or because he has failed to have it properly certified, the time within which he may file a bill of review is limited to the six months allowed by statute for taking an appeal to the circuit court of appeals.—Reed v. Stanley (C. C. A.) 521.

A bill of review cannot be filed in a federal court of equity after the expiration of the time allowed for the taking of an appeal from the decree sought to be reviewed.—Reed v. Stanley (C. C. A.) 521.

ERROR, WRIT OF.

See "Appeal and Error."

EVIDENCE.

See "Depositions"; "Witnesses."
As to damages, see "Damages," § 3.
In actions for negligence, see "Negligence," § 2.
In equity, see "Equity," § 2.
Questions of fact for jury, see "Trial," § 1.
Review on appeal or writ of error, see "Appeal and Error," § 7.

§ 1. Judicial notice.

The United States courts take judicial notice of the statutes of the several states.—Mutual Life Ins. Co. v. Hill (C. C. A.) 263.

Courts of admiralty will not take judicial notice of the regulations of the lighthouse board.—Smith v. City of Shakopee (C. C. A.) 974.

§ 2. Presumptions.

A jury may infer, from the absence of a witness beyond the reach of a subpœna, and from the fact that his absence was facilitated by one of the parties, that his testimony would not have been more favorable to such party than that of the witnesses who testified.—Frank Waterhouse v. Rock Island Alaska Min. Co. (C. C. A.) 466.

§ 3. Relevancy, materiality, and competency in general.

Testimony, though it has some tendency to establish a material fact, may be rejected, where its admission would tend to divert the attention of the jury from the precise issues involved in the case, and, by raising collateral issues, protract the trial beyond reasonable limits.—Golden Reward Min. Co. v. Buxton Min. Co. (C. C. A.) 413.

Testimony offered by a defendant for the purpose of establishing the quantity and value of ore taken by it from a mining claim *held* properly rejected, on the ground that it raised collateral issues calculated to confuse the jury.—Golden Reward Min. Co. v. Buxton Min. Co. (C. C. A.) 413.

§ 4. Documentary evidence.

A certified copy of the record of a deed *held* admissible in evidence without proof of the execution of the original deed, under the statute of Missouri, where the record was made more than 30 years before the copy was offered in evidence.—Plaster v. Rigney (C. C. A.) 12.

Diagrams may properly be admitted, in a personal injury case, to illustrate the testimony of witnesses as to objects and places which cannot otherwise be conveniently shown to the jury; and it is no objection to their admission for that purpose that their accuracy is controverted, that being a matter for determination by the jury.—Western Gas Const. Co. v. Danner (C. C. A.) 882.

§ 5. Parol or extrinsic evidence affecting writings.

Where the terms of a written contract are full and unambiguous, parol testimony is not admissible to add to its provisions.—Montgomery v. Ætna Life Ins. Co. (C. C. A.) 913.

§ 6. Opinion evidence.

The opinion of an expert *held* admissible as to the value of ore removed by defendant from plaintiff's mining claim and converted.—Golden Reward Min. Co. v. Buxton Min. Co. (C. C. A.) 413.

The question whether the rough and uneven condition of a railroad track would be likely to cause a coupling pin to be thrown out while a train was going downgrade, and thus part the train, is a proper one for expert testimony.—Chicago G. W. Ry. Co. v. Price (C. C. A.) 423.

EXCEPTIONS, BILL OF.

Necessity for purpose of reveiw, see "Appeal and Error," § 5.
Taking exceptions at trial, see "Trial," § 2.

EXPERT TESTIMONY.

In civil actions, see "Evidence," § 6.

FACTORS.

See "Brokers."

FEDERAL COURTS.

See "Courts," §§ 1–5.

FEDERAL QUESTIONS.

Grounds for jurisdiction, see "Courts," § 1.

FEES.

Of attorney, see "Attorney and Client," § 1.

FELLOW SERVANTS.

See "Master and Servant," § 1.

FINDINGS.

Review on appeal or writ of error, see "Appeal and Error," § 7.

FORCIBLE ENTRY AND DETAINER.

§ 1. Civil liability.

The fact that a defendant, in possession and claiming the equitable ownership of lands in the Indian Territory, is a citizen of the United States, and not entitled to hold such lands, affords no ground for the recovery of their possession by one to whom the legal title was conveyed in trust for the defendant.—Sanders v. Thornton (C. C. A.) 863.

Under the Arkansas statutes, in force in the Indian Territory, an action of unlawful detainer will not lie unless the relation of landlord and tenant exists between the parties.—Sanders v. Thornton (C. C. A.) 863.

FOREIGN CORPORATIONS.

See "Corporations," § 7.

FORGERY.

See "Counterfeiting."

FRAUD.

§ 1. Actions.

A seller, who practices fraud and deceit to induce the purchaser to accept goods without examination, which he would otherwise have made, will not be heard to say, in defense to an action for fraudulent representations, that the plaintiff was cheated as the result of his own negligence and credulity, and is therefore without remedy.—Strand v. Griffith (C. C. A.) 854.

FRAUDULENT CONVEYANCES.

By bankrupt, see "Bankruptcy," § 7.

§ 1. Transfers and transactions invalid.

Where mortgaged personalty is in possession of bailee of mortgagor, notice to him is necessary to delivery of possession to mortgagee that will be effectual against creditors.—Strahorn-Hutton-Evans Commission Co. v. Quigg (C. C. A.) 735.

GRANTS.

Of public lands, see "Public Lands."

GUARANTY.

See "Indemnity."

HARMLESS ERROR.

In civil actions, see "Appeal and Error," § 7.

HIGHWAYS.

See "Navigable Waters," § 1.
Accidents at railroad crossings, see "Railroads," § 4.

HUSBAND AND WIFE.

§ 1. Actions.

Under the statutes of Arkansas, a married woman, in an action for a personal injury, may recover for the impairment of her earning capacity due to the injury.—Texas & P. Ry. Co. v. Humble (C. C. A.) 837.

A married woman, suing in a federal court for a personal injury, in a state by whose laws she is permitted to maintain such action in her own name, cannot be compelled to join her husband as plaintiff.—Texas & P. Ry. Co. v. Humble (C. C. A.) 837.

§ 2. Separation and separate maintenance.

A provision in an agreement of separation that, in case the parties should again come together and live as husband and wife, it should in no way abrogate or modify the agreement as to their property rights, beyond entitling the wife to her support from the husband, is not immoral, or against public policy.—Daniels v. Benedict (C. C. A.) 367.

A provision in an agreement of separation by which the wife releases all claims to her husband's estate, in consideration of his present conveyance of property to her, is valid.—Daniels v. Benedict (C. C. A.) 367.

The cause or reason for the making of an agreement of separation between a husband and wife is for their own consideration exclusively, and the courts cannot inquire into its sufficiency, as affecting the validity of the agreement.—Daniels v. Benedict (C. C. A.) 367.

An agreement of separation, like any other contract, is only rendered invalid because of fraudulent representations when they were of existing facts, as distinguished from promises or prophecies.—Daniels v. Benedict (C. C. A.) 367.

The facts, alone, that the lawyer who acted for a wife in making an agreement of separation had previously been counsel for the husband, and was released from his retainer that he might be employed by the wife, and that by express provision of the agreement his fee was paid by the husband, do not invalidate the agreement.—Daniels v. Benedict (C. C. A.) 367.

The intervention of a trustee is not necessary, in the transfer of property from a husband to his wife in the performance of an agreement of separation, in a state where, by statute, a wife may contract directly with her husband and maintain suits in her own name.—Daniels v. Benedict (C. C. A.) 367.

The provision of the Colorado statutes that a husband may not by will deprive his wife of more than one-half his property, unless she accepts the provisions of the will after his death, does not render invalid a property settlement made in an agreement of separation.—Daniels v. Benedict (C. C. A.) 367.

The provisions of an agreement of separation as to division of property *held* just and fair to the wife.—Daniels v. Benedict (C. C. A.) 367.

Where a wife accepted and retained the property conveyed to her by her husband in execution of an agreement of separation, and lived apart from him during the remainder of his life, a court of equity will not, after his death, set aside such agreement, and restore her to the rights in his estate which she surrendered for those considerations.—Daniels v. Benedict (C. C. A.) 367.

An agreement of separation between a husband and wife resident in Colorado, where, by statute, the wife has the same property rights and right to contract as though unmarried, is presumptively valid; and a party pleading it as a cause of action or matter of defense need not aver or prove that it was fair and just to the wife.—Daniels v. Benedict (C. C. A.) 367.

It is the settled law of both England and the United States that an agreement of separation between a husband and wife, whereby he pro-

vides for her separate maintenance, and she covenants to release all her claims upon his estate, is lawful, and not in contravention of public policy.—Daniels v. Benedict (C. C. A.) 367.

Subsequent cohabitation does not abrogate an agreement of separation between husband and wife, unless such is the intention of the parties. —Daniels v. Benedict (C. C. A.) 367.

IMPLIED CONTRACTS.

See "Money Paid."

INDEMNITY.

Where two persons each deposit securities for the indemnification of a surety, and the liability is paid from the securities furnished by one alone, he may enforce contribution from the other; the liability of each being in proportion to the relative amount of the securities furnished by him.—Springs v. Brown (C. C.) 405.

Where a bond is given to a surety for the expressed purpose of counter security against the liability assumed by him, the liability of the maker thereon is commensurate with the liability of the surety, although by its terms the bond expires before the contract on which the surety is bound fully matures.—Springs v. Brown (C. C.) 405.

INDORSEMENT.

Of bill of exchange or promissory note, see "Bills and Notes," § 1.

INFRINGEMENT.

Of patent, see "Patents," §§ 6–8.
Of trade-mark, see "Trade-Marks and Trade-Names," § 3.

INSANE PERSONS.

§ 1. Disabilities in general.

A power of attorney given by a lunatic is void, and a deed executed thereunder is not admissible against the grantor.—Plaster v. Rigney (C. C. A.) 12.

INSOLVENCY.

See "Assignments for Benefit of Creditors"; "Bankruptcy."
Of corporation, see "Corporations," § 4.

INSTRUCTIONS.

In civil actions, see "Trial," § 2.
In criminal prosecutions, see "Criminal Law," § 3.

INSURANCE.

§ 1, 2. The contract in general.

Where a provision in an accident policy that the insurance should not cover "injuries, fatal or otherwise, resulting from poison or anything accidentally or otherwise taken, administered, absorbed, or inhaled," had, prior to the issuance of such policy, been construed by the supreme court of a state not to exempt the company from liability for the death of the insured from the involuntary and unconscious inhaling of illuminating gas while asleep, the same construction will be given to the provision in such policy.—Fidelity & Casualty Co. v. Lowenstein (C. C. A.) 17.

In an action on an insurance policy, containing a provision which had, prior to the issuance of such policy, been given a uniform judicial construction by the courts of last resort of several states, such construction will be adopted as the one presumably intended by the parties.—Fidelity & Casualty Co. v. Lowenstein (C. C. A.) 17.

A policy of insurance, issued from an office in the state of New York on an application forwarded through an office in the state of Washington, is a New York contract.—Mutual Life Ins. Co. v. Hill (C. C. A.) 263.

§ 3. Forfeiture of policy for breach of promissory warranty, covenant, or condition subsequent.

Although premiums for several years may be due, plaintiff can recover on a contract of insurance made in New York if the company has not complied with Laws N. Y. 1877, c. 321, § 1. —Mutual Life Ins. Co. v. Hill (C. C. A.) 263.

§ 4. Estoppel, waiver, or agreements affecting right to avoid or forfeit policy.

Laws N. Y. 1877, c. 321, § 1, providing that no insurance company shall declare a policy forfeited without having given certain notice to assured, cannot be waived.—Mutual Life Ins. Co. v. Hill (C. C. A.) 263.

Since Laws N. Y. 1877, c. 321, § 1, relative to forfeiture of insurance policies, cannot be waived, the beneficiaries are not estopped from claiming payment of a policy by an attempted waiver of the statute by the assured.—Mutual Life Ins. Co. v. Hill (C. C. A.) 263.

§ 4½. Extent of loss and liability of insurer.

Where a tontine life insurance policy provided that the holder might withdraw, at the expiration of the tontine dividend period, in addition to its share of the accumulated reserve, the surplus "apportioned by the society" to such policy, the action of the society in making such apportionment is not subject to review in a suit by the policy holder, unless fraud or irregularity in its procedure is shown.—Gadd v. Equitable Life Assur. Soc. (C. C.) 834.

§ 5. Actions on policies.

It is not a departure for plaintiff to plead a contract and compliance on his part, and depend upon the noncompliance of defendant with a statute the compliance with which would have excused him from performance.—Mutual Life Ins. Co. v. Hill (C. C. A.) 263.

A complaint upon an accident policy to recover for the death of the insured *held* to state a cause of action.—Miller v. Fidelity & Casualty Co. (C. C.) 836.

INTEREST.

See "Usury."

INTERNAL REVENUE.

The tax-paying value of stamps for fermented liquors purchased by a brewer before the tariff act of 1897 went into effect, and upon which the deduction of 7½ per centum was allowed, as provided by Rev. St. § 3341, is not affected by the repeal of that provision by such act, and the government cannot require an additional payment equal to the discount upon the use of such stamps by the purchaser, after the repeal took effect.—Nassau Brewing Co. v. Moore (C. C.) 206; India Wharf Brewing Co. v. Same, Id.; Ochs v. Same, Id.; Joseph Fallert Brewing Co. v. Same, Id.

INTERNATIONAL LAW.

See "Aliens."

INTERROGATORIES.

To witnesses, see "Depositions."

INTERVENTION.

In attachment proceedings, see "Attachment," § 1.

INVENTION.

See "Patents."

IRRIGATION.

See "Waters and Water Courses," § 1.

ISSUES.

Presented for review on appeal, see "Appeal and Error," § 3.

JUDGMENT.

Enforcement by creditors' suit, see "Creditors' Suit."
Review, see "Appeal and Error."

§ 1. On trial of issues.

In an action to recover taxes paid, judgment for plaintiff on the pleadings is not authorized, where the answer contains a general denial and no admission of the allegation of payment.—Custer County v. Western Ranches (C. C. A.) 483.

§ 2. Equitable relief.

The constitutional provision against the impairment of the obligation of contracts by a state does not apply to an erroneous decision by a state court.—Allen v. Allen (C. C. A.) 525.

A court of equity cannot set aside a judgment at law, rendered by a court which had jurisdiction, on the ground that it was not warranted by the pleadings.—Allen v. Allen (C. C. A.) 525.

A judgment cannot be impeached in equity, on the ground of fraud practiced by the successful party, where it appears that, if fraud was attempted, it was unsuccessful.—Allen v. Allen (C. C. A.) 525.

§ 3. Merger and bar of causes of action and defenses.

In an action against a county on its bonds, issued in satisfaction of a judgment against it, such judgment conclusively estops the county from making the defense that the original indebtedness upon which the judgment was rendered was in excess of the amount which it could legally incur under the limitations imposed by the constitution of the state.—Geer v. Board of Com'rs of Ouray County (C. C. A.) 435; Board of Com'rs of Ouray County v. Geer, Id.

§ 4. Conclusiveness of adjudication.

Judgment in ejectment, adjudging plaintiff entitled to possession of a vein of ore, and which necessarily determined that the apex of such vein was within the boundaries of plaintiff's claim, is conclusive of such fact in a subsequent action between the same parties to recover the value of ore alleged to have been taken from such vein by defendant.—New Dunderberg Min. Co. v. Old (C. C. A.) 150.

An action on coupons from municipal bonds is not upon the same cause of action as a former action on different coupons from the same bonds; and hence the judgment in the first action renders res judicata in the second only such issues as were actually raised, litigated, and determined in the first suit.—Board of Com'rs of Lake County v. Sutliff (C. C. A.) 270.

Where trustee in bankruptcy sues in state court to set aside fraudulent conveyance by bankrupt, and recovers property, but is doubtful as to jurisdiction of state court, and brings bill in bankruptcy court to obtain a decree for the same purpose, the judgment of the state court is conclusive.—Robinson v. White (D. C.) 33.

A judgment in a state court, to which the bankrupt, his wife, and a trustee were parties, finding conveyance by bankrupt to his wife fraudulent as to creditors, and ordering property transferred to trustee, is conclusive on bankrupt's subsequent application for discharge, opposed because of such fraudulent conveyance.—In re Skinner (D. C.) 190.

JUDICIAL NOTICE.

In civil actions, see "Evidence," § 1.

JURISDICTION.

In admiralty, see "Admiralty," § 1.
Of bankruptcy proceedings, see "Bankruptcy," §§ 1–4.
Of particular courts, see "Courts."

JURY.

Custody and conduct, see "Criminal Law," § 3.
Instructions in civil actions, see "Trial," § 2.
—— in criminal prosecutions, see "Criminal Law," § 3.

Taking case or question from jury at trial, see "Trial," § 1.

§ 1. Right to trial by jury.
The federal courts are governed by the practice at common law as to the method of trying an issue of the present insanity of a defendant, where the objection is urged in bar of his trial: and by such practice the defendant is not entitled to a jury as a matter of right, but the judge may, in his discretion, call a jury, or determine the issue himself, upon his own inspection of the defendant, and such testimony as he may choose to take, or he may direct the question to be tried by the jury with the plea of not guilty.—Youtsey v. United States (C. C. A.) 937.

LANDLORD AND TENANT.

Oil leases, see "Mines and Minerals," § 2.

§ 1. Premises, and enjoyment and use thereof.
Where leased premises are insufficient and unsafe for the purpose for which they are leased, and such fact is known to the lessee when the lease is made, or is apparent on reasonable inspection, the lessor is not liable to one injured by reason of the using of the premises by the lessee in their unsafe condition.—Schwalbach v. Shinkle, Wilson & Kreis Co. (C. C.) 483.

A petition, in an action to recover jointly from a lessor and lessee for a personal injury alleged to have resulted from the use of the leased premises by the lessee when they were insufficient and unsafe for such use, and known to be so by both defendants when they were let, is not demurrable, on the ground that it joins separate causes of action against the several defendants.—Schwalbach v. Shinkle, Wilson & Kreis Co. (C. C.) 483.

LAND OFFICE.

See "Public Lands," § 1.

LANDS.

See "Public Lands."

LETTERS PATENT.

For inventions, see "Patents."

LIBEL AND SLANDER.

§ 1. Words and acts actionable, and liability therefor.
Criticisms of a book purporting to show what American citizens are descended from royalty *held* not libelous.—Browning v. Van Rensselaer (C. C.) 531.

LICENSES.

For making, use, or sale of patented articles, see "Patents," § 5.

LIENS.

See "Maritime Liens."
Effect of proceedings in bankruptcy, see "Bankruptcy," § 7.

LIMITATION OF ACTIONS.

§ 1. Statutes of limitation.
An action in a federal court on coupons from municipal bonds is governed as to limitation by the statutes of the state.—Reynolds v. Lyon County, Iowa (C. C.) 155.

§ 2. Computation of period of limitation.
The contingent statutory liability of a stockholder in a Kansas corporation to creditors of the corporation continues, upon his death, against his personal representative, so that his death does not affect the running of limitation against an action to enforce such liability.—Fidelity Insurance, Trust & Safe-Deposit Co. v. Mechanics' Sav. Bank (C. C. A.) 297.

LOCATION.

Of mining claim, see "Mines and Minerals," § 1.

MARITIME LIENS.

§ 1. Creation, operation, and effect.
A person contracting to have a vessel built, to be paid for in installments at fixed times, does not become the owner of the vessel until it is completed and delivered to him by the builder; and one furnishing him materials, which are delivered to and used by the builder, is not entitled to a lien therefor, under Rev. St. Ohio, § 5880, giving a lien for debts contracted on account of a vessel by the owner.—The John B. Ketcham, 2d (C. C. A.) 872; Globe Iron Works Co. v. Huron Transp. Co., Id.

MARRIED WOMEN.

See "Husband and Wife."

MARSHALS.

Of United States, see "United States Marshals."

MASTER AND SERVANT.

§ 1. Master's liability for injuries to servant—Fellow servants.
A bridge builder, employed by a railroad company and furnished with cars, in which he with his assistants and tools is transported to points along the line where his services are required, by being attached to a regular train, is a fellow servant with the employés in charge of such train, while being so moved in the usual manner and in the discharge of his regular duties, and cannot recover from the company for an injury resulting from their negligence.—Tomlinson v. Chicago, B. & Q. R. Co. (C. C. A.) 252.

A section man and a conductor *held* fellow servants, though the rule of the company provides that section men shall always assist the passage of trains, and, in case of accident or delay, obey the orders of the conductor.—Slavens v. Northern Pac. Ry. Co. (C. C. A.) 255.

An injury sustained by plaintiff's decedent *held* to have been caused by failure to perform a duty imposed on fellow servants; hence plaintiff cannot recover from the master.—Slavens v. Northern Pac. Ry. Co. (C. C. A.) 255.

Master is liable to employé injured by reason of defect in appliance which it is master's duty to furnish, though defect is due to negligence of a fellow servant.—Port Blakely Mill Co. v. Garrett (C. C. A.) 537.

That one handling switching engine was reckless in a particular instance does not prove incompetency.—Thomas v. Cincinnati, N. O. & T. P. Ry. Co. (C. C.) 245.

Yard master of railroad *held* to be fellow servant of foreman of switching gang employed under him.—Thomas v. Cincinnati, N. O. & T. P. Ry. Co. (C. C.) 245.

§ 2. —— Risks assumed by servant.

Where plaintiff's decedent exposed himself to a danger of which he should have known as much as any other person, he is deemed to have assumed the risks incident to the situation.—Slavens v. Northern Pac. Ry. Co. (C. C. A.) 255.

The dangers from a defective railroad track must have been so obvious and threatening, to a servant engaged in the operation of trains thereon, that a reasonably prudent man in his situation would have avoided them, in order to charge him with having assumed the risk by continuing in the service.—Chicago G. W. Ry. Co. v. Price (C. C. A.) 423.

§ 3. —— Actions.

A conversation just preceding an accident which caused the death of decedent *held* admissible as a part of the res gestæ.—Slavens v. Northern Pac. Ry. Co. (C. C. A.) 255.

The finding of a jury that the bad condition of a railroad track was the proximate cause of an accident by which the conductor of a train was killed *held* to be sufficiently supported by the evidence, so that it could not be disturbed by an appellate court.—Chicago G. W. Ry. Co. v. Price (C. C. A.) 423.

Evidence of failure by yard master to give proper instructions as to use of switch considered, and *held* to show breach of duty, for which railroad company was liable.—Thomas v. Cincinnati, N. O. & T. P. Ry. Co. (C. C.) 245.

That yard master occasionally ran engines, and could handle them with safety, is sufficient to establish competency to run switch engine in switching yard.—Thomas v. Cincinnati, N. O. & T. P. Ry. Co. (C. C.) 245.

Where a seaman alleges that an injury was caused by defective appliances, the burden is on him to show that such defect was the proximate cause.—The Lydia M. Deering (D. C.) 971.

MASTERS IN CHANCERY.

See "Equity," § 3.

MASTERS OF VESSELS.

See "Shipping," § 2.

MATERIALITY.

Of alteration of written instrument, see "Alteration of Instruments."

MEASURE OF DAMAGES.

See "Damages," § 2.

MINES AND MINERALS.

§ 1. Public mineral lands.

A mining district has power to make a regulation requiring a prescribed amount of work to be done on a claim within 90 days after its location, and to make such claim subject to relocation in default of such work, notwithstanding the 90 days may expire before the 1st day of January succeeding the date of the location.—Northmore v. Simmons (C. C. A.) 386.

A mineral discovery made on free public land, and a claim located thereon, vests in the locators all the free public land within its limits, and every vein whose apex is found within such free public land within the surface lines of the claim extended downward vertically, whether the surface thus secured is all, or only part, of the tract within the boundary lines of the claim.—Crown Point Min. Co. v. Buck (C. C. A.) 462; Buck v. Crown Point Min. Co., Id.

Act July 1, 1892, restoring to the public domain a portion of the Colville Indian reservation, in the state of Washington, did not operate to give a right to locate mineral claims therein in advance of the proclamation of the president therein provided for.—McFadden v. Mountain View Min. & Mill. Co. (C. C. A.) 670.

A suit brought under Rev. St. § 2326, to determine a contest between mining claims, is of an equitable nature.—McFadden v. Mountain View Min. & Mill. Co. (C. C. A.) 670.

The fact that a patent for a lode mining claim includes ground extending more than 300 feet on either side of the vein or lode does not render it invalid on its face as to the excess, as it may properly include any number of mining locations owned by the patentee.—Peabody Gold-Min. Co. v. Gold Hill Min. Co. (C. C.) 657.

There can be no valid location of petroleum lands under the mineral laws relating to placer claims without a prior valid discovery of mineral within the limits of the claim.—Nevada Sierra Oil Co. v. Miller (C. C.) 681.

The owner of a town lot in Alaska, unpatented, may adverse an application for patent for a lode claim, and may maintain an action in a court of competent jurisdiction in support of such adverse.—Young v. Goldsteen (D. C.) 303.

The proceedings directed and authorized by section 2326, Rev. St., may be either by suits in equity or actions at law,—the former when the plaintiff is in possession, and the latter when he

is out of possession, of the premises.—Young v. Goldsteen (D. C.) 303.

§ 2. Title, conveyances, and contracts.
In an action to recover the value of ore wrongfully taken from plaintiff's mining claim, and converted by defendant without plaintiff's knowledge, the average value of assays of ore taken from the side walls of the workings, and shown to be of the same general character as the body of ore removed, is admissible.—Golden Reward Min. Co. v. Buxton Min. Co. (C. C. A.) 413.

A lessor *held* justified in declaring a forfeiture of an oil lease, under its terms, and not to have waived such right.—Duffield v. Michaels (C. C.) 825.

MISREPRESENTATION.

See "Fraud."

MONEY PAID.

It is not enough, to sustain an action for money paid out and expended for the use of defendant, that plaintiff has agreed to expend it, where he has not done so, and has become insolvent.—Schofield v. State Nat. Bank (C. C. A.) 282.

MORTGAGES.

Personal property, see "Chattel Mortgages."
Railroads, see "Railroads," § 2.

§ 1. Construction and operation.
A mortgage which includes "all the machinery now, or hereafter to be, placed" on the mortgaged premises, covers machinery subsequently acquired by the mortgagor under a contract held to be one of sale, and not of bailment, and placed on the premises as against a lease subsequently executed by the seller to the mortgagor, for the purpose of reserving title to such machinery until payment of the price.—Knowles Loom Works v. Ryle (C. C. A.) 730.

§ 2. Redemption.
In a suit by a mortgagor to redeem from a deed which was in legal effect a mortgage, where, under the laws of the state, the mortgage and the equity of redemption were taxable separately to the respective owners, but the mortgagee had procured the property to be assessed to itself as owner, and had paid the taxes thereon, it is entitled to recover from the mortgagor only so much of such taxes as were in excess of the amount it should have paid on its security.—Savings & Loan Soc. v. Davidson (C. C. A.) 696.

A mortgagee is bound to the exercise of fairness and good faith towards the mortgagor, and cannot acquire and hold adversely to him an outstanding title while leading him to believe that it was acquired for his protection; but he will be permitted to redeem therefrom.—Savings & Loan Soc. v. Davidson (C. C. A.) 696.

MOTIONS.

Continuance in civil actions, see "Continuance"

MUNICIPAL CORPORATIONS.

See "Counties."
Street railroads, see "Street Railroads."

§ 1. Property.
A resident and taxpayer of a city or town may maintain a suit in equity to prevent the diversion to private use by the original proprietor of the town site of land which, when the town was laid out and platted, was dedicated as a public park, and has since been maintained as such.—Davenport v. Buffington (C. C. A.) 234.

§ 2. Fiscal management, public debt, securities, and taxation.
Recitals in negotiable municipal bonds issued by officers having authority to determine whether conditions precedent have been fulfilled, that they are issued in compliance with the statute, preclude inquiry as against innocent purchasers for value as to whether or not the precedent conditions had been performed when they were issued.—Grattan Tp. v. Chilton (C. C. A.) 145.

Municipal corporations possess no power to incur debts and issue negotiable instruments therefor, unless specially authorized to do so by their charter or by statute, or the power to do so can be clearly implied from some power expressly given, which cannot be fairly exercised without it.—Watson v. City of Huron (C. C. A.) 449.

City warrants are not negotiable instruments in the sense of the law merchant; so that, when held by a bona fide purchaser, evidence of their invalidity in contradiction of their recitals, or of defenses available against the original payee, will be excluded.—Watson v. City of Huron (C. C. A.) 449.

A purchaser of void city warrants cannot recover from the city the amount paid therefor, as for money had and received, unless it is proved that the city rightfully received the money, and actually used it for legitimate purposes.—Watson v. City of Huron (C. C. A.) 449.

Warrants issued by the officers of a city, and negotiated to one having knowledge of the facts, for the purpose of raising funds to be used in securing the location of the state capital at such city, for which purpose the city had no authority to incur indebtedness, are void in the hands of all holders.—Watson v. City of Huron (C. C. A.) 449.

Recitals in municipal bonds that all the requirements of the law under which they are issued have been complied with do not estop the municipality from showing that the issue exceeded the statutory limit where each bond showed the amount of the issue of which it was a part and such amount was in excess of the legal limit as shown by the recorded assessment roll, and where the board or officers issuing them were not vested with authority to determine that question.—Geer v. School Dist. No. 11, Ouray County, Colo. (C. C. A.) 732.

Bonds issued by a county in exchange for outstanding warrants, and which are not a part of a series in itself exceeding in amount the limit of the county's legal indebtedness, cannot be held

invalid as having been issued in excess of such limit, unless it is shown that the warrants which they replaced were also invalid for the same reason.—Reynolds v. Lyon County, Iowa (C. C.) 155.

Where an issue of negotiable bonds by a county does not in itself exceed the limit of indebtedness which the county may legally contract, a purchaser from the county, in good faith, and for full value, is not chargeable with notice that they increase the indebtedness of the county beyond the constitutional limit, and is entitled as an innocent purchaser to rely on the recitals contained in such bonds, and which prima facie establish their validity.—Keene Five Cent Sav. Bank v. Lyon County (C. C.) 159.

Where a county issues negotiable bonds under statutory authority for the purpose of funding its outstanding indebtedness, and sells them to an innocent purchaser for full value, it cannot impeach the validity of such bonds by showing that its officers used the proceeds in the payment of warrants which were invalid and not enforceable.—Keene Five Cent Sav. Bank v. Lyon County (C. C.) 159.

Where a defendant county claims and introduces evidence to prove that warrants which were outstanding when its bonds in suit were issued, and which were paid from the proceeds of such bonds, were invalid and not enforceable against the county, the amount of such warrants cannot be considered in determining the existing indebtedness of the county when the bonds were issued.—Keene Five Cent Sav. Bank v. Lyon County (C. C.) 159.

NAMES.

See "Trade-Marks and Trade-Names."

NATIONAL BANKS.

See "Banks and Banking," § 3.

NATURALIZATION.

See "Aliens," § 2.

NAVIGABLE WATERS.

§ 1. Rights of public.

A city which maintains the draw of a bridge over a navigable stream in such condition as to be safe for passing vessels under ordinary circumstances is not chargeable with negligence because it is not so strongly secured, when open, as to withstand the impact of a vessel striking against it.—City of Chicago v. Wisconsin S. S. Co. (C. C. A.) 107.

A libel by a vessel against a city to recover for an injury caused by the draw of a bridge will be dismissed where the evidence fails to satisfactorily locate the fault.—City of Chicago v. Wisconsin S. S. Co. (C. C. A.) 107.

NAVIGATION.

See "Navigable Waters," § 1.

NEGLIGENCE.

Carriers, see "Carriers," § 2.
Demised premises, see "Landlord and Tenant," § 1.
Employers, see "Master and Servant," §§ 1-3.
Railroad companies, see "Railroads," § 4.

§ 1. Contributory negligence.

The rule that a plaintiff may recover for an injury although he placed himself in a dangerous position by his own negligence, where the defendant with knowledge or notice of his danger might, by the exercise of reasonable care, have avoided the injury, is inapplicable, where the injury was the result of the concurrent negligence of both parties.—Gilbert v. Erie R. Co. (C. C. A.) 747.

§ 2. Actions.

The rule of the federal courts is settled and uniform that contributory negligence is an affirmative defense, which must be established by a preponderance of evidence; and this requirement is not changed by the fact that a different rule prevails in the courts of the state where the cause of action arose.—Chicago G. W. Ry. Co. v. Price (C. C. A.) 423.

In an action for a personal injury, the questions of defendant's negligence and of plaintiff's contributory negligence *held* to be questions of fact for the jury.—Minnesota Transfer Ry. Co. v. Field (C. C. A.) 881.

In an action to recover damages for a personal injury alleged to have been caused by defendant's negligence, the plaintiff is not required to allege and prove that such damages have not been paid.—Western Gas Const. Co. v. Danner (C. C. A.) 882.

Where the question of whether a person injured was warned of the impending danger in time to have escaped the injury is in dispute, and without such warning he had no reason to apprehend the danger, the question of his contributory negligence is one for the jury.—Western Gas Const. Co. v. Danner (C. C. A.) 882.

NEGOTIABLE INSTRUMENTS.

See "Bills and Notes."

NEW TRIAL.

Costs, see "Costs," § 1.

OFFICERS.

See "Receivers"; "United States Marshals."
Bribery, see "Bribery."
Corporate officers, see "Corporations," § 3.

ORDERS.

Review of appealable orders, see "Appeal and Error."

PAROL EVIDENCE.

In civil actions, see "Evidence," § 5.

PARTIES.

Death ground for abatement, see "Abatement and Revival," § 1.
To contracts, see "Contracts," § 2.

PASSENGERS.

See "Carriers," § 2.

PATENTS.

For public lands, see "Mines and Minerals," § 1.

§ 1. Patentability.

It is not enough, to sustain a patent for a compound, that it shall be novel and useful, but its production must also involve invention or discovery.—Arlington Mfg. Co. v. Celluloid Co. (C. C. A.) 91.

The word "useful," as used in Rev. St. § 4929, providing for the granting of a patent to any person who has designed "any new, useful, and original shape or configuration of any article of manufacture," does not require that such a design, to be patentable, shall add new utility to the article.—Westinghouse Electric & Manufacturing Co. v. Triumph Electric Co. (C. C. A.) 99.

There may be invention in applying a device which is either old or simple in a new way, so as to accomplish a new result; and, in cases of that class, doubt on the question of patentability may be resolved in favor of the patent, on proof of utility and popular acceptance.—Irwin v. Hasselman (C. C. A.) 964.

The mere carrying forward and application of old ideas, so as to secure a better result by substituting newer and better materials for those previously used, does not involve invention which will sustain a patent.—Plastic Fire-Proof Const. Co. v. City and County of San Francisco (C. C.) 620.

§ 2. Requisites and validity of letters patent.

Where one court has thoroughly examined a patented device and has found the patent invalid on its face or in view of the prior art, another court should not be asked in a new and independent suit to exhaustively examine and discuss the same questions without some reason shown.—Cutter Electrical & Manufacturing Co. v. Anchor Electric Co. (C. C.) 804.

§ 3. Reissues.

When a patent is absolutely inoperative or invalid for any reason, an unexcused delay of 12 years in applying for a reissue constitutes such laches as will invalidate the reissued patent.—Pelzer v. Meyberg (C. C.) 969.

§ 4. Construction and operation of letters patent.

Where it is plain that an amendment of his claims by an applicant was for the purpose of making a particular construction a distinctive feature of his invention, and he explicitly denied the utility of a different construction to accomplish the result intended. his patent cannot be construed to cover such method of construction.—Magic Light Co. v. Economy Gas-Lamp Co. (C. C. A.) 87.

Limitation of the scope of a patent, by amendments of the claims to meet the requirements of the patent office, does not rest on the doctrine of equitable estoppel, but on that of estoppel by contract.—Magic Light Co. v. Economy Gas-Lamp Co. (C. C. A.) 87.

The claims of a patent, covering in terms only improvements in the devices or mechanism forming certain parts of a machine, cannot be enlarged to include other parts or elements not enumerated in the claims, although they may be shown by the specification and drawings, merely because they are essential parts of the machine as a whole, without which it would not be operative.—McBride v. Kingman (C. C. A.) 217; Same v. Sickels, Id.; Same v. Randall, Id.; Same v. Ainsworth, Id.

The acquiescence of an applicant in the rejection of a claim covering one feature of his invention as having been anticipated, and the filing of a substituted claim, on which a patent is granted, estops him from claiming that such patent covers the particular feature rejected, although it is included as one element of the substituted claim.—Irwin v. Hasselman (C. C. A.) 964.

A broad claim to include an entire class as equivalents, as all alkalies, cannot be sustained where some members of the class do not possess the properties required to accomplish the only result which can give validity to the patent.—Rickard v. Du Bon (C. C.) 96.

The public policy which is the foundation of the patent laws should constrain the courts to sustain the validity of a patent, although the invention is one of limited scope and minor importance, where it shows the exercise of invention, and is a distinct improvement over the structures of the prior art.—Lein v. Myers (C. C.) 607.

§ 5. Title, conveyances, and contracts.

A patentee is required to point out and distinctly claim his invention, and, when he has made his claims, he has disclaimed and dedicated to the public all devices, improvements, or combinations apparent from his specification that are not claimed, and he cannot thereafter claim them under that or any subsequent patent.—McBride v. Kingman (C. C. A.) 217; Same v. Sickels, Id.; Same v. Randall, Id.; Same v. Ainsworth, Id.

A licensee who agreed to manufacture an article under a certain patent, who stamped the article with the date of such patent and advertised and sold it as made thereunder, and who regularly paid the royalties thereon, under the license for a number of years, is estopped to set up as a defense to a claim for further royalties that the article as made was not covered by the patent.—Sproull v. Pratt & Whitney Co. (C. C.) 807.

A license to manufacture and sell articles under a number of patents construed, and *held* to be an entire agreement for a single license, which did not terminate until the last of such patents expired, the articles being ordinarily sold and used conjointly.—Sproull v. Pratt & Whitney Co. (C. C.) 807.

§ 6. Infringement—What constitutes infringement.

Patent covers only known equivalents; and where it is clear, from the proceedings in the patent office, that a different devise was not then known to be the mechanical equivalent of one described, the mere fact that it is subsequently shown to accomplish the same result will not render its use for that purpose an infringement.—Magic Light Co. v. Economy Gas-Lamp Co. (C. C. A.) 87.

A patentee who has simply made an improvement on a device that performed the same function before as after the improvement is protected only against those who use the very improvement that he describes and claims, or merely colorable evasions of it.—McBride v. Kingman (C. C. A.) 217; Same v. Sickels, Id.; Same v. Randall, Id.; Same v. Ainsworth, Id.

To subject a person selling an article to which a patented design has been applied without license from the owner to the penalty imposed by Act Feb. 4, 1887, he must have actual knowledge of the infringement.—Gimbel v. Hogg (C. C. A.) 791.

One who appropriates the substance of a patented invention cannot avoid a claim of infringement, by deliberately impairing the function of one element without destroying the substantial identity of the structure, operation, and result.—King Ax Co. v. Hubbard (C. C. A.) 795.

The more meritorious a patent the more liberal will a court be in applying the doctrine of equivalents to cover devices adopted to avoid a claim of infringement while obtaining the substantial benefit of the invention.—King Ax Co. v. Hubbard (C. C. A.) 795.

A provisional patent, issued under the law of Switzerland, which merely secures the applicant against the effect of publication for three years, during which he may secure a definitive patent by complying with certain requirements, but which secures him no substantive rights or monopoly in the invention meantime, is not a foreign patent, within the meaning of Rev. St. § 4887, the expiration of which limits the life of a patent granted for the same invention in the United States.—Société Anonyme pour la Transmission de la Force par L'Electricité v. General Electric Co. (C. C.) 604.

To constitute an infringement of a patent for a combination of mechanical powers in a machine, the elements of which are not separately claimed as the invention of the patentee, the infringing machine must substantially use all the elements of the combination.—Norton v. Wheaton (C. C.) 636.

§ 7. —— Actions at law.

In an action for infringement of a design patent, a witness may be permitted to compare the design of the patent sued on with others in evidence, and to point out the differences between them.—Myers v. Sternheim (C. C. A.) 625.

In an action at law for infringement of a design patent, the defendant may introduce in evidence under the general issue other design patents, as showing the prior state of the art, and going to the question of invention.—Myers v. Sternheim (C. C. A.) 625.

§ 8. —— Suits in equity.

A defendant cannot be subjected to more than one penalty of $250, under the provisions of the act of February 4, 1887, for the infringement of a design patent for a carpet, although a patent covers the design for the body of the carpet and for the border in different claims, and defendant sold both carpet and border made in accordance with the patented design, where the sale was a single transaction.—Gimbel v. Hogg (C. C. A.) 791.

When the question of invention is doubtful, the presumption of validity arising from the granting of the patent, as well as the practical success of the thing patented, should be given due weight and consideration.—Streator Cathedral Glass Co. v. Wire Glass Co. (C. C. A.) 950.

Under the settled rule of the supreme court, interest is not recoverable on profits allowed in equity for infringement of a patent prior to the time the master has liquidated the damages, unless under special circumstances of fraud or wantonness.—National Folding Box & Paper Co. v. Dayton Paper-Novelty Co. (C. C.) 331.

A bill for infringement will not be dismissed, on the ground that complainant has assigned his interest in the patents in suit to one who is not joined as a party, where the objection is not made until the hearing; but the complainant will be given leave to join his assignee by amendment.—Tesla Electric Co. v. Scott (C. C.) 588.

Where the allegations of a bill for infringement of a patent are good if sustained by the patent, and if, when produced, it is valid on its face, but the patent is not made a part of the bill, the sufficiency of such allegations cannot be determined on demurrer.—Warner Bros. Co. v. Warren Featherbone Co. (C. C.) 604.

Where the device of the patent in suit is disclosed by another antedating it by more than two years, the burden rests upon the complainant to prove beyond a reasonable doubt that his was the prior invention.—Lein v. Myers (C. C.) 607.

A licensee *held* not entitled to maintain a suit for infringement against one purchasing a patented machine from the patentee, who then held the title to the patent.—Newton v. McGuire (C. C.) 614.

A bill based on several patents is multifarious if it does not show that the several improvements covered thereby are all capable of conjoint operation in the same machine or device.—Russell v. Winchester Repeating Arms Co. (C. C.) 634.

When a bill is based on a patent containing numerous claims, relating to different groups of elements, the complainant may be compelled to specify the particular claims on which he relies.—Russell v. Winchester Repeating Arms Co. (C. C.) 634.

A corporation defendant, which, after the issuance of a restraining order in a suit for infringement, indirectly caused others to manu-

facture the infringing articles, and stamp them with its trade-mark, which were delivered to it, and which it sold, although it gave no formal orders therefor, is guilty of contempt.—Welsbach Light Co. v. Daylight Incandescent Gas-Lamp Co. (C. C.) 950.

§ 9. Decisions on the validity, construction, and infringement of particular patents.

The Schmid design patent, No. 21,416, for a design of a configuration of a frame for electric machines, is void for want of patentable invention.—Westinghouse Electric & Manufacturing Co. v. Triumph Electric Co. (C. C. A.) 99.

The Williams design patent, No. 30,147, for a fixture for generating and burning gas from liquid hydrocarbons, *held* not infringed.—Magic Light Co. v. Economy Gas-Lamp Co. (C. C. A.) 87.

The McBride patent, No. 199,082, for improved riding attachments for plows, construed and *held* not infringed.—McBride v. Kingman (C. C. A.) 217; Same v. Sickels, Id.; Same v. Randall, Id.; Same v. Ainsworth, Id.

The McBride patent, No. 284,036, for improved riding attachments for plows, *held* ineffective to add to the combination shown in patent No. 199,082, to the same inventor, an element shown in the prior patent, but omitted from the combination claimed therein.—McBride v. Kingman (C. C. A.) 217; Same v. Sickels, Id.; Same v. Randall, Id.; Same v. Ainsworth, Id.

The Wilson patent, No. 286,360, for improvements in folding paper boxes, construed and *held* not anticipated and infringed.—National Folding Box & Paper Co. v. Gair (C. C.) 813.

The Marqua patent, No. 301,908, for improvements in sending-traps for flying targets, *held* valid and infringed as to claims 2, 3, and 5.—Cleveland Target Co. v. Empire Target Co. (C. C.) 44.

The Jordan patent, No. 307,197, for improvements in can-ending machines, construed, and *held* not infringed by machines made in accordance with the Wheaton patents, Nos. 477,584 and 499,949.—Norton v. Wheaton (C. C.) 636.

The Potts patent, No. 322,393, for a clay disintegrator, *held* not anticipated, valid, and infringed as to claim 6.—C. & A. Potts & Co. v. Creager (C. C. A.) 78.

The Sprague patent, No. 324,892, for an improved electric railway motor, construed, and *held* infringed as to claims 2 and 6.—Sprague Electric Railway & Motor Co. v. Nassau Electric R. Co. (C. C.) 609.

The McKenna patent, No. 348,289, for an air-brake attachment, is void for lack of patentable novelty.—Plumb v. New York, N. H. & H. R. Co. (C. C.) 645.

The Noyes patents, Nos. 359,687 and 359,688, for municipal signal apparatus, construed and *held* not anticipated, valid, and infringed.—Municipal Signal Co. v. National Electrical Mfg. Co. (C. C.) 810.

The Coburn patent, No. 365,240, for an improved trolley track, construed, and *held* not infringed.—Coburn Trolley-Track Mfg. Co. v. Chandler (C. C. A.) 333.

The Potts patent, No. 368,838, for an improvement in the machine shown in patent No. 322,393 to the same parties, for a clay disintegrator, does not disclose patentable invention, and is void.—Potts v. Creager (C. C. A.) 78.

The Hebbard patent, No. 371,839, for improvements in target traps, construed, and *held* not infringed.—Cleveland Target Co. v. Empire Target Co. (C. C.) 44.

The Newton patent, No. 372,698, for improvements in feeding and delivering mechanism for brick mold sanding machines, *held* valid and infringed as to claims 1 and 2.—Newton v. McGuire (C. C.) 614.

The Taylor patent, No. 373,107, for an improvement in locks, is void for want of patentable invention.—Yale & Towne Mfg. Co. v. Sargent & Co. (C. C.) 106.

Claim 1 of the Ryan patent, No. 379,334, for improvements in bookbinding, construed, and *held* not infringed.—Irwin v. Hasselman (C. C. A.) 964.

The Brown patent, No. 399,374, for an artificial slate, as to claim 1, *held* void for anticipation.—Plastic Fire-Proof Const. Co. v. City and County of San Francisco (C. C.) 620.

In the Newton patent, No. 407,030, for a brick mold sanding machine, claim 5 is void for lack of patentable invention.—Newton v. McGuire (C. C.) 614.

The Shuman patents, No. 423,021, for a process of making wire glass, and No. 483,020, for a machine for carrying out such process, *held* not anticipated, valid, and infringed by a machine made in accordance with the Ryon patent, No. 521,570.—Streator Cathedral Glass Co. v. Wire Glass Co. (C. C. A.) 950.

The Morrison patent, No. 428,123, for a fence-wire coupling, held not anticipated, valid, and infringed by the device shown in the Gerard & Lawrence patent, No. 575,641.—Kisinger-Ison Co. v. Bradford Belting Co. (C. C. A.) 502.

The Cutter & Stanley patent, No. 437,667, for an electrical switch, as to claims 4 and 5 *held* void for want of patentable invention.—Cutter Electrical & Manufacturing Co. v. Anchor Electric Co. (C. C.) 804.

The Cuendet patent, No. 474,520, for improvements in music boxes, as to claim 1, construed, and *held* not infringed.—Regina Music-Box Co. v. Hasse (C. C.) 617.

The Dayton patent, No. 474,548, for a swaging machine used for making bicycle spoke blanks, *held* void for anticipation and lack of patentable invention.—Excelsior Needle Co. v. Morse-Keefer Cycle-Supply Co. (C. C.) 627.

The Dayton patent, No. 492,576, for a swaging machine acting in co-operation with an automatic feed to produce bicycle spoke blanks, *held* void for anticipation as to claims 1, 2, 3, 4, and 6, and valid as to claims 5, 8, and 9, and infringed by machines made under the Morse patent, No. 588,648.—Excelsior Needle Co. v. Morse-Keefer Cycle-Supply Co. (C. C.) 627.

The Kisinger patent, No. 492,811, for a trolley-wire connection, *held* void for anticipation.—Kisinger-Ison Co. v. Bradford Belting Co. (C. C. A.) 502.

The Taylor patent, No. 500,084, for an improvement in the manufacture of axes, *held* not anticipated, valid, and infringed.—King Ax Co. v. Hubbard (C. C. A.) 795.

The Roulstone patent, No. 508,557, for adjustable supports for school furniture, construed, and *held* not infringed.—Chandler Adjustable Chair & Desk Co. v. Town of Windham (C. C.) 103.

The Tesla patents, No. 511,915, for electrical transmission of power, and No. 555,190, for an alternating motor, each *held* valid and infringed.—Tesla Electric Co. v. Scott (C. C.) 588.

The Thurber & Schaefer patent, No. 542,452, for improvement in celluloid articles and in the process of manufacturing the same, is void for want of invention in either the product or method of production.—Arlington Mfg. Co. v. Celluloid Co. (C. C. A.) 91.

The Stevens & Harrison patent, No. 546,360, for a method of producing a pyroxyline compound in imitation of onyx, is void for want of patentable novelty or invention.—Arlington Mfg. Co. v. Celluloid Co. (C. C. A.) 91.

The Kenney patent, No. 549,370, for a device for holding woven-wire fabrics on a mattress frame, as to claim 2, discloses no patentable invention, and is void.—Kenney v. Bent (C. C. A.) 337.

The Rickard & Long patent, No. 604,338, for an improvement in the art of maturing tobacco leaves, construed, and *held* not infringed.—Rickard v. Du Bon (C. C.) 96.

The Williams patent, No. 606,435, for an improvement in gas-generating gas fixtures, construed, and *held* not infringed.—Magic Light Co. v. Economy Gas-Lamp Co. (C. C. A.) 87.

The Lein patent, No. 615,073, for a mattress frame, as to claim 1, *held* not anticipated, valid, and infringed.—Lein v. Myers (C. C.) 607.

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348,289. Air-brake attachment 645
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428,519. Wire-swaging machine 628
428,572. Wire-swaging machine 628
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439,952. Wire-swaging machine 629
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461,633. Music boxes 619
473,020. Wire-glass 950
474,520. Music boxes 617
474,548. Wire-swaging machine...627, 631, 633
477,584. Can-heading machine....636, 638, 644
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492,574. Wire-swaging machine 629
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PAYMENT.

Subrogation on payment, see "Subrogation."

PERSONAL INJURIES.

See "Negligence."
To employé, see "Master and Servant," §§ 1–3.
To passenger, see "Carriers," § 2.
To traveler on highway crossing railroad, see "Railroads," § 4.

PETITION.

In bankruptcy, see "Bankruptcy," §§ 1–4.

PLEADING.

In particular actions or proceedings, see "Equity," § 1; "Negligence," § 2.

§ 1. Declaration, complaint, petition, or statement.

The jurisdiction of a federal court must affirmatively appear from the allegations of the plaintiff's pleading. — Boston Safe-Deposit & Trust Co. v. City of Racine (C. C.) 817.

§ 2. Issues, proof, and variance.

Unnecessary averments in a complaint, where they do not constitute an essential part of its cause of action as pleaded, may be disregarded as surplusage.—Geer v. Board of Com'rs of Ouray County (C. C. A.) 435; Board of Com'rs of Ouray County v. Geer, Id.

POLICY.

Of insurance, see "Insurance."

PRACTICE.

In bankruptcy, see "Bankruptcy," §§ 1–4.
In criminal prosecutions, see "Criminal Law."
In equity, see "Equity."
On review, see "Appeal and Error."
Particular proceedings in actions, see "Costs"; "Damages," § 3; "Depositions"; "Evidence"; "Jury"; "Pleading"; "Removal of Causes"; "Stipulations"; "Trial."
Procedure of particular courts, see "Courts."

PREFERENCES.

Effect of proceedings in bankruptcy, see "Bankruptcy," § 7.

PRESUMPTIONS.

In civil actions, see "Evidence," § 2.

PRINCIPAL AND AGENT.

See "Attorney and Client"; "Brokers."
Corporate agents, see "Corporations," § 3.

§ 1. The relation.

On the breach of a contract of agency by the principal, the agent is justified in abandoning the contract and repudiating the agency.—Duffield v. Michaels (C. C.) 825.

One who entered upon leased property for the purpose of drilling an oil well for the lessee, at the latter's instance, *held* justified in repudiating any agency for the lessee, and in procuring a lease to himself of the property on the forfeiture of the original lease by the lessor, where the lessee refused to enter into the contract agreed upon, or to obligate himself to pay for the well, until after it was completed, and its success demonstrated.—Duffield v. Michaels (C. C.) 825.

§ 2. Mutual rights, duties, and liabilities.

A principal *held* not liable to an agent, under the contract of employment, for advances made by the latter to subagents. — Montgomery v. Ætna Life Ins. Co. (C. C. A.) 913.

A claim by an agent for compensation for extra services, rendered outside of his written contract of employment, *held* inadmissible, under the course of dealing between the parties, and where such claim was not made until after the agent's discharge.—Montgomery v. Ætna Life Ins. Co. (C. C. A.) 913.

§ 3. Rights and liabilities as to third persons.

An agent of a corporation duly authorized to indorse checks in its behalf for deposit may bind it by such an indorsement to the payment of a check purporting to have been drawn by the corporation to its own order, although such check was in fact forged by the agent himself.—Warren-Scharf Asphalt Pav. Co. v. Commercial Nat. Bank (C. C. A.) 181.

A power of attorney given by a corporation authorizing an agent to draw checks on a bank "for the use of" the company does not impose on the bank the responsibility of seeing that the money drawn on such checks is devoted to the use of the company.—Warren-Scharf Asphalt Pav. Co. v. Commercial Nat. Bank (C. C. A.) 181.

A power of attorney given by a corporation authorizing an agent to sign checks in the name

of the company construed.—Warren-Scharf Asphalt Pav. Co. v. Commercial Nat. Bank (C. C. A.) 181.

PRINCIPAL AND SURETY.

See "Bonds"; "Indemnity."

§ 1. Discharge of surety.

Where the signing of a bond by the principal would in no way affect the rights or liability of the sureties, his failure to sign it does not render it invalid as to them.—St. Louis Brewing Ass'n v. Hayes (C. C. A.) 859.

PROMISSORY NOTES.

See "Bills and Notes."

PROPERTY.

See "Copyrights"; "Mines and Minerals"; "Shipping"; "Trade-Marks and Trade-Names."

Dedication to public use, see "Dedication."

PUBLIC DEBT.

See "Counties," § 1; "Municipal Corporations," § 2; "Schools and School Districts," § 1.

PUBLIC LANDS.

Mineral lands, see "Mines and Minerals," § 1.

§ 1. Survey and disposal of lands of United States.

A homestead settler on public lands acquires no vested rights therein, as against the United States, prior to the time when under the law he becomes entitled to a patent, which deprives congress of the power to vest title to such lands in another.—Wagstaff v. Collins (C. C. A.) 3.

Bona fide purchasers of land erroneously patented under a railroad grant *held* protected in their title by the acts of congress passed for that purpose, as against the heirs of a homestead settler who surrendered possession to the railroad company under a mistake of law.—Wagstaff v. Collins (C. C. A.) 3.

The construction placed on an act of congress relating to public lands by the land department, charged with its execution, especially where it is followed uniformly for a number of years, is entitled to great weight, and should not be overthrown except for cogent reasons, and unless it is clearly erroneous.—McFadden v. Mountain View Min. & Mill. Co. (C. C. A.) 670.

Under Act Cong. May 17, 1884, all persons then in peaceable possession of lands in Alaska are guarantied right to acquire perfect title through subsequent legislation.—Young v. Goldsteen (D. C.) 303.

§ 2. Disposal of lands of the states.

Under the Minnesota act of March 9, 1875, making a grant of swamp lands to the Duluth & Iron Range Railroad Company, the executive department of the state was vested with authority to determine whether the route selected, as well as the construction of the road, was in compliance with the act; and, having determined such questions in favor of the company, such determination, in the absence of fraud, was conclusive on the state.—State of Minnesota v. Duluth & I. R. R. Co. (C. C.) 353; Duluth & I. R. R. Co. v. State of Minnesota, Id.; Cobb v. Duluth & I. R. R. Co., Id.

The amendment to the constitution of Minnesota, adopted in 1881, providing generally the manner of disposing of swamp lands owned by the state, did not operate to forfeit a previous grant of certain of the swamp lands to a railroad company, although the company was, at the time of its adoption, in default under the terms of the grant; no such purpose having been declared in the amendment.—State of Minnesota v. Duluth & I. R. R. Co. (C. C.) 353; Duluth & I. R. R. Co. v. State of Minnesota, Id.; Cobb v. Duluth & I. R. R. Co., Id.

A subsequent legislature has power to amend a land grant to a railroad, previously made, by changing the terminus of the line as fixed by the original act, where it is necessary to carry out the purpose of the grant.—State of Minnesota v. Duluth & I. R. R. Co. (C. C.) 353; Duluth & I. R. R. Co. v. State of Minnesota, Id.; Cobb v. Duluth & I. R. R. Co., Id.

QUIETING TITLE.

§ 1. Right of action and defenses.

Plaintiff, out of possession, holding legal title to land, cannot maintain bill in United States court against defendant in possession, he having adequate remedy at law.—Adoue v. Strahan (C. C.) 691.

RAILROADS.

See "Street Railroads."

Carriage of goods and passengers, see "Carriers."

§ 1. Sales, leases, traffic contracts, and consolidation.

The individual holders of bonds of a railroad company *held* to have no right to enforce an exchange of their bonds for those of a consolidated company, provided for by the consolidation agreement.—New York Security & Trust Co. v. Louisville, E. & St. L. Consol. R. Co. (C. C.) 226.

A delay of nine years by the holders of railroad bonds before asserting a claim that they were entitled to exchange their bonds for those of a consolidated company *held* such laches as to bar them of the right to relief in equity.—New York Security & Trust Co. v. Louisville, E. & St. L. Consol. R. Co. (C. C.) 226.

An offer of an exchange of the bonds of a consolidated company for those of its constituent companies, contemplated by the consolidation agreement, cannot be accepted by the holders of the outstanding bonds, so as to become enforceable by them, until it is communicated to them for acceptance by some action of the parties to the consolidation agreement.—New York

Security & Trust Co. v. Louisville, E. & St. L. Consol. R. Co. (C. C.) 226.

A provision of the charter of a railroad company authorizing it to fix rates on its road is a derogation of the sovereign power of the state to regulate rates, and the immunity does not pass with a sale of its property on foreclosure to its successor.—Matthews v. Board of Corporation Com'rs of North Carolina (C. C.) 400.

§ 2. Indebtedness, securities, liens, and mortgages.

Proposition for the issuance of bonds in aid of railroad, adopted by the vote of a township construed as to conditions precedent to their issuance.—Grattan Tp. v. Chilton (C. C. A.) 145.

Bonds voted and issued by the proper officers of a municipality in aid of a railroad *held* to be prima facie evidence that a statutory condition necessary to their validity had been complied with.—Grattan Tp. v. Chilton (C. C. A.) 145.

A mortgage given by a railroad company to a trustee is not void, under the Minnesota statutes of uses and trusts.—State of Minnesota v. Duluth & I. R. R. Co. (C. C.) 353; Duluth & I. R. R. Co. v. State of Minnesota, Id.; Cobb v. Duluth & I. R. R. Co., Id.

An option given the holder by the provisions of railroad bonds to exchange them for an equal amount of paid-up stock of the company *held* to have expired on maturity of the bonds.—Loomis v. Chicago, M. & St. P. Ry. Co. (C. C.) 755.

§ 3. Receivers.

In the hearing of claims against a receiver growing out of his operation of a railroad, it is proper for the court to recognize the methods of proof accepted as satisfactory by railroad companies generally.—Central Trust Co. of New York v. Denver & R. G. R. Co. (C. C. A.) 239.

The fact that a railroad has been sold in foreclosure proceedings does not affect the right of the court to thereafter hear and determine claims against the receiver, where the terms of sale required the purchaser to pay all liabilities incurred by the receiver before delivering possession; the purchaser being made a party and permitted to defend.—Central Trust Co. of New York v. Denver & R. G. R. Co. (C. C. A.) 239.

Where, after the sale of a railroad which has been operated by a receiver, a claim is allowed in favor of an intervener for damages growing out of a collision due to the negligence of the receiver's employés, it is proper to provide in the decree that the purchaser of the road, who had assumed liability for all claims against the receiver, on notice from the intervener of any future claim made against it on account of such collision, shall settle or defend against the same, and pay any judgment which may be rendered thereon against the intervener.—Central Trust Co. of New York v. Denver & R. G. R. Co. (C. C. A.) 239.

Where a collision occurred between a railroad train being operated by a receiver and a train of another company through the negligence of the receiver's servants, and the damages sustained by the other company are readily ascertainable by the court, it is proper to adjudicate and allow its claim therefor on a petition of intervention filed in the suit in which the receiver was appointed, without requiring it to be litigated and established in an action at law.—Central Trust Co. of New York v. Denver & R. G. R. Co. (C. C. A.) 239.

The allowance of interest on the amount of claims allowed against a receiver from the date of the decision on which the decree is based is within the discretion of the court.—Central Trust Co. of New York v. Denver & R. G. R. Co. (C. C. A.) 239.

§ 4. Operation.

A railroad company which has leased to another company the right to use in common with itself a portion of its track is liable to its own passengers and shippers for injuries received by reason of the negligence of the servants of its lessee in the operation of trains upon such track.—Central Trust Co. of New York v. Denver & R. G. R. Co. (C. C. A.) 239.

Where one railroad company leased to another the right to use a portion of its track, and each ran its own trains, in charge of its own employés, although they employed the superintendent and train dispatchers jointly, their use of the track was in common, and not joint, and each was liable to the other for injuries caused to the trains of such other by the negligence of its employés.—Central Trust Co. of New York v. Denver & R. G. R. Co. (C. C. A.) 239.

A petition to recover for the killing of plaintiff's decedent at a railroad crossing *held* to disclose such contributory negligence as precluded a recovery.—Gilbert v. Erie R. Co. (C. C. A.) 747.

REAL ACTIONS.

See "Ejectment"; "Forcible Entry and Detainer," § 1.

RECEIVERS.

Of railroad companies, see "Railroads," § 3.

§ 1. Appointment, qualification, and tenure.

Order appointing receiver, where it was part of relief sought by bill, and court had jurisdiction, cannot be attacked collaterally.—Shinney v. North American Savings, Loan & Building Co. (C. C.) 9.

§ 2. Foreign and ancillary receiverships.

Where receiver has been appointed for corporation by court of state where it is domiciled, a federal court of another jurisdiction has power to appoint the same person as ancillary receiver in such jurisdiction.—Shinney v. North American Savings, Loan & Building Co. (C. C.) 9.

RECORDS.

Transcript on appeal or writ of error, see "Appeal and Error," § 5.

REDEMPTION.

From mortgage, see "Mortgages," § 2.
From tax sales, see "Taxation," § 3.

REINCORPORATION.

See "Corporations," § 5.

REISSUE.

Of patent, see "Patents," § 3.

RELEVANCY.

Of evidence in civil actions, see "Evidence," § 3.

REMOVAL OF CAUSES.

§ 1. Origin, nature, and subject of controversy.

Suit by receiver of federal court to determine his right to assets claimed as receiver is ancillary to suit in which he was appointed, and, if brought in state court, may be removed by receiver into federal court by which he was appointed, without regard to citizenship of parties or amount in controversy.—Shinney v. North American Savings, Loan & Building Co. (C. C.) 9.

Suit for appointment of ancillary receiver in different jurisdiction is not ancillary to suit in which primary receiver was appointed, but entirely independent, and, if brought in state court, is subject to removal to federal court, the same as other causes.—Shinney v. North American Savings, Loan & Building Co. (C. C.) 9.

§ 2. Proceedings to procure and effect of removal.

Where a state court denies a petition for removal, and the defendant thereupon causes a transcript of the record to be filed and docketed in the federal court, and such petition and record disclose good grounds for removal, the state court is without jurisdiction to proceed further, and the defendant does not waive his right to proceed in the federal court by further appearing and contesting the case therein.—Hickman v. Missouri, K. & T. Ry. Co. (C. C.) 113.

REPEAL.

Of statute, see "Statutes," § 1.

REQUESTS.

For instructions in civil actions, see "Trial," § 2.
—— in criminal prosecutions, see "Criminal Law," § 3.

RESCISSION.

Of contract, see "Contracts," § 3.

RES JUDICATA.

See "Judgment," §§ 3, 4.

REVENUE.

See "Customs Duties"; "Internal Revenue"; "Taxation."

REVIEW.

See "Appeal and Error."
Bill in equity, see "Equity," § 5.

SALES.

Of railroads, see "Railroads," § 1.

§ 1. Requisites and validity of contract.

The rule that the value and quality of goods sold are matters of opinion, and that representations made by the seller relating thereto cannot be made the basis of an action for fraud, does not apply when such representations are as to matters of fact.—Strand v. Griffith (C. C. A.) 854.

§ 2. Remedies of buyer.

A seller cannot avail himself of a provision of a contract, signed by the purchaser, waiving all claims for damages, as an estoppel against the purchaser to maintain an action for fraudulent representations made in the sale, when the contract itself was obtained by fraud, and for the very purpose of protecting the seller from such an action.—Strand v. Griffith (C. C. A.) 854.

SCHOOLS AND SCHOOL DISTRICTS.

§ 1. Public schools.

An Iowa school district created by the division of a larger district which, as its equitable portion of the indebtedness of the original district, assumes the payment of certain bonds of such district issued in payment of a judgment, and which such district was precluded by the judgment from contesting, is also precluded for the same reason from contesting such bonds or others issued by it in exchange therefor.—Taylor v. School Dist. of Garfield, Lyon County, Iowa (C. C.) 753.

SEAMEN.

Fishermen are seamen, and, except as modified by their peculiar contracts, express or implied, are protected by the law as other seamen are, and for their wages may look to the vessel, her master, and, ordinarily, her owners.—The Carrier Dove (C. C. A.) 111; Rich v. Williams, Id.

Fishermen engaging to serve on a voyage on lays *held* entitled to a lien on the vessel, as for wages, for their share of the catch.—The Carrier Dove (C. C. A.) 111; Rich v. Williams, Id.

Where vessel was known to owner to be unfit for voyage, and was compelled to return in a state of wreck, seamen who signed an agreement *held* entitled to a month's wages, in addition to the wages earned under Rev. St. § 4527.—The Staghound and The Gamecock (D. C.) 973.

Owners of fund derived from sale of vessel cannot urge, against assignee of advance note to

seamen for month's wages, the rule that assignee of such a note cannot recover thereon.—The Staghound and The Gamecock (D. C.) 973.

SEPARATION.

See "Husband and Wife," § 2.

SHERIFFS AND CONSTABLES.

See "United States Marshals."

SHIPPING.

See "Admiralty"; "Maritime Liens"; "Seamen."

§ 1. Charters.
A charterer who examines a vessel, and accepts her with full knowledge of the condition of her machinery and appliances, cannot recover damages resulting from defects in such machinery and appliances, unless they were latent.—Frank Waterhouse v. Rock Island Alaska Min. Co. (C. C. A.) 466.

§ 2. Master.
The master of a vessel *held* to have had authority to charter another vessel to complete the carriage of his passengers and cargo to the point of destination where his employers had contracted to deliver them.—Frank Waterhouse v. Rock Island Alaska Min. Co. (C. C. A.) 466.

§ 3. Liabilities of vessels and owners in general.
Persons who, under an independent contract of stevedoring, load a ship are not its agents therein, so as to make it liable for their negligence in that respect, though they are also the ship's agents in that port.—The Picqua (D. C.) 649.

§ 4. Carriage of goods.
Memorandum books, valuable to owner for reference, are writings, within Rev. St. § 4281, so that owner of vessel is not liable for injuries thereto, where notice as to their character is not furnished.—The St. Cuthbert (D. C.) 340.

A shipper, putting books containing valuable memoranda with some clothing described in the bill of lading as worn clothing, *held* guilty of fraud, destroying his claim to indemnity.—The St. Cuthbert (D. C.) 340.

Delivery by ship of dutiable goods to customs authorities *held* delivery to the proper party, as between the shipper and the carrier.—Herbst v. The Asiatic Prince (D. C.) 343.

A consignee under an agreement to buy goods of a commission merchant, having sent remittances for part of them after shipment, and after arrival of goods having made tender and deposited the balance of the price, *held* equitably entitled to delivery of the goods; the commission merchant having no right to make application of the remittances on an old account.—Herbst v. The Asiatic Prince (D. C.) 343.

Where carrier assumes to deliver cargo in good order, dangers of the sea excepted, the burden is on him to prove that a loss was caused by the excepted risk.—Insurance Co. of North America v. Easton & McMahon Transp. Co. (D. C.) 653.

SMUGGLING.

See "Customs Duties," § 2.

STATES.

Public lands, see "Public Lands," § 2.

STATUTES.

Laws impairing obligation of contracts, see "Constitutional Law," § 2.
Of limitation, see "Limitation of Actions," § 1.
Revenue laws, see "Customs Duties"; "Internal Revenue."
State laws as rules of decision in federal courts, see "Courts," § 4.

§ 1. Repeal, suspension, expiration, and revival.
Act June 27, 1898, amending Act March 3, 1887, giving the circuit and district courts jurisdiction of actions on claims against the United States, by providing that such jurisdiction shall not extend to cases brought to recover fees, salary, or compensation of officers, applies to pending cases, and deprives circuit and district courts of jurisdiction to proceed further therein, and also deprives circuit courts of appeals of power to review judgments in such cases previously rendered.—United States v. Kelly (C. C. A.) 460.

The provision of the statute of Montana, making the trustees of a corporation personally liable for its debts where it failed to file the annual reports thereby required, was not repealed by the Civil Code, subsequently adopted, which re-enacted such provision, without any change affecting such liability.—First Nat. Bank v. Weidenbeck (C. C. A.) 896.

§ 2. Construction and operation.
When the language of a statute is unambiguous, and its meaning is clear, arguments by analogy, or from history, or attempted judicial construction, cannot be resorted to for the purpose of placing a different construction upon it.—Webber v. St. Paul City Ry. Co. (C. C. A.) 140.

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STIPULATIONS.

A stipulation of facts, made by attorneys on the trial of an action, is not binding upon either party in a subsequent action.—Board of Com'rs of Lake County v. Sutliff (C. C. A.) 270.

STOCKHOLDERS.

Of banks, see "Banks and Banking," § 1.
Of corporations, see "Corporations," § 2.

STREET RAILROADS.

§ 1. Establishment, construction, and maintenance.

An easement granted for a particular purpose ceases when its use for such purpose is, or becomes, impossible under the terms of the grant.—Southern Ry. Co. v. City of Memphis (C. C. A.) 819.

SUBROGATION.

One who loaned securities to another personally, with no agreement as to their use, acquires no equity in property of a third person by reason of the fact that the borrower voluntarily paid off an incumbrance thereon from the proceeds of such securities.—Springs v. Brown (C. C.) 405.

SURETYSHIP.

See "Principal and Surety."

TAXATION.

See "Internal Revenue."

§ 1. Nature and extent of power in general.

The power of county in Tennessee to levy taxes is derived solely from legislative enactments, and, in case of special taxes, must be clearly granted.—Felton v. Hamilton County (C. C. A.) 823.

§ 2. Levy and assessment.

County courts in Tennessee had no power, under the statutes of the state, to levy a special tax to provide money for making county exhibits at the state centennial exposition.—Felton v. Hamilton County (C. C. A.) 823.

The North Carolina act of March 6, 1899, creating the North Carolina corporation commission, and defining their duties and powers, did not clothe such commission with authority to appraise and assess railroad property for taxation; nor was such authority given by any subsequent legislation.—Southern Ry. Co. v. North Carolina Corp. Commission (C. C.) 513; Seaboard & R. R. Co. v. Same, Id.; Roanoke & T. R. R. Co. v. Same, Id.; Raleigh & G. R. Co. v. Same, Id.; Raleigh & A. Air Line R. Co. v. Same, Id.; Carolina Cent. Ry. Co. v. Same, Id.; Atlantic Coast Line Ry. Co. v. Same, Id.; Wilmington & W. R. Co. v. Same, Id.; Norfolk & C. R. Co. v. Same, Id.

§ 3. Redemption from tax sale.

The fact that a tax sale is irregular, where the property was legally assessed and the taxes due, does not relieve the owner from the obligation to pay the interest and penalties prescribed by statute in order to redeem from such sale.—Rice v. Jerome (C. C. A.) 719.

The holder of a certificate of purchase at tax sale of lands of an insolvent private corporation for which a receiver has been appointed is not required to file his claim as a creditor, and the receiver can only extinguish his lien like an individual owner by payment of the taxes, if valid, together with the interest and penalties prescribed by the laws of the state.—Rice v. Jerome (C. C. A.) 719.

§ 4. Tax titles.

The fact that lands are in the possession of a receiver of a federal court as a part of the assets of an insolvent corporation does not affect the right of a purchaser of such lands at tax sale to demand and receive a deed therefor, where entitled thereto under the state laws.—Rice v. Jerome (C. C. A.) 719.

In the federal courts, the payment or tender by the owner of land of the amount of taxes for which it was sold, together with the interest and penalties to which the holder of the tax certificate is entitled under the state laws, is an indispensable condition precedent to his right to maintain a bill in equity to cancel such certificate.—Rice v. Jerome (C. C. A.) 719.

TIME.

Admiralty rules that, where number of days is limited, juridical days only shall be understood,

do not apply to the juridical character of any other days than those that begin and end a period.—The Mary B. Baird (D. C.) 977; The Van Name & King, Id.

TITLE.

Tax titles, see "Taxation," § 4.

TORTS.

See "Forcible Entry and Detainer," § 1; "Fraud"; "Libel and Slander"; "Negligence." Measure of damages, see "Damages," § 2.

An action by a married woman for a personal injury, brought in the state where the injury occurred, is governed by the laws of such state as to the right of recovery and the damages recoverable, regardless of the place of plaintiff's domicile.—Texas & P. Ry. Co. v. Humble (C. C. A.) 837.

One having a contract with a state, made pursuant to law, to supply for a term of years all of certain text-books, adopted by act of the legislature, required for use in the public schools of the state, may maintain an action for damages against a third person who, with knowledge of the facts, induces the school-book boards of counties to purchase books from him and discard those of the plaintiff.—Heath v. American Book Co. (C. C.) 533.

TOWAGE.

Collisions with tugs and vessels in tow, see "Collision," § 1.

TOWNS.

See "Municipal Corporations."

TRADE-MARKS AND TRADE-NAMES.

§ 1. Marks and names subjects of ownership.

The name "Coal Oil Johnny's Petroleum Soap," as applied to a particular manufacture of soap to distinguish it from others, may constitute a valid trade-mark.—Petrolia Mfg. Co. v. Bell & Bogart Soap Co. (C. C.) 781.

§ 2. Title, conveyances, and contracts.

The ownership of a trade-mark by an assignee or transferee is sufficiently indicated by its placing its name as manufacturer on the article sold under such trade-mark.—Petrolia Mfg. Co. v. Bell & Bogart Soap Co. (C. C.) 781.

The assignment of a trade-mark by the originator and owner to a corporation organized by him to succeed to the manufacture and sale of the article is valid.—Petrolia Mfg. Co. v. Bell & Bogart Soap Co. (C. C.) 781.

§ 3. Infringement and unfair competition.

It is not an abuse of discretion for a court, in a suit for infringement of a trade-mark or for unfair trade, to refuse to grant a preliminary injunction against the use by defendants of wrappers, the use of which they have abandoned, or of advertising matter which they agree at the hearing that they will not use pending the suit.—Centaur Co. v. Marshall (C. C. A.) 785.

The intention with which a defendant adopted a particular dress for the merchandise made and sold by him does not alone afford any ground for an injunction against its use, and is immaterial, where the dress itself is not calculated to deceive purchasers to the complainant's damage. — Centaur Co. v. Marshall (C. C. A.) 785.

The trade wrappers and labels used by defendants on the bottles of Castoria made and sold by them compared with those in use by complainants, and *held* not to show such similarity as would deceive an ordinary purchaser.—Centaur Co. v. Marshall (C. C. A.) 785.

Where two manufacturers of a similar product have an equal right to the use of the same name therefor, the second in the field cannot be required to so distinguish his that a careless or indifferent purchaser will know it is not made by the other, but is only bound to dress his so that a purchaser can readily learn the manufacturer, by a reasonable examination.—Centaur Co. v. Marshall (C. C. A.) 785.

In a suit in which defendants are charged with having refilled bottles bearing complainant's trade-mark and labels with a cheap imitation of its product, which they sold as genuine, the burden of proof is strongly upon the complainant; and the evidence must be clear and satisfactory to warrant a decree in its favor.—Hostetter Co. v. Comerford (C. C.) 585.

A complainant in a suit for unfair competition *held* entitled to a preliminary injunction.—Baker v. Sanders (C. C.) 948.

Where an article has become well known under the name of the originator, through its sale under an expired foreign patent, so that the name has become descriptive of the article, and not indicative of its origin, it does not constitute unfair competition for another manufacturer to bid upon specifications calling for the article by such name. — Rahtjen's American Composition Co. v. Holzapfel's Compositions Co. (C. C.) 949.

TRAFFIC CONTRACTS.

Between railroads, see "Railroads," § 1.

TRESPASS TO TRY TITLE.

See "Ejectment."

TRIAL.

See "Continuance"; "Witnesses."
Criminal prosecutions, see "Criminal Law," § 3.
Particular civil actions, see "Negligence," § 2.
Right to trial by jury, see "Jury," § 1.

§ 1. Taking case or question from jury.

It is only when the evidence leaves the material facts admitted or undisputed, and only when those facts are such that reasonable men, in the

exercise of an honest and impartial judgment, can fairly draw but one conclusion from them, that the court may properly direct a verdict.—Chicago G. W. Ry. Co. v. Price (C. C. A.) 423.

Although the testimony of a witness upon an issue is not contradicted, where the only person who could have contradicted him is dead, and it is shown that the witness gave inconsistent testimony on a previous occasion, it is proper to submit the issue to the jury.—Chicago G. W. Ry. Co. v. Price (C. C. A.) 423.

§ 2. Instructions to jury.

Exception to an entire charge is unavailing if it contain any correct and pertinent statements of fact or declarations of law; and an exception to the refusal of a series of instructions asked is equally unavailing where any of them are erroneous or inappropriate.—New Dunderberg Min. Co. v. Old (C. C. A.) 150.

It is not error to refuse instructions asked, which are based on particular facts or items of evidence, and, by thus singling them out, give them undue prominence, or which, in stating the evidence, give it a partisan coloring.—Trumbull v. Erickson (C. C. A.) 891.

Where the charge given by the court in its own language fully and fairly presents to the jury for their determination all the material issues in the case, it may properly refuse to instruct further.—Trumbull v. Erickson (C. C. A.) 891.

TROVER AND CONVERSION.

§ 1. Actions.

In an action for conversion, where plaintiff's prayer for damages largely exceeded the amount recovered, he may recover interest although not specifically demanded in the prayer.—New Dunderberg Min. Co. v. Old (C. C. A.) 150.

When one has wrongfully converted the money or property of another, interest at the legal rate on the money or the value of the property is recoverable from the date of the conversion, and it is practically immaterial whether it is allowed as interest or damages.—New Dunderberg Min. Co. v. Old (C. C. A.) 150.

Under the statutes of Colorado, in actions for mining and converting ore, a sum equal to legal interest on the value of the ore converted from the time of the conversion is recoverable.—New Dunderberg Min. Co. v. Old (C. C. A.) 150.

Interest *held* recoverable on the amount of royalties received by defendant from lessee of a mine, for ore mined and converted from a vein owned by plaintiff.—New Dunderberg Min. Co. v. Old (C. C. A.) 150.

TRUSTS.

Conveyances in trust for creditors, see "Assignments for Benefit of Creditors."
Trust deeds, see "Chattel Mortgages"; "Mortgages."

§ 1. Management and disposal of trust property.

Under the law of California, where a bank loaned to a mortgagor a portion of the money required to redeem property from a foreclosure sale, the remainder being furnished by the mortgagor, and the property was conveyed to the bank, a trust resulted in favor of the mortgagor, which bound the bank to the exercise of the utmost good faith in dealing with the property, and to preserve and restore the title vested in it by the conveyance on payment of its claim unimpaired by any hostile act of its own; and it could not, without the mortgagor's knowledge, acquire and hold an adverse title while such relation continued.—Savings & Loan Soc. v. Davidson (C. C. A.) 696.

UNFAIR COMPETITION.

See "Trade-Marks and Trade-Names," § 3.

UNITED STATES.

See "Army and Navy"; "Customs Duties."
Courts, see "Courts," §§ 1–5; "Removal of Causes."
Public lands, see "Public Lands," § 1.

UNITED STATES MARSHALS.

A fragmentary and incomplete transcript of the accounts of a former marshal, covering only a portion of his term, and containing no item of his accounts during the last two years of his incumbency, *held* insufficient to sustain a judgment against a surety on his bond—Harvey v. United States (C. C. A.) 452.

An incomplete transcript from books of treasury department, containing accounts of a former United States marshal covering only a portion of his term, *held* insufficient to warrant judgment against his sureties 33 years after his term has expired, and long after his death.—Harvey v. United States (C. C. A.) 452.

UNLAWFUL DETAINER.

See "Forcible Entry and Detainer."

USURY.

§ 1. Usurious contracts and transactions.

A provision of a note for payment of increased interest, after maturity, at a rate in excess of that allowed by law, will render the note usurious where, from its terms, it appears to have been the understanding of the parties that the maker would be given time beyond maturity by payment of the increased interest; but, if intended only as a penalty to induce prompt payment, it will not.—Union Mortgage, Banking & Trust Co. v. Hagood (C. C.) 360; Hagood v. Union Mortgage, Banking & Trust Co., Id.; Corbin v. Same, Id.; Union Mortgage, Banking & Trust Co. v. Corbin, Id.

The proviso of the South Carolina act of 1889 relating to usury, excepting from its operation "arrangements made" prior to March 1, 1890, construed.—Union Mortgage, Banking & Trust Co. v. Hagood (C. C.) 360; Hagood v. Union

Mortgage, Banking & Trust Co., Id.; Corbin v. Same, Id.; Union Mortgage, Banking & Trust Co. v. Corbin, Id.

Notes *held* not to be usurious because of commissions paid by the maker to agents for procuring the loan.—Union Mortgage, Banking & Trust Co. v. Hagood (C. C.) 360; Hagood v. Union Mortgage, Banking & Trust Co., Id.; Corbin v. Same, Id.; Union Mortgage, Banking & Trust Co. v. Corbin, Id.

A provision in a mortgage securing notes, requiring the mortgagor to pay the taxes on the mortgaged property, does not render the notes usurious, where the mortgagor is by statute the holder of the legal title and liable for such taxes. —Union Mortgage, Banking & Trust Co. v. Hagood (C. C.) 360; Hagood v. Union Mortgage, Banking & Trust Co., Id.; Corbin v. Same, Id.; Union Mortgage, Banking & Trust Co. v. Corbin, Id.

A provision in a mortgage for the payment of attorney's fees by the mortgagor in case of foreclosure does not render the notes secured thereby usurious.—Union Mortgage, Banking & Trust Co. v. Hagood (C. C.) 360; Hagood v. Union Mortgage, Banking & Trust Co., Id.; Corbin v. Same, Id.; Union Mortgage, Banking & Trust Co. v. Corbin, Id.

A note *held* usurious on its face, under the rule of the state courts in South Carolina.—Union Mortgage, Banking & Trust Co. v. Hagood (C. C.) 360; Hagood v. Union Mortgage, Banking & Trust Co., Id.; Corbin v. Same, Id.; Union Mortgage, Banking & Trust Co. v. Corbin, Id.

The burden rests upon a complainant, seeking to enforce notes usurious on their face under a statute, to bring them within an exception in such statute.—Union Mortgage, Banking & Trust Co. v. Hagood (C. C.) 360; Hagood v. Union Mortgage, Banking & Trust Co., Id.; Corbin v. Same, Id.; Union Mortgage, Banking & Trust Co. v. Corbin, Id.

The South Carolina statute, authorizing the collection of a penalty of double the amount of usury received, does not apply to interest charged, but not received.—Union Mortgage, Banking & Trust Co. v. Hagood (C. C.) 360; Hagood v. Union Mortgage, Banking & Trust Co., Id.; Corbin v. Same, Id.; Union Mortgage, Banking & Trust Co. v. Corbin, Id.

VENDOR AND PURCHASER.

See "Sales."

Purchasers at tax sale, see "Taxation," § 4.

WAIVER.

Of forfeiture of insurance policy, see "Insurance," § 4.

WAR.

See "Army and Navy."

WATERS AND WATER COURSES.

See "Navigable Waters."

§ 1. Public water supply.

A consumer whose land is situated within the flow of the distributing system of an irrigation company, and who has, by means of water thereby supplied to him, made valuable improvements on his land, cannot be thereafter lawfully deprived of such water, in order that the distributor may supply later comers, even though a larger area, by reason of more favorable conditions, may thus be brought under cultivation.—San Diego Land & Town Co. v. Sharp (C. C. A.) 394.

Under Civ. Code Cal. § 552, the fact that a landowner obtained water for irrigating purposes from a corporation under a contract for a term of years, by which he agreed to pay a higher rental than was charged to others, and also waived all his rights under the statute, does not deprive him of the right to a continued supply of water at the lawfully established rates after the contract has expired.—San Diego Land & Town Co. v. Sharp (C. C. A.) 394.

WITNESSES.

See "Depositions"; "Evidence."

Experts, see "Evidence," § 6.

§ 1. Competency.

Under Rev. St. § 858, and 2 Hill's Code Wash. § 1646, in an action by a wife against a railroad company to recover for the death of her husband, a conductor, working for the railroad company, may testify to statements made by the decedent, as he is not a party to the record or interested in the case, so as to come within the prohibition of the statute.—Slavens v. Northern Pac. Ry. Co. (C. C. A.) 255.

§ 2. Examination.

The right of cross-examination in the federal courts is limited to facts and circumstances connected with the matter testified to on the direct examination.—Montgomery v. Ætna Life Ins. Co. (C. C. A.) 913.

§ 3. Credibility, impeachment, contradiction, and corroboration.

A letter written by defendant, containing reflections upon the conduct of a witness for the prosecution, and known to such witness, *held* inadmissible for the purpose of showing bias and prejudice on the part of the witness.—McKnight v. United States (C. C. A.) 208.

WRITS.

Writ of error, see "Appeal and Error."

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